STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 1, 2000
v	No. 216071 Wayne Circuit Court
MARSHALL MCKINNEY, a/k/a FREDERICK D. MCKINNEY, Defendant-Appellant.	LC No. 97-008834

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

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to natural life in prison for the first-degree murder conviction, to be served consecutively to a term of two years' imprisonment for the felony-firearm conviction. We affirm.

First, defendant contends that the trial court improperly instructed the jury regarding the elements of voluntary manslaughter. However, defendant failed to object to the voluntary manslaughter instruction at trial. Instructional error should not be considered on appeal unless the issue has been preserved by an objection in the trial court. Relief will be granted absent an objection only in cases of manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). While we agree that the trial court failed to instruct the jury regarding the provocation element of voluntary manslaughter, we find no manifest injustice because the evidence presented at trial did not support the existence of adequate provocation and did not support the reading of a voluntary manslaughter instruction.

Although the trial court read the voluntary manslaughter instruction directly from CJI2d 16.8, that does not automatically preclude a finding of error. When a trial court reads an erroneous or misleading jury instruction on an essential element of the charged offense, even when the misleading instruction is taken from the criminal jury instructions, this Court may find error requiring reversal. *People v Stephan*, 241 Mich App 482, 495-496; 616 NW2d 188 (2000).

MCL 750.321; MSA 28.553 provides the punishment for the crime of manslaughter. The common law, however, defines the elements of the crime. *People v Sullivan*, 231 Mich App 510,

518; 586 NW2d 578 (1998), aff'd 461 Mich 986 (2000). 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. *Id.*; *People v Etheridge*, 196 Mich App 43, 55; 492 NW2d 490 (1992). The element of provocation distinguishes the offense of manslaughter from murder. *Sullivan, supra*, 231 Mich App 518. "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." *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991).

> In addition, the provocation must be adequate, namely, that which would cause the reasonable person to lose control. Not every hot-tempered individual who flies into a rage at the slightest insult can claim manslaughter. The law cannot countenance the loss of self-control; rather, it must encourage people to control their passions. [*Id.*, internal citations omitted.]

In the present case, we agree that the trial court failed to instruct the jury regarding the provocation element of voluntary manslaughter. Nevertheless, we do not believe that the trial court's error requires reversal in this case. In a murder case, a trial court must instruct on manslaughter *where the evidence presented at trial could support a conviction of the lesser offense*. *Etheridge*, *supra*, 196 Mich App 55, emphasis added. Because the evidence produced at trial could not support a guilty verdict on voluntary manslaughter charges, we conclude that defendant was not entitled to such an instruction.

At trial, defendant did not argue that he had been provoked into killing the victim. Rather, he denied any involvement in the shooting. Defendant testified that he was not at the hotel when the shooting took place, and that he never fought with the victim. Further, the testimony of other trial witnesses did not support the existence of adequate provocation. Walter Ector testified that he heard two gunshots, then saw defendant return to the hotel, where defendant remained for approximately 10-15 seconds. Ector then saw defendant exit the hotel and shoot the victim three times. We believe that this passage of time was sufficient to provide defendant with a cooling-off period. *Id.* at 392. Further, defendant retreated into the hotel, a safe harbor, and there was no evidence that he was compelled by anyone to go back outside. *Id.* Based on this evidence, we hold that a reasonable jury could not have found the adequate provocation necessary to support a conviction of voluntary manslaughter. Moreover, even if adequate provocation did exist, this Court has held that, where a defendant is convicted of first-degree murder and the jury rejects other lesser included offenses, the failure to instruct on voluntary manslaughter is harmless. *Sullivan, supra*, 231 Mich App 520. In the present case, the jury rejected a verdict of second-degree murder (as well as a verdict of manslaughter) and found defendant guilty of first-degree murder. Thus, the instructional error does not require reversal.

Defendant next contends that the trial court committed error requiring reversal when it prefaced the instruction regarding second-degree murder by informing the jury that Michigan law required the reading of that instruction. A charge of first-degree murder requires consideration of the lesser included offense of second-degree murder. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). "In every case of first-degree murder, the jury must be instructed, sua sponte, on the necessarily included offense of second-degree murder." *People v Curry*, 175 Mich

App 33, 40; 437 NW2d 310 (1989). We believe that defendant's argument is without merit because the trial court was simply stating Michigan law.

Defendant next argues that the prosecutor made several improper remarks during rebuttal argument. Because defendant counsel failed to object to the prosecutor's comments at trial, our review of the issue is precluded absent a miscarriage of justice. A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely curative instruction. *People v Rivera,* 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte,* 240 Mich App 713, 721; 613 NW2d 370 (2000), internal citations omitted.]

Although a prosecutor may not vouch for the credibility of a witness, a prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief. *People v Launsburry,* 217 Mich App 358, 361; 551 NW2d 460 (1996). Moreover, the prosecutor is not required to state inferences and conclusions in the blandest possible terms. *Schutte, supra,* 240 Mich App 722; *Launsburry, supra,* 217 Mich App 361.

In the present case, the prosecutor told the jury that "defendant lies when it's convenient," and pointed to several instances where defendant's testimony was inconsistent. Further, the prosecutor told the jury that defendant's demeanor on the witness stand indicated that defendant was not telling the truth. Reading the prosecutor's comments in context, we believe that the prosecutor was merely attacking the weaknesses in defendant's version of what occurred, which is not improper. *People v Godbold,* 230 Mich App 508, 521; 585 NW2d 13 (1998).

Finally, defendant argues that the prosecutor improperly denigrated defense counsel during closing arguments. Although defense counsel objected during the prosecutor's rebuttal argument, that objection went to the claim that the prosecutor was addressing new issues in his rebuttal, not that the prosecutor made improper comments about defendant or defense counsel. After defense counsel objected, the trial court admonished him for objecting during the course of the prosecutor's rebuttal argument. In his brief, defendant argues that the trial court dissuaded defense counsel from making any further objections during the course of the prosecutor's rebuttal argument. Nonetheless, there was nothing preventing defense counsel from objecting at the close of the prosecutor's argument. Therefore, our review of this issue is precluded absent manifest injustice. *Rivera, supra,* 216 Mich App 651-652.

Defendant asserts that the following remarks were improper:

> First of all, I should say that I should have known. I should have known. I should have known that Defense Counsel would resort to perhaps one of the

> oldest Defense Counsel tricks of the trade. And it's kind of something that can sometimes be referred to as smoke and mirrors. You just create a lot of distractions and a lot of issues that are really nonissues, and drop some untruths into your creation, and hope that something sticks, and something that sticks can be somehow defined by one juror or some jurors' minds as reasonable doubt.
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> Defense counsel said there are a number straws that he draws on. See it's kind of like Houdini or a Globetrotter kind of move where you just hide the ball, or you hide different things, and you stay away from the issues.

These remarks must be considered in context and evaluated in light of defense arguments and their relationship to the evidence presented at trial. *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996). Viewed in this context, the prosecutor did not argue that defense counsel lied or was trying to intentionally mislead the jury concerning the facts. The prosecutor was merely responding to the following statements made by defense counsel in reference to Ector, the prosecution's witness:

> Because, see, if you testify at the district court and you come in and say, hey, that's not true, that's wrong what I testified to, that's perjury. Now you are supposed to go to jail for perjury. So what they have here is a noose around [Ector's] neck. We're going to lock you up until you testify. And if you testify to how we said and what you said down there, then we'll let you go. But if you don't, we send you to jail for perjury. If you told us something that wasn't true, then we're going to lock you up for falsifying a police report. So he has no choice. He gets back up there and repeats.

We find that defendant was not denied a fair trial by the prosecutor's comments, which were no more than a response to defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). We do not believe that a miscarriage of justice occurred in this case.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage