

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH J. WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

May 21, 2002

No. 232255

Wayne Circuit Court

LC No. 00-000326

Before: Smolenski, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of second-degree murder, MCL 750.317, and one count of felony-firearm, MCL 750.227(b). He was subsequently sentenced to a term of 40 to 85 years' imprisonment for second-degree murder and two years' imprisonment for felony-firearm. Defendant appeals both his conviction and the subsequent sentence. We affirm but remand for completion of the guidelines departure form.

Defendant raises five issues in this appeal. Defendant first argues the trial court erroneously failed to instruct the jury regarding the cognate lesser offense of statutory involuntary manslaughter. This Court reviews claims of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

Statutory involuntary manslaughter is a cognate lesser offense of murder. *People v Heflin*, 434 Mich 482, 497; 456 NW2d 10 (1990). MCL 750.329 defines statutory involuntary manslaughter as follows:

Any person who shall wound, maim or injure any other person by the discharge of any firearm, pointed or aimed, intentionally but without malice, at any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter.

Before a trial court can instruct on a cognate lesser offense, it must determine whether the evidence would support a conviction of that lesser offense. *Heflin, supra* at 495. The court must give an instruction regarding a cognate lesser offense if the defendant requests it and the evidence supports it. *People v Sullivan*, 231 Mich App 510, 517-518; 586 NW2d 578 (1998), *aff'd* 461 Mich 992 (2000). "However, there must be more than a modicum of evidence; there

must be sufficient evidence that the defendant could be convicted of the lesser offense.” *People v Cheeks*, 216 Mich App 470, 479-480; 549 NW2d 584 (1996).

In the present case, defendant argues that the record contained sufficient evidence of provocation, accident, or self-defense to support an instruction regarding statutory involuntary manslaughter. We disagree. The record did not contain even a modicum of evidence that the gun accidentally discharged when defendant fired it at the victim, that the victim attacked defendant, or that the victim was armed at the time of the shooting. Because there was no evidence supporting an inference that defendant did not shoot the victim intentionally, an instruction regarding statutory involuntary manslaughter was not warranted.

Defendant next argues the trial court erroneously refused to instruct the jury regarding self-defense. As set forth above, there was no evidence presented that the victim was armed at the time of the shooting or that defendant believed he was in danger. Although evidence was presented that the victim had a conversation with defendant before defendant obtained the rifle and shot the victim, this conversation happened well before the shooting. There was no evidence that defendant had any need to fear for his safety. Therefore, we conclude that the trial court did not err in refusing to give the requested instruction regarding self-defense.

Defendant next argues the prosecutor improperly argued facts not in evidence and improperly denigrated defense counsel, during closing arguments. Because defendant failed to object to the prosecutor’s comments at trial, this issue is unpreserved and this Court’s review is limited to plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Further, “[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.” *Id.*, quoting *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant argues that the prosecutor improperly argued during his closing argument that defendant loaded the gun before shooting the victim. As defendant points out, the prosecutor argued that defendant’s act of loading the gun proved that defendant acted with premeditation and deliberation. However, defendant was convicted of second-degree murder, which does not require proof of premeditation and deliberation. MCL 750.317. Thus, even if any comments by the prosecution in this regard constitute error, such error would necessarily be harmless.

Defendant also argues that the prosecutor mocked and denigrated defense counsel in his rebuttal closing argument by referring to the defense’s closing argument as a “McGuffin.”¹ We disagree. A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *Watson*, *supra* at 592. However, a prosecutor’s comments must be considered in light of the defense counsel’s comments and arguments. *Id.* at 592-593. “An otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel’s argument.” *Id.* at 593.

¹ The prosecutor explained that a “McGuffin” was a technique used in Alfred Hitchcock movies where a misleading fact was deliberately planted to mislead the audience.

In this case, the prosecutor's comments were made in response to defense counsel's closing argument. Defense counsel attempted to emphasize alleged discrepancies in the witness' testimony and questioned why certain tests were not performed on the victim's body. In addition, defense counsel attempted to argue a theory of self-defense, which was unsupported by the evidence introduced at trial. We conclude that it was not improper for the prosecutor to respond to the defense's argument, and we find no plain error.

