STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMAR BRAZIL,

Defendant-Appellant.

UNPUBLISHED
November 30, 1999

No. 193464
Saginaw Circuit Court
LC No. 94-009703

Before: Holbrook, Jr., P.J., and Smolenski and Collins, JJ.

PER CURIAM.

Defendant appeals by application for delayed appeal granted from his conviction by a jury of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant as an adult to fifteen to thirty years' imprisonment for the second-degree murder conviction, to be served consecutively to the mandatory two-year term for the felony-firearm conviction. We affirm.

At trial, it was undisputed that defendant, then aged fifteen, fatally shot Steven Lamark Allen. The prosecution alleged that the shooting was premeditated and charged defendant with first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a). Defendant claimed that he acted in self-defense.

On appeal, defendant first argues that the trial court erred in not granting his motion for directed verdict on the charge of first degree murder. We disagree. When reviewing a motion for directed verdict, we view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). First-degree premeditated murder requires proof that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). The length of time necessary to measure and evaluate a choice before it is made is incapable of precise determination; all that is necessary is enough time to take a second look at the actions contemplated. *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993).

Viewing the evidence in a light most favorable to the prosecution, we conclude that the trial court properly refused to grant a directed verdict on the first-degree murder charge. The evidence indicated that defendant and the victim exchanged words before defendant drew his gun. Once defendant drew the gun, he aimed it directly at the victim's face or chest at relatively close range. Furthermore, defendant took this action in the absence of any evidence that the victim was armed. Defendant shot once or twice, and then paused before firing seven or eight more shots. Witnesses testified that defendant continued to shoot at the victim after the victim tried to back away and that he repeatedly shot at close range when the victim was falling or on the ground. From these circumstances, a rational trier of fact could conclude that defendant made a conscious and deliberate decision to kill the victim and that he had sufficient time to take a second look before firing the fatal shots. The trial court did not err in refusing to grant a directed verdict on the charge of first-degree murder.

Defendant next argues that the trial court erred in refusing to instruct the jury on voluntary manslaughter. We disagree. Voluntary manslaughter is a cognate lesser included offense of first-degree murder, the charged offense in this case. See *People v Pouncey*, 437 Mich 382, 385, 387; 471 NW2d 346 (1991). Before a court instructs on a cognate lesser offense, it must examine the specific evidence to determine whether it would support a conviction of the lesser offense. *People v Heflin*, 434 Mich 482, 495; 456 NW2d 10 (1990). Giving an instruction on a lesser offense which has no evidentiary basis detracts from the rationality and reliability of the factfinding process. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). Our Supreme Court has identified the three components of voluntary manslaughter as follows:

> First, the defendant must kill in the heat of passion. Second, the passion must be caused by an adequate provocation. Finally, there cannot be a lapse of time during which a reasonable person could control his passions. [*Pouncey, supra* at 388.]

"The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason." *Id.* at 389. Additionally, the provocation must be that which would cause a reasonable person to lose control. *Id.*

Our review of the record shows that at least two of the three prongs necessary for a finding of voluntary manslaughter were not present. First, there was no evidence that defendant was in a highly inflamed state of mind or that the killing took place in the heat of passion. Defendant testified that he was not looking for trouble when he met the victim. He also stated that he was scared, that the reason he shot the victim was that he feared for his life, and that he shot the victim because he thought the victim was going to shoot him. This evidence suggests that defendant was not angry and that his ability to reason was not blurred. As in *Pouncey*, "[e]ven if he was scared and confused, [defendant's] decision to retrieve the gun was a deliberate and reasoned act." *Pouncey, supra* at 390. Second, the claimed provocation in this case consists of the words, "I'll pop your bitch ass," and a nudge to the elbow. This is not the sort of "provocation" that would cause a reasonable person to lose control. Because the evidence would not support a conviction of voluntary manslaughter, the trial court did not err in refusing to instruct the jury on that offense. *Id.* at 387.

