STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT YOUNG,

Defendant-Appellant.

UNPUBLISHED
January 10, 1997

No. 185261
Wayne County
LC No. 94-013820

Before: Corrigan, P.J., and Sullivan* and T.G. Hicks,** JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of first-degree murder, MCL 750.316; MSA. 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The court sentenced defendant to natural life in prison for the first-degree murder conviction and a consecutive term of five years in prison for the felony-firearm conviction. We affirm.

Defendant first argues the trial court erred by permitting the prosecutor to elicit testimony at trial from which the jury might have inferred that the police department possessed defendant's "mug shot," thus suggesting that defendant had a prior criminal history. The term "mug shot" was never used at trial. Defendant's picture never was referred to as a "mug shot" or admitted into evidence. No manifest injustice occurred. *People v Eaton*, 114 Mich App 330, 337; 319 NW2d 344 (1982). Absent manifest injustice, a party opposing the admission of evidence must object at trial and specify the same ground for objection on appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545-546, 553; 520 NW 2d 123 (1994). Defendant failed to object below to the testimony he now argues is improper. Similarly, defendant did not object to witness McGuffie's statement that she was glad she broke up with defendant because defendant beat her up. Moreover, the answer was unresponsive. Finally, defense counsel, not the prosecutor, elicited the testimony that the van in which defendant arrived had been stolen. Because no manifest injustice will result from our failure to review this issue, we decline to do so.

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

Defendant next argues that his convictions are based upon insufficient evidence. We disagree. Viewing the evidence presented in a light most favorable to the prosecution, we must determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified on other grounds 441 Mich 1201 (1993). To convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of homicide was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). The elements of premeditation and deliberation require that the defendant had an opportunity for a second look. The factfinder may infer the elements from the circumstances surrounding the homicide. *Id.* Premeditation may be established by evidence of: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances surrounding the killing itself; and (4) the defendant's conduct after the killing. *Id.*

On September 17, 1994, defendant, mindful that Samuel Ricardo Haywood would be present, attended a gathering at the residence of Dorothy McGuffie, with whom defendant had been involved romantically. Shortly after his arrival, defendant discharged his firearm into the ground outside of McGuffie's residence and then reloaded the gun. Defendant argued with and struck McGuffie once he was inside the residence. With the aid of a companion, defendant then identified Haywood as the person who had telephoned McGuffie during defendant's previous visit, and as the person who had questioned the gunshot that defendant fired that evening. Gun in hand, defendant stated to his companion, "Man, let's do this," left the residence and shot Haywood in the back as he fled; Haywood died from the wounds. During a telephone conversation with McGuffie the next day, defendant admitted that he "wasn't going to kill him [Haywood] at first but he ran."

Viewing defendant's initial acts of discharging the firearm and reloading it, his statement while he was armed with a loaded firearm – "Let's do this," and his admission after the shooting that he had killed Haywood when Haywood attempted to flee the scene, a rational jury could infer that defendant acted with premeditation and deliberation. The prosecution thus presented sufficient evidence to convict defendant of first-degree murder.

Defendant next argues that the trial court erred in denying his motion for a directed verdict of acquittal. We disagree. In reviewing a decision whether to grant a motion for a directed verdict of acquittal, this Court, viewing the evidence through the time the motion was made in a light most favorable to the prosecution, determines whether a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). For the reasons stated above, the trial court did not err in denying defendant's motion for a directed verdict.

Defendant next argues that the prosecutor acted improperly by shifting the burden of proof and otherwise denigrating the defense. Absent an objection, our review of improper prosecutorial remarks usually is foreclosed because it denies the trial court an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996). We will nevertheless reverse a conviction and sentence where a curative instruction would not have eliminated the prejudicial effect, or where the failure to review the issue will

result in manifest injustice. *Stanaway, supra* at 687; *Ullah, supra* at 679. Manifest injustice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). First, defendant failed to object; this issue thus has not been preserved. Second, because a curative instruction would have eliminated any prejudice, we decline to review this issue.

Defendant next argues that the trial court abused its discretion in admitting hearsay under the excited utterance exception to the hearsay rule. MRE 803(2). We disagree. The decision whether to admit evidence will not be disturbed on appeal absent an abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). An abuse of discretion arises only if an unprejudiced person, considering the facts on which the trial court relied, would say there was no justification or excuse for the ruling made. *Id.* Moreover, the trial court has wide discretion in deciding whether to admit evidence as an excited utterance. *People v Hackney*, 183 Mich App 516, 524; 455 NW2d 358 (1990).

