

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE L. ELIZONDO,

Defendant-Appellant.

UNPUBLISHED

September 22, 1998

No. 200901

Recorder's Court

LC No. 95-011027

Before: Smolenski, P.J., and McDonald and Saad, JJ.

PER CURIAM.

Defendant was convicted by a jury of 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 consecutive terms of two years' imprisonment for the felony-firearm conviction and twenty-five to fifty years' imprisonment for the murder conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in admitting into evidence in violation of MRE 404(b) four instances of other bad acts by defendant. We disagree. With respect to the police officer's testimony, we note that defendant failed to preserve this issue because he did not object below on the ground he now asserts on appeal. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). In any event, we find no error because the officer's testimony did not concern any prior acts by defendant, but rather concerned a hypothetical question.

With respect to both defendant's cross-examination testimony that he did not try to stab the decedent the night before the murder and the rebuttal testimony of defendant's daughter that defendant did try to stab the decedent the night before the murder, we again note that defendant failed to preserve these issues by objecting below. *Id.* In any event, we find no error. Defendant's theory at trial was that he and the decedent were trying to reconcile during the months preceding the murder. Defendant testified on direct examination that no violence or incidents with a knife occurred the night before the murder. The prosecutor's cross-examination of defendant was properly responsive to defendant's direct examination testimony and defendant's denial on cross-examination did not improperly interject

any evidence of other bad acts by defendant. See MRE 611(b).¹ Defendant's daughter's testimony was likewise properly admitted to rebut, and thereby impeach, defendant's direct examination testimony. *People v Leo*, 188 Mich App 417, 422; 470 NW2d 423 (1991).²

Finally, with respect to defendant's cross-examination testimony that he was not aware either that the decedent had made a report to the Hazel Park Police Department or that she had complained about being threatened by defendant, we note that defendant did preserve this issue by objecting below on the ground he now asserts on appeal. However, the trial court overruled the objection on the ground that this testimony was relevant to rebutting defendant's testimony that he and the decedent were reconciling. We find no abuse of discretion in this ruling.³ *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995).

Next, defendant argues that the trial court erred in refusing to instruct the jury on the lesser-included cognate offenses of voluntary manslaughter and assault with intent to do great bodily harm less than murder. See *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325, amended 453 Mich 1204 (1996); *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). However, there was no evidence from which the jury could have inferred that defendant was subjected to that provocation that would have caused a reasonable person to lose control and act out of passion, rather than reason. *Pouncey*, *supra* at 389-391. Thus, the trial court properly refused to instruct the jury with the lesser offense of voluntary manslaughter. *Id.* at 392. Likewise, there was no evidence from which the jury could have inferred that the causation chain leading from the decedent's death back to defendant's acts was broken by an independent, intervening cause. *Bailey*, *supra* at 671-672. Thus, the trial court properly refused to instruct the jury with the lesser offense of assault with intent to do great bodily harm less than murder. *Id.* 660-661.

Next, defendant argues that the prosecutor committed misconduct by arguing facts not in evidence. We note that defendant failed to object to the prosecutor's argument and thus appellate review is generally precluded. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). However, an exception exists if a curative instruction could not have eliminated the prejudicial effect of the remark or where the failure to consider the issue would result in a miscarriage of justice. *Id.* Here, we find no error because there was evidence on the record from which the prosecutor could argue that defendant and the decedent were involved in an abusive relationship.⁴

Next, defendant argues that he was denied the effective assistance of counsel. Specifically, defendant contends that defense counsel erroneously failed to object to the rebuttal testimony of defendant's daughter. However, we have previously ruled in this opinion that defendant's daughter's rebuttal testimony was properly admitted to rebut, and thereby impeach, the credibility of defendant's direct examination testimony. Next, defendant contends that counsel erroneously failed to object to the prosecutor's alleged acts of misconduct. However, again, we have previously ruled in this opinion that the prosecutor did not commit the misconduct about which defendant complains. Accordingly, we conclude that defendant has failed to establish that he was denied the effective assistance of counsel. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Last, defendant contends that his twenty-five year minimum sentence is disproportionate. We disagree. Defendant's minimum sentence was within the guidelines and therefore presumptively proportionate. The factors cited by defendant are not unusual circumstances that overcome the presumption. Accordingly, we conclude that the trial court did not abuse its sentencing discretion. *Id.* at 54.

Affirmed.

/s/ Michael R. Smolenski

/s/ Gary R. McDonald

/s/ Henry William Saad

¹ We likewise reject defendant's claim of prosecutorial misconduct on this ground.

² See note 1, *supra*.

³ See note 1, *supra*.

⁴ We have previously disposed of defendant's other claims of prosecutorial misconduct. See notes 1-3, *supra*.