

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRACY BARNES,

Defendant-Appellant.

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UNPUBLISHED

June 16, 2005

No. 255639

Wayne Circuit Court

LC No. 04-001116-01

Before: Gage, P.J., and Whitbeck, C.J., and Saad, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, MCL 750.316, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant to life in prison for the first-degree murder conviction, three to five years in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. Defendant appeals, and we affirm.

I. Continuance

Defendant says that the trial court abused its discretion, and interfered with his right to present a defense, when it denied his request for a continuance to search for other alibi witnesses. We disagree.<sup>1</sup>

“[T]o invoke the trial court’s discretion to grant a continuance or adjournment, a defendant must show both good cause and diligence.” *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003), citing *People v Taylor*, 159 Mich App 468, 489; 406 NW2d 859 (1987). As

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<sup>1</sup> We review the trial court's decision regarding a defendant's request for a continuance for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003); *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). An abuse of discretion "exists where an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). We review de novo the question whether a defendant was denied his constitutional right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

this Court also explained, “[g]ood cause” factors include “whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.” *Coy, supra* at 18, quoting *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

Here, defendant cannot establish that he had good cause to seek a continuance to locate alleged alibi witnesses. In court, defense counsel stated that his investigator, despite “yeoman efforts,” was unable to locate a witness named Angela (last name unknown), and two other witnesses, Raymond Keith and Cedric Brown, who was scheduled to testify, but failed to appear for trial. Defense counsel stated that, while they rigorously tried to locate those witnesses, he did not believe they could be found. He also stated that the witnesses were not “pure alibi” witnesses because, if found, they would not be able to testify about defendant’s whereabouts at the time of the shooting.<sup>2</sup> The record also demonstrates that it is pure speculation whether these witnesses would have remembered defendant or remembered seeing defendant that night. In light of this information, defendant failed to show “good cause” to adjourn the proceedings and the trial court did not abuse its discretion in denying his request.

## II. Jury Instructions

Defendant maintains that the trial court erred when it refused to instruct the jury on manslaughter.<sup>3</sup> It is well-settled that an instruction need only be given if it is supported by the evidence, and a trial court has discretion to determine whether an instruction is applicable. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998) (citations omitted). Further, “a requested instruction on a necessarily included lesser 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 Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). A lesser offense is necessarily included if its elements are completely contained in the greater offense. *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003), citing *Cornell, supra* at 356. With respect to voluntary and involuntary manslaughter, the Michigan Supreme Court has held:

The elements of voluntary and involuntary manslaughter are included in the elements of murder. Thus, both forms of manslaughter are necessarily included lesser offenses of murder. Because voluntary and involuntary manslaughter are necessarily included lesser offenses, they are also “inferior” offenses within the scope of MCL 768.32. Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence. [*Mendoza, supra* at 541, citing *Cornell, supra* at 357.]

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<sup>2</sup> Despite defense counsel’s admissions, defendant sought a continuance to resume efforts to locate the witnesses.

<sup>3</sup> This Court reviews preserved claims of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

Here, the evidence did not support an instruction for manslaughter. Defendant did not take the position at trial that he acted without the requisite “malice” to support a first-degree murder charge; rather, defendant took the position that he was not at the scene of the murder. Defendant’s own testimony, therefore, negates the inference that he acted “under the influence of passion or in heat of blood.” *Mendoza, supra* at 535. Furthermore, the circumstances of a killing may mitigate murder to voluntary manslaughter if the circumstances demonstrate that (1) malice was negated by adequate and reasonable provocation, (2) the killing was done in the heat of passion, and (3) there was not a lapse of time during which a reasonable person could control his passions. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). The provocation necessary to mitigate a homicide from murder to manslaughter is “that which causes the defendant to act out of passion rather than reason.” *Id.* at 389, citing *People v Townes*, 391 Mich 578, 590; 218 NW2d 136 (1974). Further, provocation is adequate when it would cause a reasonable person to lose control. *Id.*, citing *Townes, supra* at 590. The record in this case is devoid of any evidence that Sims provoked defendant or that defendant shot Sims in the heat of passion. Indeed, the record shows that defendant was not present when Sims was following Emma and Marlow from place to place earlier that day. The trial court held that the evidence did not warrant a charge of manslaughter and, under the controlling legal standards in *Mendoza* and *Cornell*, the trial court’s holding was correct because a rational view of the evidence did not support a jury instruction on manslaughter. *Mendoza, supra* at 541; *Cornell, supra* at 357.

Moreover, the alleged failure to instruct the jury on the crime of involuntary manslaughter was clearly harmless.<sup>4</sup> The trial court gave instructions for first-degree and second-degree murder and the jury found defendant guilty of first-degree murder. The jury's rejection of second-degree murder reflected its decision not to convict defendant of a lesser included offense such as manslaughter. *People v Sullivan*, 231 Mich App 510, 520; 586 NW2d 578 (1998); *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709 (1997). Accordingly, the trial court did not err by refusing to instruct the jury on manslaughter.

### III. Prosecutorial Misconduct

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<sup>4</sup> Harmless error analysis is applicable to jury instruction errors involving necessarily included lesser offenses. *Cornell, supra* at 362. In *People v Zak*, 184 Mich App 1; 457 NW2d 59 (1990), this Court stated:

Where the trial court instructs on a lesser included offense, which is intermediate between the greater offense and a second lesser included offense, for which instructions were requested by the defendant and refused by the trial court, and the jury convicts on the greater offense, the failure to instruct on that requested lesser included offense is harmless if the jury's verdict reflects an unwillingness to have convicted on the offense for which instructions were not given. [*Zak, supra* at 16.]

Defendant asserts that the prosecutor deprived him of a fair trial when he made improper comments during closing arguments. We disagree.<sup>5</sup>

We decide claims of prosecutorial misconduct on a case-by-case basis by examining the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). We also evaluate prosecutorial comments as a whole, in light of defense arguments, and in view of the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Further, "a defendant on appeal must demonstrate that a preserved nonconstitutional error was not harmless by persuading the reviewing court that it is more probable than not that the error affected the outcome of the proceedings." *People v Young*, \_\_\_ Mich \_\_\_; 693 NW2d 801 (2005).

Defendant specifically complains that the prosecutor improperly argued to the jury that it should convict defendant based, in part, on evidence that was admitted solely to impeach witness Samuel Wise. Were we to agree that the prosecutor's remarks were improper in this respect, we nonetheless hold that the trial court's decision to allow the remarks was clearly harmless because defendant simply cannot show that the alleged error as outcome determinative. "An error is deemed to have been 'outcome determinative' if it undermined the reliability of the verdict." *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). Here, ample direct and circumstantial evidence supported defendant's conviction, and the trial court instructed the jury to decide the case based on the evidence and that the statements and arguments of the attorneys were not evidence upon which the case could be decided.<sup>6</sup> Accordingly, we hold that defendant was not deprived of a fair trial on the basis of this alleged error.

#### IV. Newly Discovered Evidence

Defendant says that he has newly discovered evidence sufficient to warrant a new trial. Defendant did not preserve this issue by moving for a new trial in the lower court. MCR 2.611; MCR 2.612; *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998). Moreover, the affidavit he submitted on appeal is not part of the lower court record and it cannot be considered by this Court. *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992); *People v Willett*, 110 Mich App 337, 346; 313 NW2d 117 (1981). Notwithstanding defendant's procedural deficiencies, the substance of defendant's argument does not change this Court's conclusion under a plain error analysis because there is no evidence to support a finding that the three threshold elements set forth in *Carines*, *supra* at 763-764, are satisfied. Specifically, there is no evidence of plain error in the trial court, and were we to assume plain error occurred, it did not affect the outcome in the trial court.

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<sup>5</sup> This Court reviews preserved claims of prosecutorial misconduct de novo to determine whether defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

<sup>6</sup> Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Generally, prosecutors are accorded great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995).

Defendant contends that an affidavit from his mother, Rosetta Barnes, attached to his supplemental brief on appeal, contains new evidence that one witness, Jacki Marlow, lied about defendant's involvement in this case because "she believed that he and his sister had broken into her home and stolen her belongings." In *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), our Supreme Court set forth the grounds for granting a new trial because of newly discovered evidence. A defendant must show that: (1) "the evidence itself, not merely its materiality, was newly discovered"; (2) "the newly discovered evidence was not cumulative"; (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) "the new evidence makes a different result probable on retrial."

Here, we do not agree that Barnes' new testimony would have made a difference at retrial. While Barnes' testimony may impeach Marlow's original testimony, Marlow's testimony did not provide the only basis for defendant's conviction. Defendant's sole defense was that of alibi and Marlow's trial testimony concerning the identity of the shooter was wholly corroborated by two other witnesses. Regardless, were we to assume that Marlow admitted that she lied at trial, "new evidence in the form of a witness' recantation testimony has traditionally been regarded as suspect and untrustworthy." *People v Barbara*, 400 Mich 352, 362, 363; 255 NW2d 171 (1977) (citations omitted). This Court has repeatedly expressed reluctance to grant new trials on the basis of such evidence. *Canter, supra* at 550, 560. For these reasons, defendant is not entitled to remand or a new trial.

Affirmed.

/s/ Hilda R. Gage  
/s/ William C. Whitbeck  
/s/ Henry William Saad