STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2008
v	No. 274209 Bay Circuit Court
SINACA ANTWON TIMES, Defendant-Appellant.	LC No. 05-010612-FC

Before: Wilder, P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial for first-degree felony murder, MCL 750.316(b), armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), and several other felony counts based the shooting of Ricky Narvaiz, as defendant attempted to escape from a Bay City apartment after entering to rob Narvaiz. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to life in prison without the possibility of parole for the murder conviction, as well as other concurrent and consecutive prison sentences. We affirm.

Defendant first argues that the trial court erred in allowing into evidence a single-photograph identification of defendant as the shooter. To violate a defendant's due process rights, a photographic identification must be "so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). Showing a witness a single photograph is considered a suggestive identification procedure, *id.*, but a suggestive identification procedure is only improper where the totality of the circumstances indicate a substantial likelihood of misidentification, *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001), citing *People v Kurylczyk*, 443 Mich 289, 306; 505 NW2d 528 (1993). Relevant factors to consider include: (1) the witness's opportunity to view the suspect at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of a prior description from the victim, (4) the witness's level of certainty at the time of the pretrial identification, and (5) the amount of time between the crime and the confrontation. *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998).

In the present case, a witness was shown a single photograph of defendant by police officers while the witness was in jail. The officer stated that the identification was only to eliminate defendant as a suspect. Because we examine the effect of an identification procedure rather than its justification, see *Gray*, *supra* at 114, we find that this was a suggestive

identification. However, the witness testified that he had shot dice with defendant within weeks prior to the shooting. He also had an opportunity to observe the assailant inside of the apartment and while chasing the assailant as he attempted to flee. Indeed, the witness was close enough to the assailant to throw a bicycle at him. The witness identified defendant at trial as the assailant. Although the witness was uncooperative with police prior to the identification and gave inconsistent statements, given how close the witness was to the assailant and that he had met defendant prior to the shooting, "[u]nder the totality of the circumstances, defendant has failed to show that there was a substantial likelihood of misidentification." *Colon*, *supra* at 305. We conclude that there was clear and convincing evidence that the witness's identification of defendant had a sufficiently independent basis and was not based on any suggestiveness surrounding the photographic identification. *Id.* Moreover, given the overwhelming evidence identifying defendant as the shooter, including identification by two other witnesses, both of whom had met defendant prior to the incident, any error "was harmless beyond a reasonable doubt" such that reversal is not required. *People v Willing*, 267 Mich App 208, 223; 704 NW2d 472 (2005).

Defendant next argues that the trial court abused its discretion by refusing to read instructions to the jury regarding the lesser-included offenses of second-degree murder and voluntary manslaughter. We disagree. Although both second-degree murder and voluntary manslaughter are "necessarily included" lesser offenses to first-degree murder, *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003); *People v Carter*, 395 Mich 434, 437-438; 236 NW2d 500 (1975), a court is only required to instruct a jury on a lesser-included offense that is "necessarily included" in the charged offense when "a rational view of the evidence would support such an instruction," *Mendoza*, *supra* at 533.

First-degree felony murder is defined by statute as a "[m]urder committed in the perpetration of" one of several listed felonies, including armed robbery and first-degree home invasion. MCL 750.316(b). Because the only elements separating first-degree felony murder from second-degree murder are the predicate felonies, a second-degree murder instruction was only necessary if a "rational view of the evidence" would support the finding that the perpetrator did not shoot the victim while perpetrating either offense. We conclude that it does not.

