

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER EDWARD WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

November 25, 2003

No. 241765

Menominee Circuit Court

LC No. 02-002628-FC

Before: Cooper, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals by right his jury conviction for second-degree murder, MCL 750.317. We affirm.

Defendant argues that the trial court erred in denying his request for jury instructions on the offense of manslaughter. A requested instruction on an inferior necessarily-included offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser-included offense and a rational view of the evidence would support it. *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003); *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

The defendant bears the burden of showing that the error was outcome determinative or undermined the reliability of the verdict. *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000). The reliability of a verdict is undermined if a lesser-included offense instruction that was supported by substantial evidence was not given. *Cornell, supra* at 365. Failure to give the lesser-included offense instruction is harmless if the instruction was not clearly supported by substantial evidence. *Id.*

The trial court denied the manslaughter instruction because it found that the instruction was not supported by a rational view of the evidence. To meet the test for manslaughter, the defendant must kill in the heat of passion; the passion must be caused by adequate provocation, and there cannot be a lapse of time during which a reasonable person could control his passions. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). Although the determination of what is reasonable provocation is normally a question of fact for the factfinder, a trial court may find as a matter of law that no reasonable jury could find that the provocation was adequate. *Id.* at 390.

The trial court did not err in denying the instruction. Defendant confronted his estranged wife after a long day of drinking. No specific event triggered a heat of passion, and there was no adequate provocation. Even if decedent's relationship with another man were sufficient provocation, defendant knew of the relationship for weeks; consequently, there was adequate time for a reasonable person to have controlled his passions.

Defendant also argues that the trial court erred in scoring OV 7, aggravated physical abuse, at 50 points. At the time of sentencing, MCL 777.37 provided for a score of 50 points if the victim was treated with terrorism, sadism, torture, or excessive brutality. A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Scoring decisions for which there is any evidence in support will be upheld. *Id.* Here, defendant stabbed the victim four times in front of her seven-year-old son, after a confrontation. This evidence supports the scoring decision.

Finally, defendant argues that the court abused its discretion in exceeding the sentencing guidelines. The guidelines range was scored at 162 to 270 months. The trial court exceeded the guidelines by thirty months, sentencing defendant to 25 to 40 years' imprisonment.

A trial court may not depart from the sentencing guidelines unless it states a substantial and compelling reason for doing so. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). To be substantial and compelling, a reason must be objective and verifiable. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). Factors meriting departure must keenly attract the court's attention and must be of considerable worth. *Id.* To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

As factors supporting the departure, the court noted that the victim lived at least ten minutes after the stabbing, knowing that she was going to die, she suffered multiple stab wounds, and the victim's seven-year-old son witnessed the crime. These factors were objective and verifiable, and the court did not abuse its discretion in determining that they constituted substantial and compelling reasons for departure.

We affirm.

/s/ Jessica R. Cooper

/s/ Jane E. Markey

/s/ Patrick M. Meter