STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS DUSKIN,

Defendant-Appellant.

UNPUBLISHED
May 10, 2002

No. 228040
Wayne Circuit Court
LC No. 99-005068

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to twenty-five to forty years' imprisonment for the murder conviction, two to four years' imprisonment for the assault conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

I. Basic Facts and Procedural History

On October 6, 1998 during the early evening hours, the victim, Dewunn Carter and his friend, Anthony Copeland, decided to eat at the Omega Coney Island located in the city of Detroit. The victim and Copeland were there approximately an hour and a half when an individual driving a purple Monte Carlo with gold rims drove past the restaurant. Thereafter, according to Copeland, defendant and one of defendant's friends entered the restaurant. At this time, the victim and Copeland were standing by the juke box near the men's bathroom. Copeland testified that when defendant entered the restaurant, he approached the victim and the two renewed a previous "on-going" dispute.[1]

According to Copeland, after defendant approached the victim and the two exchanged harsh words, the victim stated "if you got a gun pull it, if you don't we going to scrap." Defendant pulled out his gun and fatally shot the victim in the back as he ran toward the

[1] The record is not clear as to the subject of the "dispute" between defendant and the victim. However, the testimony adduced at trial indicated that the on-going dispute revolved around the fistfight between the victim and defendant at Fairlane Mall "quite awhile" before the October 6, 1998 fatal shooting occurred.

bathroom. The jury convicted defendant of second degree murder, felonious assault and possession of a firearm during the commission of a felony.

II. Jury Instructions

On appeal, defendant argues that the trial court erred in its instructions to the jury. This Court considers jury instructions in their entirety declining to extract them piecemeal to establish the requisite error. *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). If the instructions rendered fairly presented the issues to be tried and sufficiently protected defendant's rights, there is no error even if the instructions actually rendered were somewhat imperfect. *Id*.

A. Involuntary Manslaughter

Defendant contends that the trial court erred by failing to provide an involuntary manslaughter instruction after it sua sponte provided an instruction for voluntary manslaughter.[2] Relying upon our Supreme Court's decision in *People v Ora Jones* 395 Mich 379; 236 NW2d 461 (1975), defendant argues that once a trial court renders, sua sponte, a voluntary manslaughter instruction, the trial court is automatically required to give an involuntary manslaughter instruction. We disagree.

First, we note that in *Ora Jones*, our Supreme Court stated that "a trial court is not ordinarily required to instruct on lesser included offenses unless request for those instructions is properly made." *Id*. at 386. In the case at bar, trial counsel did not request an involuntary manslaughter instruction. Second, in *People v Heflin*, 434 Mich 482, 500; 456 NW2d 10 (1990), our Supreme Court had the occasion to consider its decision in *Ora Jones*, and therein specifically rejected the defendant's argument that "*anytime*, a trial judge instructs the jury with regard to voluntary manslaughter, it must also instruct the jury with regard to involuntary manslaughter." *Id*. at 500 (emphasis in original.) Indeed, our Supreme Court narrowly construed the *Ora Jones* rule "applying it only when either party offers some evidence consistent with the requested instruction." *Id*. Thus, incumbent upon defendant to justify an instruction for involuntary manslaughter is to specifically reference some evidence adduced during the trial that would support a conviction for that cognate lesser included offense. On the record here before us, the evidence adduced during trial simply does not support a conviction for involuntary manslaughter.

Involuntary manslaughter is a cognate lesser included offense of murder. *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996). Involuntary manslaughter is 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 performed or (3) in the negligent omission to

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[2] As an initial matter, we note that defendant did not object to the trial court's failure to render the involuntary manslaughter instruction and thus failed to properly preserve this issue for appellate review. Notwithstanding, this Court reviews unpreserved claims of instructional error for plain error that affected substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

perform some legal duty." *Helfin, supra* at 507-508; see also *People v Beach*, 429 Mich 450, 477; 418 NW2d 861 (1988).

