STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2018
v	No. 337186 Oakland Circuit Court
CHRISTOPHER CHARLES RUBEN KING, Defendant-Appellant.	LC No. 2016-257460-FC

Before: M. J. KELLY, P.J., and JANSEN and METER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, second-degree arson, MCL 750.73(1), and unlawfully driving away an automobile (UDAA), MCL 750.413. Defendant was sentenced to 30 to 60 years' imprisonment for his second-degree murder conviction, 12 to 20 years' imprisonment for his second-degree arson conviction, and three to five years' imprisonment for his UDAA conviction. We affirm.

I. RELEVANT FACTS

This case arises out of a casual sexual encounter between defendant and the victim. The two met on Craigslist, and corresponded via email and text message until the day of the incident. That evening, defendant took an Uber from him home in Detroit, Michigan to the victim's home in Madison Heights, Michigan. The pair went into the victim's bedroom, and engaged in conversation for a brief period. The victim twice performed oral sex on defendant, and then defendant anally penetrated the victim. Defendant took a shower in the victim's bathroom, then returned to the bedroom to get dressed. While in the bedroom, defendant testified that he felt "someone" behind him aggressively grab his left wrist. In self-defense, defendant turned around and put the victim in a carotid "sleeper" chokehold until he stopped moving. After a short time, defendant rolled the victim away from him, and was unable to find a pulse.

Defendant testified that he finished putting his clothes on, grabbed a pair of scissors from underneath the victim's bed, walked down the stairs, and found a white plastic bag. Over the next few moments, defendant placed the scissors, a used condom, the towel he used when got out of the shower, a soiled blanket, and the top sheet from the victim's bed into the plastic bag. Defendant then returned upstairs, made sure no one else was in the various rooms, placed two wine bottles on the ground, and removed the fitted sheet, which was still on the bed, and placed

it around the victim, trailing the end of the sheet into the hallway. Defendant placed the victim's dog in the backyard, and then returned to the kitchen where he unrolled some paper towel and lit it on fire. Defendant also ignited the fitted sheet that was around the victim.

After seeing the house on fire, defendant used the victim's garage keys to open the garage and leave in the victim's car. Defendant drove to a nearby McDonald's restaurant so that he could eat, throw away the plastic bag, and use the Wi-Fi to order an Uber ride back to his Detroit home. The Uber arrived and defendant went home.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to support his second-degree murder conviction. Specifically defendant argues that there was insufficient evidence presented to show that he acted with malice, rather, the evidence showed defendant was acting out of self-defense. In the alternative, defendant argues that his second-degree murder conviction should be reduced to voluntary manslaughter because he was acting out of the heat of passion based on adequate provocation. We disagree.

Challenges to the sufficiency of the evidence are reviewed de novo. *People v Solloway*, 316 Mich App 174, 180; 891 NW2d 255 (2016). "In reviewing the sufficiency of the evidence on appeal, a court should view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012) (quotation marks and citation omitted). "[I]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Flick*, 487 Mich 1, 24–25; 790 NW2d 295 (2010) (quotation marks and citation omitted). "[C]ircumstantial evidence and all reasonable inferences drawn therefrom can constitute satisfactory proof of the crime." *Solloway*, 316 Mich App at 180-181.

We first address defendant's argument that there was insufficient evidence to find defendant acted with malice at the time of the killing, and therefore there was insufficient evidence to support his second-degree murder conviction. Defendant maintains he acted in self-defense, and used a justifiable amount of deadly force against the victim. We disagree.

The elements of second-degree murder are: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death. *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and [willful] disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998).

A defendant "may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat" if the defendant "has not or is not engaged in the commission of a crime at the time he or she uses deadly force" and "honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent

great bodily harm to himself or herself or to another individual." MCL 780.972(1)(a); *People v Guajardo*, 300 Mich App 26, 35–36; 832 NW2d 409 (2013).

Whether the use of deadly force is justifiable, this Court has considered (1) any prior relationship between the defendant and the victim, (2) who initiated the conflict, (3) the size difference between the defendant and the victim, (4) whether the victim was armed, (5) the degree of force the victim used against the defendant, (6) whether the defendant sustains injury, and (7) whether the defendant indicated that he feared death or serious bodily injury. *Guajardo*, 300 Mich App at 41–43; *People v Roper*, 286 Mich App 77, 87-89; 777 NW2d 483 (2009). "[A] defendant does not act in justifiable self-defense when he or she uses excessive force[.]" *Guajardo*, 300 Mich App at 35. Once evidence of self-defense is admitted at trial, the prosecution must disprove it beyond a reasonable doubt. *Roper*, 286 Mich App at 86.

