STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

K. REID JOHN LAWRENCE,

Defendant-Appellant.

UNPUBLISHED
December 13, 1996

No. 176342
Detroit Recorder's Court
LC No. 92-005068

Before: Jansen, P.J., and Saad and M.D. Schwartz,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to five to fifteen years' imprisonment and two years' consecutive imprisonment, respectively. He appeals as of right. We affirm defendant's convictions and sentences, but remand to the trial court for correction of the sentencing information report.

The evidence established that defendant shot David Morgan two times after several verbal and physical encounters between the two men inside the Baby Doll Lounge. Morgan died as a result of the multiple gunshot injuries. The defense theory was that defendant shot Morgan in lawful self-defense, although defendant testified that only the first of the two gunshots was intentionally fired. The jury was instructed on first-degree premeditated murder, second-degree murder and voluntary manslaughter, but was permitted to consider lawful self-defense as a defense to all three forms of homicide. The jury found defendant guilty of voluntary manslaughter and felony-firearm.

I

On appeal, defendant contends that the trial court removed an element of voluntary manslaughter from the jury's consideration by not instructing the jury that voluntary manslaughter requires an intent to kill. Because defendant did not present this issue to the trial court, we limit our

---

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

review to the question of whether manifest injustice occurred. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Hoffman*, 205 Mich App 1, 22; 518 NW2d 817 (1994).

Contrary to the prosecution's argument, the dispositive issue is not whether the trial court followed CJI2d 16.9. The standard criminal jury instructions do not have the official sanction of our Supreme Court and their use is not required. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). We also note that a voluntary manslaughter may be intentional or unintentional homicide under *People v Datema*, 448 Mich 585, 594; 533 NW2d 272 (1995), but that only the intentional form discussed in *People v Pouncey*, 437 Mich 382, 388-389; 471 NW2d 346 (1991), was at issue at defendant's trial. The test for this form of manslaughter requires that defendant kill in the heat of passion caused by an adequate provocation and that there cannot be a lapse of time during which a reasonable person could control his passions. *Pouncey, supra*, p 382. The crime constitutes a reduction of second-degree murder to manslaughter because provocation negates malice. *People v King*, 98 Mich App 146, 150; 296 NW2d 211 (1980). Under *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980), malice requires an intent to kill, an intent to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm.

Because malice under *Aaron* encompasses three possible states of mind and voluntary manslaughter, in the definitional sense, requires that the provocation negate malice, we reject defendant's argument that an intent to kill was required for voluntary manslaughter. See *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995) (identifying either an intent to kill or an intent to commit serious bodily harm, along with provocation, as elements of voluntary manslaughter when deciding if a claim of accident was a defense). Moreover, examined in their entirely, *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992), the oral and written jury instructions did not omit an essential element of voluntary manslaughter. The trial court's only error was to inform the jury that, when distinguishing the murder offenses from voluntary manslaughter, both forms of murder required proof of a "specific intent." Second-degree murder is not a specific intent crime because malice does not require an intent to kill but includes the wanton and wilful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm. *People v Langworthy*, 416 Mich 630, 651; 331 NW2d 171 (1982); *In re Robinson*, 180 Mich App 454, 462; 447 NW2d 765 (1989). However, the error caused no manifest injustice because the trial court sufficiently defined the three possible states of mind for malice and how murder was to be distinguished from the provocation indicative of voluntary manslaughter. Considering that the only material defense pursued by defendant was lawful self-defense, the instructions as a whole presented no danger that the jury would convict defendant on the basis of an unintentional killing. *People v Delaughter*, 124 Mich App 356; 335 NW2d 37 (1983).

II

Defendant next challenges the trial court's denial of his motion for new trial. We note that, contrary to defendant's statement of this issue, the record does not reflect that the motion was based on the prosecutor's violation of a discovery order, but rather concerned discovery being obtained by defense counsel without an order. The thrust of the motion was that the police withheld evidence of a

prosecution witness' arrest, which may have been used for impeachment purposes. Further, while defendant correctly points out that the trial court considered principles for newly discovered evidence in its decision, we find that the opinion also reflects that the trial court considered pertinent factors for deciding a claim that police suppressed evidence. These factors are whether (1) suppression was deliberate, (2) the evidence was requested, and (3) the defense could have significantly used the evidence. *People v Miller (After Remand)*, 211 Mich App 30, 44-45; 535 NW2d 518 (1995); *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993). The trial court also considered the miscarriage of justice standard for a new trial, which is contained in MCR 6.431(B), and determined that the great weight of the evidence supported the voluntary manslaughter conviction independent of the bartender's testimony.

Based on this record, the trial court did not clearly abuse its discretion in denying a motion for new trial without holding an evidentiary hearing to inquire into the circumstances of the alleged suppression of evidence. *People v Langley*, 187 Mich App 147, 151; 466 NW2d 724 (1991); *People v Jehsen*, 183 Mich App 305, 311; 454 NW2d 250 (1990). Other factors justified the trial court's decision including, in particular, the fact that defendant could not have made significant use of the evidence.

A witness' motivation for testifying is of undeniable relevance to witness credibility. *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990). However, in this case, the bartender had already testified at defendant's first trial that resulted in a mistrial due to a hung jury. The bartender's testimony at the second trial was similar to his testimony at the first trial. The only significant difference was the bartender's testimony at the second trial that he found a revolver behind the Baby Doll Lounge based on information obtained from two customers. If the bartender's testimony was believed, he found the revolver between the dates of the first and second trial. The arrest in question, which was for a drunk driving offense, took place after the first trial but before the bartender gave the revolver to the police.

