

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN LEE DAVIS,

Defendant-Appellant.

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UNPUBLISHED

January 17, 1997

No. 171435

Wayne Circuit Court

LC No. 93-000851

Before: Smolenski, P.J., and Michael J. Kelly and J.R. Weber,\* JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions 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 on the voluntary manslaughter conviction, which is to follow a two-year mandatory term on the felony-firearm conviction. We affirm.

Defendant's first issue on appeal is that the trial court improperly denied his motion for a directed verdict as to the second-degree murder charge. We disagree. In determining whether the prosecution has introduced sufficient evidence to avoid a directed verdict, this Court must consider all of the evidence presented up to the time the motion is made, view that evidence in a light most favorable to the prosecution, and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Davis*, 216 Mich App 47, 52-53; 549 NW2d 1 (1996).

In a prosecution for second-degree murder, the prosecution must prove beyond a reasonable doubt that: (1) defendant caused the death of the victim, and (2) the killing was done with malice and without justification. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993); *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991). Malice is defined as the "intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm with

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

knowledge that death or great bodily harm will be the probable result. Malice may be inferred from the facts and circumstances of the killing.” *Kemp, supra*.

Defendant argues that sufficient evidence was not presented as to the charged offense of second-degree murder because he acted in lawful self-defense. In determining whether the defendant acted in lawful self-defense, the prosecution must prove beyond a reasonable doubt that at the time that he used deadly force, the defendant did not honestly and reasonably believe that he was in danger of being killed or seriously injured and that the force that he used was not immediately necessary. *People v Truong (After Remand)*, 218 Mich App 325, 337-338; \_\_\_ NW2d \_\_\_ (1996); see also CJI2d 7.15; CJI2d 7.20. In determining whether the defendant acted in lawful defense of his son, the prosecution must prove beyond a reasonable doubt that the defendant did not honestly and reasonably believe that his son was in danger of being killed or seriously injured and that the force that he used was not immediately necessary. CJI2d 7.21.

We conclude that the prosecution presented sufficient evidence of second-degree murder. Defendant admitted that he caused the death of the victim. Defendant went back into his home after seeing the victim in his car and grabbed a gun. Defendant then withdrew the gun from his pocket and fired at the victim as the victim exited the automobile. From these facts the element of malice may be inferred. *Kemp, supra*.

We further hold that defendant was not justified in using deadly force to protect himself against the theft of his automobile because defendant had no reason to believe that the victim would use deadly force against him. The victim did not brandish a weapon or threaten defendant in any way which would cause him to be in fear of immediate death or great bodily harm. Rather, the victim’s only words to defendant were “this ain’t none of your car” and “let me see your papers”. Neither of these comments are sufficient to invoke the alarm necessary for responding with deadly force.

Additionally, defendant was not justified in using deadly force to defend his son because he had no reason to believe that the victim would use deadly force against his son. Defendant’s son was inside the house while the entire incident occurred outside and across the street. The victim did not threaten bodily harm to defendant’s son, nor did the victim possess a weapon. There is no evidence that the victim even knew that defendant had a son or that the son was inside the house. A rational trier of fact could find beyond a reasonable doubt, based upon these facts, that defendant intended to cause death or serious bodily harm to the victim without lawful justification.

Defendant next argues that insufficient evidence was presented to sustain his convictions for voluntary manslaughter and felony-firearm. We disagree. In determining whether sufficient evidence has been presented to sustain a conviction, the Court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 516, n 6; 489 NW2d 748, amended 441 Mich 1201 (1992).

Voluntary manslaughter requires that: (1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during

which a reasonable person could control his passions. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991).

Viewing all of the evidence in a light most favorable to the prosecution, we find that the prosecution presented sufficient evidence of a killing done in the heat of passion, caused by adequate provocation, without a sufficient lapse of time during which a reasonable person could control their passions. Defendant acted in the heat of passion. Defendant was involved in prior incidents which occurred with the drug users who lived next door. The victim's acts of exiting the vehicle and coming towards defendant, following a brief verbal confrontation, were sufficient provocation to cause defendant to act out of passion rather than reason. In addition, there was no reasonable lapse of time during which defendant could control his passions.

A conviction under the felony-firearm statute requires proof that the defendant carried or possessed a firearm during the commission or attempted commission of a felony. MCL 750.227b; MSA 28.424(2); *People v Williams*, 212 Mich App 607, 608; 538 NW2d 89 (1995). Possession may be actual or constructive and may be proved by circumstantial evidence. *Williams, supra* at 609.