A review of the record reveals that defendant's primary theory at trial was the improper identification of defendant as the perpetrator and the prosecutor's failure to sustain its burden of proving guilt beyond a reasonable doubt. Relying upon all of the inconsistencies contained in the prosecution's witness' recollection and accounts of the incident, defendant argued that the prosecution did not meet its "beyond a reasonable doubt" standard of proof. Contrary to defendant's position on appeal, at trial, defendant never claimed that he acted in self defense or that he otherwise accidentally killed the victim. Defendant never claimed that he accidentally discharged the firearm that resulted in the fatal wounds inflicted upon the victim. Similarly, defendant did not claim that he negligently performed an inherently lawful act or negligently omitted to perform a legal duty. Given that the jury found defendant guilty of second degree murder thus disregarding the voluntary manslaughter option, it obviously had no reservations about defendant's malice. See *Heflin, supra* at 515 (Brickley, J., concurring.) We do not find the requisite plain error affecting substantial rights necessary to overturn defendant's conviction.

B. Character

At trial, defendant offered character witnesses to testify as to his reputation for being a peaceful, law-abiding citizen. Although the prosecutor cross-examined the witnesses proffered by the defense, the prosecution did not offer any witnesses who specifically impugned defendant's character. Notwithstanding, the trial court instructed the jury:

> The prosecutor also called witnesses that testified that the defendant does not have the good character described by defendant's good character evidence. This witness can only be considered by you in judging whether you believe the defendant's character witnesses and whether the defendant had a good character for being peaceful and law abiding . . . .

Despite defendant's current position on appeal, a review of the record reveals that defendant did not object to the instructions given by the trial court. It was not until the jury requested a copy of the instructions *after* they retired to deliberate that the trial court's instruction became an issue. The relevant colloquy between defense counsel and the trial court relative to this issue transpired as follows:

> [Defense Counsel]: There is another instruction that could also stand a bit of polishing, the character instruction that I requested that the court gave. I don't think the third paragraph applies.
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> * * *
>
> THE COURT: I paused and was considering not reading that one, but then *it was actually read by both of you* and filled in saying peacefulness and law abiding, so I figured that you really wanted me to read paragraph 3, *because I asked you to read it over, and it was filled in so someone saw it.* (Emphasis added.)

After discussing the alterations to the jury instructions for purposes of submitting them to the jury for their consideration during deliberations, the trial court inquired whether counsel had any objection "sending in the entire packet of instructions," to which defense counsel replied, "none for the defense." To the extent that the above discussion between defense counsel and the trial court can be considered a proper "objection," a review of the record reveals that defense counsel did not object in a timely manner thus failing to preserve this issue for appellate review. Consequently, we review such an unpreserved claim of instructional error for plain error that affected substantial rights. *Aldrich, supra* at 124-125.

In the instant case, the trial judge instructed the jury that they may consider defendant's proffered character evidence to decide whether defendant committed the crime. Moreover, the trial court specifically instructed that "good character *alone* may sometimes [create] a reasonable doubt in your mind and lead you to find the defendant not guilty." (Emphasis added.) On review of the entire record and considering the jury instructions as a whole, we find that the trial court sufficiently protected defendant's rights and fairly presented the issues to be tried. Accordingly, we do not find the requisite plain error affecting substantial rights necessary to overturn defendant's conviction.

C. Flight

Defendant contends that the trial court improperly instructed the jury regarding defendant's flight from the scene after the incident. We again note that defendant failed to object to the allegedly erroneous instruction thus failing to properly preserve this issue for appellate review. Notwithstanding, this Court will review an unpreserved claim of instructional error for plain error affecting substantial rights. *Aldrich, supra* at 124-125.

It is axiomatic that evidence of flight is typically relevant and admissible to demonstrate consciousness of guilt. See *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001); *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1992). Fleeing the scene of a crime and running from police, among other things, constitute "flight" *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

In the case at bar, we find that the evidence adduced at trial supported the trial court's flight instruction. Testimony demonstrated that after the incident, defendant fled from the scene prompting police to issue an arrest warrant along with an international flight warrant for defendant. From October, 1998 though May, 1999, police actively searched for defendant. In March of 1999, police intensified their search by profiling defendant on television. Approximately two months after the television broadcast and accompanied by his legal counsel, defendant voluntarily surrendered to authorities. A review of the record reveals that the trial court's flight instruction was accurate and supported by the evidence. Accordingly, we do not find the requisite plain error affecting defendant's substantial rights necessary to overturn defendant's conviction.

