STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2016
v	No. 326683 Wexford Circuit Court
ERIK ROBERT BEAUCHAMP, Defendant-Appellant.	LC No. 14-011104-FC

Before: FORT HOOD, P.J., and RONAYNE KRAUSE and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317, following the shooting death of Lindsey Morgan on Friday, August 8, 2014. The trial court sentenced him to 37.5 to 60 years' imprisonment for the offense. We affirm.

I. BACKGROUND FACTS AND PROCEDURE

Defendant and Morgan were involved in an on-again, off-again relationship for approximately three years before the shooting. They had two children together, and Morgan also had two children with other men. Both defendant and Morgan were alcoholics. Morgan was on probation through the week of the shooting as the result of an incident in which she was driving while intoxicated and had an accident while one of her children was in the car.

Defendant described the parties' relationship in the months before the shooting as "[p]retty rocky," and explained that Morgan left him several times during the summer. When Morgan left defendant, she would sometimes go and stay with another man, Joseph Traylor. Defendant testified that the week before the shooting, he and Morgan got back together after a split, purchased a tent, and began living in his friend Dylan Shay's backyard. Defendant testified that he and Morgan planned to rent an apartment that weekend because he had received a notice of foreclosure on his property and there was no water service to his trailer because he shut it off after getting into an argument over a water bill with his neighbor.

On Wednesday, August 6, 2014, Morgan received papers releasing her from probation, so she and defendant went to the bar to celebrate. Shay met them at the bar and he and Morgan got into a heated argument during which he called her a "worthless mother" and other derogatory names. According to defendant, Morgan was upset that he did not defend her. The next day, defendant moved their camping equipment to the yard of another friend, Thelma Yokeum.

Defendant explained that when he got back to Yokeum's house after work that day, Morgan was drinking alcohol and cooking dinner. Defendant went to his property to feed his pig, and when he returned, he saw Morgan's oldest daughter load his two children into a stroller and push them down the street and around a corner, where he then watched Morgan put the children into her mother's van and leave.

Defendant said he talked to Morgan on the phone approximately 15 minutes later, at which point she stated, "[H]ow does it feel to lose your fucking kids, asshole?" Defendant testified that he was upset and could not think clearly. Morgan also sent him a text message stating, "I'm sorry, but I am done." Defendant called his mother to come pick him up, loaded the camping equipment into her car, and went back to her house for the night. That night, defendant called a social worker and told her he was concerned that Morgan had been drinking and that she did not have car seats for the children when she left. She instructed defendant to call the police if he was concerned, and said she would drive up to talk to Morgan the next day.

Defendant testified that he did not sleep much at his mother's house that night. Defendant's mother drove him to work the next morning, but defendant testified that he could not focus because he was upset. He decided to leave after he ran into something while driving a large piece of equipment. Defendant retrieved his paycheck and called his mother to come pick him up. On the way to his property, defendant and his mother stopped at a bank so he could cash his check and at a store where defendant purchased beer and whiskey. Defendant's mother became concerned when defendant told her he wanted to give her his money because he was "not going to need it anymore." Defendant's mother said she told him not to do anything stupid, and defendant responded that "he was going to kill people, mostly himself" and those people included his neighbor and Morgan.

When they arrived at his property, defendant got out of the car, told his mother that he loved her and was sorry he had to kill himself, and went into the trailer. Defendant's mother stayed in the car and called 911. After a while, defendant came out of the trailer and began walking toward the woods. Defendant explained that he walked out to a cabin at the back of his property with a 12-pack of beer, went in and picked up a 12 gauge shotgun and a .22 caliber pistol, took out three or four beers, and headed into the woods. A few minutes later, he spoke with Officer Daniel Johnson, who had arrived at the scene, on his mother's phone. Defendant told Johnson that he did not have any weapons, and he refused to come out of the woods to talk. Johnson and defendant's mother eventually left after Johnson decided he could not do anything more because defendant had not committed a crime.

Defendant testified that he did not know what he wanted to do while he was in the woods, explaining, "I mean I wanted to die at that point, but I did want to confront Lindsey for what she did to me." He did not recall speaking to anyone else on the phone during this time, but defendant's sister testified that he called and said he was going to kill Traylor, his neighbor, and Morgan. Morgan's mother also testified that Morgan called her around this time and told her that defendant called and said he was "not going to kill himself. He's coming to kill—I'm coming to kill you." Defendant testified that while he was in the woods, he decided to walk over to Traylor's house to confront Morgan.

