STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES CARL ANDERSON,

Defendant-Appellant.

UNPUBLISHED
February 3, 1998

No. 195911
Recorder's Court
LC No. 95-012333

Before: Markman, P.J., and McDonald and Cavanagh, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, and was sentenced to twenty-five to fifty years' imprisonment. He appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in denying his motion for a directed verdict on the charge of first-degree felony murder, MCL 750.316; MSA 28.548, with the underlying felony of larceny. Although defendant was acquitted of that charge, he argues that it was error to submit the charge to the jury because of the possibility of a compromise verdict. We disagree.

A directed verdict of acquittal of a charge is appropriate only if, considering all the evidence in the light most favorable to the prosecution, no rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). The court may not determine the weight of the evidence or the credibility of the witnesses. *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993).

Larceny is the taking and carrying away of the property of another, done with felonious intent and without the owner's consent. *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996). Because the intent to commit the enumerated felony of larceny is an element of the crime of felony murder, the prosecutor was required to produce some evidence with regard to this element. See

People v Brannon, 194 Mich App 121, 125; 486 NW2d 83 (1992). The statute does not require that the murder be contemporaneous with the enumerated felony, only that defendant intended to commit the underlying felony at the time the murder occurred. The felony-murder doctrine will not apply if the intent to steal property of the victim was not formed until after the homicide. See *id*.

Viewing the evidence in a light most favorable to the prosecution, we find that there was sufficient evidence to submit the charge of felony murder to the jury. There was evidence that, before the beating, defendant saw that the decedent had some marijuana and three leather coats. During the beating, defendant took the marijuana from the decedent and later smoked it in the house with his friends. In addition, there was evidence that, after the beating, defendant took the leather coats into his house. A reasonable jury could infer that defendant intended to take the marijuana and the coats when he and his companions attacked the decedent. See *Jolly*, *supra*. The trial court did not err in denying defendant's motion for a directed verdict on the charge of felony murder with the underlying felony of larceny.

II

Defendant next argues that the acoustic conditions of the courtroom denied him a fair and impartial trial. The conditions of a courtroom may affect a defendant's right to a fair trial. See *People v Vaughn*, 128 Mich App 270; 340 NW2d 310 (1983). However, defendant has failed to establish that noise from below the courtroom interrupted the proceedings so as to deprive him of a fair trial. There was no indication that the jury did not hear all of the evidence, and defendant neither complained nor moved for mistrial below. See *People v Duff*, 165 Mich App 530, 532; 419 NW2d 600 (1987); cf. *Vaughn*, *supra*.

III

Defendant next claims that the trial court's conduct and comments denied him a fair and impartial trial. However, defendant did not object to the court's comments below, and appellate review is therefore precluded absent manifest injustice. *People v Weatherford*, 193 Mich App 115, 121; 483 NW2d 924 (1992).

If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to determine whether the trial judge's comments or conduct pierced the veil of judicial impartiality is whether the comments or conduct were of such a nature as to unduly influence the jury and therefore deprive the defendant of his right to a fair and impartial trial. *People v Romano*, 181 Mich App 204, 220; 448 NW2d 795 (1989).

Having examined the comments cited by defendant in context, we find no evidence of manifest injustice. Contrary to defendant's assertion, the record does not reflect either that the court had an alliance with the prosecution or that it criticized defense counsel excessively. See *People v Anderson*, 166 Mich App 455, 461-462; 421 NW2d 200 (1988). The majority of the challenged remarks constituted a legitimate exercise of the trial court's responsibility to control the proceedings. See MCR

611(a). The remaining comments were not of such a nature as to unduly influence the jury and thereby deprive defendant of a fair trial.

IV

In his next issue, defendant argues that reversal is required because of flaws in the trial court's instructions. Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995).

A

Defendant contends that the trial court erred in refusing to instruct the jury on the lesser included offense of involuntary manslaughter, MCL 750.321; MSA 28.553. Involuntary manslaughter is a cognate lesser included offense of murder. *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996). The trial court is required to give an instruction for a cognate lesser included offense if: (1) the principal offense and the lesser offense are of the same class or category, and (2) the evidence adduced at trial would support a conviction of the lesser offense. *People v Hendricks*, 446 Mich 435, 444; 521 NW2d 546 (1994). "There must be more than a modicum of evidence; there must be sufficient evidence that the defendant could be convicted of the lesser offense." *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991).

The crime of involuntary manslaughter has been defined at common law[1] as

> the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty. [*People v Clark*, 453 Mich 572, 577-578; 556 NW2d 820 (1996).]

Where the evidence suggests only that the criminal act naturally tends to cause death or great bodily harm, an instruction on the lesser included offense of involuntary manslaughter is simply not justified. *People v Beach*, 429 Mich 450, 478; 418 NW2d 861 (1988). The evidence showed that defendant and his cohorts repeatedly punched, kicked, and stomped the decedent's face and chest, set him on fire, dragged him behind a vacant house, and abandoned him there. Clearly defendant's conduct was such that the natural tendency was to cause death or great bodily harm. Accordingly, an instruction on involuntary manslaughter was not warranted.

B

Defendant also maintains that the trial court erred in declining to give a requested instruction on assault with intent to do great bodily harm less than murder, MCL 750.84; MSA MSA 28.279. The offense of assault with intent to do great bodily harm less than murder is a cognate lesser offense of first-degree murder. *People v Williams*, 143 Mich App 574, 581; 374 NW2d 158 (1985). The elements of the crime of assault with intent to do great bodily harm less than murder are (1) an attempt or offer

with force or violence to do corporeal hurt to another (an assault), (2) coupled with an intent to do great bodily harm less than murder. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995).

In this case, defense counsel stipulated that the decedent died as the result of a beating. Evidence was presented that defendant began and participated throughout the beating of the decedent. There was no evidence that any independent intervening cause was responsible for the death of the decedent. Rather, defendant simply theorizes that the decedent's death could have been caused by some unknown force after he and his friends left the decedent. Because there is no evidentiary basis for separating the death from the assault by defendant and his companions, the trial court properly refused to give the instruction.[2] See *People v Bailey*, 451 Mich 657, 660-661, 671, 680-682; 549 NW2d 325 (1996); *Pouncey*, *supra*.

IV

Defendant also argues that the prosecutor's misconduct denied him a fair trial. Because defendant failed to object to the remarks he cites below, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. See *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely curative instruction. *People v Rivera*, 216 Mich App 648, 651; 550 NW2d 593 (1996).

We have examined the allegedly improper comments and find them to be nothing more than reasonable arguments and inferences on the evidence presented at trial, which is proper. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Moreover, to the extent that any of the comments were improper, a curative instruction could have eliminated any prejudicial effect, had one been requested. Accordingly, we find no miscarriage of justice.

V

Defendant also argues that his twenty-five year minimum sentence is disproportionate to the offense and the offender. We disagree. Defendant's sentences are within the guidelines and are therefore presumptively proportionate. See *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987).

The only "unusual" circumstance that defendant presented to the sentencing court for consideration was that he had no prior record; accordingly, his remaining arguments have been waived. See *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). However, a defendant's lack of criminal history is not an unusual circumstance that overcomes the presumption of proportionality. *People v Piotrowski*, 211 Mich App 527, 533; 536 NW2d 293 (1995).

Defendant has not presented the sentencing court and this Court with any mitigating factors sufficient to overcome the presumption of proportionality. See *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994). We conclude that defendant's sentences are proportionate to the

seriousness of the circumstances surrounding the offense and the offender. See *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

VI

Defendant's final claim is that the cumulative effect of errors denied him a fair trial and rendered the resulting convictions unreliable. Because we have concluded that no errors occurred at trial, we reject the argument that the cumulative effect of the errors requires reversal. Cf. *People v Maleski*, 220 Mich App 518, 525; 560 NW2d 71 (1996).

Affirmed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Mark J. Cavanagh

[1] MCL 750.321; MSA 28.553 provides:

> Any person who shall commit the crime of manslaughter shall be guilty of a felony punishable by imprisonment in the state prison, not more than 15 years or by fine of not more than 7,500 dollars, or both, at the discretion of the court.

[2] Moreover, any error in this regard would not require reversal. The jury was instructed with regard to second-degree murder and voluntary manslaughter, and found defendant guilty of second-degree murder. The jury's rejection of the intermediate charge of voluntary manslaughter in favor of second-degree murder indicated a likelihood that the jury would not have found defendant guilty of the lesser offense of assault with intent to do great bodily harm less than murder. *Beach*, *supra* at 491; *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990).