

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLAS D. SHACKELFORD,

Defendant-Appellant.

UNPUBLISHED

January 23, 2001

No. 217124

Wayne Circuit Court

LC No. 98-005494

Before: Saad, P.J., and Griffin and R. B. Burns*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of voluntary manslaughter. He was sentenced to seven to fifteen years' imprisonment and ordered to pay \$1,320 restitution as a condition of parole. Defendant appeals of right, raising seven issues. We affirm.

I

In this case, defendant was convicted of stabbing and stomping the victim to death. Defendant first argues the trial court committed error requiring reversal when it failed to sua sponte instruct the jury on involuntary manslaughter after sua sponte instructing on voluntary manslaughter. Defendant neither requested such an instruction nor objected to the trial court's failure to instruct on involuntary manslaughter. Accordingly, this Court's review is limited to whether the omission constituted plain error resulting in manifest injustice. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

When the trial court sua sponte instructs on voluntary manslaughter, and a defendant presents evidence that would support a conviction for involuntary manslaughter, the trial court must sua sponte instruct on involuntary manslaughter. *People v Heflin*, 434 Mich 482, 506; 456 NW2d 10 (1990). Involuntary manslaughter is defined in Michigan as

the unintentional killing of another without malice in (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the commission of some lawful act, negligently

*Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

performed or (3) in the negligent omission to perform some legal duty. [*Id.* at 507-508, quoting *People v Beach*, 429 Mich 450, 477; 418 NW2d 861 (1988).]

Defendant failed to present evidence that would support a conviction for involuntary manslaughter. Rather, defendant's trial strategy was (1) to cast doubt on whether he was involved in the beating that led to the victim's death, (2) to undermine the credibility of the prosecution witnesses, who testified that he was involved in the beating, and (3) to argue that if he did kill the victim, he did so in defense of another. Pursuant to this trial strategy, no evidence was presented showing that the killing was unintentional or accidental. Consequently, the trial court was not required to instruct on involuntary manslaughter, *Heflin, supra* at 503, and therefore did not commit error when it failed to sua sponte instruct on involuntary manslaughter after sua sponte instructing on voluntary manslaughter.

II

Defendant next maintains the trial court erroneously denied his motion for directed verdict, because there was insufficient evidence from which a rational trier of fact could conclude that defendant was guilty beyond a reasonable doubt of second-degree murder. However, defendant was convicted of voluntary manslaughter and acquitted of the second-degree murder charge. "The [alleged] error is cured when the jury acquits the defendant of the unwarranted charge." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). "[A] defendant has no room to complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury." *Id.* at 486-487. In the instant case, the proofs warranted a charge of voluntary manslaughter. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). Defendant's argument is therefore without merit.

III

Defendant also contends that the trial court abused its discretion when it refused to instruct the jury on identification as set forth in CJI2d 7.8. This Court reviews a trial court's refusal to give a requested instruction for abuse of discretion. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). A trial court is required to give a requested instruction when the instruction is supported by the evidence or the facts of a case. *Id.* In this case, because defendant's identification was not at issue, the trial court did not abuse its discretion in refusing to instruct on identification.

IV

Defendant next challenges the admission of photographs taken before the victim's autopsy. This Court reviews the trial court's decision to admit evidence, including photographs, for an abuse of discretion. *Id.* at 187-188. Photographs are admissible when they are probative of any material fact in issue and when their probative value is not substantially outweighed by their prejudicial effect. MRE 401; MRE 403; *People v Turner*, 17 Mich App 123, 130; 169 NW2d 330 (1969).

In this case, the photographs were properly admitted as probative of the elements of the crime and the credibility of witnesses. *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995); *People v Howard*, 226 Mich App 528, 549-551; 575 NW2d 16 (1997). Moreover, defendant attacked the credibility of various witnesses by showing that some of the witnesses made prior inconsistent statements, consumed drugs and alcohol on the day of the victim's death, and had prior convictions. One of the prosecution's key witnesses was originally charged with second-degree murder as a co-defendant, pleaded guilty to voluntary manslaughter, and received sentencing consideration in exchange for testifying against defendant. Under these circumstances, the photographs were relevant to corroborate the witnesses' testimony regarding the nature and extent of the victim's injuries and how the injuries were received. *Mills*, *supra* at 76.