Applying the factors enumerated in *Guajardo* to the facts of this case, we are not persuaded that defendant's use of deadly force was justifiable under these circumstances. We find compelling that there was no prior relationship between defendant and the victim, and therefore nothing to suggest their prior history would have placed defendant on notice that his life may be in danger. Defendant testified that the victim initiated the conflict; however, our review of the record indicated that the victim merely grabbed defendant's hand. We cannot conclude that grabbing someone's hand, particularly after a romantic encounter, is a significant degree of force to warrant defendant's use of deadly forced in defense of himself. Further, defendant failed to mention anything about the victim's alleged use of force during his police interview. According to defendant, the only injury he received was a single "scratch" on his arm, which occurred only after the victim was struggling during the chokehold. Although defendant contends that he was defending himself because he was in fear for his life, we do not find this assertion compelling. We also note that although defendant's physical size is not contained within the record, the jury had the benefit of seeing defendant at trial, and the Michigan Department of Corrections lists defendant as being 6'1" and 145 pounds. At the time of the incident, defendant was 19-years-old and worked as a lifeguard and swim teacher. In comparison, the victim was 5'6", only weighed approximately 130 pounds, and was 59 years old.

Based on the foregoing, we conclude that a reasonable jury could have concluded that even if the victim had initiated the physical conflict and excessive force by defendant would have been justified, defendant's continual choking of defendant beyond consciousness is excessive and was "unnecessary" to prevent his imminent death or great bodily harm. See MCL 780.972(1)(a); *Guajardo*, 300 Mich App at 35. At trial, an expert testified that the victim's unconsciousness likely occurred within 7 to 20 seconds of defendant's application of the chokehold, and that death likely occurred somewhere between two and five minutes. Therefore, at a minimum, defendant continued choking the victim for 100 seconds beyond the point where the victim could have posed any imminent threat.

Additionally, a reasonable jury could conclude that because defendant set the house on fire and drove the victim's car away from the scene after the victim was deceased, he was aware that he was not acting in self-defense, and instead, had committed a crime and was attempting to conceal it. See *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003) (citation omitted) (holding that "evidence of flight is admissible to support an inference of 'consciousness of guilt' and the term 'flight' includes such actions as fleeing the scene of the crime.").

Therefore, looking at the evidence in the light most favorable to the prosecution, a reasonable fact-finder could not have concluded that defendant was acting in self-defense.

Next, defendant argues that his second-degree murder conviction should be reduced to voluntary manslaughter because there was insufficient evidence presented at trial to "disprove" the theory that defendant was acting out of the heat of passion induced by adequate provocation. We disagree.

"To show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Reese*, 491 Mich at 143 (brackets omitted). "[T]he elements of voluntary manslaughter are included in murder, with murder possessing the single additional element of malice." *Id*. at 144. "[P]rovocation is not an element of voluntary manslaughter. . . . Rather, provocation is the circumstance that negates the presence of malice." *People v Mendoza*, 468 Mich 527, 536; 664 NW2d 685 (2003).

"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 Tierney*, 266 Mich App 687, 714-715; 703 NW2d 204 (2005) (quotation marks omitted). "In order for the provocation to be adequate it must be that which would cause a reasonable person to lose control." *Id.* (quotation marks omitted). "The determination of what is reasonable provocation is a question of fact for the fact-finder." *Id.*

Defendant argues that he was adequately provoked because the victim unexpectedly grabbed his hand, and that scissors that had been sitting on the bathroom counter disappeared. Defendant also contends that he became "edgy" after having sex with the victim because the two had met on Craigslist. Considering the evidence in a light most favorable to the prosecution, defendant's adequate provocation argument is without merit.

The fact that defendant became cognizant of the dangers associated with meeting people from Craigslist does not provide adequate provocation. Defendant admitted that he met up with people from Craigslist for the purpose of sex many times before. In fact, defendant "couldn't even count" how many times he had previously used Craigslist to meet casual sex partners. Based on the record before us, we are unpersuaded that this particular sexual encounter caused greater concern than other past encounters did. Further, although defendant testified that he had observed the missing scissors underneath the victim's bed, he admitted that he had not seen the scissors until *after* the victim was already on the floor in a chokehold. We also note that defendant made no mention of seeing the scissors underneath the bed during his police interview.

