

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS GOVER,

Defendant-Appellant.

UNPUBLISHED

August 17, 1999

No. 203768

Wayne Circuit Court

LC No. 94-013688

Before: Sawyer, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, intentional discharge of a firearm at a dwelling, MCL 750.234b; MSA 28.431(2); and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to sixty to one hundred years in prison for the murder conviction, twenty to sixty years for the assault convictions, two to four years for the discharge of a firearm conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant now appeals as of right, raising a myriad of issues. We affirm.

The present case stems from a fatal drive-by shooting in Detroit, motivated by revenge against a person responsible for the robbery of one of the participants in the shooting on the previous day. Defendant and three other individuals allegedly drove to the neighborhood where the purported robber resided and, on finding that he was not there, opened fire with several weapons at the front of the house. The consequences were tragic – a nine-year-old girl, an innocent bystander, was killed and two others were wounded.

I

Defendant first claims on appeal that the trial court erred in refusing defendant's request to instruct the jury on the cognate lesser included offenses of involuntary manslaughter and reckless discharge of a firearm.¹ We disagree.

The test to determine whether an instruction on a cognate lesser included offense must be given is as follows:

The record must be examined, and if there is evidence which would support a conviction of the cognate lesser offense, then the trial judge, if requested, must instruct on it. *People v Van Wyck*, 402 Mich 266, 270; 262 NW2d 638 (1978); *People v Van Wyck (On Remand)*, 83 Mich App 581; 269 NW2d 233 (1978). Under this standard, there must be more than a modicum of evidence; there must be sufficient evidence that the defendant could be convicted of the lesser offense. Only then does the judge's failure to instruct on the lesser included offense constitute error. 402 Mich 270. If the evidence presented could not support a conviction of the lesser offense, then the judge should not give the requested instruction. See *People v Beach*, 429 Mich 450, 480; 418 NW2d 861 (1988). [*People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991).]

See also *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997); *People v Hendricks*, 446 Mich 435, 444; 521 NW2d 546 (1994); *People v Flowers*, 222 Mich App 732, 734; 565 NW2d 12 (1997).

In *People v Datema*, 448 Mich 585, 606; 533 NW2d 272 (1995), the Michigan Supreme Court defined involuntary manslaughter as follows:

An unlawful act committed with the intent to injure or in a grossly negligent manner that proximately causes death is involuntary manslaughter. In the former instance the defendant has consciously intended to injure in wanton disregard of the safety of others: conduct which if it causes death is (at least) involuntary manslaughter. In the latter instance, criminal liability is imposed because, although the defendant's acts are not inherently wrong, the defendant has acted or failed to act with awareness of the risk to safety and in wilful disregard of the safety of others.

* * *

Unlike murder, involuntary manslaughter contemplates an unintended result and thus requires something less than an intent to do great bodily harm, an intent to kill, or the wanton and wilful disregard of its natural consequences. An intent to injure or gross negligence strikes the appropriate balance in this crime, which by definition criminalizes an unintended result, i.e. death.

See also *People v McCoy*, 223 Mich App 500, 502; 566 NW2d 667 (1997).

The elements of careless, reckless, or negligent use of a firearm with injury or death resulting, MCL 752.861; MSA 28.436(21), are set forth in CJI2d 11.20: (1) someone was injured or killed; (2) the injury was caused by the discharge of a gun; (3) the defendant discharged the gun or the gun was under the control of defendant, who caused or allowed the gun to be discharged; (4) the discharge was

the result of the defendant's carelessness, recklessness, or negligence; and (5) the shooting was not the result of the defendant's willfulness or wantonness.

This Court's decision in the factually analogous case of *People v Todd*, 186 Mich App 625; 465 NW2d 380 (1990), is relevant to the issue at hand. In *Todd*, the defendant on appeal alleged error in the trial court's failure to instruct on the lesser offense of involuntary manslaughter. Notwithstanding the fact that the issue of instructional error had not been preserved, this Court nevertheless concluded, *id.* at 631-632, that an instruction regarding involuntary manslaughter was inappropriate, noting:

The only form of involuntary manslaughter that was arguably applicable here was the one that defines the offense as an unintentional killing of another without malice in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm. . . . Defendant admitted that he repeatedly fired the shotgun from a moving car in the direction of the people in the front yard of the house. We believe that this was an unlawful act that naturally tended to cause death or great bodily harm. Therefore, an involuntary manslaughter instruction was inappropriate. This conclusion is not affected by defendant's claims that he did not aim at anyone and that he did not intend to kill anyone, or by one witness' ambiguous testimony that defendant may have been shooting high. It was the act of shooting the gun from a moving car toward a group of people which precluded an involuntary manslaughter instruction. . . . Since the instruction was not appropriate, there would have been no error even if the instruction had been requested and refused. We also disagree that an instruction regarding reckless discharge of a firearm was appropriate here.

In the instant case, no evidence was adduced at trial supporting either a conviction of involuntary manslaughter or careless and reckless discharge of a firearm resulting in death. Defendant denied any involvement in the offenses, testifying that he did not ride in the car and did not participate in the shootings. Thus, the requested instructions were inconsistent with defendant's defense. Conversely, witnesses at trial testified regarding defendant's presence in the car, his possession of a .9 millimeter pistol, and gave descriptions of one of the shooters that matched defendant's description. The evidence established that defendant's friend had been robbed the night before the drive-by shooting in question. The next day, defendant, along with three other persons, sought revenge for the robbery. They set out in a car in search of "Rick," the alleged robber. Defendant was armed with a .9 millimeter semi-automatic pistol and the other persons in the vehicle were likewise armed with an AK-47 and .380 automatic. They stopped in front of a house looking for Rick and unable to find him, emptied a barrage of gunfire at the house, outside of which children were playing. Spent shell casings were found at the scene belonging to a .9 millimeter weapon and the codefendant's .380 automatic. The slug taken from the body of the young victim was a .9 millimeter slug.

The drive-by shooting in question was neither careless nor reckless, but planned, with obvious and foreseeable consequences. The resultant death and injuries cannot, under the circumstances, be deemed to be either unintended or the product of something less than an intent to do great bodily harm.

Shooting several volleys in the direction of people and where they lived was clearly an unlawful act naturally tending to cause great bodily harm or death. Therefore, we find no error in the trial court's refusal to instruct on the lesser cognate offenses of involuntary manslaughter or careless and reckless discharge of a firearm resulting in death.

II

Next, defendant contends that he was denied his right to counsel by the trial court's dismissal of his attorney of choice. The day after a jury was selected, defendant's appointed counsel moved to withdraw from the case because defendant refused to accept what defense counsel considered to be "a very fair plea offer" from the prosecutor. A hearing was held, at which time the trial court questioned defendant about his position on the motion to withdraw. Defendant replied in pertinent part, "I know if he [my attorney] don't want to go through with it, then I probably should get somebody else" and did not otherwise object to his counsel's withdrawal. The trial court then granted defense counsel's request, declared a mistrial, and dismissed the jury. Defendant now argues that he was denied his right to counsel of his choice and that his statements at the hearing cannot be construed as a voluntary consent to the withdrawal. We disagree.

As this Court explained in *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991),

An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. . . . *Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic.* . . . The decision regarding substitution of counsel is within the sound discretion of the trial court and will not be upset on appeal absent a showing of an abuse of that discretion. [Citations omitted (emphasis added).]

See also *People v Morgan*, 144 Mich App 399, 400-402; 375 NW2d 757 (1985).

In the present case, defense counsel indicated that he had represented defendant in this case for two years and consequently, being familiar with the facts, had advised defendant that the best course of action would be to accept the proposed plea agreement which, in his opinion, was reasonable and justifiable under the circumstances: "I've communicated to both my client and his family that I cannot in good conscience proceed to a jury trial, with a young man of his age, given the consequences he may face." Given the irreconcilable rift in the tactical postures of defendant and his attorney, and defendant's accession to the request to withdraw, we conclude that the trial court did not abuse its discretion in granting defense counsel's request to withdraw from the case. Defendant was not denied his right to counsel under these circumstances.

III

Defendant asserts that the trial court abused its discretion when it denied defendant's motion for a mistrial based on the prosecutor's interjection of allegedly improper character evidence at trial contrary to MRE 404(a)(1).² Defendant's argument is without merit.

At trial, the prosecutor questioned a prosecution witness, an acquaintance of defendant, about snippets of conversation that he overheard between defendant and other individuals immediately prior to the shooting. The prosecutor then asked the witness what tone of voice defendant was using in this conversation. The witness responded that defendant "had one mode of character" that was "cool and collected." The phrase "cool and collected" was repeated verbatim again by both the prosecutor and the witness. There was no objection to the witness' testimony in this regard. Indeed, there was neither an objection by the defense during the entire time the witness was on the stand, including direct, cross, re-cross, and redirect examinations nor was there a motion for mistrial made contemporaneously with that testimony. Later in the trial, however, defendant moved for a mistrial, based in part on prosecutorial misconduct in eliciting character evidence before defendant testified or placed his character in issue. The trial court denied defendant's motion, but gave defendant the opportunity to present a character witness other than his father, whose proffered testimony in this regard was disallowed because he had been present during the proceedings; defendant ultimately chose not to present such character testimony.

The failure to object to the admission of evidence waives appellate review in the absence of manifest injustice. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). We find no manifest injustice in the present case. Asking a witness to describe the tone of voice or demeanor of the defendant at or near the time of the killing is not an attempt to introduce improper character evidence. See, generally, *People v Harris*, 458 Mich 310; 583 NW2d 680 (1998). Even assuming that the witness' response pertained to defendant's "character," no error requiring reversal occurred. As previously explained by this Court in *People v Barker*, 161 Mich App 296, 305-306; 409 NW2d 813 (1987):

The power to declare a mistrial should "be used with the greatest caution, only under urgent circumstances, and for very plain and obvious causes." 2 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 698, p 426. A mistrial will not be declared as a consequence of any mere irregularity which is not prejudicial to the rights of the defendant. . . . The grant or denial of a motion for a mistrial rests in the trial court's sound discretion and an abuse of discretion will only be found where a denial of the motion deprives the defendant of a fair trial. . . . The test is the defendant's inability to get a fair trial. . . . In the instant case, if prejudicial error occurred, it came from witness Emerson's volunteered and unresponsive statement. Generally, unresponsive statements by prosecution witnesses are not grounds for declaring a mistrial.

"A witness cannot bring error into a case by volunteering inadmissible testimony which is immediately stricken out. It may be true that such remarks work a certain amount of mischief with the jury, but a conviction is to be tested on appeal by the rulings of the judge. A witness cannot put error into a case by an unauthorized remark, neither called out by a question nor sanctioned by the jury; and if what he or she says or does

improperly is likely to do much mischief, it is presumed that the judge will apply the proper corrective measures in his or her instructions if requested to do so. Unresponsive testimony by a prosecution witness, although error, is not necessarily grounds for reversal. Generally, the failure of defense counsel to request a curative instruction regarding a gratuitous answer will preclude appellate review of the issue in the absence of a showing of manifest injustice. [2 Gillespie, supra, § 600, pp 203-204.]” [Citations omitted.]

See also *People v Coles*, 417 Mich 523, 554-555; 339 NW2d 440 (1983).

In this case, there is no indication that the prosecution knew in advance that the witness would respond in the manner indicated; the witness’ answer to the prosecutor’s question regarding defendant’s tone of voice was unexpected and volunteered and could have been cured by an objection and curative instruction. *Id.* at 307. Under these circumstances, we find no manifest injustice in the trial court’s denial of defendant’s motion for a mistrial.

IV

Defendant was bound over for trial on the charge of first-degree murder. He filed a motion to reduce the charge, which was denied by the trial court. Subsequently at trial, following the close of plaintiff’s case, defense counsel moved for a directed verdict of acquittal regarding the first-degree murder charge. The trial court denied the motion and the jury returned a verdict of second-degree murder, thereby acquitting defendant of the first-degree murder charge. Defendant now argues on appeal that the trial court erred in submitting the first-degree murder charge to the jury.

Defendant’s allegation of error in this regard has been undermined by the Michigan Supreme Court’s recent decision in *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998), in which the Court explained:

“There is no basis on this record to assume that the jury’s verdict was a product of compromise. There is simply no more reason for assuming that jurors have compromised on a verdict when there is an erroneous charge than there is to believe that they have simply reached a middle ground when several instructions are correctly given. If there was error in allowing the first-degree murder charge to go to the jury, the jury corrected that error by acquitting defendant of that charge and returning a proper verdict of second-degree murder. Most courts agree that a proper verdict of second-degree murder cures an error in instructing a jury on first-degree. . . . While Michigan cases have not agreed, . . .any other conclusion is based on judicial speculation that jurors who have acquitted the defendant have compromised their views despite an express direction from the trial court to the contrary. [Citations omitted.]”

* * *

[T]he error is cured when the jury acquits the defendant of the unwarranted charge. We are persuaded by the view that a defendant has no room to complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury. Such a result squares with respect for juries. Further, not to adopt this view is to countenance a misuse of judicial resources by automatically reversing an otherwise valid conviction. [*Id.* at 486-487, quoting *People v Johnson*, 427 Mich 98,116, n 15; 398 NW2d 219 (1986) (opinion by Boyle, J.)]

The facts of the present case, a fatal drive-by shooting motivated by revenge, certainly supported the charge of second-degree murder that was submitted to the jury. There is otherwise no persuasive indication of jury compromise or unresolved confusion. *Id.* at 487-488. The error, if any, in submitting the first-degree murder charge to the jury was therefore harmless. *Id.*

V

Defendant's next assignment of error relates to the prosecution's elicitation of testimony and reference in closing argument that several witnesses had been threatened prior to trial. These threats originated from defendant's friends, his sister, and the "gang Dennis used to ride with." Defendant contends these threats were not connected to defendant and that this testimony was irrelevant and inflammatory.

The evidence defendant now challenges was either admitted without objection, and hence has not been preserved for appellate review, *Asevedo, supra*, or was objected to on the basis of hearsay, not the grounds of error now raised on appeal. Defendant's belated request for a cautionary instruction, denied by the trial court, did not come until the close of all the proofs. An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Kilbourn*, 454 Mich 677, 684-685; 563 NW2d 669 (1997); *People v Welch*, 226 Mich App 461, 464; 574 NW2d 682 (1997); *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).³

VI

Defendant also contends that the trial court clearly erred when it denied defendant's motion to suppress his confession. Defendant maintains that his statement was not voluntarily made, based on his assertion that it was induced by a police investigator's indication that he would "cut him loose."

We review a trial court's determination regarding the voluntariness of a defendant's statement by examining the whole record and making an independent determination. *People v Gould*, 225 Mich App 79, 88; 570 NW2d 140 (1997). However, we defer to the trial court's superior ability to view the evidence and witnesses and will not disturb its factual findings unless they are clearly erroneous. *Id.*; *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997); *People v Carigon*, 128 Mich App 802, 810; 341 NW2d 803 (1983). The test of voluntariness is whether considering the totality of the circumstances, the confession is "the product of an essentially free and unconstrained choice by its maker," or whether the accused's "will has been overborne and his capacity for self-

determination critically impaired.” *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). See also *Peerenboom*, *supra* at 198. The burden is on the prosecution to prove voluntariness by a preponderance of the evidence. *People v DeLisle*, 183 Mich App 713, 719; 455 NW2d 401 (1990).

Here, following the testimony of the police investigator and defendant at the *Walker*⁴ hearing, the trial court denied defendant’s motion to suppress, stating:

It’s interesting that the defendant said that, Sgt. Garrison was rough in his tone to the defendant and that Sgt. Garrison told the defendant that he didn’t believe what he was saying. But that Sgt. Garrison didn’t use any threats or make any promises or anything like that to the defendant. And the defendant told Sgt. Garrison that he didn’t do anything. He, the defendant, didn’t do anything, was not involved in this shooting.

And then the defendant testifies that Investigator Clark, he doesn’t say that he raised his voice at him. He doesn’t say that he made any threats against him or made any promises other than this, if he signed this statement, really just exculpatory statement, saying that he was with the other people, that Investigator Clark would cut him loose. That doesn’t make any sense.

It really doesn’t make any sense with Officer Clark and Investigator Garrison armed with all the information that they claimed they had regarding the shooting, and the people involved.

If this is the only thing, even if this took place, even if Sgt. Clark or Investigator Clark said that. I still think that the prosecutor has carried its burden by a preponderance of the evidence that this statement was knowing and voluntarily made without any improper action on the part of the officers. Especially in light of the fact that the officers kept giving him his rights and kept getting him to initial his rights.

We find no clear error in the trial court’s determination, after hearing the witnesses, that defendant’s statement was knowingly and voluntarily made. As the trial court noted, defendant was repeatedly advised of his rights. Under the totality of the circumstances, defendant was not likely to have reasonably understood the investigator’s comment as a promise of leniency or to have relied on the comment in making his confession. See *People v Conte*, 421 Mich 704, 750; 365 NW2d 648 (1984) (opinion by Williams, C.J.). Defendant’s motion to suppress was therefore properly denied.

VII

Defendant next claims that he was denied a fair trial because the prosecutor and the trial court repeatedly denigrated defense counsel in front of the jury. See *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984); *People v Bairefoot*, 117 Mich App 225, 230-232; 323 NW2d 302 (1982). Defendant argues that during trial the prosecutor accused defense counsel of improper

conduct, misleading statements, and unfair tactics and that the trial judge reinforced this denigration by repeatedly admonishing him in front of the jury and threatening to hold him in contempt.

Improper prosecutorial comments are grounds for reversal where they deny the defendant a fair and impartial trial. *People v Messenger*, 221 Mich App 171, 179; 561 NW2d 463 (1997). However, defendant did not object on this basis below. Therefore, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect of the remarks or where a miscarriage of justice would result. *Id.*; *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996).

On review of the record and the remarks taken in context, we conclude that the prosecutorial remarks in question constituted fair and responsive comment upon the evidence presented during a trial – a trial characterized by heated advocacy. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997); *People v Callington*, 123 Mich App 301, 305; 333 NW2d 260 (1983). Even assuming arguendo error in these comments, appellate review of this unpreserved issue will not result in a miscarriage of justice, given the strong evidence against defendant and the trial court’s instruction that the lawyers’ statements were not evidence. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Messenger, supra* at 179-180; *Stimage, supra* at 30.

Defendant did not object to the trial court’s conduct at trial. In the absence of objection, this Court may review the matter if manifest injustice results from the failure to review. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). A trial court has wide, but not unlimited, discretion and power in matters of trial conduct. *Id.* A trial court’s conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprives the defendant of a fair and impartial trial. *Id.* The questioned conduct must be viewed in the context of the whole record. *Id.*

We conclude that the actions and comments of the trial court fell within the bounds of propriety and did not pierce the veil of judicial impartiality by unduly influencing the jury. The cited remarks of the trial judge concerned the trial court’s attempt to control the conduct of the trial and in particular, defense counsel’s repeated and inappropriate interruptions of the prosecutor. It is significant to note that the trial court cautioned *both* the prosecutor and defense counsel on several occasions about their conduct and comments and did not unfairly single out or disparage defense counsel. Defendant therefore was not denied a fair and impartial trial on the basis of this complaint; no manifest injustice has occurred as a result of the court’s conduct.

VIII

Defendant argues that error requiring reversal occurred when the trial court allegedly allowed inadmissible hearsay into evidence at trial and improperly restricted defense counsel’s cross-examination of certain prosecution witnesses. We disagree.

The trial court’s decision to admit evidence will not be disturbed on appeal absent an abuse of discretion. *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996). The scope of

cross-examination is likewise a matter left to the discretion of the trial court, with due regard for a defendant's constitutional rights. *People v Blunt*, 189 Mich App 643, 651; 473 NW2d 792 (1991).

First, defendant complains about the admission of testimony concerning statements made by a codefendant expressing her desire to get even with individuals who robbed her and graphically describing the method of revenge. We agree with the prosecution, however, that this evidence was admissible pursuant to MRE 803(3)⁵, the state of mind exception to the hearsay rule and was certainly relevant insofar as the statements had some bearing on the issue of defendant's conduct; i.e., his awareness of the situation precipitating the drive-by shooting and his complicity therein. *People v Fisher*, 449 Mich 441, 449; 537 NW2d 577 (1995).

Defendant further alleges that the statements attributed to his codefendant denied him his constitutional right to confrontation and were inadmissible under *People v Banks*, 438 Mich 408; 475 NW2d 769 (1991). However, these statements of the codefendant constituted declarations against interest pursuant to MRE 804(b)(3) and bore sufficient indicia of reliability to be admissible under the circumstances. See *People v Poole*, 444 Mich 151, 165; 506 NW2d 505, (1993); *People v Petros*, 198 Mich App 401; 499 NW2d 784 (1993).

With respect to the challenged testimony of police officers regarding what witnesses to the crimes told them at the scene, this evidence was properly admitted because it was not offered for the truth of the matter asserted, but rather to demonstrate the police officers' state of mind by explaining why they took actions that led to defendant's arrest. See *People v Lewis*, 168 Mich App 255, 267; 423NW2d 637 (1988).

Finally, we find no abuse of discretion in the trial court's limitation on defense counsel's re-cross-examination of certain witnesses. Defense counsel's inquiry directed to a police witness with regard to why defendant's statement was not tape recorded was in fact answered by the witness and, in any event, exceeded the scope of redirect examination. Thus, the trial court correctly precluded further inquiry on re-cross-examination into police policies. Similarly, defense counsel's attempt to question another witness about whether she went to the police and gave a statement likewise exceeded the scope of redirect. We therefore find no abuse of discretion in the court's limitation of cross-examination by defense counsel.

IX

Defendant also asserts that he was denied due process of law by the cumulative effect of the prosecutorial misconduct alleged in issues V, VII, and VIII, *supra*. Defendant adds that the prosecutor's comments that no one pleads guilty to first-degree murder, that defendant had no alibi, and that the defense is under no duty to provide discovery, were all prejudicial misstatements of law and fact. These alleged misstatements were not preserved by timely objection. *Messenger, supra*. Having previously found no error requiring reversal in defendant's prior claims of prosecutorial misconduct and similarly finding no merit in the added claims, we conclude that defendant's argument of cumulative error does not amount to a miscarriage of justice. *Id.* Any possible error could have been remedied by timely objection and curative instruction. There was contentious advocacy by both attorneys in this

serious case. However, the conduct and comments of the prosecutor did not cross over the line between that which is fair and that which is unfair to the rights of the defendant.

X

Defendant next challenges the denial of his motion to disqualify the trial judge from imposing sentence. Following his conviction and prior to sentencing, defendant moved to disqualify the trial judge. Defendant's motion was denied and the decision was appealed to the chief judge of the circuit, who affirmed denial of the motion.

We find no error requiring reversal in the denial of defendant's motion to disqualify the trial judge. Defendant's motion was untimely to the extent that that he relies on comments made by the trial judge before the trial commenced.⁶ Consideration of a disqualification claim not raised at the time of trial is precluded when the basis for such disqualification was known before the trial. MCR 2.003(C)(1); *People v Ensign*, 112 Mich App 286, 290; 315 NW2d 570 (1982).

Regarding the remaining judicial conduct cited as a basis for defendant's motion, defendant has not overcome the heavy presumption of judicial impartiality that applies to his bias claim. As explained by this Court in *In re Hamlet*, 225 Mich App 505, 524; 571 NW2d 750 (1997):

Absent an actual personal bias or prejudice, a judge will not be disqualified. MCR 2.003(B)(1); *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). Opinions formed by a judge on the basis of facts introduced or events that occur during the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. *Id.* at 496. Likewise, judicial remarks during the course of a trial that are "critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Id.* at 497, n 30, quoting *Liteky v United States*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994). Moreover, a party who challenges a judge on the basis of bias must overcome a heavy presumption of judicial impartiality. *Cain, supra* at 497.

Defendant's allegations of bias include his belief that the judge thought he had "rigged the jury" and the judge's alleged statement to the prosecutor that defendant "is going to get hammered." Ironically, on the eve of trial, defendant wrote a letter to the judge praising her for her fairness and patience. Upon review of the record, we find defendant's allegations of judicial bias to be unsubstantiated; the trial court's reasonable efforts to control the proceedings in this case should not be interpreted or misconstrued as bias.

XI

Next, defendant claims that the trial court improperly took defendant's failure to admit guilt, his "cool" demeanor, and his lack of remorse into account at sentencing and that his sentence of sixty to one hundred years for second-degree murder is disproportionate. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

A sentencing court cannot, in whole or in part, base its sentence on a defendant's refusal to admit guilt. *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977). See also *People v Adams*, 430 Mich 679, 687, n 6; 425 NW2d 437 (1988). However, evidence of a lack of remorse can be considered in determining an individual's potential for rehabilitation. *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987) (opinion of Archer, J.). As previously explained by this Court in *People v Calabro*, 166 Mich App 389, 396; 419 NW2d 791 (1988):

[A] defendant's lack of remorse may be considered by a court in imposing sentence. It is undeniable that when a defendant is remorseful, it is urged in mitigation by him or on his behalf, and it is healthful to ventilate the process from both perspectives rather than to sanction the use in amelioration while condemning it in aggravation.

See also *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995).

Having reviewed the trial court's sentencing remarks in full, we conclude that the court emphasized defendant's "lack of remorse" for these serious offenses in the context of avoidance of responsibility for his actions and prospects for rehabilitation, most notably his history of following "bad advice rather than good advice." *Wesley, supra; People v Stewart (On Remand)*, 219 Mich App 38, 44; 555 NW2d 715 (1996); *People v Drayton*, 168 Mich App 174, 178; 423 NW2d 606 (1988). There is no indication in the record that the trial court sentenced defendant in the forbidden context of punishing him because of his failure to admit guilt, *Yennior, supra*. Defendant's argument is therefore without merit.

In a related matter, although defendant was only seventeen years old at the time of the offense and lacked any prior felony convictions, we reject defendant's claim that his sentence of sixty to one hundred years for the murder conviction grossly exceeds the recommended guidelines range of fifteen to thirty years and violates the principle of proportionality set forth in *Milbourn, supra*. A sentencing court is entitled to depart from the guidelines whenever the recommended ranges are considered an inadequate reflection of the proportional seriousness of the matter at hand. *People v Witcher*, 192 Mich App 307, 309; 480 NW2d 636 (1991). Departures are appropriate where the guidelines do not adequately account for important factors legitimately considered at sentencing. *Id.* In deviating from the guidelines in this case, the trial court reasoned:

[Y]ou are on crutches with a gun, which indicates to this Court that you were determined to commit some crimes here, determined, going to someplace with guns to take care of those that you think robbed this illegal drug house. Where, incidentally, there are minors living, residing at that house. And you on crutches with your gun are going to go defend this drug house.

* * *

[Y]ou were under Holmes Youthful Trainee for a gun charge. . .and then, you get involved in this situation with guns involved, protecting drugs, guns involved, protecting guns, nine-year-old girl died. And the reason I keep saying nine, it wouldn't

have been good for anybody to die, but the reason I say nine is it makes it all the more tragic because she didn't even have a chance to grow up and make her choices, whatever those choices would have been, not even a chance.

For similar reasons, we conclude that the sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender and does not constitute an abuse of discretion.

XII

Defendant next maintains that he was denied his right to a fair trial because the trial court coerced the jury's verdict by disallowing a hung jury and refusing to grant a mistrial based on the jury's indications that it was unable to reach a verdict during deliberations. We disagree.

Denial of a motion for a mistrial rests within the sound discretion of the trial court and will not be disturbed unless such denial constituted an abuse of discretion. *Messenger, supra; People v Vettese*, 195 Mich App 235, 245-246; 489 NW2d 514 (1992). To find error requiring reversal a trial court's denial of a mistrial must have been so gross as to have deprived the defendant of a fair trial and to have resulted in a miscarriage of justice. *Id.* Reversal is not warranted unless the defendant makes an affirmative showing of prejudice resulting from the abuse of discretion. *Id.*

Claims of coerced verdicts are reviewed case by case, and all the facts and circumstances, including the particular language used by the trial court, must be considered. *People v Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995); *Vettese, supra* at 244.

Early on the second day of deliberations, the jury indicated that it could not reach agreement. Thereafter, defendant moved for a mistrial, the trial court denied the motion and gave the jury a *Sullivan*⁷ deadlock instruction. There was no objection. On the fourth day of deliberations, the jury sent a note asking for help because there was "no movement." The note disclosed that some jurors did not believe that defendant intended to kill, other jurors believed that he intended to kill but in "hot blood," and one juror believed there was no "hot blood" during deliberation and premeditation. The court found the jury to be confused with respect to the charges it had to consider, none of which included a determination of the existence of any mitigating factor such as "hot blood," and thus re-instructed the jury regarding the elements of first- and second-degree murder. The court further instructed the jury that the term "hot blood" did not apply to the facts of the case. Later, the jury reached a verdict of second-degree murder.

We find no element of coercion in these circumstances warranting the declaration of a mistrial based on a miscarriage of justice. The jury was confused, not hopelessly deadlocked, and the action taken by the trial court was an effort to allay that confusion. There is absolutely no indication that any juror abandoned his position to defer to the majority solely for the sake of reaching an agreement. The instruction was entirely appropriate in light of the nature of the charged offenses. Moreover, defendant's contention that "a vast majority of the jurors found that defendant was not guilty of murder, but possibly guilty of a lesser offense" is purely speculative. Under these circumstances, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

In a related assertion, defendant argues that the trial court should have sua sponte instructed the jury on the offense of voluntary manslaughter. Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. *People v VanDorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). We find no manifest injustice under these circumstances, since not even a modicum of evidence was adduced at trial that defendant acted in the heat of passion, caused by adequate provocation, with no lapse of time to control his passions. *Pouncey*, supra 388. See, generally, issue I, *supra*.

Alternatively, defendant claims that his attorney was ineffective by not requesting the instruction on the lesser included offense of voluntary manslaughter. Defendant's defense at trial was that he did not participate in the drive-by shooting. Defendant has not overcome the presumption that defense counsel's decision not to request this instruction might be considered sound trial strategy. *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998); *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996); *People v Armstrong*, 124 Mich App 766, 769; 335 NW2d 687 (1983).

XIII

Finally, defendant contends that the trial court abused its discretion in denying his motion for a continuance. We disagree.

A trial court's decision whether to grant a continuance is reviewed for an abuse of discretion. *People v Sekoian*, 169 Mich App 609, 613; 426 NW2d 412 (1988). Adjournments or continuances are not to be granted except for good cause shown. *Id.* at 613. In reviewing this question, this Court must consider whether (1) defendant is asserting a constitutional right; (2) there is a legitimate reason for asserting the right; (3) defendant is guilty of negligence; (4) adjournments were at defendant's behest; and (5) prejudice to defendant will result. *Id.* at 613-614.

In this case, defendant requested a continuance on the day of trial, purportedly to discuss a plea agreement and to obtain transcripts of his prior evidentiary hearing and the codefendant's trial for use as impeachment at the trial. The trial court denied defendant's motion, questioning the sincerity of defendant's request in light of the fact that a mistrial had previously been declared and this matter had been set for trial several times over a period of a year and a half. We find no error in this determination, finding the court's suspicion of defendant's sincerity to be legitimate. Recalling the substance of the second issue raised by defendant in this appeal (see issue II, *supra*), defendant had already rejected a plea agreement, causing his original attorney to withdraw from the case and a mistrial to be declared. Moreover, defendant's lack of diligence in obtaining the transcripts and his failure to demonstrate any prejudice as a result of the denial of his motion preclude further consideration of this claim.

Affirmed.

/s/ David H. Sawyer

/s/ Richard Allen Griffin

¹ Cognate lesser included offenses are those in which the lesser offense shares some common elements with the greater offense, but which may also include some elements not found in the greater offense. *People v Heflin*, 434 Mich 482, 495; 456 NW2d 10 (1990); *People v Beach*, 429 Mich 450, 461-462; 418 NW2d 861 (1988). Involuntary manslaughter (common law and statutory) and reckless discharge of a firearm resulting in death are cognate lesser included offenses of murder and second-degree murder, respectively. See *Heflin, supra* at 496-497; *Beach, supra* at 462; *People v Cheeks*, 216 Mich App 470, 479-480; 549 NW2d 584 (1996).

² MRE 404(a)(1) provides:

(a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of the accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same.

³ In any event, the prosecutor's questioning regarding certain threats was advanced for the proper purpose of explaining hesitation to testify and discrepancies between certain witnesses' testimony and what they had indicated previously; discrepancies motivated by fear of reprisal. *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998); *People v Clark*, 124 Mich App 410, 412; 335 NW2d 53 (1983).

⁴ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

⁵ MRE 803(3) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(3) *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

⁶ Defendant contends that the trial judge exhibited her prejudice against him by permitting defendant's attorney to withdraw before trial because defendant would not take a plea to second-degree murder, then chastising defendant for ignoring the good advice of an excellent attorney and commenting that "that tells me something," meaning, according to defendant, that there would be repercussions for his decision not to accept the plea agreement.

⁷ *People v Sullivan*, 392 Mich 324, 341-342; 220 NW2d 441 (1974).