STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN S. MITCHELL,

Defendant-Appellant.

UNPUBLISHED
June 19, 1998

No. 197732
Recorder's Court
LC No. 95-011268

Before: Young, Jr., P.J., and Kelly and Doctoroff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of involuntary manslaughter, MCL 750.321; MSA 28.553. He was sentenced to ten to fifteen years in prison. Defendant now appeals as of right. We affirm.

Defendant's first argument on appeal is that the trial court erred in denying his motion for a new trial on the basis of the trial court's failure to re-instruct the jury after the court realized that it had given an erroneous jury instruction. The record reveals that when the trial court decided to re-instruct the jury with the correct second-degree child abuse instruction, defendant objected to the giving of the correct instruction. Defendant cannot both object to a trial court's decision to correct an error that it made and then claim on appeal that he should be granted relief because of the trial court's error. *People v Bart (On Remand)*, 220 Mich App 1, 11; 558 NW2d 449 (1996) (a defendant cannot harbor error to be used as an appellate parachute in the event of jury failure).

Next, defendant claims that the prosecutor improperly attempted to elicit the sympathy of the jurors during closing argument. This claim was not preserved for appellate review and we find that manifest injustice will not result from this Court's refusal to review the issue because any error in this regard was cured by the lower court's instructions. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121; 115 S C 923; 130 LE 2d 802 (1995). Furthermore, the prosecutor's comments were supported by the evidence. On a related claim, because the prosecutorial comments were not improper, defense counsel was not ineffective for failing to object to them. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Defendant's third argument is that the prosecution presented insufficient evidence of gross negligence to support his conviction. We disagree.

In order to show gross negligence, the following elements must be established:

> (1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another.
>
> (2) Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand.
>
> (3) The omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. [*People v McCoy*, 223 Mich App 500, 503; 556 NW2d 667 (1997), citing *People v Lardie*, 452 Mich 231, 251-252; 551 NW2d 656 (1996); *People v Orr*, 243 Mich 300, 307; 220 NW 777 (1928).]

We conclude that the jury could properly have inferred that defendant knew that the care of a nine-month old baby required the exercise of ordinary care and diligence to avert injury. Similarly, there is no question that the jury could have properly inferred that defendant had the ability to avoid the death that resulted by exercising ordinary care and diligence, but failed to do so. *McCoy, supra*, 223 Mich App 503. Finally, the jury could also have inferred that, to the ordinary mind, it would have been apparent that leaving an unattended nine-month old child dressed in a two-piece outfit and blazer in the seat of a van for over three hours could prove disastrous to the child. Accordingly, sufficient evidence was presented from which a rational trier of fact could find the elements of involuntary manslaughter were proven beyond a reasonable doubt. *People v Kozyra*, 219 Mich App 422, 428; 556 NW2d 512 (1996).

With regard to defendant's fourth issue, we have reviewed the existing record and conclude that defendant was not denied the effective assistance of counsel. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Michael J. Kelly
/s/ Martin M. Doctoroff