Additionally, even if the victim had grabbed defendant's hand, such a gesture, by itself, does not justify becoming so impassioned that choking the victim past rendering him unconscious was reasonable. Prior to the victim grabbing his hand, defendant's testimony does not suggest that the victim was hostile. In fact, defendant's own testimony revealed the two engaged in conversation prior to sex, the victim was submissive during the act, and the pair cuddled during sex.

Moreover, the victim was, at the very least, unconscious for 100 seconds before he died. Accordingly, even if defendant had been adequately provoked, a reasonable fact-finding could have determined that defendant would have had, at the very least, 100 seconds to "cool off." See *People v Pouncey*, 437 Mich 382, 385; 471 NW2d 346 (1991) (finding that "approximately thirty seconds" was a sufficient cooling down period.). Therefore, looking at the evidence most favorable to the prosecution, a rational fact-finder could conclude that defendant was not adequately provoked or that even if provoked, a reasonable cooling off period occurred after the provocation, but before the killing.

Whether this "cooling off" period actually occurred is a jury question. See *Tierney*, 266 Mich App 714-715. Here, the jury was properly instructed that it was responsible for determining whether defendant was adequately provoked and whether a sufficient cooling off period had expired. The jury found defendant guilty of second-degree murder, not manslaughter, and we find no basis in the record before us to disturb that finding.

II. SCORING ERROR

Defendant next contends that offense variable ("OV") 19 was incorrectly scored. Defendant argues that OV 19 should be assessed at zero points because even though defendant set the victim's house on fire after his murder, the fire did not constitute a force against a person, as is required by MCL 777.49. We disagree.

In reviewing a defendant's claim that the trial court incorrectly assigned a score to an offense variable, this Court reviews for clear error the trial court's factual determinations, which must be supported by a preponderance of the evidence. *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016). This Court will affirm "the trial court's [factual] findings unless left with a definite and firm conviction a mistake was made." *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). The trial court's interpretation and application of the sentencing guidelines is reviewed de novo. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

Here, the trial court scored the guidelines for defendant's second-degree murder conviction, a Class M2 offense, MCL 777.16p, using the sentencing grid found in MCL 777.61. Defendant was assessed a total of 90 OV points, placing him in OV Level II. MCL 777.61. Defendant was assessed a prior record variable (PRV) score of 20 points, placing him in PRV Level C. MCL 777.61. Accordingly, defendant's minimum sentencing guidelines range was determined to be 180 to 300 months' imprisonment, or life imprisonment. MCL 777.61.

Defendant argues that he was incorrectly assessed 15 points for OV 19, and that OV 19 should have been scored at zero points. We disagree.

MCL 777.49, the statute governing OV 19, relates to "interference with administration of justice," and provides that:

> (1) Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services. Score offense variable 19 by determining which of the

following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) The offender by his or her conduct threatened the security of a penal institution or court ..... 25 points

(b) The offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services ..... 15 points

(c) The offender otherwise interfered with or attempted to interfere with the administration of justice ..... 10 points

(d) The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice or the rendering of emergency services by force or threat of force ..... 0 points

The plain and ordinary meaning of "interfered with or attempted to interfere with the administration of justice" under OV 19 is "to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process." *People v Hershey*, 303 Mich App 330, 343; 844 NW2d 127 (2013). This definition has "broad application." *Id.* Interference with the administration of justice is not limited to the actual judicial process, but the definition can encompass conduct that occurs before criminal charges are filed such as acts that constitute obstruction of justice and acts that do not fully rise to the level of a chargeable offense. *Id.* Similarly, conduct that occurred after the completion of the offense may be considered when scoring OV 19. *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010).

In this case, trial testimony established that after defendant killed the victim, defendant intentionally set two fires in the victim's home after placing his dog in the backyard, and stole the victim's vehicle. Further, defendant took a soiled blanket with him when he left the victim's home, and later disposed of the blanket in a dumpster located in the parking lot of a McDonald's restaurant where defendant left the victim's car. We conclude that the foregoing evidence proves by a preponderance of the evidence that defendant used force against the victim's property (setting two fires) in order to interfere with the administration of justice (conceal evidence), and therefore, defendant was properly assessed 15 points for OV 19. Regardless, even if OV 19 was incorrectly scored, defendant would not be entitled to resentencing on the basis of an evidentiary error because the error would not have affected defendant's minimum sentencing guidelines range. See *People v Francisco*, 474 Mich 82, 89-90; 711 NW2d 44 (2006).