III. Reference to "Street Names"

Next, defendant argues that that trial court committed error requiring reversal by permitting the prosecutor to introduce evidence regarding defendant's street name. We do not agree. A review of the record demonstrates that defendant failed to object to the testimony of a

police officer wherein the police officer defined the term street name in accord with the trial court's request. Accordingly, defendant failed to properly preserve this issue for appellate review. Thus, to avoid forfeiture, defendant must establish that: (1) an error occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

During trial counsel's cross-examination of one of the police witnesses, the witness indicated that the shooter was known on the street as "Cap." One of the jurors handed the deputy a note which advised that the term "street name" peppered the trial testimony and further requested a definition of the term. After the trial court discussed the juror's concern with both counsel, the trial court suggested that a subsequent police witness define the term. In accord with the trial court's suggestion agreed upon by both the prosecutor and defense counsel, during another police officer's testimony, the trial court asked the witness for a definition of the word "street name." The officer complied with the trial court's request and defined the term. Thereafter, while cross-examining Anthony Copeland, a witness for the prosecution, defense counsel asked his street name as well as the victim's street name and another of the witness' street name. On redirect, the prosecution asked Copeland about defendant's "nickname" but Copeland was not aware that defendant had such a name.

On appeal, defendant argues that this testimony was for the improper purpose of prompting the jury to speculate that defendant was attempting to hide his true identity and thus conceal an ignoble purpose. A review of the record belies defendant's position. Throughout the trial there was testimony relating to street names or nicknames introduced by both the prosecution and the defense. The prosecutor attempted to demonstrate that there were several reasons for an individual to have a nickname which do not necessarily indicate a dastardly purpose. On review of the entire record, we do not discern the requisite plain error affecting defendant's substantial rights necessary to overturn defendant's conviction.

IV. Proportionality of Defendant's Sentence.

Finally, defendant argues that his sentence of twenty-five to forty years' imprisonment is disproportionately severe. To that end, defendant argues that he does not have any juvenile or adult felony record and has only been previously convicted of a single misdemeanor which indicates that he may be successfully rehabilitated. Defendant also references his age and steadfast family support system contending that these factors also counsel for a sentence at the lower end of the guidelines range. Consequently, defendant submits that the trial court's twenty-five year minimum sentence, the highest minimum sentence that the guidelines will tolerate, on the facts herein presented, constituted a draconian sentence without proper justification. We do not agree.

This Court reviews a sentence imposed by a trial court for an abuse of discretion. *People v Bennett*, 241 Mich App 511, 515; 616 NW2d 703 (2000). When a trial court imposes a sentence that is not proportional to the seriousness of the circumstances surrounding the offense and the offender, the trial court abuses its sentencing discretion. *People v Sabin* (*On Second Remand*), 242 Mich App 656, 661; 620 NW2d 19 (2000).

In the case sub judice, the testimony adduced at trial established that during the early evening hours, defendant entered a restaurant where the victim and a friend were doing nothing

but eating and talking, approached the victim, rekindled a prior disagreement, pulled out a gun and without mercy shot the victim in the back as the victim attempted to flee. On these facts, despite defendant's age and lack of prior criminal history, a sentence imposed within in the upper most echelon of the sentencing guidelines is certainly not disproportionate to the seriousness of the circumstances surrounding the instant offense.

Defendant was sentenced within the range recommended by the sentencing guidelines. A sentence within the guidelines range is presumptively neither excessive or disparate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). On the record herein presented, defendant has failed to identify any unusual circumstances to overcome the presumptive proportionality of his sentence. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990); *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Accordingly, we conclude that the trial court did not abuse its sentencing discretion and thus affirm defendant's conviction.

Affirmed.

/s/ Jessica R. Cooper
/s/ Harold Hood
/s/ Kirsten Frank Kelly