STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
December 23, 2003

No. 242865
Wayne Circuit Court
LC No. 01-005310

Before: Schuette, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He appeals as of right. We affirm.

I

Defendant argues that the trial court erroneously instructed the jury that events occurring before the immediate shooting incident could not be considered in determining whether adequate provocation existed for purposes of voluntary manslaughter. We conclude that there is no basis for reversal. We review this claim of instructional error de novo. *People v Lowery*, 258 Mich App 167, 173; ___ NW2d ___ (2003). Jury instructions are reviewed as a whole in determining whether the trial court made an error requiring reversal. *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999). Jury instructions do not have to be perfect; however, they must fairly present the issues for trial and sufficiently protect a defendant's rights. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

The principal support for defendant's manslaughter theory was based on events occurring before the immediate shooting incident. Apart from defendant's testimony, there was substantial evidence presented at trial indicating that the victim had engaged in a pattern of threatening and intimidating behavior directed at both defendant and defendant's girlfriend, Traci Newell. Newell testified about several past incidents in which the victim said he was going to kill defendant and broke into the apartment shared by defendant and Newell. Many of the incidents were reported to the police and were corroborated by the testimony of different police officers who investigated the incidents. Defendant's union steward also testified that defendant had informed her before the killing that he was afraid for his life because of the victim's harassing and threatening conduct.

Voluntary manslaughter is a necessarily included lesser offense of murder. *People v Mendoza*, 468 Mich 527, 540-541; 664 NW2d 685 (2003). The single additional element that differentiates second-degree murder from manslaughter is "malice," which "is negated by the presence of provocation and heat of passion." *Id.* at 540. Voluntary manslaughter, as opposed to murder, exists if (1) the defendant killed in the heat of passion, (2) the passion was caused by adequate provocation, and (3) there cannot have been a lapse of time during which a reasonable person could control his or her passions. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991).

Defendant's challenge arises out of a sua sponte comment made by the trial court during defense counsel's closing argument and the court's instruction on voluntary manslaughter. During closing argument, defense counsel, discussing voluntary manslaughter and heat of passion – adequate provocation, stated that "it's perfectly acceptable under the law to consider the entire history of this story because you're the judge as to what time frame - - ." The trial court interjected, stating that "actually the provocation must be at the time . . . [i]t doesn't go to what happened before." During instructions on voluntary manslaughter and heat of passion – adequate provocation, the court stated: "Again, ladies and gentlemen, this provocation must be at the time the defendant acted." More thorough discussions by the trial court and the parties on the topic were conducted outside the presence of the jury.

We believe that the trial court was attempting to communicate that the killing had to have occurred while defendant was in the heat of passion or in a state of emotional excitement, which would be a correct statement of the law. *Pouncey*, *supra* at 388. Arguably, the trial court may have been under the mistaken belief that circumstances occurring before the killing could not be considered by the jury for any purpose. As our Supreme Court stated in *People v Townes,* 391 Mich 578, 589; 218 NW2d 136 (1974), "[t]o reduce a homicide to voluntary manslaughter the fact finder must determine *from an examination of all of the circumstances surrounding the killing* that malice was negated by provocation and the homicide committed in the heat of passion." (Emphasis added). However, an examination of the entire record reveals that the jury was clearly made aware that it could consider all of the surrounding circumstances with respect to voluntary manslaughter, and, in light of the record, we fail to see how the jury would have thought otherwise based on the brief statements made by the trial court.

First, extensive evidence regarding the history of the victim's interaction with defendant was in fact presented to the jury.

Next, directly following the trial court's sua sponte interjection during defense counsel's closing argument, counsel stated, without objection or any comment by the judge, as follows:

> Okay. I submit to you that the provocation at this time was Traci's scream, *but you can consider everything that Mr. Williams testified to that went into his state of mind or his feelings before. . . .*
>
> * * *
>
> [I] submit to you that was not enough time to formulate a plan for murder in the first degree, *not considering everything that you believe that may have been*

> *in my client's persona, everything that occurred under that reign of terror.* [Emphasis added.]

Finally, as part of the trial court's instructions on voluntary manslaughter and heat of passion – adequate provocation, the court stated:

> This emotional excitement must have been the result of something that would cause a reasonable person to act rationally or on impulse. The law does not say which things are enough. That is for you to decide. Second, the killing itself must result from this emotional excitement. The Defendant must have acted before a reasonable time had passed to calm down and returned to reason. The law does not say how much time is needed. That is also for you to decide.
>
> The test is whether reasonable time had passed under the circumstances of this case. *You must think about all the evidence in deciding what the Defendant's state of mind was at the time of the alleged killing.* [Emphasis added.]

We conclude that the jury instructions fairly presented the issues for trial and sufficiently protected defendant's rights. Reversal is not warranted.

II

Defendant next argues that the trial court abused its discretion by excluding testimony related to the victim's alleged mental problems and reputation for violence. However, contrary to what defendant argues, the offer of proof regarding the proposed testimony of the victim's brother did *not* establish that he was prepared to testify that the victim had a reputation for violence or delusions or other mental problems. Further, defendant did not preserve for review by making an appropriate offer of proof under MRE 103(a)(2) regarding testimony from other defense witnesses regarding whether the victim suffered from delusions, other mental problems, or had a reputation for violence. Because defendant has failed to show that a plain error affected his substantial rights, this unpreserved issue does not warrant appellate relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

III

Finally, defendant advances a claim of error based on the court's written manslaughter instruction that was given to the jury in response to a request during deliberations. The record discloses that defense counsel affirmatively approved the instruction that was given. Counsel's conduct extinguished any error in this regard. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Affirmed.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ Richard A. Bandstra