Defendant next contends that the trial court erred in sentencing defendant as an adult. We disagree. On appeal from a decision to sentence a juvenile defendant as an adult, this Court reviews the trial court's factual findings for clear error, and reviews the court's decision to sentence a defendant as an adult for an abuse of discretion. *People v Dilling*, 222 Mich App 44, 52; 564 NW2d 56 (1997). The prosecuting attorney has the burden of establishing by a preponderance of the evidence that sentencing a juvenile defendant as an adult would be in the best interests of the juvenile and the public. MCR 6.931(E)(2). The rule also requires the court to consider the following criteria:

> (a) the juvenile's prior record and character, physical and mental maturity, and pattern of living;
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> (b) the seriousness and circumstances of the offense;
>
> (c) whether the offense is part of a repetitive pattern of offenses which would lead to the determination:
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> (i) that the juvenile is not amenable to treatment, or
>
> (ii) that, despite the juvenile's potential for treatment, owing to the nature of the delinquent behavior, the juvenile is likely to disrupt the rehabilitation of others in the treatment program owing to the nature of the delinquent behavior;
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> (d) whether, despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to render the juvenile dangerous to the public when released at age 21;
>
> (e) whether the juvenile is more likely to be rehabilitated by the services and facilities available in the adult programs and procedures than in the juvenile programs and procedures; and
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> (f) what is in the best interests of the public welfare and the protection of the public security. [MCR 6.931(E)(3). See also MCL 769.1(3); MSA 28.1072(3).]

The court must make findings of fact and conclusions of law regarding the basis for the decision to sentence the juvenile as an adult. MCR 6.931(E)(4).

(a) Defendant's prior record, character, physical and mental maturity, and pattern of living.

The trial court found that defendant was an admitted drug dealer, that he was on probation at the time he committed the crime, that he had a truancy problem, and that he failed high school. The court also found that defendant came from a dysfunctional home. Defendant argues that no evidence was ever presented to the court that defendant was an admitted drug dealer or that he came from a dysfunctional family.

The rules of evidence do not apply to a juvenile sentencing hearing. The court may receive all relevant and material evidence. MCR 6.931(E)(1). Here, Martin Shackelford, delinquency services employee with the Saginaw County Department of Social Services, testified that defendant's father lived in Texas, while his mother lived in Saginaw. Barbara Awad, juvenile probation officer for the Saginaw County Probate Court, also testified that during the time period that she supervised defendant, he had been dealing drugs without her knowledge. Awad asked defendant how much money he earned selling drugs and he admitted that he made thousands of dollars. Finally, defendant had a prior drug offense. These facts support the trial court's finding that defendant was an admitted drug user and that he came from a dysfunctional home.

(b) The seriousness and circumstances of the offense.

The jury convicted defendant of second degree murder and a felony firearm violation. Defendant does not dispute the seriousness of the offense, but argues that the court should have considered the fact that the homicide took place under combative circumstances and while defendant was in a state of panic.

Defendant's self-defense theory was necessarily discredited by the jurors, as evidenced by their conviction, rather than acquittal, of defendant on the charged offenses. The trial court did not clearly err in disregarding defendant's alleged panic.

(c) Whether the offense is part of a repetitive pattern of offenses which would lead to the determination (i) that the juvenile is not amenable to treatment, or (ii) that, despite the juvenile's potential for treatment, owing to the nature of the delinquent behavior, the juvenile is likely to disrupt the rehabilitation of others in the treatment program owing to the nature of the delinquent behavior.

The trial court found that defendant would not likely disrupt the rehabilitation of others in the juvenile system, based on the fact that defendant did not cause any disruption during his previous detention in the Saginaw County Juvenile Center. Defendant complains that the court made no findings on the question whether he was amenable to treatment or whether defendant's murder conviction was part of a repetitive pattern of behavior.

A review of the trial record supports defendant's contention that the trial court made no findings of fact regarding defendant's amenability to treatment or his pattern of behavior. Nevertheless, as discussed in part (E), below, the court did make a specific finding that defendant was not amenable to treatment in the juvenile system.

(d) Whether, despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to render the juvenile dangerous to the public when released at age twenty-one.

The trial court found that defendant would likely be dangerous to the public if he were released at age twenty-one. Defendant asserts that the court's finding was baseless, and that it erred in not considering the testimony of Shackelford and Awad, who felt that defendant could be rehabilitated.

The court concluded that a maximum detention of four years in the juvenile system would not be sufficient to rehabilitate defendant. The court supported its conclusion with the fact that defendant had been detained in the juvenile system previously and had not been rehabilitated. Awad admitted that defendant's probation "wasn't successful." Furthermore, the trial court was free to disregard the opinions of Shackelford and Awad regarding whether defendant would likely be rehabilitated on his release at age twenty one. See *People v Adams*, 430 Mich 679, 687; 425 NW2d 437 (1988). We find no clear error.

(e) Whether the juvenile is more likely to be rehabilitated by the services and facilities available in the adult programs and procedures than in the juvenile programs and procedures.

The court found that the adult system was far more likely to rehabilitate defendant. The court emphasized the fact that detention in the adult system would afford defendant the time necessary to complete his high school education and finish college, whereas in the juvenile system he would be released at age twenty-one, and would not yet have completed these educational pursuits. Defendant complains that the court ignored the testimony of Shackelford and Awad, who testified that defendant would have a greater likelihood of success in the juvenile system.

The trial court was free to weigh the evidence and testimony and make its own determination regarding which system would be most likely to successfully rehabilitate defendant. In light of the fact that the adult system would allow defendant to further his education prior to his release, and the fact that defendant's prior detention in the juvenile system did not rehabilitate defendant to the degree necessary to prevent him from committing homicide, the court did not clearly err in determining that the adult system was more likely to rehabilitate defendant.

(f) The public welfare and the protection of the public security.

The trial court determined that sentencing defendant as an adult would best serve the public's welfare and protection. Defendant challenges this finding as conclusory and contradicted by the testimony of Shackelford and Awad.

The court did not state specific reasons for its conclusion that the public's welfare and protection would be best served by sentencing defendant as an adult. Nevertheless, the court's conclusion was preceded by a full analysis of factors (a) through (e) of MCR 6.931(E)(3). Most notable in the court's analysis was the fact that defendant committed murder while on probation from a prior drug violation.

This Court reviews the trial court's decision to sentence defendant under an abuse of discretion standard. *Dilling*, *supra* at 52. In order to exercise its discretion at a juvenile sentencing hearing

properly, the trial court must weigh the relevant factors in a meaningful way at the sentencing hearing. *People v Perry*, 218 Mich App 520, 542; 554 NW2d 362 (1996). Here, the record supports the court's factual findings. These findings reveal that most or all of the criteria of MCL 6.931(E)(3) were met. This defendant had two encounters with the legal system by the age of fifteen, the second of which led to his conviction of second degree murder. We do not find that the trial court abused its discretion in sentencing defendant as an adult.

Defendant's final argument on appeal is that during the rebuttal portion of the prosecution's closing argument, the prosecutor made certain remarks that were so prejudicial to defendant that he was deprived of a fair trial. We disagree. The test for prosecutorial misconduct is whether the conduct complained of denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). For alleged misconduct not objected to at trial, review is limited to a miscarriage of justice. *People v Rivera*, 216 Mich App 648, 651; 550 NW2d 593 (1996). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Id.* at 661-662.

During closing arguments, the prosecution stated:

> How is it that he's telling you, ladies and gentlemen, this car drives up, somebody's in it he doesn't know, they call him over and the guy in the car says you got something? I asked the defendant what's he mean. They probably wanted drugs from me. Now, why does this person think he's selling drugs? Drugs, guns.
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> And then Steve Allen comes up to the car, and he said that one of the things that Steve Allen said is you know you can't be out here when I'm here. You know you can't be out here when I'm here. I asked the defendant what that meant, whether it could mean was he competition to Steve Allen, whether the person of the defendant was evidence he was a drug dealer.
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> Do these things the defendant told you begin to add up like two and two – guns, you got something, you can't be out here when I'm here – in terms of what this was really all about?

Defendant complains that the prosecution impermissibly referred to defendant as drug dealer and that the record did not support such a comment. However, upon request by defendant, the trial court gave a curative instruction: "The prosecutor's argument and advice to the jury in cross-examination alluding that the defendant may have been involved in drug trafficking was improper, and you are to disregard such argument and comments."

We conclude that the prosecution's statements do not require reversal. Unlike the cases relied on by defendant, the prosecutor in this case made only a single reference to drugs. The quoted statement does not show that the prosecutor referred to defendant as a drug dealer; rather, he summarized the testimony elicited from defendant on cross examination. While the prosecutor invited

the jurors to infer that defendant was a drug dealer, but he did not directly state that defendant was dealing drugs. Moreover, unlike *People v Duncan*, 402 Mich 1; 260 NW2d 58 (1977), and *People v Meir*, 67 Mich App 534; 241 NW2d 280 (1976), the trial court in the present case instructed the jury that the prosecutor's allusions to drug dealing were improper and that the jurors were to disregard them. Jurors are presumed to follow a court's instructions unless the contrary is shown. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994).

Defendant also argues that the prosecutor's comments regarding defendant's economic status were unfairly prejudicial. Prosecutors may not refer to a defendant's poverty as a character assassination tactic. *People v Andrews*, 88 Mich App 115, 118; 276 NW2d 867 (1979). Nor is poverty probative of credibility. *People v Johnson*, 393 Mich 488, 498; 227 NW2d 523 (1975). Here, the prosecutor asked the jurors to consider the fact that defendant took the small amount of money that he had to purchase a gun, and infer from these facts defendant's lack of regard for human life. The jurors could have also inferred that because defendant was unemployed, he might have turned to drug dealing as an alternative source of income. Nevertheless, the prosecution's statements regarding defendant's unemployment did not directly encourage the jurors to convict defendant based on lack of employment or poverty, and any danger that the jurors might have drawn inferences from the prosecution's statements were sufficiently cured by the court's instruction.

Defendant next contends that the following argument by the prosecutor was an improper appeal to the jurors' sense of civic duty:

> You know, ladies and gentlemen, it is so easy, it would be so easy for someone to kill somebody by putting nine shots in him, somebody particularly who had somewhat less that the best reputation, somebody who could come into court and say he was a bad guy and I was afraid of him and then say but I killed him in self-defense even though I shot him nine times. Is that what we're prepared tell the world we want to do? Is that the kind of conduct we want to condone by saying it was entirely justified, that is was not criminally improper?

A prosecutor may not urge jurors to convict a defendant as part of their civic duty. *Bahoda, supra* at 282. Such arguments are condemned because they inject issues into the trial which are broader than a defendant's guilt or innocence of the charges and because they encourage the jurors to suspend their own powers of judgment. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991).

Defense counsel did not object to these statements on the record. As a result, the prosecutor's comments are reviewed to determine whether they led to a miscarriage of justice. *Rivera*, s*upra* at 651-652. Although the prosecutor's comments suggest an appeal to the juror's sense of civic duty, we do not believe that they rise to the level of a miscarriage of justice. Moreover, any prejudice to defendant could have been cured by an instruction from the court. Therefore, reversal is not required.

Finally, defendant claims misconduct where the prosecutor misstated the law of self-defense in Michigan. During closing argument, the prosecutor stated that "if you have the honest and the

reasonable belief that you're in danger, before you use – before you exert self-defense, you first have to try to retreat." Defense counsel immediately objected, and the court addressed the jury: "I will instruct the jury on the law that applies. If anything that counsel said is different than what I instruct you on the law, you are to follow my instructions." The court later told the jurors that in Michigan, the law of self-defense does not impose a duty to retreat. In *People v Reed*, 449 Mich 375, 401; 535 NW2d 496 (1995), our Supreme Court held that jurors are presumed to follow the law, and that any misstatement of the law by the prosecutor was presumptively not harmful, where the trial judge later instructed the jury properly. In the present case, the court immediately instructed the jury not to consider the prosecutor's misstatement of the law, and later gave a correct instruction on self-defense. Accordingly, reversal is not required.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski
/s/ Jeffrey G. Collins