# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAMI ALI JABER,

Defendant-Appellant.

UNPUBLISHED
March 11, 2021

No. 352092
Wayne Circuit Court
LC No. 18-005065-01-FC

Before: LETICA, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to consecutive prison terms of 35 to 50 years for the second-degree murder conviction, and two years for the felony-firearm conviction. We affirm.

Defendant owned a convenience store and was in the cashier area with his clerk, encased in bulletproof glass, when the clerk and a customer, Derek Roberts, began arguing about the cost of a purchase. The argument escalated, and defendant came out from behind the safe area because Roberts would not leave the store. After more words were exchanged, defendant sprayed Roberts in the face with dog repellant. A couple of seconds later, defendant fatally shot Roberts in the chest, explaining that he thought Roberts was reaching for a gun.

## I. LESSER OFFENSE INSTRUCTIONS

Defendant first argues that the trial court erred in denying his motion to instruct the jury regarding the lesser offense of voluntary manslaughter. We disagree.

A trial court's determination that a jury instruction was inapplicable is reviewed for an abuse of discretion, which occurs when the decision is outside the range of principled outcomes. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010); *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). A defendant has the right to a properly instructed jury. *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995). "[T]he trial court is required to instruct the jury

concerning the law applicable to the case and fully and fairly present the case to the jury in an understandable manner." *Id*. "Accordingly, jury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence." *People v McKinney*, 258 Mich App 157, 162-163; 670 NW2d 254 (2003).

Defendant was charged with first-degree premeditated murder and requested a jury instruction of voluntary manslaughter, which is murder without malice. See *People v Mendoza*, 468 Mich 527, 534-535; 664 NW2d 685 (2003). Voluntary manslaughter occurs when "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." *Id*. at 535-536. In other words, "the element distinguishing murder from manslaughter—malice—is negated by the presence of provocation and heat of passion." *Id*. at 540. In this case, the trial court concluded that the evidence was not adequate to include manslaughter in the final jury instructions.

The trial court determines, as a matter of law, whether the evidence at trial would support giving the instruction, i.e., whether a reasonable jury could find that the provocation was adequate. *People v Pouncey*, 437 Mich 382, 390-392; 471 NW2d 346 (1991). A person acts in the heat of passion when a reasonable person in the defendant's situation would lose control and act out of passion rather than reason. *People v Roper*, 286 Mich App 77, 87; 777 NW2d 483 (2009).

In this case, Roberts was having a verbal confrontation with the store clerk when defendant, who was also behind the bulletproof glass-encased register area, joined in the verbal jousting. Because of the disrespectful words, the clerk and defendant asked Roberts to leave several times, including after Roberts began unwrapping individual mints that were for sale and dropping them on the floor. Regarding the specific words spoken, defendant characterized Roberts as speaking in a demanding way, but a customer-witness said that the clerk "sassed out to [Roberts]" and was dismissive. The clerk said that Roberts was loud and disrespectful, and was acting up. Defendant testified that Roberts became angry when defendant told him that he should not make them rich and called Roberts the "N" word. According to the customer-witness, Roberts told her that the Arab store owner thought he was better than the African-American customers. According to defendant, other customers left because of the situation, and he became angry when Roberts told another customer not to spend his money at the store because the store owners thought they were better than the customers.

The clerk and the customer-witness testified that defendant opened the door to the protected clerk area with "mace" in his hand. Roberts then said "what are you going to do" and "show me what you got," but Roberts did not stop unwrapping candies. Defendant said that he became very angry and waited at the door of the enclosed area for about five seconds before he entered the sales floor with the intention of using the "mace" to get Roberts to leave. Defendant testified that he demanded that Roberts "get out of here with that shit," and told Roberts repeatedly to "make your move" while waiting a couple of seconds to see if he would leave or stop opening candy before spraying him with the "mace." Defendant stated that it appeared the spray was not effective, and that he saw Roberts move a step and a half toward him and reach down to his waist. Defendant said that he was afraid Roberts was reaching for a gun, so he took a step back and fired.

There was a great deal of testimony from defendant about his level of anger propelling his actions. He said that he put himself in a "stupid predicament" by leaving the enclosed area because

of his anger, and that he "let my anger get to me." However, to justify giving an instruction there must be sufficient evidence that the defendant could have been convicted of the lesser offense—manslaughter. See *People v Cheeks*, 216 Mich App 470, 479-480; 549 NW2d 584 (1996). The question is whether the interaction would have caused a reasonable person in defendant's situation to lose control and act out of passion rather than reason. See *Roper*, 286 Mich App at 87.

