STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLAY DONALD HAYWARD,

Defendant-Appellant.

UNPUBLISHED
July 16, 1996

No. 164251
LC No. 91-1264-C

Before: Markey, P.J., and Holbrook, Jr., and M.J. Matuzak,* JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to serve a mandatory two-year term for the felony-firearm conviction followed by a term of nonmandatory life imprisonment for the murder conviction. He appeals as of right, and we affirm.

On the evening of January 24, 1992, defendant had several visitors at his home. At about 8:00 p.m., defendant's former girlfriend, Deborah Grego, came to the house and told defendant she might be pregnant with his child. He was happy to hear this news, until he received a telephone call a few hours later from someone who indicated that Grego might have been going out with other men. Defendant became enraged, hitting and kicking the wall. Grego telephoned defendant and he began yelling at her. He told her he was going to beat her until she was black and blue.

At the time of the telephone call, Grego was at Stacy Zrakovi's house with Chris Cramer and Mark Schafer. While on the telephone, defendant told Grego to tell Schafer that if Schafer came over, he was going to blow him away, or to tell Schafer to come over, so he could blow him away. There had been ill feelings between defendant and Schafer in the past. Defendant had been told on different occasions that Schafer said he was going to bury defendant when he got out of the Army, or put him six feet under. Defendant had also been told that Schafer had "head-butted" Pete Avery in a fight,

* Circuit judge, sitting on the Court of Appeals by assignment.

shattering Avery's nose. Schafer was about 6'2" tall and weighed about 220 pounds, whereas defendant was about 5'9" tall and weighed about 150 pounds.

Grego and Zrakovi drove to defendant's house; Cramer and Schafer followed behind in a different car. Grego began arguing with defendant when she arrived at his house. A brief shoving match ensued in which Zrakovi hurt her elbow. Schafer and Cramer arrived and walked into defendant's house without permission. Defendant immediately began yelling repeatedly for Schafer to leave his house. Schafer asked defendant why he had to be such a tough guy and why did he have to beat up girls. Grego tried unsuccessfully to get Schafer to leave, but he pushed her to the side and continued to argue with defendant. Defendant told Schafer he had three seconds to leave and started counting. When defendant reached three he pulled out a handgun and shot Schafer several times until the gun was empty, threw the gun, and kicked Schafer.

Defendant was tried on a charge of first-degree premeditated murder. Defense counsel requested, and was granted, an instruction on voluntary manslaughter. The jury convicted defendant of second-degree murder and felony-firearm.

Defendant's most persuasive argument on appeal is that he was denied a fair trial by the improper admission of (1) evidence tending to establish defendant's general reputation for fighting, (2) evidence of defendant assaulting Deborah Grego in the past, and (3) rebuttal evidence regarding defendant's knowledge of the victim's involvement in a specific instance of violence that was factually similar to the present matter (i.e., whether the victim was the aggressor in the incident). We agree that the trial court abused its discretion in admitting this evidence. First, defendant's reputation for nonviolence was not injected into the case by defendant, therefore, evidence presented during the prosecutor's case-in-chief regarding defendant's reputation as a fighter was inadmissible. See MRE 404(a)(1), 405(a). Second, evidence of defendant's threats and assaults on Grego that were remote in time and unconnected with the charged offense was inadmissible character evidence. See MRE 404(b). And, third, the prosecutor's rebuttal evidence was irrelevant given that the victim's state of mind was not a material issue in this case. See MRE 404(a)(2), 405(b). See also *People v White*, 401 Mich 482, 504; 257 NW2d 912 (1977). Nonetheless, the improper admission of evidence does not constitute error warranting reversal where one cannot conclude beyond a reasonable doubt that it tipped the scale in favor of the prosecution and contributed to the jury's verdict. *People v Anderson*, 446 Mich 392, 407; 521 NW2d 538 (1994). Here, we conclude that the error was harmless because the trial court also erred in instructing the jury on the lesser-included offense of voluntary manslaughter when there was insufficient evidence, as a matter of law, of provocation. Therefore, we find any evidentiary error during trial to be harmless beyond a reasonable doubt because defendant was convicted of second-degree murder, the only lesser-included offense that was properly placed before the jury, and his guilt of that charge was overwhelming. See, e.g., *People v Williamson*, 205 Mich App 592, 596; 517 NW2d 846 (1994).