Yokeum was with Morgan and her children at Traylor's house at the time, and said she was scared and wanted to leave, but Morgan would not leave until she had car seats for the children. Morgan texted her friend, Amanda Brooks, to ask if she had any car seats, and Brooks loaded some car seats into her car and headed toward Traylor's house with Adam Morgan, who is Lindsey's cousin, and her two children. When they turned onto Traylor's road, Brooks saw defendant walking toward the house with a shotgun in his hands. Once inside the house, either Brooks or Adam announced that defendant was coming and had a gun, and Morgan took her children into the bathroom.

Someone locked the exterior door before defendant got to the house, but he pounded on it with the butt of his shotgun, broke the glass window in the door, reached in and unlocked it, and entered the house. Defendant said he could hear the children in the bathroom, so he began beating the door with his shotgun. Morgan came out and the two began struggling over the shotgun, which continued down the hallway and into the living room. Brooks testified that defendant threw Morgan on top of an end table and punched her repeatedly. Yokeum testified that defendant pushed Morgan into a coffee table, and then got on top of her on the ground and started punching and kicking her. Yokeum explained that while defendant was punching Morgan, Morgan hit him a couple of times in the head with the shotgun they were both holding.

During the struggle, the shotgun went off. Morgan got ahold of the shotgun and ran outside the house. Defendant followed her, but before he left the house, he withdrew his pistol. Once outside, defendant shot Morgan three times, once in the shoulder and twice in the head; he then began beating her body with the pistol. Morgan died as a result of the gunshot wounds.

After the shooting, defendant told several people that he shot and killed Morgan in front of their children. Defendant testified that he did not remember most of the conversations he had with people before and after the shooting. That night, the police located defendant driving a stolen pickup truck and took him into custody after he lost control of the vehicle.

At trial, defendant testified that he never planned to kill Morgan, but rather went to Traylor's house to confront her and to kill himself in front of her, but "then everything got twisted and went to shit. I didn't have a plan. I just went over there to confront her and this happened . . . ." He testified that he never thought clearly from the time Morgan left with the children until the time he was incarcerated, stating, "I was nuts." He also testified that he did not know why he shot Morgan, but rather "lost control" and "lost all thoughts." At the close of proofs, defense counsel requested a jury instruction on voluntary manslaughter, which the trial court denied. Ultimately, the jury acquitted defendant of first-degree premeditated murder and convicted him of second-degree murder.

II. VOLUNTARY MANSLAUGHTER

Defendant first argues that the trial court abused its discretion by refusing to instruct the jury on the lesser included offense of voluntary manslaughter. "Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). An abuse of discretion occurs when the

trial court's decision falls outside the range of reasonable and principled outcomes. *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006).

Jury instructions must clearly present the case and applicable law to the jury and must adequately protect a defendant's rights. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). The instructions must include all elements of the charged crime, and must not exclude relevant issues, defenses, and theories that are supported by the evidence in the case. *Id.* Generally, a trial court must instruct the jury with respect to a necessarily included lesser offense upon a request for such an instruction if it is rationally supported by the evidence. *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003), citing *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Voluntary manslaughter is a necessarily included lesser offense of murder. *Mendoza*, 468 Mich at 541. "Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Id.*

"[T]o show voluntary manslaughter, one must show that [1] the defendant killed in the heat of passion, [2] the passion was caused by adequate provocation, and [3] there was not a lapse of time during which a reasonable person could control his passions." *Id.* at 535. The degree of provocation required to mitigate a killing from murder to manslaughter "is that which causes the defendant to act out of passion rather than reason." *People v Mitchell*, 301 Mich App 282, 287; 835 NW2d 615 (2013) (citation and quotation marks omitted). "[P]rovocation is adequate only if it is so severe or extreme as to provoke a reasonable man to commit the act." *People v Sullivan*, 231 Mich App 510, 519; 586 NW2d 578 (1998). Thus, "[n]ot every hot-tempered individual who flies into a rage at the slightest insult can claim manslaughter." *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). In general, whether the provocation was reasonable is a question of fact for the jury, but "if no reasonable jury could find that the provocation was adequate, the court may exclude evidence of the provocation." *Mitchell*, 301 Mich App at 286 (citation and quotation marks omitted).

Defendant argues that he was adequately provoked by Morgan taking his children the night before the shooting to stay with Traylor, and the fact that he received a blow to the back of his head while he and Morgan struggled over the shotgun. We disagree. Defendant offers no authority suggesting that Morgan's act of leaving and taking the children constituted adequate provocation, and the record reflects that Morgan went to stay with Traylor multiple times in the months leading up to the shooting. Defendant contends that this time was different because Morgan took his two children and she was no longer on probation. However, Morgan's act of leaving with the children did not involve a violent or physical confrontation, and she did not take the children to a place where defendant could not find them.

