STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEXANDER NEMETH, III,

Defendant-Appellant.

UNPUBLISHED
October 10, 1997

No. 195153
Recorder's Court
LC No. 91-004750

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ALEXANDER NEMETH, III,

Defendant-Appellee.

No. 197415
Recorder's Court
LC No. 91-004750

Before: Bandstra, P.J., and Murphy and Young, JJ.

PER CURIAM.

In these consolidated cases, defendant appeals by leave granted from his bench trial convictions for 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). He was originally sentenced to fifteen to thirty years in prison for the second-degree murder conviction, and two years for the felony-firearm conviction, the sentences to run consecutively. The prosecutor appeals as of right from the trial court's subsequent judgment resentencing defendant to five to fifteen years for the second-degree murder conviction, and two years for the felony-firearm conviction, the sentences to run consecutively. We affirm defendant's convictions, reverse the trial court's order granting resentencing, vacate the sentence of five to fifteen years for the second-degree murder conviction, and reinstate defendant's original

sentences of fifteen to thirty years for the second-degree murder conviction and two years for the felony-firearm conviction.

To facilitate our analysis, we begin by addressing defendant's second and third arguments, leaving his first argument for discussion together with the prosecutor's sole argument. Defendant argues that he was deprived of his right to a fair and impartial trial because of judicial bias. This argument stems from an incident that occurred in chambers when attorney Jacqueline George (who was not an attorney of record in this case) told the trial judge that the brother of a witness in the case wished to assist the judge in his election campaign. Defendant failed to move for disqualification of the trial judge below under the procedure provided in MCR 2.003(C)(1). Therefore, this issue is not preserved for appellate review absent manifest injustice. *People v Sharbnow*, 174 Mich App 94, 99; 435 NW2d 772 (1989). See, also, *Stockler v Rose*, 174 Mich App 14, 23; 436 NW2d 70 (1989). Judicial misconduct is grounds for reversal only if the defendant has been deprived of his right to a fair and impartial trial. *Sharbnow*, *supra*. Here, defendant has made no showing of bias or prejudice on the part of the trial judge sufficient to overcome the presumption of judicial impartiality. *In re Forfeiture of $1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992). The trial judge's comments on the record disclosing this incident make clear that he did not allow this incident to affect his decision in the case and that he was not even aware whether the person offering assistance was related to a prosecution witness or to a defense witness. The judge further indicated that he asked attorney George to leave as soon as it was brought out that the person offering assistance was the brother of a witness. We are satisfied from the judge's comments on the record that the incident did not affect his decision and that defendant was not denied a fair and impartial trial. We therefore see no need to remand for an evidentiary hearing on this issue.

Defendant argues that the trial judge failed to find defendant guilty beyond a reasonable doubt of all of the elements of the charged offense. We find no merit in defendant's argument because defendant confuses the trial judge's role in ruling on a motion for directed verdict and his role in this bench trial as the ultimate trier of fact. The standard to be used by a trial court in ruling on a motion for directed verdict is the same standard that this Court uses in reviewing such a ruling: "the court must consider the evidence presented by the prosecutor, up to the time the motion was made, in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt." *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). When denying defendant's motion, the trial judge explained that he was not finding as the trier of fact that each element had been proven beyond a reasonable doubt, but rather that he was viewing the evidence in the light most favorable to the people and determining whether a rational trier of fact could find that the essential elements of the offense had been proven. Our review of the judge's comments reveal that he applied the correct standard when ruling on defendant's motion. Defendant misconstrues the judge's comments as indicating that the judge, as the trier of fact, was not finding defendant guilty of each element beyond a reasonable doubt.

Defendant further contends that the trial court should have granted his motion because the evidence established that adequate and reasonable provocation for his actions existed, thus requiring a conviction for manslaughter rather than second-degree murder. We disagree.

> To establish second-degree murder, the prosecution was required to prove that defendant caused the death of the victim and that the killing was done with malice and without justification or excuse. [Citation omitted.] Malice is 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 knowledge that such is the probable result. Malice may be inferred from the facts and circumstances of the killing. . . . A homicide may be reduced to voluntary manslaughter if the circumstances surrounding the killing show that malice was negated by adequate and reasonable provocation and the homicide was committed in the heat of passion. [*People v Harris*, 190 Mich App 652, 659, 661; 476 NW2d 767 (1991).]

Here, a rational trier of fact could infer the requisite state of mind from defendant's use of the gun in shooting decedent three times. *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995). Moreover, we do not believe that malice was negated by adequate and reasonable provocation. Defendant was injured several minutes before he fired the gun, and he then fired the gun a second and third time at the decedent as he laid on the ground at least seven seconds after the first shot. A sufficient "cooling-off" period existed to make reasonable a finding of malice. See, generally, *People v Pouncey*, 437 Mich 382, 385, 392; 471 NW2d 346 (1991) (sufficient "cooling-off" period existed where the defendant went into his house following a verbal exchange and returned thirty seconds later with a shotgun); *People v Wofford*, 196 Mich App 275, 280; 492 NW2d 747 (1992).

We now address the sentencing issues raised by both parties. The prosecutor argues that the trial court did not have authority to order that defendant be resentenced. We agree. Whether the trial court had such authority is a question of law, which we review de novo. *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996). The trial court indicated that the reason for its decision to resentence defendant was that the original sentence was disproportionate. We have recently held that a trial court may not grant resentencing on that basis. *People v Wybrecht*, 222 Mich App 160, 168; 564 NW2d 903 (1997). "[O]nly appellate courts are authorized to invalidate sentences for lack of proportionality." *Id*. The trial court did not have authority to grant resentencing.

Defendant's first argument is that his original sentence of fifteen to thirty years for second-degree murder violated the principle of proportionality. We disagree. A sentence constitutes "an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Defendant's minimum sentence fell within the guidelines range of 48 to 180 months. The sentence is therefore presumed to be proportionate. *Wybrecht, supra* at 175. Defendant has failed to overcome this presumption. Defendant, the owner of Elmer's Bar, fired three shots at the decedent, a patron of the bar. Although defendant had been injured during a commotion, testimony at trial (which defendant disputed) indicated that the injury occurred five to ten minutes before the shooting. It also appears from the testimony of several witnesses (excluding defendant) that any danger posed to defendant by the decedent had passed. After the decedent attempted to throw a chair at defendant, who was behind the bar, the chair landed on the bar and another customer began to escort the decedent toward the front door to leave. Defendant and decedent then resumed arguing. Defendant fired the first shot while decedent, who was

apparently unarmed, was at least six feet away. At least seven seconds later, defendant leaned over the bar and fired two more shots into decedent's body while he was lying helplessly on the ground. Given these facts, we do not believe that the original sentence of fifteen to thirty years in prison is disproportionate to the seriousness of the circumstances surrounding the offense and the offender.

Defendant's convictions are affirmed. The trial court's order granting resentencing is reversed, and defendant's sentence of five to fifteen years in prison for the second-degree murder conviction is vacated. Defendant's original sentences of fifteen to thirty years in prison for the second-degree murder conviction and two years for the felony-firearm conviction are reinstated.

/s/ Richard A. Bandstra
/s/ William B. Murphy
/s/ Robert P. Young