

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JOHN NYE,

Defendant-Appellant.

UNPUBLISHED

January 17, 1997

No. 176943

LC No. 94-36648-FH

Before: Saad, P.J., and Corrigan and R. A. Benson,* JJ.

PER CURIAM.

Defendant's two-year-old daughter and a nineteen-year-old driver of another car both died in a head-on collision on December 10, 1993. Defendant appeals from his conviction for involuntary manslaughter, MCL 750.321; MSA 28.553, negligent homicide, MCL 750.324; MSA 28.556, and operating a vehicle while under the influence of alcohol, MCL 257.625(1); MSA 9.2325(1). We affirm.

I

Defendant first contends that the trial court erroneously instructed the jury. Defendant asserts that the instructions caused the jurors to incorrectly believe that the contributory negligence of Ann Marie Sorenson (the driver of the other car) could not be considered in relation to defendant's negligence. Because defendant failed to object to the court's instruction, he waived any error unless he can show that it would be manifestly unjust to allow his conviction to stand. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). As a preliminary matter, it must be noted that it is rare that an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. *Id.*, 441 Mich at 545. Because the instructions presented here were proper, we do not believe that this case presents one of those rare instances.

We review the instructions in their entirety to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). We note that the instructions

* Circuit judge, sitting on the Court of Appeals by assignment.

regarding contributory negligence limited the jury's consideration of Sorenson's contributory negligence only to counts that pertain to Sorenson. However, contributory negligence is not a defense, but is "only one factor" for the jury to consider in determining whether defendant's conduct caused Nicole Nye's death, *People v Tims*, 449 Mich 83, 99; 534 NW2d 675 (1995). Therefore, the court was not required to instruct on a theory of contributory negligence unless defendant made a request, *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212; 539 NW2d 504 (1995), and defendant did not make that request.

The court is required to instruct the jury regarding the law applicable to the case and to fully and fairly present the case to the jury in an understandable manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). The court did instruct the jury more than once that defendant's conduct must be a substantial cause. Taken as a whole, the instructions did address the applicable law and did fully and fairly present the case to the jury. Accordingly, there was no error and no manifest injustice.

II

Defendant next claims that the court erred in sentencing. Defendant alleges that the court relied on erroneous information in reaching a sentence, and that the court imposed a disproportionately harsh sentence. We review a sentence for abuse of discretion. *People v Antolovich*, 207 Mich App 714, 720; 525 NW2d 513 (1994). Defendant's sentence was within the guidelines, and defendant has not overcome the presumption that his sentence is not excessively severe or unfairly disparate. See *People v Poppa*, 193 Mich App 184, 190; 483 NW2d 667 (1992). Even though defendant contends that the court did not properly consider the facts in sentencing, the court did state the criteria it considered and the facts supporting the sentence. See *Id.*, 193 Mich App at 189-190. The court referred to defendant's prior record, his substance abuse problem, his poor prospects for rehabilitation, and the circumstances leading to the incident, which included speeding, driving without insurance, driving on a suspended license, and driving while impaired. There is no requirement that the court only consider the facts that defendant favors. The record supports the court's reasoning. In addition, defendant incorrectly contends that the court did not consider his employment -- the record shows that it was considered. In any event, the court's reference to the guidelines alone is sufficient explanation for the sentence when the sentence is within the guidelines. *Poppa*, 193 Mich App at 190.

Defendant also argues that his sentence was inconsistent with the jury's verdict. Defendant reasons that the jury necessarily concluded that his blood alcohol content was below .1 percent and that he did not cause the accident because the jury convicted him of *negligent homicide* of Ann Marie Sorenson, not *involuntary manslaughter*. Defendant's contention is pure speculation; the jury could have instead concluded that defendant's impairment, even if it was below .1 percent, caused the accident.

Affirmed.

/s/ Henry William Saad

/s/ Maura D. Corrigan

/s/ Robert A. Benson