Likewise, defendant being hit in the head while he struggled with Morgan over the shotgun did not constitute adequate provocation. In *People v Maclin*, 101 Mich App 593, 596;

300 NW2d 642 (1980),[1] this Court concluded that a victim's actions in self-defense could not be used to reduce an aggressor's crime of murder to manslaughter. See also *People v Townes*, 391 Mich 578, 592; 218 NW2d 136 (1974) (noting that a defendant may be "held legally accountable as an aggressor for responsive conduct by another that is reasonably attributable to [the defendant's] own conduct"). Defendant sustained his head injury during a struggle that began after he used his shotgun to break into the house where Morgan was staying and to beat the bathroom door where she was hiding with her children. Under these circumstances, defendant was the aggressor, and Morgan's acts of self-defense during the assault could not be used to reduce defendant's crime of murder to manslaughter.

As to the third element of voluntary manslaughter, a sufficient period of time passed that would have allowed a reasonable person to control his or her emotions. Our Supreme Court has held that a mere 30-second period was sufficient to constitute a "cooling off" period. *Pouncey*, 437 Mich at 385, 392. In *People v Wofford*, 196 Mich App 275, 280; 492 NW2d 747 (1992), this Court held that a 24-hour cooling off period was sufficient, despite the fact that the defendant "was angry about what had happened to him the day before." The Court explained that the defendant "was not compelled to go back to the decedent's house and could have stayed away." *Id.*

Approximately 15 hours passed between the time Morgan left with the children and the time of the shooting. During this time, defendant called his mother, cleaned up camping equipment, went to his mother's house and slept, went to work the next morning, collected and cashed his paycheck, bought items at a store, went to his property, walked around in the woods, and walked about three miles to Traylor's house. Although defendant was upset about the events of the day before, nothing compelled him to go to Traylor's house, and he could have stayed away. See *Wofford*, 196 Mich at 280. Under these facts, no reasonable jury could find that 15 hours was not a sufficient amount of time for a reasonable person to control his or her passions.

III. PROSECUTORIAL ERROR

Defendant argues that several of the prosecutor's statements during closing argument amounted to error and denied him a fair and impartial trial. Generally, we review claims of prosecutorial error de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, "[w]here a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). At trial, defense counsel moved for a mistrial on the basis of two statements made by the prosecutor that were attributed to Officer Daniel Johnson and defendant's co-worker, Scott Bassett; defendant did not object to the other statements raised on appeal. Therefore, only defendant's claims as they relate to these two statements are properly preserved. *Id.*

[1] We note that cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), but they can be considered persuasive authority, *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 444 n 4; 773 NW2d 29 (2009).

The test for prosecutorial error is whether the prosecutor's conduct denied the defendant a fair and impartial trial. *Abraham*, 256 Mich App at 272. We review claims of prosecutorial error on a case-by-case basis and examine the prosecutor's statements or actions in context to determine whether error requiring reversal occurred. *Id.* at 272-273. A prosecutor may not make factual statements to the jury that are unsupported by the evidence, but he or she is free to argue the evidence and all reasonable inferences arising from it as it relates to the prosecution's theory of the case. *Dobek*, 274 Mich App at 66. Prosecutors are not required to argue the case in the blandest possible terms. *People v Unger (On Remand)*, 278 Mich App 210, 239; 749 NW2d 272 (2008). Reviewing courts generally afford prosecutors great latitude regarding their arguments at trial. *Id.* at 236.

Defendant argues that the prosecutor's following two statements, which he objected to at trial, had no basis in the evidence presented:

> [R]emember Scott Bassett, coworker—says something about needing to kill her, wanting to kill her, can't really remember what.
>
> Dan Johnson, the police officer. What does he tell him? Well I don't take guns into the woods. I do, however, wish my ex-girlfriend was gone.

At trial, Bassett testified that defendant was upset on the morning of the incident and said, "[I]t's the last straw." Bassett then testified, "Now whether he said he was going to kill her then, I don't know exact words. . . . You know, like I say, in this society, that word gets thrown out way too easily." The prosecutor could reasonably infer from Bassett's testimony that defendant said something about killing Morgan on the morning of the shooting, but he "d[id]n't know exact words." Therefore, the prosecutor's closing statement about Bassett's testimony was not unsupported by the evidence.

In contrast, Johnson did not testify that defendant ever told him he wanted Morgan "gone." Although the prosecutor's reference to Johnson's testimony was improper, *Dobek*, 274 Mich App at 66, the reference was isolated and was met by an immediate objection by defense counsel. The trial court expressly agreed with defense counsel that he did not recall Johnson making the challenged statement, and then instructed the jury that the attorneys' arguments were not evidence, and that if an attorney said something that was not supported by the evidence, it should be disregarded. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *Abraham*, 256 Mich App at 279. Also, although Johnson never testified that defendant stated he wanted Morgan "gone," multiple people testified that defendant made statements before the shooting indicating that he wanted to kill Morgan. Considering the isolated nature of the prosecutor's improper reference, the swift objection by defense counsel, the trial court's agreement and instruction, and the presence of additional evidence demonstrating defendant's intent to kill Morgan, defendant has not shown that this statement alone rendered his trial unfair or partial.

Defendant also claims that the prosecutor's following statement, which he did not object to at trial, had no basis in the evidence presented: "Adam Morgan; angry but calm. Amanda Brooks; angry but calm." At trial, Adam testified that when he saw defendant walking down the road toward Traylor's house before the shooting, "[h]e just seemed angry but calm." Brooks

testified that "most of the time [defendant] was pretty mellow" but she had "personally seen anger come from him." She also testified that defendant was not himself on the day of the shooting. Defendant argues that the prosecutor's statement was intended to address defendant's demeanor at the time of the shooting to rebut the defense theory of hot blood. It is not clear from the context of the prosecutor's statement that he was in fact arguing that Brooks said defendant was calm at the time of the shooting. However, even if the prosecutor was arguing that Brooks said defendant was calm at the time of the shooting, which is unsupported by the record, to bolster his theory of premeditation, defendant cannot demonstrate prejudice because the jury acquitted him of first-degree premeditated murder.

Finally, defendant argues that the following statements by the prosecutor, which he also did not object to at trial, were so over-the-top that they "exceeded the bounds of acceptable argument" and denied him a fair trial:

> Ladies and gentlemen, remember the advice about common sense, use your common sense? Really? Really? You take a pistol and a shotgun, fortify yourself with beer and go in the woods to kill yourself. Right. Flies in the face of reality. The most nonsensical argument I've ever heard.
>
> And then he says—he has the audacity to say—well I was really, really mad, you know, I was out of it. But, boy, when I got hit on the head, that even made me madder and that's why he killed her. Flies in the face of reality.
>
> [A]nd all this because he wants to confront her, right? He wants to talk about her. That's not commonsensical at all, folks, and don't go down that bunny trail, that simply isn't true. He's there to kill her.
>
> He was just a boyfriend. He's not a father. He's not a husband. He's just a boyfriend.
>
> I submit, ladies and gentlemen, that flies in the face of reality and truth. He wasn't suicidal, he was homicidal.
>
> Can't even recognize her, can you? That's way above and beyond killing somebody, people; that's way above and beyond murder two. I wrote notes to myself last night. I looked at that, I said, you know what? That's not murder in the first degree, that's murder in the nth degree. Way above and beyond; the brutality there, the hostility there, the meanness, way above and beyond.
>
> He's not an . . . enraged boyfriend, he's an executioner. He's a militant on a mission.
>
> His argument that, well he was super nuts at the time that this happened. Remember, he was out of it. Why didn't he kill more people? You can't have it both ways. He didn't kill more people, because he was there to kill Lindsey. And when he killed her, he left. You can't say I was so nuts I didn't know what was going on, but I didn't kill anybody else. If he was really out of his mind, he probably would have killed other people. You're arguing out of both sides of

your mouth; you can't say I didn't know what was going on, but I only killed her. He knew exactly what was going on.

None of these statements amounted to error requiring reversal. "A prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The defense theory was that defendant was suicidal and did not have any deliberate or premeditated plan to kill Morgan, but rather killed her out of a sudden impulse without thought or reflection during the struggle at Traylor's house. The prosecutor's arguments were appropriately supported by the facts as they related to his theory of premeditation. The prosecutor could reasonably argue from the facts in evidence that defendant did not need two weapons if he only intended to kill himself, that the struggle between defendant and Morgan was not enough to give rise to a spontaneous decision to kill her, that taking weapons to the house was not reasonable if defendant merely wanted to confront Morgan, and that defendant was not "out of his mind" if he only shot one person despite the presence of multiple people at the scene.

Although the prosecutor referred to defendant as a "boyfriend" rather than a husband or a father, "homicidal," "an executioner," and "a militant on a mission," the use of colorful rhetoric is generally insufficient to demonstrate prosecutorial error. See *People v Fyda*, 288 Mich App 446, 462; 793 NW2d 712 (2010). Further, even if the prosecutor's rhetoric was somewhat prejudicial, we presume that the trial court's instruction cured any error. See *Abraham*, 256 Mich App at 279. Defendant cannot demonstrate prejudice arising from the prosecutor's comments or his conduct of showing the pictures of Morgan's body to support his theory of premeditation because the jury ultimately acquitted defendant of first-degree premeditated murder. In sum, defendant has not demonstrated prosecutorial error requiring reversal.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Amy Ronayne Krause
/s/ Michael F. Gadola