However, even if the arrest could have been utilized to show the bartender's motive for producing the revolver, this motive, at best, would have discredited his testimony on how he found the revolver. It is impermissible and improper to rely upon the untruthfulness of a witness' testimony as establishing the truthfulness of an inverse factual proposition. *Employment Relations Comm v Cafana Cleaners, Inc*, 73 Mich App 752, 761; 252 NW2d 536 (1977). overruled on other grounds in *Kalamazoo City Ass'n v Kalamazoo Public Schools*, 406 Mich 579, 606 n 14; 281 NW2d 454 (1979). Thus, the discredited testimony would not have permitted a reasonable inference that the revolver was removed from Morgan's body or that the revolver was within Morgan's reach at the time of the shooting.

Because the evidence had no significant impeachment value and the trial court did not clearly abuse its discretion in finding that the great weight of the evidence supported the voluntary manslaughter conviction, independent of the bartender's testimony, we find no basis for vacating its decision to deny a new trial.

III

We next consider defendant's pro se claim that the evidence was insufficient to disprove self-defense. We will not determine the credibility of witnesses when deciding the sufficiency of the evidence. *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993). We conclude that defendant had a duty to retreat, if he could safely do so, before using deadly force because the shooting took place in a business, where both defendant and David Morgan were mere customers. *People v Dabish*, 181 Mich App 469, 476; 450 NW2d 44 (1989). In any event, a person is only entitled to use the amount of force necessary to defend himself when claiming lawful self-defense. *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985). The killing of another 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 Fortson*, 202 Mich App 13, 19-20; 507 NW2d 763 (1993). Regardless of whether defendant should or could have left the Baby Doll Lounge before using deadly force, viewed most favorably to the prosecution, the evidence introduced at trial was sufficient for a rational trier of fact to find that defendant's belief of imminent danger was not honest or was unreasonable at the time that he shot the victim. *Id.*, p 20. Thus, reversal on this ground is not warranted.

IV

With regard to the remaining pro se arguments raised by defendant concerning the trial, we find no basis for relief. Defendant's claim of prosecutorial misconduct was not preserved for appellate review by specific objections and requests for curative instructions. Moreover, there is no exception that warrants relief. The prosecutor did not shift the burden of proof to the defense. Any misleading or prejudicial effect of the prosecutor's remarks could have been cured by a timely objection and request for a curative instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Moreover, limiting our review to the record, defendant has not established the deficient performance and prejudice required to succeed on a claim of ineffective assistance of counsel. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Armendarez*, 188 Mich App 61, 74; 468 NW2d 893 (1991). Further, defendant was not denied a fair trial. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995); *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987).

V

Turning to the sentencing issues raised by defendant pro se, we find that the trial court properly responded to the defense objections to the presentence report raised at sentencing by granting defense counsel's request to delete specific sentences. Although the trial court did not comply with the provision of MCR 6.425(D)(3)(a) that the probation officer delete the challenged information, the error was harmless because the deletions were made. Because the trial court, rather than the probation officer, is charged with the duty of determining the accuracy or relevancy of the information in the presentence report, the probation officer could only have made the changes authorized by the trial court. *People v Norman*, 148 Mich App 273; 384 NW2d 147 (1986). In any event, defendant's failure to object to

the procedure used by the trial court to delete the information constitutes a waiver of this issue. See *People v Strunk*, 172 Mich App 208, 210; 431 NW2d 223 (1988).

The other issues raised by defendant concerning the accuracy of the presentence report and whether certain letters written on his behalf should be attached to the report were not preserved for appellate consideration because they were not raised at sentencing. *People v Sharp*, 192 Mich App 501; 481 NW2d 773 (1992). Moreover, because defendant did not request the presentence report from the trial court, defendant has not preserved his claim that MCR 6.425(B) was violated by the trial court. See *People v Oster (On Resubmission)*, 97 Mich App 122, 140; 294 NW2d 253 (1980); *People v Moore*, 60 Mich App 1, 4; 230 NW2d 281 (1975). Based on our review of the sentencing record, we do not find that defendant was denied his right of allocution. MCR 6.425(D)(c); *People v Westbrook*, 188 Mich App 615; 470 NW2d 495 (1991).

We do not consider defendant's argument regarding the parole guidelines data entry form. Even assuming for purposes of our review that this form was part of the sentencing record, defendant's failure to bring this issue to the attention of the trial court at sentencing precludes appellate review. *Strunk, supra*, p 210.

With regard to defendant's challenge to the guidelines' offense variables, defendant has waived his challenge to the scoring of five points for Offense Variable 13 by not pursuing it in the motion for resentencing. *People v Riley*, 88 Mich App 727, 731; 279 NW2d 303 (1979). Moreover, the trial court properly denied defendant's motion for resentencing based on its determination that the error in scoring Offense Variable 3 did not affect the sentencing decision. *People v Polus*, 197 Mich App 197, 202; 495 NW2d 402 (1992); *People v Dale Williams*, 191 Mich App 269, 279-280; 477 NW2d 877 (1991). However, we remand to the trial court for the ministerial task of correcting the sentencing information report and the presentence report to reflect that Offense Variable 3 was scored at ten points and that the guidelines' minimum sentence range was twelve to sixty months.

With regard to defendant's challenge to the length of his sentence for voluntary manslaughter, defendant is not entitled to resentencing because he has not shown that the sentence is disproportionate or otherwise invalid. *In re Dana Jenkins*, 438 Mich 364, 369 n 3; 475 NW2d 279 (1991); *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). Moreover, limiting our review to the record, defendant was not denied the effective assistance of counsel at sentencing. *Pickens, supra; Armendarez, supra.*

Defendant's convictions and sentences are affirmed, but the case is remanded to the trial court for the limited purpose of correcting the sentencing information report in accordance with this opinion. No further jurisdiction is retained.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Michael D. Schwartz