

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUDY ROLINE-PEOPLES HALL,

Defendant-Appellant.

UNPUBLISHED

September 25, 1998

No. 199548

Saginaw Circuit Court

LC No. 96-012164-FC-2

Before: O’Connell, P.J., and White and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right from her conviction by jury of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to eighteen to thirty years’ imprisonment for the murder conviction, to be served consecutively to a two year term of imprisonment for the felony-firearm conviction. We affirm.

I

Defendant first argues that there was insufficient evidence of intent to support her convictions. We disagree. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to conclude that defendant possessed the requisite intent at the time of the shooting. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748; modified 441 Mich 1201-1202 (1992).

Defendant argues that intent cannot be inferred from possession or use of a gun, that the prosecutor could not meet the burden of proving defendant’s intent merely by asking the jury to disbelieve her testimony, that inferences may be drawn from circumstantial evidence only if they follow “as an impelling certainty,” and that the prosecutor had an additional burden of proving that there is no innocent theory possible which will, without violation of reason, accord with the facts. These arguments have no merit.

Malice may be inferred from the facts and circumstances of the killing, including the instruments used. *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991); *Guilty Plea Cases*, 395 Mich 96, 130; 235 NW2d 132 (1975). Where the evidence is circumstantial, the prosecution need not negate every reasonable hypothesis consistent with the defendant's innocence. *People v Boose*, 109 Mich App 455, 472-473; 311 NW2d 390 (1981). Although defendant is correct that mere disbelief in a witness's testimony does not justify a conclusion that the opposite is true without other sufficient evidence supporting that conclusion, *People v O'Connor*, 48 Mich App 524, 529; 210 NW2d 805 (1973), in this case there was other evidence on which the jury could rely to find that the prosecutor proved malice beyond a reasonable doubt.

Defendant admitted that she possessed and used a gun to kill the victim. Evidence was admitted showing that the couch cushion was pushed up, allowing the prosecutor to argue that the gun was hidden and pulled out by defendant specifically to kill the victim. There was also evidence that after the shooting, defendant moved the gun from the porch with the possible intent of hiding it in the house, that defendant referred to the victim as an "enemy," and that she told police that she grabbed for the gun before the victim ever saw it. Although there was no direct evidence of defendant's intent, there was sufficient evidence for a reasonable jury to infer from the surrounding facts that defendant had the intent required for second-degree murder.

II

Defendant next contends that the trial court erred by instructing the jury that it could infer intent from defendant's use of a gun and by not instructing the jury that its verdict had to be unanimous with respect to the specific mental state. Since defense counsel did not object to the trial court's instructions, review is waived unless manifest injustice will result. *People v Curry*, 175 Mich App 33, 39; 437 NW2d 310 (1989). We find no manifest injustice.

Defendant's arguments are without merit because the instructions at issue were accurate statements of the law. First, there was no error in instructing the jury that it could "infer that the defendant intended the usual results that follow from the use of a dangerous weapon, or that it could infer intent from defendant's use of a gun. Permissive inferences are allowed, including the inference of intent from the use of a gun, and only mandatory inferences or presumptions that shift the burden of proof to the defendant are unlawful. *People v Woods*, 416 Mich 581, 613; 331 NW2d 707 (1982). Second, when a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory. *People v Johnson*, 187 Mich App 621, 629-630; 468 NW2d 307 (1991). Second-degree murder's alternative states of mind relate to a single element of a single offense, not separate and distinct offenses, so jury unanimity in regard to these is not required. *Id.*

III

Defendant next raises the issue of prosecutorial misconduct, arguing that she was denied a fair trial based on a large number of allegedly unfair comments by the prosecutor during closing arguments.

Absent an objection or a request for a curative instruction, this court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would eliminate the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

It is improper for a prosecutor to argue facts not presented to the jury, but a prosecutor can comment on testimony, draw inferences from it and argue that a witness is not worthy of belief. *Id.* The prosecutor stated that defendant was under the influence of drugs and alcohol at the time of the shooting. This was based on facts in evidence that were testified to by defendant herself. The prosecutor stated that defendant tried to make the shooting look like an accident. This was a proper inference from the evidence that defendant moved the gun and initially lied to the police. The prosecutor stated that the gun used had to be prepared to fire at the time of the shooting. This was drawn from expert testimony regarding the use of the gun, and from defendant's statement that the gun was "safe" when she received it. We agree that the prosecutor's allusions to other notorious cases was improper. However, any error in comparing the cases could have been cured by prompt instruction and did not result in an unfair trial. Similarly, the prosecutor may have gone beyond proper comment in calling defendant's heart "depraved," but this remark was isolated and could have been cured by proper objection and instruction. *Launsbury*, *supra* at 361. The remainder of the challenged remarks were properly based on evidence and were not improper.

Defendant next argues that the prosecutor made improper arguments that shifted the burden of proof to defendant, in violation of due process. Although it is the duty of the prosecutor to prove each element of a crime beyond a reasonable doubt, it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of the other. *People v Fields*, 450 Mich 94, 110-111; 538 NW2d 356 (1995). Defendant challenges the prosecutor's arguments that the jury did not need to reach a unanimous verdict with respect to the intent element of second-degree murder, that it could "infer the defendant intended to kill if a dangerous weapon is used in a way that was likely to cause death," that it could "infer the defendant intended the usual results that followed from the use of a dangerous weapon," and that "the law says I intend the natural consequences that flow from pulling a trigger on a gun at close range." The first three comments were accurate statements of the law, but the last comment tended to suggest an impermissible mandatory presumption. However, it was one isolated comment that was followed by correct instructions by the trial court regarding the burden of proof, permissible inferences, and the obligation to follow the law as stated by the court, not the attorneys. Therefore, any error was not so great as to prejudice defendant or cause manifest injustice.

Prosecutors should not resort to civic duty arguments appealing to the fears and prejudices of jury members. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Defendant argues that the prosecutor did so by mentioning the victim's family and by arguing:

Don't try to make sense out of the sense of violence of a criminal act. That will cause a law-abiding citizen, which I believe all of you are, to never be able to reach the

goal of figuring out what the truth is in a criminal case because criminal cases, criminal acts, acts of serious violence, killing someone you know over something pretty stupid, doesn't make sense.

Neither of these arguments has merit. First, when the prosecutor mentioned the victim's family, he also mentioned defendant's family in an effort to urge the jurors to be objective, not sympathetic to either side. Second, the comment regarding senseless criminal acts seems to be an argument regarding motive, and the prosecutor did not argue that the jury should disregard the truth, but specifically argued that the goal was to figure out the truth. Therefore, there was no error resulting in manifest injustice and nothing that could not have been cured by curative instructions.

Defendant also argues that the prosecutor made statements of fact that were not supported by evidence, argued his own personal belief of defendant's guilt, and jeopardized the possibility of the jury finding defendant not guilty of one charge. The prosecutor's argument that it did not make sense for defendant to leave a loaded gun on a couch by the door when people were going in and out all night was a reasonable inference from facts in evidence. The prosecutor related these facts and inferences to his theory of the case. The prosecutor also commented on the law, basically noting that the charge of felony-firearm is proven by some of the same elements as the homicide charge. In the end, the prosecutor did inform the jury that even though the elements overlap, the law gives the choice whether to convict defendant of one or both charges. There was no error. The prosecutor argued finally that "the People's witnesses really don't have an interest or bias." The prosecutor may not attempt to place the prestige of his office behind a witness or evidence, or vouch for credibility. *People v Erb*, 48 Mich App 622, 632; 211 NW2d 51 (1973). In this case, however, the prosecutor did not state that he believed the witnesses. He only commented on their motive, or lack thereof, to fabricate. This is permissible and, in any event, any implication of vouching could have been cured by an immediate curative instruction. *People v Couch*, 49 Mich App 69, 72; 211 NW2d 250 (1973).

IV

Lastly, defendant contends that her sentence was disproportionate and that the trial judge failed to explain the sentence. We disagree. Defendant's sentence, which was within the recommended range of the sentencing guidelines, reflected the seriousness of the matter and did not constitute an abuse of discretion. *People v Houston*, 448 Mich 312, 320-321; 532 NW2d 508 (1995). Also, contrary to defendant's contentions, a trial court's express reliance on the sentencing guidelines in imposing sentence satisfies the articulation requirement of *People v Coles*, 417 Mich 523, 550; 339 NW2d 440 (1983). *People v Lawson*, 195 Mich App 76, 77; 489 NW2d 147 (1992).

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Richard A. Bandstra