STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BETHEL WILLIAM HENLEY,

Defendant-Appellant.

UNPUBLISHED
September 20, 1996

No. 176348
LC No. 93002947 FC

Before: Marilyn Kelly, P.J., and Wahls and M.R. Knoblock,* JJ.

PER CURIAM.

Defendant appeals as of right from his conviction for second-degree murder and possession of a firearm during the commission of a felony. MCL 750.316; MSA 28.548, MCL 750.227b; MSA 28.424(2). The trial judge sentenced him to two years' imprisonment for the felony-firearm conviction and consecutively to a term of twenty-three to fifty years' for the murder count.

On appeal, defendant argues that the judge erred in instructing the jury on the lesser-included offense of voluntary manslaughter. He asserts that numerous instances of prosecutorial misconduct denied him a fair trial. Finally, he alleges that his sentence is disproportionate. We affirm.

I

First, defendant argues that the judge erred when it failed to instruct the jury that the victim's conduct, taken in conjunction with defendant's impaired state at the time of the shooting, constituted sufficient provocation to reduce the murder charge to manslaughter. We disagree.

Jury instructions are reviewed in their entirety to determine whether error occurred warranting reversal. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Here, the trial judge instructed the jury on first-degree murder, second-degree murder and voluntary manslaughter. The judge properly instructed the jury that the crime of murder may be reduced to voluntary manslaughter if the defendant acted on passion arising from by an adequate cause. He then instructed that evidence that

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

the victim flirted and danced with other men and snubbed defendant cannot, alone, constitute adequate provocation to reduce the crime of murder to manslaughter.

We find that the instruction, taken as a whole, sufficiently protected defendant's rights. Contrary to defendant's argument, the judge allowed the jury to consider whether defendant was provoked into killing decedent. The judge did not err in determining, as a matter of law, that the victim's flirting and dancing with other men did not provide defendant reasonable provocation to kill her. The provocation required to reduce the crime of murder to manslaughter is that which causes a defendant to act out of passion instead of reason. *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). The provocation must be adequate, meaning that it must be such that a reasonable person would lose control. *Id*. Although the determination of what is reasonable provocation is for the fact finder, the trial judge furnishes the standard of what can constitute adequate provocation. *Id*. at 390.

We agree with the trial judge that the victim's actions, standing alone, were insufficient to constitute adequate provocation. However, his instructions were not inconsistent, because he allowed the jury to consider whether defendant's impaired mental state combined with the victim's actions, constituted sufficient provocation.[1] Therefore, the instructions adequately protected defendant's rights.

II

Next, defendant argues that several instances of prosecutorial misconduct denied him a fair trial. Questions of prosecutorial misconduct are decided on a case-by-case basis. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). We review the prosecutor's remarks in context to determine if the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Legrone, supra* at 82-83.

First, defendant argues that the prosecutor improperly appealed to the jurors' sense of civic duty. Because defendant failed to object to the alleged improper argument at trial, we will review the issue only if failure to do so will result in a miscarriage of justice. *People v Slocum*, 213 Mich App 239, 241; 539 NW2d 572 (1995). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Biggs*, 202 Mich App 450, 455; 509 NW2d 803 (1993).

After reviewing the record, even if we were to find that the prosecutor's argument was improper, any prejudicial effect could have been cured by a cautionary instruction. *Id*. Furthermore, a miscarriage of justice did not result, because there was overwhelming evidence of defendant's guilt. *Id*.

Next, defendant argues that the prosecutor's comments that the defense was "hocus pocus" and was based on desperation not fact, does not amount to misconduct. The prosecutor is allowed to comment on the testimony in the case and is free to argue any reasonable inferences arising from those facts. *Bahoda, supra*. By stating that the defense of diminished capacity was "hocus pocus," the prosecutor was merely commenting that it was not believable based on the evidence. The prosecutor is not required to use the blandest terms when arguing to the jury.

Finally, defendant argues that the prosecutor improperly referenced the objected-to instruction that the judge was going to give to the jury about sufficient provocation, discussed above. However,

we previously ruled that the instruction did not deprive defendant of a fair trial. Therefore, neither did the prosecutor's reference to it.

III

Defendant argues that his sentence is disproportionate where its length is such that he cannot reasonably expect to serve the twenty-five year minimum term with any prospect of release during his lifetime, citing *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989). Under *Moore*, the sentence must be one that the defendant has a reasonable prospect of actually serving.

Michigan's Supreme Court has upheld a sentence where the defendant would have been 87 years old upon serving his minimum term. *People v Rushlow*, 437 Mich 149, 156; 468 NW2d 487 (1991). In *People v Weaver (After Remand)*,[2] this Court held that the defendant had a reasonable prospect of serving his minimum term even though he would be in his early nineties at that time. Here, defendant was 61 years old at the time of sentencing. He would be in his mid-eighties upon serving his minimum terms. Therefore, under *Moore*, we conclude that he could reasonably expect to serve his sentence within his lifetime.

Even if he did not have a reasonable possibility of serving the minimum sentence, the reasoning in *Moore* was implicitly overruled in *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994). See *People v Kelly*, 213 Mich App 8, 13; 539 NW2d 538 (1995). In *Kelly*, this Court held that we are no longer constrained to remand for resentencing where an indeterminate sentence is effectively a life term without parole. The proper test is whether the sentence is proportionate under the standard of *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

According to the Supreme Court's decision in *Milbourn*, a sentence must be proportionate to both the seriousness of the offense and the background of the offender. *Milbourn, supra*. Here, defendant's minimum sentence falls within the recommended guidelines range of eight to twenty-five years. Therefore, it is presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). While a minimum sentence within the range could violate the proportionality rule in unusual circumstances, defendant has failed to present any unusual circumstances that would warrant a new sentence. *Milbourn, supra* at 661; *People v Dukes*, 189 Mich App 262; 471 NW2d 651 (1991).

Affirmed.

/s/ Marilyn Kelly
/s/ Myron H. Wahls
/s/ M. Richard Knoblock

[1] Not raised by defendant in this appeal is the issue of whether adequate provocation is determined solely by the reasonable person standard or whether a defendant's state of mind may be considered. Therefore, it is not necessary to resolve that issue here.

[2] 192 Mich App 231; 480 NW2d 607 (1991).