The trial court did not abuse its discretion in concluding that the manslaughter jury instruction was inapplicable under the facts of this case. It would not have been reasonable for defendant to lose his ability to reason when faced with the provocation of Roberts's verbal obstinance and his physical refusal to leave the store, even after defendant sprayed his face with an irritant. The customer-witness testified that she did not see Roberts with a weapon, did not hear him make any threats, and did not see Roberts moving like he was going to fight. The clerk testified that Roberts did not appear to be armed or attempting to strike defendant, and defendant acknowledged that he had not seen Roberts with a gun. Generally, insulting words are not considered adequate provocation. *Pouncey*, 437 Mich at 391. Trading insults, and Roberts's refusal to comply with defendant's directions, would not have provoked a reasonable person to kill Roberts out of fervency, without reason.

Furthermore, defendant's actions support the conclusion that his ability to reason had not been overcome by passion. Despite his anger, defendant did act deliberately with a strategy to eject defendant from his store. Defendant testified that he had reasoned that the police likely would not have responded promptly to this level of dispute, and so he concluded that he would have to personally eject Roberts without support. It was this choice not to wait for Roberts to leave while defendant was in a protected area, or to attempt to apply pressure to Roberts to leave by involving authorities, that eventually culminated in the shooting. Defendant said that he waited briefly by the door to the sales floor—a deliberate act—before deciding that he should enter the sales floor with "mace" to see if he could motivate Roberts to leave. Reasoning that the situation could "get out of hand," defendant moved the spray to his left hand so he could keep his right hand on his concealed gun. Defendant admitted that he repeatedly challenged Roberts to "make your move," apparently attempting to provoke Roberts to physically respond. Defendant testified that, before spraying Roberts, he waited briefly to assess whether Roberts would leave after commanding Roberts to "get out of here with that shit." It took about two seconds for defendant to realize that spraying Roberts's face with an irritant did not subdue him, before he allegedly thought that Roberts may have been reaching for a gun, such that he had to shoot him.

In summary, considering the evidence, the trial court did not abuse its discretion by denying defendant's motion to instruct the jury regarding the lesser offense of voluntary manslaughter.

## II. IMPARTIAL JURY

Defendant next argues that there should have been a hearing to determine if jurors saw defendant being escorted from the courtroom in shackles because, if so, he was denied a fair trial. We disagree.

This Court reviews "a trial court's decision whether to hold an evidentiary hearing" for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). The Sixth Amendment guarantee of the right to a fair trial means that guilt or innocence is determined

on the basis of evidence introduced at trial "and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002) (internal quotation marks and citation omitted).

Defendant's trial counsel informed the trial court that a deputy approached defendant during a break in the trial to escort him to a holding area while jurors were still present. The trial court stated that one juror may have been "on the way out the door," whereas defendant alleged that it was four or five jurors but was not sure if any of them looked at defendant. Defendant expressed concern that the jury might infer that he was in custody, and the trial court responded that it would be reasonable for a juror to believe that someone on trial for first-degree murder would be in police custody. Defendant requested that the trial court ask the jurors whether they had seen anything unusual as they left the courtroom. The trial court noted, "I saw things differently," adding that it had already instructed the jury to presume defendant's innocence, and concluding: "I'm not going to inquire of the jury if they saw something out of the ordinary in this courtroom because I do believe that it will call attention to something that really is a non-issue as it pertains to this case."

Defendant argues that the trial court erred by not questioning the jurors in light of the possibility that a juror may have seen defendant handcuffed and escorted away, which constitutes an extraneous influence. However, the prohibition against shackling during a trial, except in extraordinary circumstances, *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996); see also *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994), "does not extend to safety precautions taken by officers while transporting a defendant to and from the courtroom," *People v Horn*, 279 Mich App 31, 37; 755 NW2d 212 (2008). Here, defendant was at best handcuffed during transport and, regardless, he has not demonstrated that he was prejudiced by any error. See *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009).

The record does not demonstrate that a juror witnessed defendant in handcuffs. Defendant's counsel stated that a deputy was approaching defendant while the jury was exiting, and the trial court believed that the last juror was "on the way out the door." That a deputy was "approaching" does not implicate handcuffs. Despite any view a juror may have had of defendant in handcuffs while he was transported out of the courtroom, he was not in shackles, as defendant represents. The trial court reasoned that it would unnecessarily draw the jury's attention to defendant's incarceration to ask the jurors about seeing him in handcuffs. Further, in terms of prejudice, the trial court noted that it would have been reasonable for a juror to assume that defendant was in custody, given that the trial was for first-degree murder. There is nothing in the record to demonstrate that the trial court was mistaken in its conclusions, and denying defendant's request to question the jury in this regard did not amount to an abuse of discretion.

## III. VERDICT FORM

Defendant next argues that the trial court plainly erred by presenting the jury with an improper verdict form. We disagree. This issue is unpreserved, and thus, our review is for plain error affecting substantial rights. See *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005).

"[A] criminal defendant is deprived of his constitutional right to a jury trial when the jury is not given the opportunity to return a general verdict of not guilty." *People v Wade*, 283 Mich

App 462, 467; 771 NW2d 447 (2009). In *Wade*, the unacceptable verdict form appeared as follows:

> POSSIBLE VERDICTS
>
> YOU MAY RETURN ONLY ONE VERDICT FOR EACH COUNT.
>
> COUNT 1- HOMICIDE-MURDER FIRST DEGREE-PREMEDITATED (EDWARD BROWDER, JR)
>
> __ NOT GUILTY
>
> __ GUILTY
>
> OR
>
> __ GUILTY OF THE LESSER OFFENSE OF-HOMICIDE-MURDER SECOND DEGREE (EDWARD BROWDER, JR.)
>
> OR
>
> __ GUILTY OF THE LESSER OFFENSE OF-INVOLUNTARY MANSLAUGHTER-FIREARM INTENTIONALLY AIMED (EDWARD BROWDER, JR.). [*Id*. at 465.]

The problem was that the form did not provide the jury with "the opportunity to find defendant either generally not guilty or not guilty of the lesser-included offenses," but the form would have been sufficient if it had "included a box through which the jury could have found defendant not guilty of second-degree murder and not guilty of involuntary manslaughter." *Id*. at 468.

Here, defendant argues that the verdict form likewise did not afford the jury the opportunity to find him generally not guilty or not guilty of lesser-included offenses. The jury was presented with the following form:

> COUNT 1: FIRST DEGREE PREMEDITATED MURDER
>
> ___ Not Guilty
>
> ___ Guilty
>
> ___ Guilty of Lesser Included Offense of Second Degree Murder

There is an obvious difference between the verdict forms in this case and the *Wade* case. In *Wade*, the verdict form allowed for a not guilty verdict and then allowed for a verdict of guilty of the charged crime *or* guilty of lesser-included offenses. It was not apparent that the not guilty selection would apply to the lesser-included offenses, and therefore, the jury did not have an option of selecting not guilty for the lesser-included offenses. In contrast, the verdict form in this case provided that the not guilty option would apply to the charged offense and its lesser-included offenses because it stated that the jury was selecting among not guilty, guilty as charged, or guilty of the lesser offenses. The jury could only mark one of the three options, so it was possible to find

defendant not guilty of the lesser offense as well as the charged offense. In *Wade*, the conjunction "or" separated the not guilty option for the charged crime from the options for the lesser offenses. But in this case, the jury form provided the jury with the opportunity to find defendant not guilty of the charged offense, and not guilty of the lesser included offense. Accordingly, defendant has failed to establish error warranting appellate relief.

## IV. EXPERT TESTIMONY

Defendant argues that the trial court abused its discretion when it excluded testimony from defendant's proposed psychiatric expert who would testify on the issues of malice and self-defense. We disagree.

This Court reviews a trial court's determinations concerning the qualifications of an expert and the admissibility of proposed expert witness testimony for an abuse of discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999); *People v Peebles*, 216 Mich App 661, 667; 550 NW2d 589 (1996).

