

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 17, 2012

v

CHARLES BERNARD FOSTER,
Defendant-Appellant.

No. 303379
Wayne Circuit Court
LC No. 10-010588-FC

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and sentenced to a prison term of 12 to 30 years. He appeals by right. We affirm.

Defendant was convicted of murdering his girlfriend, who died by manual strangulation. Defendant admitted to the police and at trial that he and the victim were involved in an altercation after they returned from a party to defendant's home, and that he placed a hand on the victim's neck as he tried to hold her down. Defendant's intent and self-defense were the principal issues at trial.

Defendant argues on appeal that the evidence was insufficient to support his conviction of second-degree murder. We disagree. When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). "In order to convict a defendant of second-degree murder, the prosecution must prove: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009) (citation and internal quotation marks omitted). "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 wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* (citation omitted).

The evidence in this case showed that defendant caused the victim's death by manual strangulation. Defendant does not contend that such evidence is legally insufficient to establish the requisite malice for second-degree murder. Instead, he argues that the evidence failed to show beyond a reasonable doubt that he did not act in the heat of passion based on reasonable provocation sufficient to negate a finding of malice. The crime of second-degree murder may be

mitigated to manslaughter where a killing occurs under circumstances that negates the element of malice. “Manslaughter is murder without malice.” *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). “[T]he element distinguishing murder from manslaughter—malice—is negated by the presence of provocation and heat of passion.” *Id.* at 540. Voluntary manslaughter is established where “(1) defendant killed in the heat of passion, (2) this passion was caused by an adequate provocation, and (3) there was no lapse of time during which a reasonable person could have controlled his passions.” *Roper*, 286 Mich App at 87. The adequacy of the provocation is usually a question of fact for the jury but it must be such ““that which would cause the reasonable person to lose control.”” *Id.* at 87-88, quoting *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991).

Defendant testified that the victim repeatedly insulted him and called him derogatory names; however, he stated although it bothered him “a little bit” and made him somewhat angry, he was not mad. Verbal exchanges are not usually sufficient to constitute adequate provocation. *Roper*, 286 Mich App at 88. According to defendant, as the victim was threatening him, and he was holding her down and encouraging her to relax and rest. Defendant denied losing control during the struggle. The jury could have reasonably found from defendant’s testimony that he did not act in the heat of passion caused by adequate provocation, and, therefore, the crime of second-degree murder was not mitigated to manslaughter.

Defendant alternatively argues that the prosecutor failed to disprove self-defense beyond a reasonable doubt. We again disagree. In *Roper*, 286 Mich App at 86, this Court explained:

“In Michigan, the 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.” *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990); see also MCL 780.972(1)(a) (providing that a person may use deadly force against another if the person “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”). “Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt.” *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

The medical evidence alone was sufficient to disprove that defendant acted in self-defense. According to the prosecution’s medical expert, death by manual strangulation requires continuous pressure for minutes after the victim has lost consciousness. A rational jury could have reasonably determined that defendant killed the victim by continuing to choke her after she was no longer conscious and struggling, and thus that defendant could not have honestly and reasonably believed that he was in danger of death or serious injury from the victim after she was no longer conscious. Accordingly, the evidence was sufficient to enable the jury to reject defendant’s claim of self-defense beyond a reasonable doubt.

Defendant also argues that reversal is required because, during rebuttal argument, the prosecutor referred to defense counsel’s closing argument as a “smokescreen,” thereby accusing her of attempting to mislead the jury. Defendant did not object to the prosecutor’s remarks at trial, leaving this issue unpreserved. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272

(2008). Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *Id.* Defendant must establish that an error occurred, that it was plain (i.e., clear or obvious), and that the error affected his substantial rights, which generally requires a showing that it affected the outcome of the trial court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even when these requirements are satisfied, reversal is only warranted “when the forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant’s innocence.” *Id.* (citation and internal quotations omitted). Error requiring reversal will not be found where a curative instruction could have alleviated any prejudicial effect. *Unger*, 278 Mich App at 235.

Defendant is correct that “[a] prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury.” *Id.* at 236 (citation and internal quotations omitted). In *Unger*, this Court disapproved of arguments that defense counsel had attempted to confuse the issues, fool the jury, confuse and mislead the jury, and deter the jury from seeing the real issues in the case. *Id.* at 238. This Court observed:

“The prosecutor may not question defense counsel’s veracity. When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client. This argument undermines the defendant’s presumption of innocence. Such an argument impermissibly shifts the focus from the evidence itself to the defense counsel’s personality.” [*Id.* at 236, quoting *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984).]

And our Supreme Court has

emphasize[d] that it is improper for a prosecutor to make a personal attack on defense counsel, suggesting to jurors in closing argument that counsel is intentionally trying to mislead them. Although such conduct may not require reversal in a given case, it is still improper and unbecoming of a representative of the state. [*People v Light*, 480 Mich 1197-1198; 748 NW2d 518 (2008).]

Nevertheless, prosecutors are afforded great latitude regarding their arguments and conduct at trial. *People v Bahoda*, 448 Mich 261, 282, 531 NW2d 659 (1995). Prosecutors “are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case.” *Unger*, 278 Mich App at 236. Here, the prosecutor properly explained that defense counsel’s closing argument focused on matters that were unimportant to a determination of defendant’s guilt or innocence. Even if the prosecutor improperly argued and insinuated that defense counsel raised the irrelevant issues as a “smokescreen,” i.e., “something intended to disguise, conceal, or deceive,” Random House Webster’s College Dictionary (2d ed, 1997), defendant is not entitled to relief. A timely objection and curative instruction could have alleviated any perceived prejudice. See *Unger*, 278 Mich App at 238. The case did not present a credibility contest between defendant and an eyewitness or a complainant where the insinuation that defense counsel did not believe her client might have influenced the verdict. The case turned on the credibility of the medical evidence concerning the length of time that continuous

pressure must be applied for death to occur by strangulation. Any impropriety regarding the prosecutor's argument was insignificant in the context of this case.

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor's remarks. Nonetheless, there is no reasonable probability that the outcome of trial would have been different had defense counsel objected. Therefore, defendant is unable to establish the requisite prejudice necessary to prove a claim of ineffective assistance of counsel. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

We affirm.

/s/ Jane E. Markey
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro