STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OTIS LEE COLE,

Defendant-Appellant.

UNPUBLISHED
March 27, 1998

No. 185844
Recorder's Court
LC No. 92-011196

Before: Gage, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life imprisonment without parole for the first-degree felony murder conviction, life imprisonment for the second-degree murder conviction, and two years' imprisonment for the felony firearm conviction. We affirm.

Defendant first argues that the trial court erred when it admitted the statement that he gave to police into evidence at trial because he did not give the statement voluntarily. This Court reviews the entire record and makes an independent determination regarding the voluntariness of a confession. This Court will, however, defer to the trial court's findings of facts unless they are clearly erroneous. *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997). "The test of voluntariness is whether 'considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker,' or whether the accused's 'will has been overborne and his capacity for self-determination critically impaired.'" *Id.*, quoting *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988).

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education, or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the

> accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; whether the suspect was threatened with abuse. [*Cipriano, supra* at 334.]

In the present case, the trial court held a pretrial *Walker*[1] hearing, after which it ruled that defendant's statement was voluntary. Defendant was eighteen years old and had an eleventh grade education when he gave the statement to the police. He was able to read his constitutional rights to the police officer, and he placed his initials next to each right listed on the form. Although defendant alleged that he did not read the statement, he made corrections to it. Defendant also claimed that he was intoxicated when he gave the statement, but the officer who took the statement testified that defendant did not appear intoxicated. The officer denied making any promises to the defendant in exchange for the statement and testified that defendant was given a can of soda prior to making the statement. The trial court's findings of fact regarding the voluntariness of defendant's statement touched on the *Cipriano* factors and considered the evidence presented at the hearing. After a review of the record, we find that the trial court did not err when it determined that defendant's statement was voluntary.

Next, defendant argues that the trial court erred when it refused to instruct the jury on voluntary manslaughter as requested by defendant. We disagree. When properly requested, a trial court should give an instruction on a lesser included offense if a rational view of the evidence would support the instruction. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993). "If evidence has been presented which would support a conviction of a lesser included offense, refusal to give a requested instruction is reversible error." *People v Mosko*, 441 Mich 496, 500; 495 NW2d 534 (1992), quoting *People v Phillips*, 385 Mich 30, 36; 187 NW2d 211 (1971). A necessarily included offense is one that is necessarily included within the greater offense. The evidence will always support conviction of the lesser offense if the evidence supports conviction of the greater. *Id.* A cognate lesser offense is related to the greater offense in that they share similar elements but contain some elements not found in the greater offense. *Id.*

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. *People v Fortson*, 202 Mich App 13, 19; 507 NW2d 763 (1993). Voluntary manslaughter is a cognate lesser included offense of first-degree murder in that there is the further element of provocation or heat of passion that must be demonstrated by the evidence. See *People v Cheeks*, 216 Mich App 470, 479-480; 549 NW2d 584 (1996).

In the present case, defendant and Len Cameron went together to the house where the killings took place. Two versions of the homicides were presented at trial. Defendant's custodial statement was introduced into evidence through the testimony of the officer who took the statement. Defendant maintained that Cameron shot the victims without any provocation after robbing them of drugs and money. At the time of defendant's trial, Cameron had already pleaded guilty to second-degree murder pursuant to a plea bargain and was awaiting sentencing. Cameron testified at defendant's trial that

defendant first entered the house alone and immediately ordered the victims to get down to the ground. According to Cameron, he heard defendant shoot Watson and saw defendant shoot Bechard. In neither version of the killings was any evidence presented of an argument or bad feelings between defendant and the victims. Therefore, a rational view of the evidence would not support a conviction of voluntary manslaughter, and the trial court did not err in refusing to instruct the jury on that offense.

Next, defendant argues that the trial court erred when it gave an instruction to the jury regarding the number of witnesses. Defendant did not object to the instruction at trial, and this issue was not therefore preserved for our review. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Generally, failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052; *Id.* Manifest injustice occurs when an erroneous or omitted instruction pertains to an essential and controlling issue in the case. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Here, no manifest injustice will occur if we do not review this issue. The jury instruction of which defendant now complains is a standard instruction that did not pertain to a basic or controlling issue in the case.

