STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES JOSEPH QUIRK,

Defendant-Appellant.

UNPUBLISHED
March 28, 1997

No. 182707
Oakland Circuit Court
LC No. 94-133294-FC

Before: Fitzgerald, P.J., and MacKenzie and Taylor, JJ.

PER CURIAM.

Defendant was convicted by a jury of involuntary manslaughter, MCL 750.321; MSA 28.553, and arson of a dwelling house, MCL 750.72; MSA 28.267. For those respective convictions, he was sentenced to concurrent terms of five to fifteen years' imprisonment and five to twenty years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion for a new trial on great weight of the evidence grounds. We disagree. This Court reviews a denial of such a motion for an abuse of discretion. *People v Gonzalez*, 178 Mich App 526, 532; 444 NW2d 228 (1989). With respect to the involuntary manslaughter conviction, the evidence did not clearly weigh in favor of defendant's theory that the firefighters' negligence caused the death of the fireman. The evidence established that even if firefighters had been clearly informed that this was a basement fire, they would not have fought the fire any differently. The evidence showed that firefighters checked the possibility of weakened floors, followed normal procedure, and decided to leave as soon as they realized the floor was spongy. Further, even if there was some evidence from which the jury could conclude that there was negligence on behalf of the firefighters, this would not be a defense as long as the jury still found that defendant's conduct was a proximate cause of the victim's death. *People v Tims*, 449 Mich 83, 96-99; 534 NW2d 675 (1995). Here, given the evidence that defendant started the fire which ultimately lead to the fireman's demise, the jury could have found this to be the case. Further, in light of the evidence that defendant threatened to burn the house down, there was ample evidence from which the

jury could conclude that the fire was intentionally set by defendant. The trial court did not abuse its discretion in denying defendant's motion with respect to the arson conviction.

Next, defendant claims that the court erred in denying his motion for directed verdict. This Court reviews the denial of a motion for directed verdict by reviewing the evidence presented in a light most favorable to the prosecution and determining whether a rational trier of fact could have found that the essential elements of the charged offenses were proven beyond a reasonable doubt. *People v Harris*, 190 Mich App 652, 658; 476 NW2d 767 (1991). Defendant contends that there was insufficient evidence of the requisite intent for both crimes. However, given that several witnesses testified that defendant threatened to burn down the house, the jury could have found that this was a willful act, as the arson statute requires. MCL 750.72; MSA 28.267. Further, evidence that defendant set fire to the house as a result of brandishing a fire-starter supported a finding of reckless or grossly negligent conduct, the requisite intent for a finding of involuntary manslaughter. *People v Moseler*, 202 Mich App 296, 298; 508 NW2d 192 (1993). Therefore, defendant was not entitled to a directed verdict.

Next, we conclude that even if there was error in admitting a photograph of the deceased into evidence, the error was harmless beyond a reasonable doubt. *People v Price*, 214 Mich App 538, 546; 543 NW2d 49 (1995).

Defendant also alleges a variety of instructional errors. Because there was no request for, or objection to, the instructions, appellate review is waived absent manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). We find no manifest injustice in this case. The failure to instruct on lesser offenses did not result in the denial of a fair trial, given that defendant's strategy was not to distinguish between arson and some lesser offense, but rather to persuade the jury to absolve him of any intentional crime. See *People v Haywood*, 209 Mich App 217, 231; 530 NW2d 497 (1995). Nor did the failure to give additional instructions on proximate cause result in the denial of a fair trial. Finally, the trial court's unanimity instructions were not deficient under the principles announced in *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994), as the prosecution did not offer evidence of multiple acts to support a single offense.

Next, we conclude that defendant's statement at the crime scene was properly admitted, as he was not entitled to *Miranda* warnings (*Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 [1966]) because he was not subjected to custodial interrogation. *People v McElhaney*, 215 Mich App 269, 279; 545 NW2d 18 (1996). There was no abuse of discretion resulting from the denial of a new trial on this ground.

We also reject defendant's claim that his convictions and sentences subjected him to double jeopardy. Defendant's reliance on the same transaction test, *People v White*, 390 Mich 245; 212 NW2d 222 (1973), overruled in part on other grounds *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984), is misplaced because the two charges were tried together. There was no double jeopardy violation because arson and involuntary manslaughter concern different social norms and manifest two distinct legislative intents. *People v Hurst*, 205 Mich App 634, 637; 517 NW2d 858 (1994).

Next, we conclude that defendant has not shown the requisite prejudice or deficient conduct to sustain his claim of ineffective assistance of counsel. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Lastly, defendant claims that his sentences are disproportionate. However, defendant has failed to overcome the presumption that his minimum sentences, which are within the recommended guidelines' range for the more serious offense of arson, are proportionate to the circumstances surrounding the offenses and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Clifford W. Taylor