The admissibility of hearsay under the excited utterance exception depends upon two inquiries: (1) whether the declarant had time to contrive or misrepresent, and (2) whether the declarant's emotional state at the time of the declaration permitted fabrication. *People v Edwards*, 206 Mich App 694, 697; 522 NW2d 727 (1994). The statement must relate to the startling event or condition made while the declarant remains under the stress of excitement caused by the event or condition. *Hackney, supra* at 521.

Dorothy McGuffie spoke to an investigating police officer about a startling event, the shooting death of Haywood. The record reflects that McGuffie was under the stress of the event when she made the declarations about Haywood's death. Additionally, only a short time had elapsed from when she was notified of the shooting and the officers interviewed her. Her excitement and the brief span of time did not permit fabrication. *Edwards, supra* at 697; *Hackney, supra* at 521. An unprejudiced person, considering the facts upon which the trial court relied, could not conclude that no justification or excuse existed for the admission of this statement as an excited utterance. Accordingly, the trial court did not abuse its discretion in admitting McGuffie's statement.

Defendant next argues that the trial court, in a preliminary instruction, improperly foreclosed the jury from reviewing trial testimony during its deliberations. Defendant failed to object to the court's preliminary instruction regarding the availability of the trial transcript for the jury's review. Absent manifest injustice, instructional error is not properly preserved for appeal absent a timely objection. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Because this issue is not properly preserved for our review and because our refusal to review this issue will not result in manifest injustice, we decline to review the claim.

Defendant next argues that the trial court erred in declining to instruct the jury on the crimes of manslaughter. We disagree. A court should not instruct the jury on an offense on which the parties did not present evidence at trial. *People v Beach*, 429 Mich 450, 480; 418 NW2d 861 (1988). On this record, the evidence did not support convictions for the crimes of voluntary or involuntary manslaughter.

We initially note that defendant denied being the shooter and claimed the prosecution identified the wrong man. Defendant could have argued that he acted in the heat of passion or that he acted without malice or intent. Defendant did not so argue. We decline to permit defendant to assert on appeal that he was entitled to instructions on a defense that he did not declare at trial. Defendant "cannot now seek reversal on the basis of the trial court's refusal to instruct the jury on an offense inconsistent with the evidence and defendant's theory of the case." *People v Heflin*, 434 Mich 482, 499; 456 NW2d 10 (1990).

The elements of the crime of voluntary manslaughter are: (1) defendant killed in the heat of passion, (2) that passion was caused by adequate provocation, and (3) enough time had not elapsed between the provocation and the killing to permit a reasonable person to control his passions. *People v Pouncey*, 437 Mich 382, 387-388; 471 NW2d 346 (1991). None of the elements for voluntary manslaughter are present on this record. The evidence did not establish that defendant killed in the heat of passion. Although defendant testified that he was not jealous of Haywood's relationship with McGuffie, defendant now argues that he acted in a jealous rage. Defendant's own testimony eliminated a showing of the heat of passion element. Defendant's ability to reason was not impaired by jealousy, preventing him from acting with deliberation. *Id.* Moreover, in determining whether provocation was adequate to support a conviction for voluntary manslaughter, the trier of fact must determine that the victim's act provoked emotions in the defendant such that a reasonable person would lose control. *Id.* at 389. Defendant testified that he was unsure whether he even spoke with Haywood on the night in question. He therefore cannot argue successfully that Haywood's actions provoked a response that led to the shooting. Accordingly, the parties presented insufficient evidence to support a jury instruction on the crime of voluntary manslaughter.

Involuntary manslaughter is the killing of another without malice or intent but: (1) while doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, (2) while negligently doing some act lawful in itself, or (3) by the negligent omission to perform a legal duty. *People v Datema*, 448 Mich 585, 595-596; 533 NW2d 272 (1995). Defendant argues that the evidence established that Haywood may have been running, leaning, tripping or slipping when defendant discharged the firearm, thus negating any inference that he aimed the weapon at Haywood and implying that he accidentally inflicted the fatal wound. The record reflects insufficient evidence of Haywood's condition or posture when the bullet entered his body to support defendant's contention that he unintentionally discharged the firearm in Haywood's direction. Consequently, an instruction on involuntary manslaughter would have been inappropriate. A review of the jury instructions in their entirety reflects that the issues were fairly presented and protected defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

Finally, defendant argues the cumulative effect of the errors at trial denied him a fair trial. Because defendant's allegations of error are without merit, we reject this claim. *People v Morris*, 139 Mich App 550, 563; 362 NW2d 830 (1984).

Affirmed.

/s/ Maura D. Corrigan
/s/ Joseph B. Sullivan
/s/ Timothy G. Hicks