It is undisputed that defendant went back into his house after seeing the victim in his car and grabbed a gun. Defendant carried the gun in his pocket as he approached the automobile and shot the victim. A rational trier of fact could find beyond a reasonable doubt that defendant possessed a firearm during the commission of a felony.

Defendant did not act in lawful self-defense in regards to both the voluntary manslaughter and felony-firearm convictions based upon the same facts as outlined above with regard to the second-degree murder charge.

A rational trier of fact could find beyond a reasonable doubt, based upon these facts, that defendant caused the victim's death in the heat of passion, with a firearm, with adequate provocation, and without a reasonable lapse of time during which defendant could control his passions. Therefore, there was sufficient evidence to support defendant's convictions.

Defendant also argues that he was denied a fair and impartial trial as a result of prosecutorial misconduct. We disagree. We review this issue on a case by case analysis to determine whether the defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

Defendant argues that the prosecutor, during her opening statement, violated his right against self-incrimination by referring to what defendant's testimony would show. However, defendant actually testified on his own behalf. Because defendant did not elect to rely on the presumption of innocence but rather testified in his own behalf, his Fifth Amendment right not to testify was not impinged upon. *People v Fields*, 450 Mich 94, 109; 538 NW2d 356 (1995).

Defendant also argues that the prosecutor's rude and improper remarks deprived him of a fair trial. A prosecutor must refrain from denigrating a defendant with intemperate and prejudicial remarks. *People v Bahoda*, 448 Mich 261, 283, 288; 531 NW2d 659 (1995). The complained of comments

did not cause the court to be persuaded either way in its decision on the merits. A trial court possesses an understanding of the law which allows it to ignore such errors and to decide a case based solely on the evidence properly admitted at trial. *People v Smith*, 211 Mich App 233, 237; 535 NW2d 248 (1995).

Defendant also claims that the prosecutor's mistake as to whose car the victim was in deprived him of a fair and impartial trial. However, defendant failed to object at trial. Appellate review of prosecutorial misconduct is generally precluded absent an objection unless the failure to consider the issue would result in a miscarriage of justice. *McElhaney, supra*. In this case, our failure to consider this issue will not result in a miscarriage of justice. We hold, therefore, that defendant was not denied a fair and impartial trial based upon prosecutorial misconduct.

Defendant also argues that his sentence of five to fifteen years was disproportionate. We disagree. Defendant's five year minimum sentence was within the guidelines minimum sentence range of one to five years. Therefore, it is presumed proportionate unless unusual circumstances exist. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990).

Although defense counsel argued that defendant's background and lack of criminal history constituted unusual circumstances, this Court has held that a defendant's age and lack of prior criminal history are not unusual circumstances which would warrant a finding that the trial court abused its discretion in imposing a sentence within the guidelines. *People v Piotrowski*, 211 Mich App 527, 533; 536 NW2d 293 (1995); *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994); *People v McKernan*, 185 Mich App 780, 782; 462 NW2d 843 (1990). Because defendant has failed to overcome the presumptive proportionality of his sentence, we conclude that the court did not abuse its sentencing discretion.

Defendant's last issue on appeal is that he was denied due process by the court's consideration of the cognate offense of manslaughter. We disagree. Whether defendant was denied due process because of failure to notify him of the charges against him is a question of law and will be reviewed de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

A trial court has no authority to convict a defendant of an offense not specifically charged unless the defendant has had adequate notice. *People v Adams*, 202 Mich App 385, 387; 509 NW2d 530 (1993). The notice is adequate if the latter charge is a lesser included offense of the original charge. *Id.*

Manslaughter is a cognate lesser included offense of murder. *Pouncey, supra* at 388. The information provided defendant with adequate notice of the possibility that he would be called upon to defend against the crime of voluntary manslaughter as a cognate lesser offense of second-degree murder. Voluntary manslaughter is of the same nature as second-degree murder. Both are homicides and share the element of being intentional killings. *Id.* The fact that voluntary manslaughter has an element not included within the greater offense of second-degree murder does not preclude it from being included in the greater. *People v Ora Jones*, 395 Mich 379, 388; 236 NW2d 461 (1975). We hold, therefore, that defendant was not denied due process because he had adequate notice of the charges pending against him.

Affirmed.

/s/ Michael R. Smolenski

/s/ Michael J. Kelly

/s/ John R. Weber