STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 15, 2005
v	No. 252102 Wayne Circuit Court
LARRY PACER MCWATTERS, Defendant-Appellant.	LC No. 03-007633-01

Before: Wilder, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and two counts of first-degree criminal sexual conduct ("CSC"), MCL 750.520b(1)(f) (personal injury to victim and penetration accomplished by force). The trial court imposed a life sentence for each conviction, to be served concurrently. Defendant now appeals as of right. We affirm.

I

The victim, a seventy-four-year-old woman, was found dead in her house in 1995. The victim had been strangled to death with a lamp cord and belt, and had been beaten and raped both vaginally and anally. A county medical examiner testified at trial that strangulation generally takes at least four minutes of continuous pressure to kill the victim.

The police obtained DNA samples from several suspects, but none had a DNA profile that matched the sperm found in the victim's body. Although defendant was considered a suspect from the early stages of the investigation, the police did not obtain a DNA sample from him until January 2002, and they did not receive the test results until January 2003. Defendant's DNA matched the sperm.

In the summer of 2002, defendant confided in Larry Terlecki that he had killed an elderly woman. He told Terlecki that he broke into the victim's house to steal her money, and that he beat and strangled her after she startled him by waking up. He denied raping her. Terlecki did not immediately report this to the police, because he did not know about the victim's death and he did not know whether defendant was serious. Terlecki reported defendant's confession to the police in May 2003, after learning that the police were investigating a man he and Terlecki both knew.

Defendant was charged with first-degree premeditated murder, first-degree felony murder, and two counts of first-degree CSC. The jury acquitted him of both theories of first-degree murder, but convicted him of second-degree murder and the two CSC charges.

II

Defendant claims that he was prejudiced by the prosecutor's misconduct because the prosecutor improperly vouched for Larry Terlecki's credibility and appealed to the jury's sympathy. A defendant must preserve a claim of prosecutorial misconduct by specific objection and request for a curative instruction. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). Defendant did not object to either of these alleged instances of misconduct, so we review this issue for plain error affecting defendant's substantial rights. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

A prosecutor may not vouch for a witness' credibility or suggest that the government has some special knowledge that a witness' testimony is truthful. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Defendant's claims of improper vouching arise from the prosecutor's statement during closing argument that Terlecki "testified honestly and truthfully" and his statement during rebuttal argument that Terlecki did the right thing by revealing defendant's confession. Read in context, the prosecutor was not implying any special knowledge that Terlecki was truthful. Rather, he was arguing that Terlecki was believable, despite his criminal past, because his testimony about defendant's confession substantially comported with the facts surrounding the offense, which Terlecki did not know about before defendant told him. The prosecutor used the quote from Einstein not to improperly bolster Terlecki's credibility, but to praise him for coming forward with his information. Accordingly, defendant cannot establish any error, let alone plain error affecting his substantial rights.

Defendant also claims that the prosecutor appealed to the jury's sympathy by repeatedly referring to the victim's age and commenting that she did not deserve to be murdered. Appeals to the jury to sympathize with the victim are improper. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001); *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988). In *Dalessandro*, this Court reversed a conviction on the ground of prosecutorial misconduct where the prosecutor commented that the victim's injuries " 'shouldn't happen to a dog, let alone a ten month old baby,' " and repeatedly referred to "the poor innocent baby." *Id.* However, this Court will not reverse where the prosecutor's conduct is isolated and where the appeal to jury sympathy is not blatant or inflammatory. For example, in *Watson*, the prosecutor stated that the defendant "attacked his stepdaughter . . . and he did something to her that no one should do to any other human being. He treated her in a way that no animal should be treated." *Watson*, *supra* at 591. This Court held that the remark was isolated, and not blatant or inflammatory, and therefore did not require reversal. *Id.* at 591-592. The Court further held that the trial court corrected the potential error by instructing the jury that it could not decide the case on sympathy. *Id.* at 592.