Murder and manslaughter are both intentional killings, but manslaughter is distinguished by the element of provocation. Voluntary manslaughter requires proof beyond a reasonable doubt that (1) the

defendant killed in the heat of passion, (2) the passion was caused by an adequate provocation, and (3) no lapse of time occurred during which a reasonable person could have controlled his passions. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). Adequate provocation is that which would cause a reasonable person to lose control. Although the determination whether adequate provocation existed is generally a question for the trier of fact, the trial court may exclude evidence of provocation, as a matter of law, where no reasonable jury could find that the provocation was adequate. *Id.* at 390.

On appeal, defendant challenges the trial court's ruling that precluded him from arguing to the jury that his provocation was in part the result of his anger toward Grego and the news that he was not going to be a father. As noted above in finding that defendant was not prejudiced by the trial court's evidentiary errors, we find no merit to this argument because defendant's emotional state regarding Grego and his fear of or anger toward Schafer did not constitute adequate provocation, as a matter of law, to reduce murder to manslaughter. Although Schafer entered defendant's home without permission, he was unarmed and did not physically threaten or attack defendant. Schafer merely exacerbated defendant's anger toward Grego by asking defendant why he had to beat up on girls. Mere words or gestures, however, rarely rise to the level of adequate provocation for homicide. *Id.* at 391. Our Supreme Court accurately summarized the controlling principle in this case when it stated in *Pouncey*, at 389: "The law cannot countenance the loss of self-control; rather, it must encourage people to control their passions."

Instead, facts such as these—e.g., prior verbal threats by the decedent to harm defendant, decedent's entry into defendant's home without permission, decedent's refusal to leave when repeatedly told to, decedent and defendant's substantial size difference, and defendant's knowledge of specific instances of violence by decedent—*might* have warranted an instruction on self-defense or imperfect self-defense.[1] See *People v Robinson*, 79 Mich App 159-160; 261 N.W.2d 544 (1977). In Michigan, a person whose home is forcibly entered by another or who is assaulted in his or her home need not retreat and may resist the intrusion with as much force as he or she honestly and reasonably believes necessary, including deadly force. See CJI2d 7.15; 7.17. Where a defendant was the initial aggressor or reacted with excessive force, the qualified defense of imperfect self-defense may be asserted to mitigate second-degree murder to voluntary manslaughter. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993).

Here, defendant argues on appeal that the trial court had a duty to instruct the jury sua sponte on self-defense and imperfect self-defense. However, at trial, defense counsel specifically stated on the record that he was not seeking a self-defense instruction, and hinged defendant's defense on reducing murder to voluntary manslaughter by arguing adequate provocation. A defendant may not assign error on appeal to something which his own counsel deemed proper at trial. Thus, absent a miscarriage of justice, we will not allow defendant to harbor error as an appellate parachute. See *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991). Cf. *People v Curry*, 175 Mich App 33, 41; 437 NW2d 310 (1989). We find no miscarriage of justice in this case because the jury convicted defendant of the lesser-included offense of second-degree murder.[2]

Defendant next argues that the prosecutor improperly commented on defendant's right to remain silent when she argued to the jury during her closing argument that the main facts were not in dispute.. We disagree. While a prosecutor may not comment on a defendant's failure to take the stand, it is permissible to argue that the evidence is uncontradicted or undisputed. See *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991).

Defendant next argues that the trial court abused its discretion in limiting the testimony of his expert witness. We disagree. The court properly allowed the witness to testify regarding issues that were beyond the jury's understanding, but disallowed proposed testimony that was not unique or beyond the average juror's ability to evaluate. See *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990). The jury in this case did not need expert testimony to tell it that defendant's reaction to the events of that day was normal. *Id.* at 715.

In sum, having reviewed the record in this matter, we affirm defendant's conviction of second-degree murder.