Finally, the probative value of the admitted photographs was not substantially outweighed by unfair prejudice. Admittedly, the photographs depicting the victim's injuries were gruesome and admission of gruesome photographs merely to arouse the jury's sympathies or prejudices may constitute error requiring reversal. *Ho*, *supra* at 188. However, a photograph that is admissible for a legitimate purpose is not rendered inadmissible because of its gruesome details or the shocking nature of the crime. *Id.* In this case, the photographs constituted accurate factual representations of the nature and extent of injuries suffered by the victim. *Mills*, *supra* at 77. The photographs corroborated the witnesses' accounts of the nature and extent of Lawson's injuries, and there was no evidence that the photographs were enhanced or altered to magnify the extent of the victim's injuries. *Id.* at 77-78.

V

Defendant next challenges the admission of what he characterizes as other acts evidence. Defendant failed to object to the admission of this evidence. Therefore, this Court's review is limited to whether admission of the evidence constituted clear error that resulted in manifest injustice. MRE 103(d); *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994); *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998).

Defendant argues testimony was presented that he was drinking alcoholic beverages and smoking marijuana with other individuals before the assault on the victim and that he purchased marijuana immediately before the assault. This argument is flawed for two reasons.

First, the testimony defendant characterizes as other acts evidence does not in fact implicate defendant in the drinking, smoking marijuana, or purchase of marijuana. Rather, various witnesses testified that they or others were drinking and smoking marijuana, but they also testified that defendant was not present at those times. Other testimony indicated that defendant was present when his former co-defendant purchased marijuana, but that defendant did not purchase marijuana.

Second, defendant elicited and emphasized testimony demonstrating that the prosecution witnesses had engaged in drinking alcoholic beverages and smoking marijuana. This proffered evidence also showed that he was not present when this activity transpired. A defendant waives appellate review of evidence that he introduced or evidence made relevant by a defendant's

placement of a matter in issue. *City of Troy v McMaster*, 154 Mich App 564, 570-571; 398 NW2d 469 (1986).

VI

Defendant next contends the trial court abused its discretion when it failed to change the scoring of twenty-five points on offense variable four, aggravated physical injury. This Court reviews scoring on offense variables for abuse of discretion, and we will not reverse a scoring decision provided there is evidentiary support for the score. *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994). Appellate review of challenges to scoring of the sentencing guidelines is very limited. *People v Richardson*, 162 Mich App 15,16; 412 NW2d 227 (1987). A scoring challenge constitutes a basis for relief when (1) the factual predicate for the score is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. *People v Cain*, 238 Mich App 95, 131; 605 NW2d 28 (1999).

In this case, evidence presented at trial established that the victim was severely beaten, repeatedly stomped, and stabbed to death by defendant, even after the victim lay motionless on the ground. The factual predicate for scoring of offense variable four at twenty-five points was not wholly unsupported or materially false, and as discussed in defendant's final issue, *infra*, defendant's sentence was not disproportionate.

VII

Finally, defendant contends that the trial court abused its discretion by sentencing him to a disproportionately harsh sentence because unusual circumstances existed. This Court reviews sentencing decisions for abuse of discretion. *People v Coles*, 417 Mich 523, 537; 339 NW2d 440 (1983), overruled in part on other grounds *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra* at 636. A sentence within the guidelines' recommended range is presumptively proportionate. *People v Broden*, 428 Mich 343, 350; 408 NW2d 789 (1987). However, a sentence within the guidelines range may be disproportionate where unusual circumstances exist. *Milbourn, supra* at 661. The term "unusual circumstances" has been interpreted to mean "uncommon" or "rare." *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). A defendant bears the burden of coming forward with unusual circumstances to defeat the presumption that his guidelines sentence is proportionate. *Broden, supra* at 354-355.

In this case, defendant was sentenced to 7 to 15 years – 84 months to 180 months – imprisonment and the guidelines' minimum sentence range was 24 months to 84 months. Thus, the trial court's imposition of a minimum sentence of 84 months was within the guidelines and is presumptively proportionate. *Broden, supra* at 350. Defendant nonetheless maintains that his sentence was disproportionate because he had no prior criminal record, a history of employment, and strong family support. These circumstances are not unusual. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). As such, defendant has failed to overcome the presumption

that his sentence within the guidelines is proportionate. The sentencing court did not abuse its discretion.

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Robert B. Burns