Defendant next argues that the trial court erred when it permitted the prosecutor to present evidence regarding the non-production of witnesses. At trial, the prosecutor adduced evidence from the officer in charge of the case concerning efforts to produce four witnesses. Defendant alleges that this violated his right to confrontation of the witnesses. However, this issue is not preserved for our review because defendant objected to this evidence at trial on the issue of relevance and not on the ground that his right to confrontation was violated. Generally, an objection based upon one ground is not sufficient to preserve an appellate attack based upon a different ground. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Furthermore, defendant was not denied a fair trial because the prosecutor exercised due diligence in attempting to produce the witnesses. *People v Wolford*, 189 Mich App 478, 482-484; 473 NW2d 767 (1991). Moreover, defendant did not request that the witnesses be produced and did not request a jury instruction on the prosecutor's duty in this matter.

Next, defendant argues that the prosecutor engaged in misconduct during rebuttal closing argument. Again, this issue was not preserved for appellate review because defendant failed to object at trial. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121; 115 S Ct 923; 130 L Ed 2d 802 (1995). Appellate review of allegedly improper remarks 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. *Id.* A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW 2d 593 (1996). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW 2d 342 (1995). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW 2d 810 (1992). Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

In the present case, the prosecutor referred to defense counsel's implication that Len Cameron's testimony was not truthful and argued in rebuttal that Cameron's testimony was the same as on the day he was arrested. The prosecutor further noted that defense counsel had the opportunity to challenge Cameron's testimony on cross-examination with references to his custodial statements. Defendant contends that these comments refer to facts not in evidence and improperly shift the burden of proof to the defense. We disagree. First, the prosecutor's comments were in response to defendant's argument that Cameron was untruthful and are therefore proper rebuttal argument. Second, Cameron was cross-examined about his statement, and evidence of his custodial statement was therefore part of the record. Finally, the prosecutor's comment was in response to defense counsel's suggestion that the prosecutor manufactured evidence against defendant. As a whole, the comments did not shift the burden of proof to defendant. See *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995); *People v Lawton*, 196 Mich App 341, 353-354; 492 NW2d 810 (1992).

Defendant next argues that the trial court erred when it admitted certain graphic photographs of the victims into evidence. We disagree. The admission of photographic evidence is reviewed for an abuse of discretion. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). Photographs are not inadmissible merely because they are gruesome and shocking. *People v Zeitler*, 183 Mich App 68, 69; 454 NW2d 192 (1990). Photographs should not be admitted however, if their probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Id*. The danger is that a juror may forget that the defendant may not be responsible for the crime depicted in the gruesome photographs. *Id.*

In the present case, the jury was shown four photographs from the crime scene depicting the dead victims and their fatal gunshot wounds. Because defendant was charged with premeditated first-degree murder, the prosecutor was required to present evidence that the killings were premeditated. The photographs tended to demonstrate that the murders were cold, calculated assassinations. We find that the probative value of the photographs was not outweighed by the danger of unfair prejudice to defendant. MRE 403; See *People v Mills*, 450 Mich 61, 66, 77-78; 537 NW2d 909 (1995), modified 450 Mich 1212; 539 NW2d 504 (1995). Therefore, the trial court did not abuse its discretion when it admitted the photographs into evidence.

Finally, defendant argues that his convictions for first-degree felony murder and second-degree murder are not supported by the evidence. We disagree. This Court reviews the sufficiency of the evidence by viewing the evidence in a light favorable to the prosecution and determining whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reeves*, 222 Mich App 32, 34; 564 NW2d 476 (1997). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *Id.* After the prosecution presented its proofs, defendant moved for a directed verdict on the first-degree murder charge, which was denied by the trial court. When ruling on a motion for a directed verdict, the court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

The elements of felony murder are (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995). Robbery is an enumerated felony under the first-degree murder statute. MCL 750.316(1)(b); MSA 28.548(1)(b). The elements of second-degree murder are (1) the killing of a human being (2) with the intent to kill, or to do great bodily harm, or with wilful and wanton disregard of the likelihood that the natural tendency of one's actions will be to cause death or great bodily harm. *People v Johnson (On Rehearing)*, 208 Mich App 137, 140; 526 NW2d 617 (1994).

Defendant admitted that he and Cameron went to the house where the killings took place to kill someone named Pimp. Defendant stated that Cameron put a gun to the head of Watson, one of the victims, and demanded drugs and money from him. According to defendant, Cameron shot both victims. He took drugs and money from Watson. Cameron testified that he heard a gunshot and then saw defendant shoot Bechard. Watson was lying on the ground after Cameron heard the first shot. The medical examiner testified that both victims died from gunshot wounds. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of first-degree felony murder as to the victim Watson and second-degree murder as to the victim Bechard had been proven beyond a reasonable doubt. Therefore, defendant's convictions are supported by sufficient evidence.

Affirmed.

/s/ Hilda R. Gage
/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly

[1] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).