The evidence presented at trial demonstrated that defendant entered an apartment occupied by the victim and others without permission, and that defendant threatened the group with a gun while taking money and a cell phone from the victim, thereby establishing the elements for both armed robbery, *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007), and first-degree home invasion, MCL 750.110a(2). While fleeing the apartment, and while being pursued by the victim and another man, defendant fired a handgun two or three times. One of those gunshots struck the victim, killing him. The term "perpetration" in the felony murder statute is a broader concept than the elements of the predicate felony and includes any murder committed "during the uninterrupted chain of events surrounding the commission of the predicate felony . . . ." *People v Gillis*, 474 Mich 105, 121; 712 NW2d 419 (2006). Defendant did not dispute the evidence, but whether he was the perpetrator. Consequently, the only rational view of the evidence was that the victim's shooter did so during a first-degree home invasion and robbery, so that the lesser-included offense of second-degree murder was not required. *Mendoza*, *supra* at 533.

Manslaughter was similarly not required. "Manslaughter is murder without malice." *Id.* at 534. The element of malice "is negated by the presence of provocation and heat of passion." *Id.* at 540-541. Adequate provocation is "that which would cause a reasonable person to lose control." *People v Tierney*, 266 Mich App 687, 715; 703 NW2d 204 (2005) (internal quotations omitted). In the present case, there simply was no evidence of any provocation that a reasonable juror could conclude was adequate. Any claim that the perpetrator was provoked by the possibility of not escaping after his armed robbery is meritless. "Although defendant was provoked, in a broad sense, that provocation is not one which we recognize as 'adequate' for the purposes of the law of manslaughter." See *People v Gjidoda*, 140 Mich App 294, 298; 364 NW2d 698 (1985). Without any evidence of provocation, no rational view of the evidence supported a manslaughter instruction. *Mendoza, supra* at 533.

Defendant next argues that the trial court abused its discretion when it allowed plaintiff to introduce six photographs taken during the victim's autopsy. Defendant argues that the photographs should have been excluded under MRE 403 because he was willing to stipulate the cause of death, making the gruesome photographs more prejudicial than probative. Although gruesome photographs should not be admitted to garner sympathy from a jury, "a photograph that is otherwise admissible for some proper purpose is not rendered inadmissible because of its gruesome details or the shocking nature of the crime." *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998).

The photographs were admitted into evidence as exhibits used by the pathologist who examined the victim to show the victim's injuries, both internal and external. They are accurate reflections of the damage a bullet did to the victim's body and are gruesome only to the extent that the subject matter is gruesome. "Gruesomeness alone need not cause exclusion[,]" and "[p]hotographs are not excludable simply because a witness can orally testify about the information contained in the photographs." *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995). Moreover, "[t]he prosecution must carry the burden of proving every element beyond a reasonable doubt, regardless of whether the defendant specifically disputes or offers to stipulate any of the elements." *Id.* at 69-70. Given that the cause of death was an element of the crime, defendant's offer to stipulate did not remove the prosecution's burden to prove it. "The claim that evidence that goes to an undisputed point is inadmissible has also been rejected in criminal cases." *Id.* at 71. We conclude the trial court did not abuse its discretion is admitting the evidence. *People v Cervi*, 270 Mich App 603, 625; 717 NW2d 356 (2006).

Defendant next argues that the trial court committed reversible error by allowing a police officer to give his opinion concerning the likelihood that a latent fingerprint would be sufficiently detailed for the state forensic scientist to attempt to match. Again, we disagree. As a lay witness, the officer's testimony was governed by MRE 701. This Court interpreted MRE 701 in *People v Grisham*, 125 Mich App 280, 286; 335 NW2d 680 (1983), holding that "any witness is qualified to testify as to his or her physical observations and opinions formed as a result of these observations." The officer's testimony was not overly dependent upon scientific, technical or other specialized knowledge and was a conclusion and helped assist the trier of fact in explaining an absence of fingerprint evidence. Accordingly, the lay testimony was proper. *People v Oliver*, 170 Mich App 38, 50; 426 NW2d 898 (1988), mod on other grounds 433 Mich 862 (1989). Even if its admission were error, the error was harmless because the lay witness's

testimony was largely cumulative of the testimony of a forensic scientist, and the error was probably not "outcome determinative." See *People v Bauder*, 269 Mich App 174, 180; 712 NW2d 506 (2005).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ William C. Whitbeck