Defendant next argues that he is entitled to resentencing because of certain irregularities in the imposition of his life sentence for the murder conviction. We find no error, and affirm defendant's life sentence.

Defendant contends that the presiding trial judge improperly disqualified himself from sentencing defendant. At sentencing, the substituted judge asked defense counsel if he had any objection to the presiding judge's disqualification, and counsel specifically stated that he and his client wanted to proceed with sentencing without placing an objection on the record. Thus, this issue has not been preserved for appellate review.

Before addressing defendant's remaining sentencing issues, a review of what occurred at sentencing is in order. At sentencing, the prosecutor argued that the court should deviate from the recommended minimum sentence under the guidelines of eight to twenty-five years and impose a minimum prison sentence of forty years. Defense counsel argued mitigating factors and asked for a sentence within the guidelines. In reviewing the guidelines, the court noted that they did not consider the fact that the victim was a substantially larger person than defendant or that the altercation occurred in defendant's home. On the other hand, the court also noted that the guidelines did not consider (1) the fact that defendant chose to arm himself with a deadly weapon and chose to use deadly force against an unarmed victim, (2) there was no physical contact or altercation between defendant and the victim or physical threat by the victim prior to the firing of the gun by defendant, (3) the fact that, after defendant fired one shot which caused the victim to fall to the floor, defendant continued to shoot until the gun was empty, insuring that death would result, and (4) after the victim was presumably dead, defendant kicked the victim with the "intent to further degrade" him. The sentencing judge stated that it was appropriate to depart from the guidelines, adding that he believed the guideline committee was wrong in considering a life sentence to be necessarily greater than a sentence of twenty-five years. The judge noted that a person sentenced to serve life imprisonment becomes eligible for parole after ten years, although as a

general rule a much longer period of time is required to be served before parole can be considered. The judge then imposed a life sentence on defendant, finding it to be appropriate based on his review of the presentence report, the guidelines, the concept of proportionality, and "particularly with regard to the lifer statute concerning parole." The judge further stated that if he were to impose an indeterminate sentence, he would exceed the maximum minimum guidelines recommendation of twenty-five years.

Defendant argues on appeal that the sentencing judge's decision was based on the mistaken belief that defendant would be eligible for parole after ten years, when in fact he would not be eligible for fifteen years. Defendant is the one who is mistaken. A defendant convicted of an offense committed *before* October 1, 1992, is eligible for parole after ten years, while an offense committed *after* that date is not eligible for parole until fifteen years have elapsed. MCL 791.234(6); MSA 28.2304(6). Here, defendant's offense was committed on January 25, 1992, therefore, he will be eligible for parole after serving ten years.

Defendant also argues that the sentencing court imposed a life sentence under the mistaken belief that defendant would be eligible for parole sooner with a life sentence than a long term of years. We believe defendant has misconstrued the sentencing court's comments. The court's articulation of its reasons for imposing a life sentence were thorough and accurate, as the law currently stands, and it clearly was not the court's intent to subvert the purposes of the "lifer" statute. See *People v Lino (After Remand)*, 213 Mich App 89; 539 NW2d 545 (1995).[3] Contrary to defendant's argument, the sentencing judge's assessment of the facts was not erroneous. The court accurately noted that there was no evidence that the victim physically confronted or threatened defendant immediately before the shooting, and that defendant kicked the victim in the foot after the shooting. Given the sentencing court's reasons for deviating from the guidelines, we are unable to say that a life sentence was disproportionally harsh. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Jane E. Markey
/s/Donald E. Holbrook, Jr.
/s/ Michael J. Matuzak

[1] We express no opinion regarding the merits of such a defense in this case, or defendant's possible tactical reasons for not raising the defense at trial. Our intent is merely to note the important distinction between the defenses of adequate provocation and self-defense.

[2] The prosecutor's Memorandum of Law, filed December 10, 1992, which objected to the trial court's proposed manslaughter instruction, succinctly and accurately analyzed the legal and factual aspects of this issue.

[3] This Court has recently ordered that a special panel by convened to resolve the conflict between *Lino* and *People v Carson*, ___ Mich App ___ (No. 159501, issued 06/04/96).