STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EVERETT,

Defendant-Appellant.

UNPUBLISHED
May 31, 2002

No. 225986
Wayne Circuit Court
LC No. 99-007475

Before: Jansen, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of second-degree murder, MCL 750.317. The trial court sentenced him to twenty-five to fifty years' imprisonment. We affirm.

Defendant first argues that the trial court erred by allowing testimony that defendant was "on the run" from New York. Defendant contends that this testimony created a prejudicial inference that he had committed a prior criminal act.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion will be found if an unprejudiced person, considering the facts available to the trial court, would find no justification for the ruling made. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

Defendant contends that testimony in question constituted "bad acts" evidence as discussed in MRE 404(b), which prohibits the introduction of a defendant's other acts if they are offered to prove the defendant's propensity to commit the charged offense. We disagree that testimony indicating that defendant was "on the run" from New York served to create a violation of MRE 404(b). Indeed, the testimony merely indicated that defendant was avoiding an unidentified situation or person in New York and did not create an inference that he committed the instant homicide by acting in conformance with his character.[1] Moreover, the evidence was admissible as a response to the alibi defense that defendant first asserted in opening statements.[2]

[1] The trial court specifically prohibited mention of any pending criminal charges in New York.

[2] Defendant's family members testified that defendant was in New York at the time of the instant
(continued…)

See generally *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). Finally, given the additional evidence supporting defendant's conviction, we are convinced that the challenged testimony, even assuming, arguendo, that it should not have been admitted, did not "more probabl[y] than not" affect the outcome of the trial. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (explaining that an error in the admission of evidence is not grounds for reversal unless "it is more probable than not that a different outcome would have resulted without the error"). Appellate relief is unwarranted.

Next, defendant argues that the trial court erred by allowing testimony that defendant had gone to another state with his child against the wishes of the child's mother. Once again, defendant alleges that this testimony violated MRE 404(b) and should have been excluded because it implied that defendant was prone to criminal acts and that he acted in conformity with this tendency in committing the instant offense. Defendant's argument is without merit. Indeed, the challenged testimony was properly admitted to rebut testimony introduced by defense witnesses and to impeach those witnesses.[3] See generally *Figgures, supra* at 399, and *Lukity, supra* at 499. Moreover, given the additional evidence supporting defendant's conviction, we are again convinced that the challenged testimony did not "more probabl[y] than not" affect the outcome of the trial. See *Lukity, supra* at 495-496.

Next, defendant argues that the trial court erred by giving a jury instruction on flight. A trial court's determination whether an instruction is supported by the evidence is reviewed for an abuse of discretion. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). This Court has held that a flight instruction is warranted if the defendant leaves the scene of a crime out of fear of apprehension. See *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989). We are satisfied that defendant's flight from Detroit to New York, and finally to Mississippi, coupled with the abandonment of his personal property and dog, were indicative of consciousness of guilt and warranted a flight instruction. *Id*.; *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). No abuse of discretion occurred.

Next, defendant argues that the trial court erred by failing to give an instruction on voluntary manslaughter. Defendant failed to object to the instructions given or request an instruction on voluntary manslaughter at trial; thus, this issue is unpreserved. *Snider, supra* at 420. We will review the issue only for plain error. *Id*.; *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must demonstrate a clear or obvious error that likely affected the outcome of the case. *Carines, supra* at 763. Jury instructions do not warrant reversal as long as "they adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried." *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997).

A cognate lesser offense is one that shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater. *People v Perry*,

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(…continued)

homicide.

[3] Defense witnesses testified that defendant came with his child to New York at the request of the child's mother because she did not wish to care for the child.

460 Mich 55, 61; 594 NW2d 477 (1999). "Both voluntary and involuntary manslaughter are cognate lesser included offenses of murder." *People v Cheeks*, 216 Mich App 470, 479-480; 549 NW2d 584 (1996). 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 (1990).

A homicide may be reduced from murder to voluntary manslaughter if the circumstances surrounding the killing demonstrate that the killing occurred as a result of adequate provocation. *Id.* at 388. As noted in *People v Fortson*, 202 Mich App 13, 19; 507 NW2d 763 (1993):

> Voluntary manslaughter is an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to cool and reason to resume its habitual control.

We conclude that the evidence in this case did not support a conviction for voluntary manslaughter. Indeed, defendant's conduct was not indicative of a person acting with passion or hot blood. Defendant made previous threats that he would "plug the house up" and he made attempts to warn the unintended victim to stay away from his intended target. Moreover, the shooting occurred at least a day after the alleged provocation. Defendant's statements demonstrated reflective thought and cold calculation to seek revenge. Accordingly, the evidence did not support a conviction of voluntary manslaughter, and the trial court properly refused to instruct on this lesser offense. *Pouncey*, *supra* at 387.

Defendant additionally contends that his trial attorney rendered ineffective assistance by failing to pursue a voluntary manslaughter instruction. However, because the evidence did not merit a voluntary manslaughter instruction, defense counsel was not ineffective for failing to seek such an instruction. Indeed, "counsel is not required to advocate a meritless position." *Snider*, *supra* at 425. Defendant cannot demonstrate that his attorney's failure to seek the instruction constituted deficient performance or affected the outcome of the case. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Finally, defendant argues that the trial court imposed a disproportionately long sentence.[4] We review sentencing decisions for abuse of discretion. *People v McGrady*, 213 Mich App 474, 483; 540 NW2d 718 (1995). A trial court abuses its discretion if it violates the principle of proportionality. *Id.* This principle is violated if the sentence is not proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id*.

A sentence that is within the judicial sentencing guidelines is presumptively valid and proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Jones*, 201 Mich App 449, 457; 506 NW2d 542 (1993); however, a sentence that is within the guidelines may constitute an abuse of discretion if unusual circumstances exist. *People v Hadley*, 199 Mich App 96, 105; 501 NW2d 219 (1993), aff'd 450 Mich 316 (1995). This Court

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[4] Because of the date of the offense, defendant sentence was governed by the judicial sentencing guidelines.

has construed the phrase "unusual circumstances" to mean "uncommon" or "rare" circumstances. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Defendant has failed to establish such circumstances and did not allege such circumstances below. Accordingly, no abuse of discretion occurred. *Id*.

Moreover, even ignoring the presumption of proportionality discussed above, we are convinced that defendant's sentence at the high end of the guidelines was supported by both defendant's prior record, and, most significantly, by the extremely serious nature of the offense, a drive-by shooting. The trial court did not abuse its discretion by sentencing defendant to a twenty-five year minimum sentence.

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Patrick M. Meter