

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL SYLVESTER PUROLL,

Defendant-Appellant.

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UNPUBLISHED

January 31, 1997

No. 183596

Charlevoix Circuit Court

LC No. 94-356-08-FC

Before: Reilly, P.J. and MacKenzie, and B.K. Zahra,\* JJ.

PER CURIAM.

Defendant was convicted 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). Defendant was sentenced to two years' imprisonment for the felony-firearm conviction, and to a consecutive term of twenty-five to fifty years' imprisonment for the murder conviction. He appeals as of right. We affirm.

Defendant admits shooting and killing the victim. The essential dispute at trial was whether defendant's actions were justified or excused, or whether his culpability should in any way be mitigated. The defense argued that defendant was the victim of a homosexual rape, and that he killed in self-defense, in a temporarily incapacitated state, and as the result of being provoked. The jury rejected each argument.

I

On appeal, defendant first argues that he was denied a fair trial when the court instructed the jurors that if they agreed upon the elements of second-degree murder, they could stop their deliberations and return a verdict. More specifically, defendant contends that because the crimes of second-degree murder and voluntary manslaughter share the same basic elements, with the exception of the additional element of provocation, the order of deliberation instruction given by the court essentially precluded the jury from considering the evidence of provocation once the elements of second-degree

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

murder were satisfied. In the absence of an objection at trial, defendant now asserts that manifest injustice occurred when the court effectively removed the possible verdict of voluntary manslaughter from the jury's consideration. We disagree.

Jury instructions are reviewed in their entirety, balancing the general tenor of the instructions as a whole against the potentially misleading effect of a single isolated sentence, to determine if reversal is required. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995); *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). Reversal is not required where the instructions, even if imperfect, sufficiently protected the defendant's rights and fairly presented the issues to be tried. *Moldenhauer, supra*.

At trial, after instructing on the elements of second-degree murder, felony-firearm, and voluntary manslaughter, and the doctrines of self-defense and legal insanity, the judge stated the following:

When you discuss the case, you may consider the crime of second degree murder. You must do that.

If you all agree that the Defendant is guilty of that crime, you may stop your discussions and return your verdict.

If you believe that the Defendant is not guilty of second degree murder or if you cannot agree by [sic] that crime, you should consider the less serious crime of voluntary manslaughter.

You decide how long to spend on second degree murder before discussing voluntary manslaughter. You can go back to second degree murder after discussing voluntary manslaughter if you want to.

Aside from the obvious fact that the aforementioned instruction does not preclude the consideration of voluntary manslaughter, in order to arrive at a unanimous decision with respect to second-degree murder, the jury was in fact required to consider any or all potential mitigating factors. In regard to the elements of second-degree murder, the jury was instructed that it must find the following beyond a reasonable doubt:

First, that the Defendant caused the death of [the victim]. That is, that [the victim] died as a result of gun shot wounds to the head.

Second, that the Defendant had one of these three states of mind. He intended to kill or he intended to do great bodily harm to [the victim] or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm was the likely result of his actions.

Third, that the killing was *not justified, excused or done under circumstances that reduce it to a lesser crime*.

Therefore, the instructions properly charged the jury that to find defendant guilty of second-degree murder, it must consider whether any of the evidence presented at trial would *justify, excuse, or reduce* the principal charge to a lesser crime. The verdict indicates that the jury rejected that possibility. We conclude that no miscarriage of justice was created by the court's instruction to the jury. *People v Kelly*, 423 Mich 261, 271-272; 378 NW2d 365 (1985).

## II

Defendant next argues that the court erred in admitting a photograph of the victim and his dog (taken before the victim's death), claiming that the photo's probative value was substantially outweighed by unfair prejudice. Initially, we note that defendant did not object to the photo's admission on this basis<sup>1</sup>, and therefore, the issue is not preserved for appellate review absent manifest injustice. *People v Canter*, 197 Mich App 550, 563; 496 NW2d 3 (1992); *People v Asevaedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996).

Although defendant now argues that the photograph was unduly prejudicial, we are not persuaded that the admission of one photo of the victim and his dog, taken before the victim's death, was so prejudicial that it resulted in manifest injustice. The error, if any, was harmless.

## III

Last, defendant argues that his sentence of twenty-five to fifty years' imprisonment for the murder is disproportionately severe considering the circumstances under which he killed the victim. We disagree.

Defendant's sentence fell within the guidelines range, and is thus presumed to be neither excessively severe nor unfairly disproportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). In arguing that his sentence violates the principle of proportionality, defendant merely attempts to relitigate issues of potential mitigation that the jury rejected in rendering its verdict of second-degree murder. In our view, defendant has failed to overcome the presumption that his sentence was proportionate. The trial court did not abuse its discretion by imposing the twenty-five to fifty year sentence for the murder committed by defendant.

Affirmed.

/s/ Maureen Pulte Reilly  
/s/ Barbara B. MacKenzie  
/s/ Brian K. Zahra

<sup>1</sup> Defense counsel objected to the admission of the photo on the basis that it was "a surprise" "a last minute attempt to get something in that isn't proper" and that it was not furnished to the defense as required by the pretrial.