Here, the prosecutor made only a few references to the victim's age, such as by stating "[t]his 74 year old woman was by all means tortured," and asking "[w]hat justification and what

excuse is there to treat a 74 year old woman the way that she was treated?" These brief comments were not inflammatory, they did not blatantly appeal to the jury's sympathy, and they were based on the evidence that the victim, a seventy-four-year-old woman, was beaten, raped twice, and strangled. The comments did not suggest that the jurors should convict defendant regardless of the evidence. This Court held in *People v Aldrich,* 246 Mich App 101, 112; 631 NW2d 67 (2001), quoting *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), that a prosecutor "need not confine argument to the 'blandest of all possible terms,' but has wide latitude and may argue the evidence and all reasonable inferences from it." Finally, the trial court instructed the jury that it could not decide the case based on sympathy. Consequently, we find no error in the prosecutor's argument.

III

Defendant argues that the evidence was insufficient to support his conviction of second-degree murder. When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

Defendant argues that the prosecutor failed to prove the malice element of second-degree murder, because he failed to show that the killing did not occur under circumstances that reduce the crime to manslaughter. Common-law voluntary manslaughter is defined as an intentional act of killing that is " 'committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition.' " *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003), quoting *Maher v People,* 10 Mich 212, 219 (1862). 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. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). Case law has consistently held that the provocation must be adequate, namely, that which would cause a *reasonable person* to lose control. *Id.* In the instant case, there is no evidence of legally adequate provocation; on the contrary, the evidence showed that defendant broke into the victim's home to steal her money, and attacked her when she woke up and startled him. Without evidence of provocation, defendant's rage or irrationality during the killing cannot reduce the offense from murder to manslaughter. *Id.* at 519-520.

Defendant also argues that the evidence was insufficient to support the first-degree murder charges, and that the improper charge led to a jury compromise. Our Supreme Court held in *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998), 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." The Court stated that an erroneous submission of a higher offense, such as first-degree murder, is cured when the jury acquits the defendant of the higher offense and convicts him of a properly submitted lesser charge. *Id.* at 487. The Court recognized that reversal may be warranted if "sufficiently persuasive indicia of jury compromise are present." *Id.* at 487. Defendant here was convicted only of second-degree murder; consequently, even if the first-degree murder charge was improper, the error was harmless, because there is no indicia of jury compromise.

We briefly note, however, that the evidence was sufficient to support the charges of first-degree murder under both the felony-murder and premeditation theories. The elements of first-degree felony murder are (1) the killing of a human being, (2) malice, and (3) the commission, attempted commission, or assisting in the commission of one of the felonies enumerated in MCL 750.316(1)(b). *People v Watkins*, 247 Mich App 14, 32; 634 NW2d 370 (2001). The evidence was sufficient to support this charge, because the jury could have found that defendant murdered the victim during the commission of the sexual assaults, the attempted commission of a robbery, or both. In order to convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberate. *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Id.* at 370-371. The jury could have found that defendant had sufficient opportunity for reflection, because the strangulation required at least four minutes of continuous pressure. *People v Johnson*, 460 Mich 720, 730; 597 NW2d 73 (1999).

IV

Defendant claims that his life sentences violate the principle of proportionality and the constitutional prohibition against cruel and unusual punishments. We disagree.

Because the offenses were committed before January 1, 1999, the legislative guidelines are not applicable; therefore, defendant was sentenced under the judicial sentencing guidelines. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Defendant's recommended minimum sentence range was fifteen to thirty years, or life.

This Court reviews a sentence imposed under the judicial guidelines for an abuse of discretion. *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998). A sentencing court abuses its discretion when the sentence is disproportionate to the seriousness of the crime and the defendant's prior record. *People v Babcock*, 469 Mich 247, 254; 666 NW2d 231 (2003).

Because defendant's sentences are within the guidelines range, they are presumptively proportionate. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). Defendant claims that the sentences are disproportionate because he had not previously committed an assaultive offense, he was thirty-six years old at the time of sentencing, he had earned his high school diploma, and he has a supportive family. These unremarkable factors do not constitute unusual circumstances to overcome the presumption of proportionality, especially in light of the sadistic nature of this crime against an elderly woman. Accordingly, the life sentences do not violate the principle of proportionality. Furthermore, because defendant's sentences are proportionate, they represent neither cruel or unusual punishment under the Michigan Constitution, nor cruel and unusual punishment under the United States Constitution. *People v Bullock*, 440 Mich 15, 27-31; 485 NW2d 866 (1992).

V

Defendant claims that the trial court sentenced him to life in prison based on the erroneous assumption that he would become eligible for parole sooner than if he were sentenced to a term of years in prison. Defendant acknowledges that he will become eligible for parole

review after fifteen years, but contends that he is unlikely to receive the review for thirty or forty years, and unlikely to ever be paroled.

At sentencing, the trial court asked the prosecutor, "Life can be a shorter sentence than the sentence for a year, term of years, can it not?" The prosecutor replied that a defendant sentenced to life in prison for second-degree murder would become eligible for parole in twenty years, but a defendant sentenced to a term of years would not become eligible until the minimum term of years had expired. The trial court commented that a life sentence "in effect, affords an individual an opportunity to be considered for parole sooner than if he was given a sentence that exceeded 20 years." When the trial court sentenced defendant to life in prison, it commented that he would become eligible for parole review in twenty years. The court stated:

> [Defendant] will be brought before the Parole Board, they will review the whole circumstances [sic]. They may not let him out. They probably won't for the first time around or maybe even the second or third time around. If he acts up in prison, he may do the natural life. But at least he'll have the opportunity sometime in the distant future to maybe breathe air again in a free society.

The trial court did not misunderstand the implications of its sentence. MCL 791.234(6) provides that a prisoner serving a life sentence (except for specified offenses not applicable here) for a crime committed on or after October 1, 1992, is subject to the jurisdiction of the parole board and may be released on parole by the parole board after he has served fifteen years of his sentence. Except for erroneously indicating twenty years instead of fifteen (i.e., that the parole law was actually *more* favorable to defendant than the trial court realized), the trial court correctly recited the substance of this statute. Contrary to defendant's claim, the trial court did not indicate that it intended to achieve a strong likelihood of early parole. Instead, the trial court acknowledged that defendant was unlikely to be paroled at his first review, that he might not be paroled at the second or third review, and that he might never be paroled. Consequently, it is apparent that the trial court did not misunderstand the consequences of imposing a life sentence.

VI

Defendant claims that the trial court improperly considered his refusal to admit guilt as a factor in imposing the life sentence. Defendant correctly asserts that refusal to admit guilt is an improper consideration in a sentencing court's decision. *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977); *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). However, resentencing is required only if the alleged error is apparent from the trial court's actions and statements, e.g., if the court asked the defendant to admit his guilt or offered him a lesser sentence if he did. *Id.*

Here, there is no indication that the trial court chose a life sentence because defendant would not admit guilt. Although the trial court commented on defendant's insistence that he was innocent, it did so in the context of comparing the weight of the incriminating evidence against defendant's claim of innocence and his family's belief in his innocence. The trial court did not penalize defendant for claiming innocence, instead, it explained why it found that claim unbelievable.

VII

Defendant claims that the trial court made an independent finding that he was guilty of first-degree murder and sentenced him in accordance with this finding. Defendant has misread the trial court's statements. The trial court commented that defendant "did get a break that he probably isn't entitled to but he received it anyways." The court explained that under the law of felony murder, a murder committed during the commission of a CSC automatically elevates the murder from second-degree to first-degree, thus the jury disregarded the trial court's instructions when it found defendant guilty of CSC and second-degree murder, but acquitted him of first-degree felony murder. This explanation was an accurate statement of the law, and not an independent factual finding. *Watkins, supra* at 32.

Moreover, the trial court did not sentence defendant based on its belief that he should have been convicted of first-degree murder, in disregard of the jury's verdict. The trial court commented that a defendant convicted of first-degree murder receives a mandatory life sentence without parole, in contrast to defendant, who would be eligible for parole review. The trial court did not depart from the judicial sentencing guidelines. There is no indication on the record that the trial court imposed a life sentence because it believed defendant should have been convicted of first-degree murder. In any event, a sentencing court may take into consideration aggravating factors that are supported by the evidence introduced at trial. In *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995), our Supreme Court upheld a trial court's decision to upwardly depart from the judicial guidelines when sentencing a defendant who had been convicted of manslaughter, based on evidence that the victim was repeatedly shot in the back. The Court rejected the defendant's argument that the sentence was improperly based on an independent finding that the defendant was actually guilty of first-degree murder, and stated instead that "the sentencing judge was making permissible inferences from the evidence introduced at trial." *Id.* This reasoning applies with greater force here, where there was no departure from the guidelines.

Affirmed.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Helene N. White