MRE 702 provides for the admission of expert opinion that results from "scientific, technical, or other specialized knowledge," and assists the trier of fact. To determine whether expert testimony is admissible under MRE 702, a searching inquiry is mandated. The opinion of an otherwise qualified expert must be shown to be reliable, as must the data underlying the expert's theories and the methodology by which the expert draws his conclusions. *People v Yost*, 278 Mich App 341, 394; 749 NW2d 753 (2008), quoting *Gilbert v DaimlerChrysler Co*, 470 Mich 749, 782; 685 NW2d 391 (2004). An expert's opinion testimony is limited to the expert's area of expertise. *People v Jones*, 95 Mich App 390, 394; 290 NW2d 154 (1980). The admissibility of expert testimony is generally determined by a three-part test: "(1) the expert must be qualified, (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist the trier of fact in determining a fact in issue, and (3) the evidence must be from a recognized discipline." *People v Parcha*, 227 Mich App 236, 239-240; 575 NW2d 316 (1997).

In this case, defendant moved to offer the testimony of Dr. Gerald A. Shiener as an expert in psychiatry. He had examined defendant, and ostensibly would have testified about what "was operating on the defendant at the time" of the shooting. In particular, he would have apparently testified that defendant had post-traumatic stress disorder which caused defendant to act impulsively and to be unable to act with malice. The trial court excluded Dr. Shiener's testimony, finding it unusual that defendant's medical records were not examined. The court acknowledged that the video of the event had been reviewed but concluded that the doctor's opinions would be based on "information that the doctor received from the defendant without any corroboration." Thus, the trial court apparently concluded that Dr. Shiener's testimony was not reliable and would not assist the trier of fact to better understand the evidence or to determine a fact in issue because of the deficiencies noted by the court. This determination was within the range of reasonable and principled outcomes, and thus, did not constitute an abuse of discretion.

Defendant also argues that the evidence should have been admitted because it was relevant to his self-defense claim. He urges that Dr. Shiener's testimony would have supported his self-defense argument. However, defendant did not raise an insanity defense. The defense he did raise, self-defense, involves whether defendant reasonably believed that he was in immediate danger of

unlawful bodily harm necessitating the use of force. See *People v Heflin*, 434 Mich 482, 502-503; 456 NW2d 10 (1990) ("[T]he killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm.") In *People v Carpenter*, 464 Mich 223; 627 NW2d 276 (2001), our Supreme Court rejected the "diminished capacity" defense, which permits the defendant "to offer evidence of some mental abnormality to negate the specific intent required to commit a particular crime," *id*. at 232, in deference to the Legislative scheme that makes insanity an "all or nothing" defense, *id*. at 237. "[T]he Legislature's enactment of a comprehensive statutory scheme concerning defenses based on either mental illness or mental retardation demonstrates the Legislature's intent to preclude the use of *any* evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent." *Id*. at 236. Thus, without defendant asserting an insanity defense, Dr. Shiener's testimony about how defendant's capacity for malice was influenced in the situation did not go to establish a viable self-defense theory.

## V. OFFENSE VARIABLE 5

Defendant argues that the trial court erred by assessing offense variable (OV) 5 at 15 points for psychological injury to Roberts's family. We disagree.

This Court reviews the trial court's factual determinations at sentencing for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*. See also *People v Calloway*, 500 Mich 180, 184; 895 NW2d 165 (2017).

"A defendant is entitled to be sentenced by a trial court on the basis of accurate information." *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). The court must consult the advisory sentencing guidelines and assess the highest amount of possible points for all offense variables. *People v Lockridge*, 498 Mich 358, 392 n 28; 870 NW2d 502 (2015). The sentencing offense determines which offense variables are to be assessed, and the appropriate offense variables are generally assessed on the basis of the sentencing offense. *People v Sargent*, 481 Mich 346, 348; 750 NW2d 161 (2008).

OV 5 considers psychological injury to a member of a victim's family. The trial court assessed 15 points, which is appropriate when there was "serious psychological injury" to a victim's family member that could require professional treatment regardless of whether treatment has been sought. MCL 777.35(1)(a); MCL 777.35(2). Defendant argues that OV 5 should have been assessed at zero points because there was no evidence that a member of Roberts's family suffered severe psychological injury. The trial court relied on the statements of Roberts's father and brother, and stated:

> And, to Mr. Roberts' mother, I see your pain, and I understand that you are not able to speak today with regard to this issue.
>
> The Court is going to -- notwithstanding the fact that the two gentlemen that stood here and the statements that they made, the Court is going to assess points for OV

> 5. This has to be psychologically damaging for this family. And, I can see the tears and the trauma that this has caused without anyone even having to speak. So, the Court is going to score OV 5.

