

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS D. BERRY,

Defendant-Appellant.

UNPUBLISHED

January 4, 2000

No. 210038

Wayne Circuit Court

LC No. 97-004493

Before: Cavanagh, P.J., and Holbrook, Jr. and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive terms of ten to fifteen years in prison for the manslaughter conviction and two years in prison for the felony-firearm conviction. We affirm defendant's convictions and sentences, but remand for the completion of the sentence information report guideline departure form.

I

Defendant raises multiple claims of deficiencies in the trial court's instructions to the jury. However, defendant did not object to the instructions or request that additional instructions be given at trial. Therefore, our review is limited to the issue whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Manifest injustice occurs where the erroneous or omitted instruction pertains to a basic and controlling issue in the case. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). As a general rule, this Court is hesitant to reverse a lower court because of an error in jury instructions where no objection was raised at trial. *People v Hess*, 214 Mich App 33, 36; 543 NW2d 332 (1995).

A

Defendant first argues that the trial court failed to properly instruct on the necessary elements of the lesser included offense of manslaughter. Specifically, defendant argues that the trial court failed to

provide the elements of voluntary manslaughter and erred by stating that manslaughter requires a person to act instantly.

Although the trial court did not specify, a cursory review of its instruction reveals that the jury was instructed on voluntary manslaughter. The elements of voluntary manslaughter are (1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), lv gtd 461 Mich 880 (1999). After carefully reviewing the trial court's instructions, we find no manifest injustice. The trial court's instruction on manslaughter adequately conveyed what the jury had to find in order to convict defendant of voluntary manslaughter.

Defendant complains that the instruction was flawed because the trial court stated that a person has to act instantly. We disagree. Although the trial court stated that the killing "has to be done immediately," it went on to explain that the killing must have resulted from an emotional excitement and must occur before the person has had a reasonable time to calm down. Taken as a whole, the instruction was proper. See *People v Daoust*, 228 Mich App 1, 14; 577 NW2d 179 (1998) ("Instructions to the jury should be considered as a whole rather than extracted piecemeal to establish error.").

In addition, defendant contends that the trial court's instruction on the malice requirement for second-degree murder was incomplete. The element of malice for second-degree murder is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999). Contrary to defendant's assertion on appeal, the trial court did instruct the jury that malice is present where a person "does an act willfly [sic] and with disregard for the likelihood that the natural tendency would be to cause death or great bodily harm." We find neither error nor manifest injustice.

Defendant also argues that the trial court failed to define the intent for the state of mind necessary to satisfy a manslaughter conviction. An essential element of the crime of voluntary manslaughter is the intent to kill or commit serious bodily harm. *Hess, supra* at 38. Murder and voluntary manslaughter are both homicides and share the element of being intentional killings. However, the element of provocation that characterizes the offense of voluntary manslaughter separates it from murder. *Id.* In the present case, the court first gave the jury instructions on first- and second-degree murder. The court then instructed the jury on voluntary manslaughter. Defendant did not argue at trial that the killing of the decedent was accidental or the result of negligence. Moreover, there is no indication in the record that the jury was confused regarding the distinctions between first-degree murder, second-degree murder, and voluntary manslaughter. Accordingly, we find no manifest injustice. Cf. *People v Paquette*, 214 Mich App 336, 339-340; 543 NW2d 342 (1995).

Defendant further asserts that the trial court erred in failing to properly distinguish between involuntary and voluntary manslaughter. Involuntary manslaughter is the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to

cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty. *People v Clark*, 453 Mich 572, 578; 556 NW2d 820 (1996). Involuntary manslaughter is a cognate lesser included offense of murder. *People v Heflin*, 434 Mich 482, 495; 456 NW2d 10 (1990). An instruction on a cognate offense is proper only where it is consistent with the evidence and the defendant's theory of the case. *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997). Because there was no evidence that defendant was doing an unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm or acting negligently, and defendant claimed that he was acting in self-defense, an instruction on involuntary manslaughter was not warranted. Accordingly, the trial court did not err in failing to distinguish between involuntary and voluntary manslaughter.

B

Defendant next claims that the trial court intimated that defendant bore the burden of proving self-defense in its supplemental instructions. We disagree. The trial court initially instructed the jury that the prosecution had to prove beyond a reasonable doubt that defendant did not act in self-defense. After the jury requested additional instruction, the court re-instructed the jury on self-defense but did not re-state the burden of proof. However, given that the trial court twice correctly instructed the jury on the burden of proof, we find no manifest injustice.

C

Defendant additionally maintains that the trial court erroneously instructed the jury on the concept of reasonable doubt. We disagree. The trial court's explanation of reasonable doubt was nearly identical to that in CJI2d 3.2, which this Court has already determined presents an adequate instruction on the concept of reasonable doubt. See *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999). The trial court did not err in instructing the jury that it had a duty to return a verdict of "guilty" if it was convinced that the prosecutor had met his burden of proof and a duty to return a verdict of "not guilty" if it was not so convinced.

II

Defendant next argues that his sentence is disproportionate. Defendant argues the trial court erred in imposing a sentence above the guidelines range and in making an independent finding that he was guilty of murder. A trial court's imposition of a particular sentence is reviewed on appeal for an abuse of discretion, which will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

The sentencing information report (SIR) indicates that the guidelines range for defendant's convictions was twenty-four to eighty-four months. During sentencing, the prosecutor stated on the record that the guidelines were scored incorrectly. The prosecutor stated that the proper sentencing guidelines range was forty-eight to 120 months in prison. However, the trial court never adopted the prosecutor's amendments, and the SIR continues to reflect a guidelines sentence range of twenty-four to

eighty-four months. Notwithstanding, the SIR incorrectly indicates that the sentence was *not* a departure from the stated range.

Nevertheless, where the trial court clearly explains the sentence and states that it is an appropriate sentence, even if it is a departure from the recommended guidelines' range, the proper scoring of the guidelines is mooted. *People v Phillips (After Second Remand)*, 227 Mich App 28, 38; 575 NW2d 784 (1997). Here, the trial court stated that defendant had committed murder, and accordingly imposed the maximum sentence possible for the actual conviction of manslaughter. We find no error requiring reversal. Where there is record support that a greater offense has been committed by a defendant, it may constitute an aggravating factor to be considered by the court at sentencing. *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995).

The prosecutor presented evidence that defendant was angry after the cashiers at Jimmy's Party Store refused to cash his paycheck. Defendant left, but telephoned the store and made threats. Defendant returned to the store and tried to buy a cigar, but was unsuccessful because he did not have enough money. Defendant swore at the cashier and again departed. Defendant came back later and was again unable to make a purchase because of lack of money. As before, defendant responded by yelling and swearing. Defendant fired at the decedent, who was armed only with a glass bottle, three or four times; after the other cashier helped the decedent behind the glass enclosure, defendant fired two more times. By his actions, defendant killed one man and endangered the lives of the other persons in the store. Defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra*.

Although we affirm the sentence imposed by the trial court, we note that a sentencing court is required to articulate its reasons for departing from the guidelines range both on the record at sentencing *and* on the SIR. MCR 6.425(D)(1); *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). Here, the trial court supplied its reasons for departure at the sentencing hearing but failed to complete an SIR departure form. See *id.* We therefore remand for the completion of the SIR guideline departure form.

Defendant's convictions and sentences are affirmed; however, we remand for the ministerial task of completing the SIR guideline departure form. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly