

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEON JAMES MORROW,

Defendant-Appellant.

UNPUBLISHED

March 26, 2009

No. 281864

Wayne Circuit Court

LC No. 07-008340-FC

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 20 to 30 years' imprisonment for the second-degree murder conviction and to two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant was convicted of killing Ronald Guevara during a fight following an earlier altercation between defendant, Carlos Flemister and Guevara as they played basketball. After the initial altercation, in which defendant and Flemister got the best of Guevara, Guevara and a group of men approached the covered porch of a house on which defendant, Flemister and others were standing, and a fight ensued. No one in Guevara's group was armed. During the fight, defendant pulled a gun from his waistband and fired a single, fatal shot into Guevara's forehead.

Defendant first contends that the prosecutor failed to present sufficient evidence to secure a conviction for second-degree murder. We disagree. When reviewing a challenge based on the sufficiency of the evidence, this Court conducts a de novo review. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). A conviction will be affirmed when, viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

In order to secure a conviction for second-degree murder, the prosecution must establish that an act of the defendant caused a death, that the act was committed with malice, and that there was no excuse or justification for the act. *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001). On appeal, defendant does not contest that his action caused a death. Rather, defendant first contends that his act was not committed with malice where it was the result of provocation and, consequently, is properly classified as voluntary manslaughter. In the alternative, defendant contends that his act was justified because it was done in self-defense.

Voluntary manslaughter is a lesser-included offense of second-degree murder. *People v Mendoza*, 468 Mich 527, 544; 664 NW2d 685 (2003). The only difference between the two crimes is that where second-degree murder requires a finding of malice, voluntary manslaughter occurs when the killing is committed without malice as a result of an adequate provocation. *Id.* at 540. Malice has been defined as “an intent to kill, an intent to do great bodily harm, or an intent to create a high risk of death or great bodily harm with knowledge that such is the probable result.” *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). “The facts and circumstances of a killing may give rise to an inference of malice” and “[i]t is for the jury to determine whether the element of malice can be inferred from all the evidence.” *People v Flowers*, 191 Mich App 169, 176-177; 477 NW2d 473 (1991). Furthermore, “[a] jury can properly infer malice from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm.” *Id.* at 177. In contrast, a killing is committed with an adequate provocation where the defendant acted out of passion, rather than reason, after a provocation occurred that would have caused a reasonable person to “lose control.” *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991).

In his brief on appeal, defendant presents the general assertion that the killing was the result of adequate provocation without providing factual support for the theory. Defendant emphasizes certain facts, such as that Guevara charged the porch and initiated the confrontation between the men during which Guevara was killed. However, such facts speak more to a theory of self-defense than a theory of provocation. Nothing demonstrates that defendant did not have the ability to think rationally or with clarity, or that he acted out of passion rather than reason at the time he fired the shot that killed Guevara. There is no evidence that Guevara acted in a way that caused defendant to lose control of himself. Therefore, the theory of adequate provocation is inapplicable to the facts of this case and does not result in a finding that the evidence at trial was insufficient regarding the second-degree murder conviction.

Defendant further asserts that the evidence did not establish second-degree murder where he was entitled to rely on a theory of imperfect self-defense. This Court previously stated that imperfect self-defense can mitigate a second-degree murder to a voluntary manslaughter. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). This Court further noted, “[t]he doctrine applies only where the defendant would have been entitled to self-defense had he not been the initial aggressor.” *Id.* Therefore, in order to determine whether a defendant is shielded by the doctrine of imperfect self-defense, this Court must determine whether the defendant would have been entitled to self-defense had he not initiated the confrontation with the victim. Here, defendant did not initiate the confrontation between the men that resulted in Guevara’s death. Further, a defendant is entitled to self-defense only if “he honestly and reasonably believe[d] that he [was] in imminent danger of death or great bodily harm and that it [was] necessary for him to exercise deadly force.” *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002); MCL 780.972. The doctrine “requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat.” *Id.* In addition, an individual can only use the amount of force that is necessary to defend himself. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). An individual is permitted to use deadly force in defense of another individual when there is a reasonable belief that such force is needed to prevent death or serious bodily harm. *People v Kurr*, 253 Mich App 317, 321; 654 NW2d 651 (2002).

Defendant asserts that the shooting of Guevara was justified because defendant was acting in defense of himself and of others. Defendant again cites to the fact that Guevara initiated the second altercation by charging defendant and others on the enclosed porch, joined by acquaintances that had come to his aid. However, these facts do not set forth a justification for the use of deadly force. There was no testimony that Guevara or his acquaintances were armed. There is no evidence that defendant honestly and reasonably believed that he, or someone else, was in imminent danger of death or great bodily harm such that the use of deadly force was necessary. Rather, during the course of an ordinary fight, defendant introduced a weapon into the altercation and fired a bullet into Guevara's head. Deadly force was not an appropriate avenue where there was never a significant threat to the life or health of any of the parties involved in the altercation.

When viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could have concluded that defendant caused Guevara's death while acting with malice and that the killing was not justified or excusable. Therefore, sufficient evidence was presented in support of the conviction.

Similarly, defendant contends that the prosecution abused its discretion in charging defendant with second-degree murder. We disagree. This Court reviews unpreserved issues for plain error affecting the substantial rights of the defendant. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

As the Supreme Court has stated, “[w]e have repeatedly recognized that the decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor.” *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). Furthermore, the discretion granted to the prosecutor is broad and he may bring any charge that is supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). As discussed throughout this opinion, there was sufficient evidence in support of the notion that defendant was guilty of second-degree murder and that the killing was not justified under a theory of self-defense where defendant did not have a reasonable belief that deadly force was necessary. It follows that the prosecution did not abuse its broad discretion in charging defendant with second-degree murder.

Defendant next asserts that his trial counsel was ineffective where he failed to request an instruction on self-defense and an instruction regarding defendant's right to maintain his ground without fleeing. We disagree. Defendant's claim that he was denied effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). While the trial court's factual findings are reviewed for clear error, the questions of constitutional law are reviewed de novo. *Id.* Because defendant failed to preserve this issue, this Court is limited to reviewing errors that are evident on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

In order to prevail on his claim of ineffective assistance, defendant must establish that his trial attorney's assistance “fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial.” *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There is a strong presumption that defense counsel's actions were sound trial strategy. *Id.* In order to demonstrate prejudice, defendant must establish that there is a reasonable probability that, but for mistakes of his attorney, the result of the trial would have been different. *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). The United

States Supreme Court has further stated that the proper inquiry is whether, as a result of counsel's performance, the outcome of the trial was fundamentally unfair, unreliable or prejudicial. *Lockhart v Fretwell*, 506 US 364, 369; 113 S Ct 838; 122 L Ed 2d 180 (1993).

As discussed above, this Court has concluded that the theory of self-defense was not applicable to the facts of this case where defendant failed to show that he had a reasonable belief that his life or health was at risk when he shot Guevara. Defense counsel is not ineffective where he chooses to not pursue a meritless position. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Defendant was therefore not denied the effective assistance of counsel by his attorney's decision not to present an argument that would not have succeeded.

Next, defendant asserts that the trial court abused its discretion in admitting photographs of Guevara's body at the crime scene. We disagree.

This Court reviews a trial court's decision regarding whether to admit evidence for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). The abuse of discretion standard recognizes that in certain circumstances there are multiple reasonable and principled outcomes and, so long as the trial court selects one of these outcomes, its ruling will not be disturbed. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Generally speaking, evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the case more or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Thus, evidence is admissible if "it is helpful in throwing light on any material point." *Aldrich, supra* at 114. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. *Id.* Evidence is not unfairly prejudicial simply because it is damaging to the defendant's position at trial; all relevant evidence will be damaging to the extent it tends to prove that the defendant is guilty of the charged offense. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, mod on other grounds, 450 Mich 1212; 539 NW2d 504 (1995). Unfair prejudice is "an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." *People v Asher*, 449 Mich 494, 501; 537 NW2d 168 (1995). As our Supreme Court explained in *Mills, supra* at 76:

The decision to admit or exclude photographs is within the sole discretion of the trial court. Photographs are not excludable simply because a witness can orally testify about information contained in the photographs. Photographs may also be used to corroborate a witness' testimony. Gruesomeness alone need not cause exclusion. The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice. [Citations omitted.]

The *Mills* Court further explained that:

[p]hotographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions. If photographs which disclose the gruesome aspects of an accident or a crime are not pertinent, relevant, competent, or material on any issue in the case and serve

the purpose solely of inflaming the minds of the jurors and prejudicing them against the accused, they should not be admitted in evidence. However, if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. [*Id.* at 77, quoting *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972).]

Additionally, the *Mills* Court noted that,

“It may be presumed that today’s jurors, inured as they are to the carnage of war, television and motion pictures, are capable of rationally viewing, when necessary, a photograph showing the scene of a crime or the body of a victim in the condition or the place in which found.” [*Id.* at 77, n 11, quoting *People v Turner*, 17 Mich App 123, 132; 169 NW2d 330 (1969).]

The photographs in question, while not pleasant to view, are not particularly gruesome. They present objective, factual representations of the injuries suffered by Guevara, of the place in which his body was found, and of the physical evidence present at the crime scene. As the trial court rightly noted, “[t]here is no blood and gore demonstrated in the photographs. For all intents and purposes they are clean and in the opinion of the Court would not lead to or elicit or evoke passions of the jury or sympathy for one side or the other[,] but clearly and purely demonstrate what the condition of the victim was at the time this incident occurred.” The nature of Guevara’s injuries was relevant to defendant’s intent when shooting him. And, the depiction of the crime scene, of the surrounding area, and of the physical evidence corroborated the testimony of certain witnesses and bore on issues of credibility. As the *Mills* Court explained,

Although we must protect the defendant from the prosecution’s attempt to shock the jury, we must also make sure that the truth is found through relevant evidence that is not unfairly prejudicial.

The trial court is not expected to protect the jury from all evidence that is somewhat difficult to view. The Rules of Evidence provide that the court must only limit that evidence whose probative value is substantially outweighed by the danger of unfair prejudice. [*Id.* at 79-80.]

A trial court does not abuse its discretion by admitting photographs that are relevant to the defendant’s intent or which corroborate, or refute, testimony of witnesses. *Id.* at 80. The instant photographs were relevant to the determination of defendant’s guilt and they were not shocking or likely to induce the jury to decide the case based on an emotional basis. Therefore, the trial court properly concluded that the photographs were not unfairly prejudicial to defendant. Thus, the trial court did not abuse its discretion by admitting the photographs into evidence. *Id.*

Defendant next asserts that the trial court erred in failing to hold an evidentiary hearing to address potential juror misconduct. We disagree. This Court reviews unpreserved issues for plain error affecting the substantial rights of the defendant. *Carines, supra* at 763-764.

Defendant asserts that two separate instances of misconduct occurred. First, defendant states that Guevara’s family members had improper contact with the jury. In support of his

claim, defendant attaches the affidavit of Bryan Stephens to his standard 4 brief. It is not clear who Bryan Stephens is. In the affidavit, Stevens claims to have knowledge of an alleged conversation between four jurors and Guevara's mother about a television show viewed by one of the jurors that apparently related to or addressed Guevara's murder. As this Court has previously held, a party may not expand the record on appeal. *People v Williams*, 241 Mich App 519, 524 n 1; 616 NW2d 710 (2000). As a result, we will not consider the Stephens affidavit in analyzing this issue as that affidavit was not a part of the lower court record.

Where a defendant alleges that an extrinsic force unduly influenced a jury, he must establish that the jury was exposed to the force in question and that the force likely had an affect on the jury's verdict. *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997). If the defendant makes those showings, the burden shifts to the prosecution, which has the task of showing that the error was harmless beyond a reasonable doubt. *Id.* at 89. The prosecution can successfully show the error was harmless by showing that there was overwhelming evidence of the defendant's guilt. *Id.* Even if defendant could show that there was an improper influence on the jury, there was overwhelming evidence of defendant's guilt presented at trial. Particularly strong was the eyewitness testimony of Joseph Hopkins that he observed defendant shoot Guevara. Additionally, Flemister told police that, immediately after he heard the gunshot, he saw defendant holding a gun, and he testified at trial that after the shooting, defendant said that he was going to prison because he had just "murdered somebody." Flemister also testified that he did not see anyone else with a gun around the time of the shooting. Another witness, Anthony Mendez, testified that, immediately after he heard the gunshot, he saw defendant holding a gun. Defendant did not present any evidence to rebut this testimony, and there was no evidence presented that anyone other than defendant possessed a gun at the time of the shooting. Thus, considering this overwhelming evidence of defendant's guilt, any alleged improper influence on the jury was necessarily harmless. *Id.*

Defendant also contends that the jury behaved improperly where it was heard deliberating after the close of the presentation of evidence but before being instructed by the trial court. In general, where a defendant alleges juror misconduct, "some showing must be made that the misconduct affirmatively prejudiced the defendant's right to a trial before a fair and impartial jury." *People v Fox*, 232 Mich App 541, 557; 591 NW2d 384 (1998). The alleged premature deliberations in this matter occurred after the parties presented their cases but before closing arguments. The improper conduct was therefore unlikely prejudicial where it did not prevent the jurors from considering all of the evidence presented. Further, the evidence of defendant's guilt was overwhelming where, as previously discussed, Hopkins witnessed defendant shoot Guevara in the head and both Flemister and Mendez saw defendant holding a gun immediately after the shot was fired. In light of this evidence, defendant cannot show that the alleged premature deliberations affected the outcome of his trial or that an evidentiary hearing would have impacted the ultimate result. He is not entitled to relief.

Next, defendant asserts that the trial court erred in failing to instruct the jury on the credibility of co-conspirator testimony and drug-addicted witnesses. After instructing the jury, the trial court asked the attorneys whether they had any "objections, corrections or deletions" to discuss. While defendant's attorney did ask for clarification on one matter not related to this appeal, she did not request the addition of an accomplice instruction or an addicted informant instruction and affirmatively approved of the remaining instructions as given. Where a defendant affirmatively approves of an instruction, he waives any objection to the instruction and

extinguishes any resulting error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Additionally, defendant asserts the prosecutor improperly elicited testimony regarding defendant's prior incarceration. We agree. However, because the error did not affect defendant's substantial rights, he is not entitled to relief. *Carines, supra* at 763-764.

"References to a defendant's prior incarceration are, unless specifically ruled otherwise, generally inadmissible." *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983). Because the evidence of defendant's prior incarceration was not relevant at trial, it was improper for the prosecution to elicit that testimony. However, we conclude that defendant was not prejudiced by the error because it did not affect the outcome of the trial. When asked how long he had known the defendant Flemister indicated that he met the defendant "months ago" while they were "locked up together." Following this testimony, the prosecution made no further mention of defendant's prior incarceration. This Court is not persuaded that the isolated reference to defendant's prior incarceration resulted in his conviction, particularly considering the eyewitness testimony of Hopkins, who observed defendant shoot Guevara. Furthermore, Flemister signed a statement in which he alleged that defendant told him he was going to jail for life because he murdered someone. This evidence, which was frequently referenced at trial, was likely far more influential on the deliberating jury than the brief passing mention of defendant's previous incarceration. Therefore, defendant cannot establish that he is entitled to relief on the basis of this unpreserved error.

Finally, defendant argues that he was denied a fair trial as a result of prejudice resulting from cumulative error. We disagree. This Court reviews unpreserved issues for plain error affecting the substantial rights of the defendant. *Carines, supra* at 763-764.

A criminal defendant is entitled to relief when the cumulative effect of trial errors denied him a fair trial. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). When determining whether cumulative error denied a defendant a fair trial, this Court only aggregates actual errors. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). This Court has determined that two minor errors, which were not prejudicial, occurred during defendant's trial. There is no evidence that these errors, when taken together, affected the substantial rights of defendant where defendant was convicted on the basis of strong eyewitness testimony. Therefore, defendant has not established that multiple errors cumulated to deny him a fair trial. He is not entitled to relief.

We affirm.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra