

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMAL S. ALLEN,

Defendant-Appellant.

UNPUBLISHED

March 23, 2001

No. 218921

Wayne Circuit Court

LC No. 98-003030

Before: Murphy, P.J., and Hood and Cooper, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree murder, MCL 750.316; MSA 28.548. He was sentenced to life imprisonment without parole, and appeals as of right. We affirm.

I

Defendant first contends that the trial court erred by failing to properly instruct the jury regarding the definition of reasonable doubt. We disagree.

This Court reviews unpreserved claims of instructional error for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 761-764, 774; 597 NW2d 130 (1999); *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000). A plain error is prejudicial, i.e., it could have affected the outcome of the trial. *People v Mass*, 238 Mich App 333, 339; 605 NW2d 322 (1999). The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 774.

Defendant has not established plain error. A trial court is not required to define the meaning of reasonable doubt. *People v Spears*, 241 Mich 67, 71; 216 NW 398 (1927); *People v Trudell*, 220 Mich 166, 171-172; 189 NW 910 (1922). These rulings by our Supreme Court have never been overruled or modified. A criminal defendant's rights are protected where the jury is given the general charges that the defendant is entitled to be presumed innocent and that the jury may not convict the defendant unless each juror is convinced of guilt beyond a reasonable doubt. *Trudell, supra*, 220 Mich 171-173. Here, because the trial court was not required to define reasonable doubt, it did not err by failing to do so. Moreover, defendant's right to a fair trial was

preserved where the trial court defined reasonable doubt during the giving of preliminary jury instructions to the jury venire before jury selection and when the court repeatedly informed the jury that it could not convict defendant of any offense unless it found beyond a reasonable doubt that the elements of the offense had been proven.

II

Defendant next contends that the trial court's denial of his request for a jury instruction on the cognate lesser offense of manslaughter constitutes error mandating reversal. We disagree.

The failure to give a requested jury instruction is reviewed for an abuse of discretion. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

A trial court must instruct on lesser included offenses when so requested and if supported by the evidence. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (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 Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). Both involuntary manslaughter and voluntary manslaughter are cognate lesser included offenses of murder. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998); *People v Michael Fuqua*, 146 Mich App 133, 139; 379 NW2d 396 (1985).

We decline to address whether defendant was entitled to have the jury instructed with regard to manslaughter because we conclude that, even if such instructions should have been given, the failure to do so constitutes harmless error. Here, although the jury was instructed on the lesser included offense of second-degree murder, it convicted defendant of the greater charge: "Where the trial court instructs on a lesser included offense which is intermediate between the greater offense and a second lesser included offense, for which instructions were requested by the defendant and refused by the trial court, and the jury convicts on the greater offense, the failure to instruct on that requested lesser included offense is harmless if the jury's verdict reflects an unwillingness to have convicted on the offense for which instructions were not given." *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990). We conclude that the jury's rejection of second-degree murder reflects the jury's unwillingness to convict on manslaughter and, therefore, the failure to so instruct constitutes harmless error.

III

Defendant contends that he is entitled to a new trial because the prosecutor argued facts not in evidence during his closing argument, as well as expressed his personal belief in defendant's guilt. We disagree.

Defendant failed to object below to any of the prosecutor's remarks defendant now challenges. Appellate review of allegedly improper prosecutor conduct is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998).

Assuming without deciding that the prosecutor improperly summarized and argued the testimony of witness Jasmynne Allen, we conclude that a timely objection by defense counsel and a curative instruction would have alleviated the prejudice, if any, generated by the prosecutor's arguments.

Furthermore, we reject defendant's claim that the prosecutor expressed his personal belief in defendant's guilt. The crucial inquiry is not whether the prosecutor said "we know," but rather whether the prosecutor was attempting to vouch for the defendant's guilt. *People v Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995) (Boyle, J.). Here, read as a whole, and in the context of this case, the prosecutor's use of "we know" does not reflect an attempt to place the credibility of his office behind the case or suggest he possessed extrajudicial information on which defendant should be convicted. Instead, the prosecutor was asserting that "we know," on the basis and strength of the evidence adduced at trial and inferences drawn from that evidence, that the propositions advanced had been established.

IV

Finally, defendant contends that he is entitled to a new trial because the prosecution introduced improper rebuttal testimony which denied defendant a fair trial. We disagree.

For an unpreserved claim of evidentiary error, a defendant must show a plain error that affected substantial rights. *Carines, supra* at 744. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Whether the evidence could have been offered in the case in chief is not the test, as defendant suggests. See *People v Bettistea*, 173 Mich App 106, 126; 434 NW2d 138 (1988). Rebuttal evidence is admissible to refute relevant and material evidence, that is, evidence bearing on an issue properly raised in a case. *Id.* Its relevance should be tested by whether it is justified by the evidence which it is offered to rebut. *Id.*

To the extent that Jasmynne Allen's testimony rebutted defendant's testimony that he was not at the crime scene near the time the victim's body was discovered, the testimony constituted proper rebuttal. Nevertheless, even if it constituted improper rebuttal evidence, the witness' testimony was not prejudicial. At worst, the testimony was cumulative of other testimony offered at trial.

Affirmed.

/s/ William B. Murphy

/s/ Harold Hood