Finally, defendant raises two issues regarding sentencing. Because the instant offenses occurred on October 3, 1999, defendant's sentence is governed by the legislative sentencing guidelines. MCL 769.34. As calculated by the trial court, the guidelines called for a minimum sentence of 225 to 375 months or life imprisonment. The trial court sentenced defendant to a term of 40 to 85 years, which equates to a term of 480 to 1020 months. Because the court did not impose a life sentence, but imposed a term-of-years sentence whose minimum exceeds the 375-month limitation, the sentence constitutes an upward departure from the guidelines. *People v Johnson*, 202 Mich App 281, 291; 508 NW2d 509 (1993).

A sentencing court may depart from the recommended sentence only when it has "substantial and compelling" reasons for that departure, and states on the record the reasons for departure. MCL 769.34(3). Further, the court may not base a departure on an offense or offender characteristic already accounted for in the guidelines, unless the court finds from the facts contained in the record that the guidelines have given the characteristic inadequate or disproportionate weight. MCL 769.34(3)(b). When reviewing an upward departure from the applicable guidelines range, the existence of a particular factor is a factual issue subject to review for clear error; the determination that a factor is objective and verifiable is reviewed as a matter of law; the determination that the factors constituted substantial and compelling reasons for departure is reviewed for abuse of discretion. *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000), quoting *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995).

Defendant contends that the trial court's articulated reasons for exceeding the guidelines range were neither substantial nor compelling. Further, defendant argues that these factors were already taken into consideration in the guidelines themselves. Therefore, defendant urges this Court to reverse and remand for resentencing.

During sentencing, the trial court explained that it was departing upward from the guidelines because of: (1) the extreme nature of defendant's actions, (2) the need to punish and rehabilitate defendant, and (3) the need to protect society from such a dangerous person as defendant.² The evidence in this case indicated that the victim's family took defendant in and provided him with a place to live, as an act of charity. When the victim told defendant that he had to move out, defendant left the room, obtained a rifle, and shot the victim in cold blood. Defendant ignored the pleas of his own brother to refrain from committing this murder, and he apparently shot the victim in front of the victim's family members. We conclude that the trial

² Although the trial court articulated its reasons for departure on the record, we were unable to find a guidelines departure form in the record. Because the court is required to complete this form, remand is necessary for completion of this ministerial task. *People v Armstrong*, 247 Mich App 423, 426; 636 NW2d 785 (2001).

court appropriately considered the cold-blooded nature of defendant's crime, for which there was no apparent justification or excuse, as an objective and verifiable factor justifying an upward departure from the guidelines. Further, we conclude that the nature of defendant's actions in this case provided substantial and compelling reasons for an upward departure.

Defendant also argues that the extent of the trial court's upward departure violates the principle of proportionality, as the minimum sentence of 480 months far exceeded the guidelines' maximum minimum sentence of 375 months. As explained in *People v Babcock (After Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 235518, issued March 19, 2002), slip op, p 3, there can be varying degrees of substantial and compelling circumstances that must be considered in reviewing the *extent* of a departure. "In other words, if there are substantial and compelling reasons to slightly depart from the guidelines, e.g., a six-month departure, those same reasons may not be sufficient to support a more significant departure, e.g., a three-year departure." *Id.* at 3-4. When reviewing the extent of a trial court's departure from the legislative sentencing guidelines, the principle of proportionality can be considered. *Id.* at 4. However, because defendant has failed to adequately explain how the extent of the trial court's departure was disproportionate to either the offender or the offense, this Court is not required to address this issue. Furthermore, given the nature of defendant's crime, we conclude that the extent of the trial court's departure was proportionate based on the circumstances.

Finally, defendant argues the court sentenced defendant based on the inaccurate information that defendant loaded the rifle before shooting the victim. Although there was no direct evidence defendant loaded the rifle, we conclude that it could properly be inferred from the evidence and circumstances. For example, defendant retrieved the gun alone, a box of bullets was found on the kitchen table, and defendant shot the victim with a loaded gun. Therefore, we conclude that defendant is not entitled to resentencing based on this issue.

We affirm defendant's conviction and sentence but remand for the ministerial task of completing the guidelines' departure form. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Janet T. Neff
/s/ Helene N. White