III. UNREASONABLE SENTENCE

Finally, defendant argues that his sentence for second-degree murder was unreasonable and disproportionate because he had no prior relationship with the victim and no adult criminal history. Defendant further takes issue with the trial court's failure to articulate on the record its reasons for the extent of the departure. We disagree.

This Court reviews departure sentences for reasonableness using the principal of proportionality articulated in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). See *People v Steanhouse*, 500 Mich 453, 471-472; 902 NW2d 327 (2017) (*Steanhouse II*). As this Court recently explained in *People v Dixon-Bey*, ___ Mich App ___, ___; ___ NW2d ___ (2017) (Docket No. 331499); slip op at 16:

> "A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). "[T]he standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is an abuse of discretion. [*Steanhouse II*, 500 Mich at 471.] In *Steanhouse*, the Michigan Supreme Court clarified that 'the relevant question for appellate courts reviewing a sentence for reasonableness' is 'whether the trial court abused its discretion by violating the principle of proportionality[.]' [*Id*.] The principle of proportionality is one in which
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> > "a judge helps to fulfill the overall legislative scheme of criminal punishment by taking care to assure that the sentences imposed across the discretionary range are proportionate to the seriousness of the matters that come before the court for sentencing. In making this assessment, the judge, of course, must take into account the nature of the offense and the background of the offender." [[*Id*. at 472], quoting *Milbourn*, 435 Mich [at 651].]
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> Under this principle, " '[T]he key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range.' " [*Steanhouse II*, 500 Mich at 472,] quoting *Milbourn*, 435 Mich at 661. [*Dixon-Bey*, ___ Mich App at ___; slip op at 16.]

The sentencing guidelines remain an "aid to accomplish the purposes of proportionality . . . ." *Id*. at ___; slip op at 18. The sentencing guidelines " 'provide objective factual guideposts that can assist sentencing courts in ensuring that the offenders with similar offense and offender characteristics receive substantially similar sentences.' " *Id*., quoting *People v Smith*, 482 Mich 292, 309; 754 NW2d 284 (2008) (brackets omitted). Our Supreme Court has been clear that while the sentencing guidelines are now merely advisory, they "remain a highly relevant consideration in a trial court's exercise of sentencing discretion . . . ." *Lockridge*, 498 Mich at 391. See also *Steanhouse II*, 500 Mich at 474-475. As this Court recently explained:

> Because the guidelines embody the principle of proportionality and trial courts must consult them when sentencing, it follows that they continue to serve as a 'useful tool' or 'guideposts' for effectively combating disparity in sentencing. Therefore, relevant factors for determining whether a departure sentence is more proportionate than a sentence within the guidelines range continue to include (1) whether the guidelines accurately reflect the seriousness of the crime, *People v Houston*, 448 Mich 312, 321-322; 532 NW2d 508 (1995), see also *Milbourn*, 435 Mich at 657, (2) factors not considered by the guidelines, *Houston*, 448 Mich at 322-324, see also *Milbourn*, 435 Mich at 660, and (3) factors considered by the

> guidelines but given inadequate weight, *Houston*, 448 Mich at 324-325, see also *Milbourn*, 435 Mich at 660 n 27. [*Dixon-Bey*, ___ Mich App at ___; slip op at 18-19.]

Other factors to consider "include 'the defendant's misconduct while in custody, *Houston*, 448 Mich at 323, the defendant's expressions of remorse, *id*., and the defendant's potential for rehabilitation, *id*.' " *Dixon-Bey*, ___ Mich App at ___; slip op at 19 n 9, quoting *People v Steanhouse (Steanhouse I)*, 313 Mich App 1, 46; 880 NW2d 297 (2015).

In *Milbourn*, our Supreme Court observed:

> Even where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality. See *People v McKinley*, 168 Mich App 496, 512; 425 NW2d 460 (1988). ("We do not dispute that a prison sentence—even a lengthy one—is in order. We conclude, however, that a fifteen-year minimum sentence for the events that occurred here is disproportionate to the specific acts committed and the danger involved. *Too frequently reasons are given for a sentence that apply equally to a lesser or greater sentence unless an explanation is offered on the record for the specific sentence given*. Such was the case here.") (Emphasis added.) [*Milbourn*, 435 Mich at 659-660 (footnote omitted).]