While assessing OV 5, a trial court "should consider the severity of the injury and the consequences that flow from it, including how the injury has manifested itself before sentencing and is likely to do so in the future, and whether professional treatment has been sought or received." *Calloway*, 500 Mich at 186. "In this context, 'serious' is defined as having important or dangerous possible consequences." *Id.* (quotation marks and citation omitted). "The trial court may rely on reasonable inferences arising from the record evidence to sustain the scoring of an offense variable." *People v Earl*, 297 Mich App 104, 109; 822 NW2d 271 (2012).

The trial court's consideration of this "be[ing] psychologically damaging for this family" should not be a justification for assessing OV 5. Despite the logic of the assumption, "[t]he trial court may not simply assume that someone in the victim's position would have suffered psychological harm[.]" *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2012). However, the statement of the victim's brother and the appearance of Roberts's mother were evidence of severe psychological injury. The brother spoke of the continuing long-term consequences of traumatic loss, foreshadowing the pain that he and their mother would experience on the anniversary of the death, exacerbated by the specific date. The mother's severe psychological injury could be inferred by her tearful inability to speak about her loss. While assessing OV 5, it is proper to weigh and consider "[t]he trial court's opportunity to observe the demeanor of [the victim's family] during their testimony[,]" along with victim impact statements made at a sentencing hearing, as well as the traumatic nature of the circumstances surrounding the offense. *People v Steanhouse*, 313 Mich App 1, 39; 880 NW2d 297 (2015), rev'd in part on other grounds 500 Mich 453 (2017). The nature and descriptions of the psychological effects of Roberts's death on his family members were sufficient to establish "serious psychological injury" to a victim's family that could have required professional treatment. As a result, the trial court did not clearly err by assessing 15 points for OV 5.

## VI. UNREASONABLE SENTENCE

Defendant also argues that the trial court abused its discretion by imposing a sentence that greatly departs from the guidelines. We disagree.

"A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *Lockridge*, 498 Mich at 392. When a sentence is determined to be unreasonable, resentencing is required. *Id.* This Court reviews a departure sentence for an abuse of discretion and looks at whether the trial court's sentence violated the principle-of-proportionality test. *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017).

When imposing a sentence, a court must consult the sentencing guidelines, calculate the recommended sentencing guidelines range, and take that range into account when determining a defendant's sentence. *Lockridge*, 498 Mich at 391-392. While a court must score and consider the sentencing guidelines, the court is not compelled to impose a minimum sentence within the calculated range. *Id.* at 391. A sentencing court may depart from the sentencing guidelines range

without stating substantial and compelling reasons to justify the departure; however, the trial court's sentence must be reasonable. *Id.* at 391-392.

Defendant argues that his sentence was unreasonable because it was a departure that was not justified by the circumstances, and the trial court impermissibly considered several factors. Since the trial court sentenced defendant to a minimum term of 420 months in prison when the guideline minimum range was 162 to 270 months, the sentence departed from the recommended minimum sentence by 150 months.

The reasonableness of a sentence is determined by evaluating whether the sentence violated the principle of proportionality, which requires " 'sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.' " *Steanhouse*, 500 Mich at 474, quoting *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). This Court recited several factors for consideration regarding the proportionality of a sentence, such as:

> (1) the seriousness of the offense, (2) factors that were inadequately considered by the guidelines, and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation[.] [*Steanhouse*, 313 Mich App at 46 (internal citations omitted).]

Here, the trial court explained its sentence by first noting that it had reviewed a number of letters from family members, the presentence report, and victim impact statements, as well as the trial evidence. It noted that it disagreed with the jury's verdict, concluding that defendant "had time to reflect on your actions and to formulate how you would proceed." The court continued:

> [N]ot only did you interject yourself into an argument that Mr. Roberts was having with someone else, you invited Mr. Roberts to stick around so that you could further, whatever was going on there. You came from a place of safety, and prior to doing that, you invited Mr. Roberts back behind bullet proof glass twice. Once you exited from behind the bullet proof glass, you sprayed Mr. Roberts in the face, and then you shot him with another person in very close proximity to you. So much so, that when she testified, and we also saw it on the video, she had to say, "hey, I'm right here." You could have shot her as well.
>
> And, then, when the court reviews the presentence report, the court finds out that you did not spray Mr. Roberts with mace, you sprayed him with dog repellant. You did not see the humanity in Mr. Roberts.
>
> The court believes that your actions were egregious and they were avoidable. The first thing you did after you shot Mr. Roberts, you lied about what you did to the other person that was in the gas station. You told her that the gun was a blank. You then picked up the bullet, walked back and tried to flush it. You did not call for assistance for Mr. Roberts, you first watched the video in the gas station so you could get your story together. You didn't see the humanity in Mr. Roberts.

