

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSE SPENCER, JR.,

Defendant-Appellant.

UNPUBLISHED

May 7, 1999

No. 207467

Recorder's Court

LC No. 97-003427

Before: McDonald, P.J., and Sawyer and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549. He was sentenced to twenty to forty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant's conviction arose out of the brutal beating of Buford Hughes, a frail, fifty-three-year-old man in defendant's mother's care. On appeal, defendant first argues that the trial court erred in denying him the opportunity to place before the jury evidence that he sustained an injury to his hand during the attack on Hughes, when that evidence was relevant to his theory of self-defense. We disagree.

During his cross-examination of the officer in charge of the investigation in this case, defense counsel asked him to "take a look at Mr. Spencer's right hand and tell me if you see anything on his hand." The trial court denied admission of this evidence on the ground that it was irrelevant. Later, defense counsel informed the court that defendant would not be testifying, but requested that defendant be allowed to show the jury his right hand and let the jurors accord whatever weight they thought appropriate to evidence of a mark on his hand. Again, the trial court found the evidence to be irrelevant and excluded it. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.*

Generally, all relevant evidence is admissible. MRE 402; *People v Brooks*, 453 Mich 511, 517; 557 NW2d 106 (1996). “Relevant evidence is evidence having any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401; *Brooks*, *supra*. Admission of physical evidence requires that the party proffering the evidence lay a proper foundation establishing that the evidence is what it is purported to be and that it is connected with the crime or the accused. *People v Furman*, 158 Mich App 302, 331; 404 NW2d 246 (1987). However, other than his mere assertion that he sustained a cut to his hand as a result of the altercation with Hughes, defendant offered nothing to show that any mark on his hand at the time of trial was linked to the altercation that occurred six months earlier. Defendant offered no witnesses able to testify to having seen a cut on defendant’s hand at or near the time of the altercation. Thus, we conclude that because defendant did not lay an adequate foundation for admission of the evidence at issue, the trial court did not abuse its discretion in excluding it.

Defendant next argues that the trial court’s failure to give an instruction on involuntary manslaughter amounts to a denial of defendant’s due process rights. We disagree. Involuntary manslaughter is a cognate lesser included offense of murder. *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996). Instructions on cognate lesser included offenses must be given only where the evidence adduced at trial would support a conviction of that offense. *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993); *People v Sullivan*, 231 Mich App 510, 517-518; 586 NW2d 578 (1998). An instruction on a lesser offense which has no evidentiary basis detracts from the rationality and reliability of the factfinding process. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). In *People v Beach*, 429 Mich 450, 477; 418 NW2d 861 (1988), the Court, quoting *People v Ora Jones*, 395 Mich 379; 236 NW2d 461 (1995), defined involuntary manslaughter as follows:

Involuntary manslaughter is the unintentional killing of another without malice in (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the commission of some lawful act, negligently performed, or (3) in the negligent omission to perform some legal duty. [Citations omitted; emphasis deleted.]

Defense counsel focused on the first enumerated type of involuntary manslaughter, arguing that the jury might believe that defendant had only the requisite intent for a battery, without the intent to do great bodily harm or cause death. However, evidence was presented to establish that defendant threw Hughes, who weighed just over one hundred pounds, at most, and who could not stand or walk without assistance, to the floor numerous times, dragged him around the apartment, punched him in the eye or face with his fist with sufficient force so that the internal bruises and hemorrhaging within the brain were visible to the medical examiner during the autopsy one month later, choked him with a telephone cord, poured rubbing alcohol over his head, even possibly struck him with a windshield wiper or a pair of pliers, and during this attack yelled that he would kill Hughes. Defendant brutalized Hughes to such a degree that he never regained consciousness prior to his death. Given that the first enumerated type of involuntary manslaughter contemplates acts “not naturally tending to cause death or great bodily harm,”

we find that the evidence adduced at trial did not support an instruction on involuntary manslaughter; thus, the trial court did not err in denying defendant's request for that instruction.

We note that defendant appears to argue that a flawed use of self-defense, such as acting with excessive force, constitutes involuntary manslaughter, thus supporting that instruction in this case. In support of his argument, defendant relies on *In re Gillis*, 203 Mich App 320; 512 NW2d 79 (1994). Defendant's reliance is misplaced. In *Gillis, supra* at 322, this Court determined that self-defense may be asserted as a defense to a charge of involuntary manslaughter, and that use of excessive force in the act of self-defense can negate the defense. This Court did not determine, as argued by defendant, that the use of excessive force in the act of self-defense constitutes the crime of involuntary manslaughter. Accordingly, we find defendant's argument in this regard to be without merit.

Finally, defendant argues that the prosecutor made improper comments during rebuttal, thereby denying him a fair trial. Claims of prosecutorial misconduct are decided on a case by case basis. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). This Court reviews the record and evaluates the prosecutor's remarks in context. *Id.* The test is whether defendant was denied a fair and impartial trial. *Id.* However, appellate review of alleged prosecutorial misconduct is precluded if the defendant fails to object or request a curative instruction, unless the misconduct was so serious that no curative instruction could have removed the prejudice to the defendant, or if failure to review would result in manifest injustice. *Id.* at 341-342.

Defendant contends that the prosecutor improperly expressed his personal belief that defendant's self-defense argument was ridiculous, and indicated that this belief was based upon his experience as a prosecutor. However, defendant failed to object to this instance of alleged prosecutorial misconduct. Because the comments made by the prosecutor were not improper and curative instructions, if timely requested, would have removed any potential prejudice to defendant, manifest injustice will not result from our failure to review this unpreserved issue.

Affirmed.

/s/ Gary R. McDonald
/s/ David H. Sawyer
/s/ Jeffrey G. Collins