Therefore, "[w]hen making this determination and sentencing a defendant, a trial court must ' "justify the sentence imposed in order to facilitate appellate review," ' *Steanhouse*, [500 Mich at 470], quoting *Lockridge*, 498 Mich at 392, which 'includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been,' *Smith*, 482 Mich at 311." *Dixon-Bey*, ___ Mich App at ___; slip op at 19.

Our first step in the reasonableness review is to determine whether there were " 'circumstances that are not adequately embodied within the [offense] variables used to score the guidelines.' " *Steanhouse III*, ___ Mich App at ___; slip op at 3, quoting *Milbourn*, 435 Mich at 659-660. Our analysis requires comparing "the stated reasons for exceeding the guidelines with the scored offense variables (OVs) to determine whether those reasons were already encompassed within the guidelines." *Steanhouse III*, ___ Mich App at ___; slip op at 3. The relevant inquiry becomes "whether the trial court abused its discretion by imposing a departure sentence without articulating whether the guidelines adequately took into account the conduct alleged to support the particular departure imposed." *Id*.

Defendant's minimum sentencing guidelines range was 180 to 300 months' imprisonment: the trial court sentenced defendant to 30 to 60 years' imprisonment for his second-degree murder conviction, a five-year departure. In choosing to upwardly depart from the minimum sentencing guidelines range, the trial court considered the following factors: (1) defendant's lack of remorse; (2) defendant's defiance; (3) that fact that "strangulation takes some time," therefore defendant must have intended to kill the victim because defendant easily could have stopped once the victim was rendered unconscious; and (4) the fact that the trial court could not score OV 9 (number of victims), MCL 777.39, even though setting fire to the victim's house could have easily spread to neighbor's homes and put firefighters and police in jeopardy.

Defendant's lack of remorse and defiance was a valid reason to depart from the sentencing guidelines because the sentencing guidelines do not account for those factors, and they relate to the circumstances surrounding defendant and his crime. *Steanhouse I*, 313 Mich App at 46.

The trial court also considered the fact that defendant must have intended to kill the victim because he could have stopped strangling the victim once he was unconscious. However, OV 6 accounts for an offender's intent to injure or kill another individual, and is scored at 25 points where "[t]he offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." MCL 777.36(1)(b). Defendant was, in fact, assessed 25 points for OV 6, which was consistent with the jury's verdict that defendant was guilty of second-degree murder. The trial court failed to explain why the scoring of OV 6 at 25 points was inadequate. Accordingly, we conclude that this was not a proper reason to impose a departure sentence. *Steanhouse III*, ___ Mich App at ___; slip op at 5.

Finally, the trial court correctly found that it could not score any points for OV 9, seeing as possible damage to the community cannot support an assessment of any points under OV 9. See *People v Carrigan*, 297 Mich App 513, 516; 824 NW2d 283 (2012). Therefore, the fact that other homes could have caught fire, and the lives of firefighters and police were put at risk as a result of defendant's arson, was not properly considered by the guidelines, and were properly considered by the trial court as it relates to the circumstances surrounding defendant and his crime. *Steanhouse III*, ___ Mich App at ___; slip op at 5.

In sum, three of the four reasons given by the trial court for imposing a departure sentence were properly considered; however the fact that defendant had an intent to kill, or at minimum cause great bodily harm, was already adequately considered by the guidelines under OV 6, and therefore could not have been considered by the trial court when imposing a departure sentence. Regardless, even absent consideration of defendant's intent to kill, it is clear from the record before us that trial court would have departed from the minimum sentencing guidelines.

Likewise, we conclude that the trial court adequately justified the extent of the departure sentence imposed. As this Court stated in *Steanhouse III*, "it is necessary for a trial court to articulate its reasons for [ ] imposing a departure sentence to permit appellate review of whether the court abided by the principle of proportionality. *Steanhouse III*, ___ Mich App at ___; slip op at 5, citing *Milbourn*, 435 Mich at 659-660. Given the reasoning articulated by the trial court, as well as the record before us, we cannot conclude that the extent of the departure was unreasonable, or that the trial court abused its discretion. *Steanhouse III*, ___ Mich App at ___; slip op at 5, quoting *Steanhouse II*, 500 Mich at 476.

Affirmed.

/s/ Michael J. Kelly
/s/ Kathleen Jansen
/s/ Patrick M. Meter