

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES K. DAVIS,

Defendant-Appellant.

UNPUBLISHED

August 18, 2000

No. 217370

Kent Circuit Court

LC No. 98-000403-FC

Before: Smolenski, P.J., and Zahra and Collins, JJ.

PER CURIAM.

Defendant was convicted by a jury of voluntary 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). He was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to twenty to sixty years' imprisonment for the voluntary manslaughter conviction and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant was charged with open murder. Without objection, the trial court instructed the jury on first- and second-degree murder and voluntary manslaughter. Defendant now argues that his voluntary manslaughter conviction must be reversed because there was insufficient evidence of premeditation to support the trial court's first-degree murder instruction, thus subjecting him to the potential for a compromise verdict and denying him the due process of law. We disagree.

In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation requires sufficient time for the defendant to take "a second look." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Premeditation and deliberation may be inferred from all the facts and circumstances, but the inferences must have support in the record and cannot be drawn based on mere speculation. *Id.* at 301. A non-exhaustive list of factors which may be considered to establish premeditation includes: (1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted. *Id.* at 300.

Here, evidence tending to show premeditation included that witness Marcus Hester observed the victim lying on the floor of defendant's apartment, covering his head with his hands and pleading with defendant not to shoot, whereupon defendant replied, "[N]aw, nigga, don't come over my [sic] house talkin' shit," and fired twice at the victim's head; the forensic pathologist's testimony that one of the victim's wounds was a "contact wound" in which the muzzle of the weapon had been placed in direct contact with the victim's skull when the gun was fired; defendant's request of Hester that Hester help carry the body to a nearby abandoned house; and defendant's changing of his clothes, trying to clean up blood from his apartment, removal of spent shell casings and blood-stained carpeting, and attempting to hand a gun to an acquaintance. This evidence was sufficient to warrant submission to the jury of the first-degree murder charge.

Furthermore, even assuming that the evidence regarding premeditation was insufficient to support a charge of first-degree premeditated murder, any resulting error was harmless. Defendant's reliance on *People v Vail*, 393 Mich 460; 227 NW2d 535 (1975) (requiring automatic reversal when a trial judge has refused a directed verdict of acquittal on any charge where the prosecution has failed to present evidence from which the jury could find all elements of the crime charged), is misplaced because that case has been specifically overruled by *People v Graves*, 458 Mich 476, 488; 581 NW2d 229 (1998). The *Graves* Court explained that

[w]here a jury acquits a defendant of an unwarranted charge (first-degree murder) and a lesser included warranted charge (second-degree murder) before convicting of a still lesser charge (voluntary manslaughter), we find that it is highly probable that the erroneous submission of the unwarranted charge did not affect the ultimate verdict. There is no basis on this record to find that it was a product of juror compromise. [*Id.* at 487; footnote omitted.]

Here, as in *Graves*, defendant was acquitted of first- and second-degree murder and was convicted of voluntary manslaughter. Defendant concedes that "the evidence raises a strong inference of intent to kill, sufficient to support a [second-degree] murder conviction." Further, as in *Graves*, there is no basis in the record to find that the voluntary manslaughter conviction was a product of juror compromise. Consequently, *Graves* compels the conclusion that even if there was insufficient evidence to support submission to the jury of a charge of first-degree murder, no prejudicial error requiring reversal of defendant's conviction and sentence for voluntary manslaughter occurred.

Defendant next contends that the prosecutor's closing and rebuttal arguments impermissibly shifted the burden of proof regarding self-defense and placed before the jury facts not in evidence. Because defendant failed to object at trial to the prosecutorial comments he now challenges on appeal, appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or the failure to consider the issue would result in a miscarriage of justice. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). Generally, we review claims of prosecutorial misconduct to determine whether the prosecutor's remarks denied the defendant a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 434-435; 597 NW2d 843 (1999). We view the prosecutor's remarks in context and on a case by case basis. *Id.* Prosecutorial comments must be

read as a whole and evaluated in light of the defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

Our review of the record shows that no error occurred. Contrary to defendant's contentions, during closing and rebuttal argument the prosecutor did not impermissibly shift the burden of proof regarding self-defense. Rather, the prosecutor simply argued that in order to find defendant guilty of voluntary manslaughter, or not guilty, the jury would have to believe defendant's testimony regarding what transpired at the time of the shooting, which it could not logically do because defendant had consistently lied. A prosecutor may argue from the facts that the defendant is not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Further, the prosecutor did not argue facts not in evidence. Because no actual errors occurred, we reject defendant's claim that the cumulative effect of errors denied him a fair trial. *Rice*, *supra* at 448.

Finally, defendant argues that his sentence for voluntary manslaughter is excessive, and that the trial court improperly relied on legislatively enacted sentencing guidelines that were not in effect at the time of sentencing. Provided that permissible factors are considered, appellate review of prison sentences is limited to whether the sentencing court abused its discretion. *People v Coles*, 417 Mich 523, 550; 339 NW2d 440 (1983), overruled in part on other grounds *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). A sentencing court abuses its discretion when it violates the principle of proportionality. A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *Milbourn*, *supra* at 635-636, 654.

The trial court did not abuse its discretion in sentencing defendant to twenty to sixty years' imprisonment for voluntary manslaughter. When sentencing defendant, the trial court reviewed his extensive prior criminal record and noted that defendant's status as a fourth felony offender derived from previous convictions for fourth-degree criminal sexual conduct, felonious assault as a second felony offender, and larceny of property worth over \$100. The court stated that it considered the objectives of rehabilitation, incarceration, deterrence, and punishment. Although the court referred to the legislative sentencing guidelines, it specifically noted that the "guidelines are not technically applicable under present law to habitual offenders," observed that the legislative guidelines covering habitual offenders "obviously, [are] not in place at the present time," remarked that the guideline score in defendant's case is "illustrative and gives us an important jumping off point for our consideration of the appropriate sentence to achieve all of the objectives previously set forth on the record," and, in response to defense counsel's objection to the court's use of the new guidelines as a basis point, replied, "Well, I don't think the Court is bound by the new guidelines, simply adopting the methodology which will soon be mandated." Because the court clearly recognized that the sentencing guidelines did not apply to defendant's sentence, that the pending guidelines were only "illustrative," and that the court was not bound by them, no abuse of discretion occurred. The sentence imposed for voluntary manslaughter is

proportionate to the seriousness of the crime and to defendant's prior record. *Id.*; *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995).

Affirmed.

/s/ Michael R. Smolenski

/s/ Brian K. Zahra

/s/ Jeffrey G. Collins