> The court is going to depart from the guidelines. The court is going to go above the guidelines for reasons that the court has stated on the record. I believe that your behavior was egregious. I do not believe that you show any remorse. You took the stand in this case, and when you were asked -- and I reviewed your testimony, I had the transcript, I reviewed it. And, when you were asked what you could do different, your response was that you wouldn't come to work that day, not that you would not shoot a person after spraying him with dog repellant.

Defendant argues that the trial court impermissibly considered his refusal to admit his guilt in issuing the sentence. "A sentencing court cannot base a sentence even in part on a defendant's refusal to admit guilt." *Payne*, 285 Mich App at 193-194, quoting *People v Dobek*, 274 Mich App 58, 104; 732 NW2d 546 (2007). However, the court may consider a defendant's lack of remorse as it bears on the defendant's potential for rehabilitation. *Id*. This Court examines three factors in order to determine whether the sentencing court improperly considered a defendant's refusal to admit guilt: " '(1) the defendant's maintenance of innocence after conviction; (2) the judge's attempt to get the defendant to admit guilt; and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe.' " *Payne*, 285 Mich App at 194, quoting *People v Wesley*, 428 Mich 708, 713; 411 NW2d 159 (1987). When the three factors are implicated, the " 'sentence was likely to have been improperly influenced by the defendant's persistence in his innocence.' " *Dobek*, 274 Mich App at 104, quoting *Wesley*, 428 Mich at 713.

Here, defendant did not continue to maintain his innocence; he admitted to the shooting, as depicted on video, and testified regarding his explanation for the shooting. Therefore, the trial court could not sensibly refer to defendant's refusal to admit guilt, or attempt to persuade defendant to admit guilt, or give a lesser sentence if defendant admitted guilt, because defendant admitted that he killed Roberts. There is also no evidence in the trial court's statement to support a conclusion that if defendant had admitted guilt he would have received a lesser sentence. The trial court explained that it did not believe defendant exhibited remorse because, when asked what he would do differently, he did not state that he would not have been physically aggressive toward Roberts or would not have shot Roberts. Again, a sentencing court may consider a defendant's lack of remorse in sentencing without impermissibly considering the defendant's failure to admit guilt. *Dobek*, 274 Mich App at 104.

Defendant also argues that the trial court impermissibly sentenced him based on a belief that defendant was guilty of first-degree murder. A defendant is presumed innocent after a jury has specifically acquitted the defendant of a charge, and the trial court may not consider acquitted conduct as an aggravating factor at sentencing. *People v Beck*, 504 Mich 605, 626-627; 939 NW2d 213 (2019). The trial court did state that it disagreed with the jury's finding that defendant committed second-degree rather than first-degree murder. However, the trial court also indicated that it respected the verdict and, as defendant noted, scored OV 6 at 25 points for the "offender's intent to kill or injure another individual," rather than at 50 points, which would apply if "the offender had premeditated intent to kill." MCL 777.36(1)(a). Most notably, the trial court did not mention premeditation as a reason for the departure sentence.

Defendant argues that the trial court did not explain or justify its reasons for the longer sentence. The trial court, however, mentioned multiple times that defendant did not see the

humanity in Roberts and that the shooting was egregious, as well as avoidable. The trial court explained its concern that defendant did not consider Roberts's humanity, as defendant interjected himself into an argument, challenged Roberts, and left a place of safety and then sprayed Roberts with dog repellant before he shot him in the chest at close range. The trial court also noted that another person standing near Roberts had been endangered. Further, the trial court noted that defendant tried to obfuscate his crime and delayed in calling 911. Defendant does not dispute the trial court findings. The trial court clearly considered the seriousness of the offense, as well as several factors not accounted for in the guidelines like defendant's low potential for rehabilitation and lack of remorse, as well as his disregard for the humanity of his victim. Therefore, the trial court justified its determination that the upward departure from the advisory guidelines range was "proportionate to the seriousness of the circumstances surrounding the offense and the offender," *Steanhouse*, 500 Mich at 474, and did not abuse its discretion because it issued a reasonable sentence.

Affirmed.

/s/ Anica Letica
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood