# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD THOMAS WATKINS,

Defendant-Appellant.

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UNPUBLISHED
February 12, 1999

No. 204739
Kent Circuit Court
LC No. 97-001003 FC

Before: Kelly, P.J., and Gribbs and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of carrying a concealed weapon, MCL 750.227; MSA 28.424, and second-degree murder, MCL 750.317; MSA 28.549, for the fatal stabbing of Joseph Mitchell, and the life sentence imposed for the second-degree murder conviction. We affirm.

Defendant first argues that the trial court erred in ruling, as a matter of law, that there was insufficient evidence of adequate provocation to support his request for an instruction on voluntary manslaughter. We disagree. We review the trial court's refusal to instruct on a lesser included offense for clear error. *People v Mosko,* 441 Mich 496; 495 NW2d 534 (1992). Voluntary manslaughter is a cognate lesser included offense of murder, wherein the defendant acts in the heat of passion, the passion must be caused by adequate provocation, and there cannot be a lapse of time during which a reasonable person could control his passions. *People v Pouncey,* 437 Mich 382, 388; 471 NW2d 346 (1991). Where a cognate offense instruction is requested, we, like the trial court, examine the evidence presented at trial to determine if it would support a conviction of the lesser offense. *People v Bailey,* 451 Mich 657, 669-670; 549 NW2d 325 (1996). We agree with the trial court that the evidence in the instant case shows, at most, that defendant was "provoked" into starting a fight with the victim because the victim looked defendant up and down. Such would not justify the loss of self-control and rage exhibited by defendant. *Pouncey, supra* at 389. The alleged "provocation" in this case would not cause a reasonable person to act out of passion rather than reason. *Id.* at 390. Further, it is inherently unreasonable, as defendant seemingly suggests, to argue that the initial fight between himself and the victim provided adequate provocation for him to pursue and attack the victim again in the

second fight, ending in the death of the victim. The trial court did not err in its refusal to issue an instruction on voluntary manslaughter.

Second, defendant contends there was insufficient evidence of intent to kill to support a conviction of either first- or second-degree murder. However, viewing the evidence in a light most favorable to the prosecution, *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979), we conclude that there was sufficient evidence of intent to kill, including premeditation and deliberation, to support a conviction of either first- or second-degree murder. *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997); *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996); *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979). There was evidence that defendant formulated an intent to kill "someone," focused that intent on the victim, attacked the victim, repeatedly stated his intent to kill the victim, and, after a fight between defendant and the victim was broken up, pursued and killed the victim. Defendant had sufficient time to take a "second look" before he killed the victim. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

Third, defendant asserts that the trial court abused its discretion in admitting photographs that depicted the wounds on the victim's body. We conclude that the trial court did not abuse its discretion in admitting the photographs as more probative than prejudicial to show defendant's intent to kill the victim and to corroborate the testimony of the medical examiner regarding the nature and extent of the injuries. *People v Mills*, 450 Mich 61, 71-78; 537 NW2d 909 (1995); *People v Hoffman*, 205 Mich App 1, 18-19; 518 NW2d 817 (1994).

Fourth, defendant claims that the court erred in its instructions to the jury regarding intent to kill and the concept of reasonable doubt. Defendant did not object below to the instructions now challenged on appeal and, therefore, has waived review of this issue. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). We will review the issue only to determine if relief should be granted because manifest injustice otherwise would result. MCL 768.29; MSA 28.1052; *Van Dorsten, supra*. Our review convinces us that the trial court's instructions to the jury were not erroneous and, hence, did not result in manifest injustice. Regarding intent to kill, this Court has held that "It is only necessary that the state of mind exist, not that it be directed at a particular person." *People v Lovett*, 90 Mich App 169, 172; 283 NW2d 357 (1979); *People v Lawton*, 196 Mich App 341, 350-351; 492 NW2d 810 (1992). As to the instruction on reasonable doubt, the trial court adequately conveyed this concept to the jury and, unlike *People v Davies*, 34 Mich App 19; 190 NW2d 694 (1971), the trial court did not instruct the jury that a reasonable doubt could not be based upon a lack of evidence or upon the unsatisfactory nature of the evidence. See *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996); *People v Ames*, 60 Mich App 168, 173-174; 230 NW2d 360 (1975).

Fifth, defendant maintains that he was denied a fair trial due to prosecutorial misconduct because the prosecutor elicited evidence concerning defendant's uncooperative behavior at the jail after his arrest. However, our review of this issue is precluded because defendant did not object below, and our failure to review the issue would not result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). See also *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1995). The evidence of defendant's guilt was overwhelming, and we cannot conclude that the jury

would have given undue weight to the testimony that defendant kicked an officer after his arrest such that it would have been decisive of the outcome of the case. *Grant, supra*.

Finally, defendant claims that his life sentence for second-degree murder is disproportionate, an abuse of discretion, and constitutes cruel and unusual punishment. We disagree. The sentence of life imprisonment is within the limit authorized by MCL 750.317; MSA 28.548, for second-degree murder. The serious nature of the instant crime, defendant's criminal history, and his clear inability to reform convinces us that the sentence is proportionate and the trial court did not abuse its discretion in imposing it. *People v Hansford (After Remand),* 454 Mich 320, 326; 562 NW2d 460 (1997). Further, because the sentence is proportionate, it is not cruel and unusual. *People v Terry,* 224 Mich App 447, 456; 569 NW2d 641 (1997).

Affirmed.

/s/ Michael J. Kelly
/s/ Roman S. Gribbs
/s/ E. Thomas Fitzgerald