STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 8, 1999
v	No. 204708 Recorder's Court
ROBERT L. FRIESS, Defendant-Appellant.	LC No. 96-007435

Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant of two counts of manslaughter with a motor vehicle, MCL 750.321; MSA 28.553. The trial court sentenced defendant to ten to fifteen years' imprisonment on each count. Thereafter, the trial court enhanced defendant's sentence to twenty to forty years' imprisonment as a fourth habitual offender pursuant to MCL 769.12; MSA 28.1084. Defendant appeals as of right on multiple grounds. We affirm.

I. Basic Facts

Defendant and a female companion were occupants of a Mercury Marquis registered in defendant's name. Two police officers witnessed what appeared to be a drug transaction transpiring between the occupants of the Mercury and a pedestrian. When the police approached the Mercury, the driver attempted to flee. A highspeed pursuit ensued, that culminated in the Mercury entering an intersection against a red light. As a result, the Mercury struck another vehicle. The crash killed the occupant of that vehicle, as well as defendant's female companion. Defendant was also injured in the accident. Defendant contended at trial that he was not driving the vehicle at the time of the accident.

II. Standards Of Review

A. Suppression Of Defendant's Inculpatory Statements

Whether a defendant's statements were knowing, intelligent and voluntary is a question of law for the court which must be determined under the totality of the circumstances. *People v Cheatham*,

453 Mich 1, 27; 551 NW2d 355 (1996). An appellate court must give deference to the trial court's findings in a suppression hearing. *Id.* at 29. Although we review the entire record do novo, we will not disturb a trial court's factual findings regarding a knowing and intelligent waiver of *Miranda* rights unless we find that ruling to be clearly erroneous. *Id.* We will find a lower court's ruling to be clearly erroneous only where we are left with a definite and firm conviction that a mistake had been made. *People v O'Neal*, 167 Mich App 274, 279; 421 NW2d 662 (1988).

B. Judicial Impartiality

We review issues of law de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995). A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deny a defendant a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

C. Jury Instructions

We consider jury instructions as a whole rather than piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). The trial court must charge the jury concerning the law applicable to the case. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). "Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Bell, supra* at 276.

D. Expert Witness Qualification

The qualifications of a witness as an expert, and the admissibility of his testimony, are in the trial court's discretion, and we will not reverse on appeal absent an abuse of that discretion. *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986).

E. Sentencing

In reviewing sentences imposed for habitual offenders, this Court must determine whether there has been an abuse of discretion. *People v Hansford*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). When an habitual offender's underlying felony and history of prior felonies demonstrate that the offender is unable to conform with the law, a sentence within the statutory limits is not an abuse of discretion. *Id.* at 326.

III. Suppression Of Defendant's Inculpatory Statements

Defendant argues that two inculpatory statements that he gave while hospitalized were not voluntarily made because he was physically and mentally incapable of giving a voluntary statement due to the injuries he received in the accident. Defendant contends that the trial court erred in denying his motion to suppress. We disagree.

The prosecution may not use custodial statements as substantive evidence unless it demonstrates that, prior to any questioning, the police warned the accused that he had the right to remain silent, that

his statements could be used against him and that he had the right to retained or appointed counsel. See *Cheatham, supra* at 11-12. The police may make an advice of rights orally or in written form. *People v Brannon,* 194 Mich App 121, 130-131; 486 NW2d 83 (1992).

In this case, the police took three statements, two of them inculpatory, from defendant while he was hospitalized. The police officers taking the statements testified that, prior to any interrogation, they read to defendant his rights. One officer actually held the form in front of defendant so that he could read the rights to himself. Then, defendant indicated that he understood his rights and wished to make a statement. Defendant could not sign any of the forms because intravenous lines were attached to his arm. The trial court did not err when it found that defendant was sufficiently advised of his rights.

However, compliance with *Miranda*[1] does not complete the inquiry; it only establishes the "knowing and intelligent" aspect of the waiver. It is also necessary to establish that the statement was given voluntarily. *People v Godboldo,* 158 Mich App 603, 605-606; 405 NW2d 114 (1986). In *People v DeLisle,* 183 Mich App 713, 719; 455 NW2d 401 (1990), this Court set forth some of the factors to be considered when determining whether a statement is voluntarily made:

> [T]he circumstances which must be considered include, but are not limited to, the length and conditions of the detention, the physical and mental state of the defendant, the age, mentality, and prior criminal experience of the defendant, the nature of any inducement offered, the conduct of the police, and the adequacy and frequency of the advice of rights.

The burden is on the prosecution to prove voluntariness by a preponderance of the evidence. *Id.* After reviewing the record, we find that the prosecutor proved by a preponderance of the evidence that defendant's statements were voluntarily made.

Prior to questioning defendant, the police officer who took defendant's first statement asked the attending nurses for permission to speak with defendant; when he received this permission, he began the questioning. The police officers testified that defendant, while in some pain, was still lucid. Defendant's answers were coherent and responsive to the police officers' questions. One of defendant's attending nurses testified at the suppression hearing that defendant was coherent and understood what was occurring. She also testified that, at the time the second statement was taken, that the interrogation was brief and that the police officer's questions immediately ceased when defendant indicated that he was tired. Lastly, the nurse testified that she would not have given permission for the police officers to question defendant if he showed any signs of being incoherent or confused. Based upon the foregoing record, we conclude that the trial court's finding that defendant's statements were knowingly, intelligently and voluntarily made was not clearly erroneous.

IV. Judicial Impartiality

A. Introduction

Defendant argues that the trial court made several remarks during trial and took certain actions that demonstrated that it had abandoned the mantle of impartiality and was biased against defendant. After reviewing the record we find no merit to this argument. Moreover, because defendant failed to object at the trial court level on the grounds asserted on appeal, his claims of judicial bias have not been preserved for our review. *Meagher v Wayne State University*, 222 Mich App 700, 726; 565 NW2d 401 (1997); *People v Ensign (On Reh)*, 112 Mich App 286, 290; 315 NW2d 570 (1982).

B. Motion To Suppress.

First, defendant argues that the trial court's reference during the *Walker*[2] hearing to a book that allegedly calls for repudiation of the rule formulated by the Supreme Court in *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), was evidence of the trial court's bias against defendant and requires that defendant's conviction be reversed. We disagree.

Defendant has not preserved this issue for review, as he did not object at the time of the *Walker* hearing. Nor would manifest injustice result from our failure to review this issue. Regardless of the trial court's reference to a book that apparently criticized the underpinnings of *Miranda*, it is evident that the trial court applied the proper test when ruling upon the motion to suppress. A trial judge need not personally agree with binding precedent so long as the judge properly applies that precedent. The trial court looked to whether defendant's statements were knowingly, intelligently and voluntarily made. Because the record does not show actual bias or prejudice, no manifest injustice will result by this Court's refusal to review this unpreserved claim of error.

C. Possible Sentence

At the conclusion of the *Walker* hearing, the trial court asked whether the case could be resolved short of a trial. The trial court indicated that the consequences of going to trial were grave, given the fact that a notice of habitual offender-fourth had been filed. The trial court then informed defendant that it gave sentence concessions for bench trials and pleas in order to move the docket. The trial court, however, indicated that the concessions were diminished if the pleas or bench trial occurred on the morning set for the jury trial. The trial court then encouraged the prosecution to communicate any available offer to defendant quickly.

On the first day of trial, the trial court told defendant, in the interest of adequately informing him of any offers, that there was an outstanding offer of a guilty plea with a ten to fifteen year sentence, in exchange for the dismissal of the habitual offender notice. The trial court reminded defendant that if he were found guilty at trial, he faced the possibility of life imprisonment under the habitual offender statute. Defendant then indicated that he wished to proceed with a jury trial. Defendant contends that the trial court's remarks *at trial*[3] were intended "to send a clear message that if he chose to continue to assert his constitutional right to trial by jury he was going to pay a penalty." We find that the trial court's remarks did not evidence prejudice or bias and that the trial court did not place undue pressure on defendant to enter a plea.

Once again, defendant's claim of judicial misconduct has not been preserved, as no objection was placed on the record at either the *Walker* hearing or the first day of trial. Nor is there a risk that manifest injustice will result if the Court refuses to consider the issue. The trial court simply gave defendant a final opportunity to consider his decision. The language employed by the trial court was not coercive. In addition, the suggestion of a sentence concession at the *Walker* hearing is not unduly coercive because there is no indication that if defendant opted for a jury trial he would have faced retaliatory sentencing. *People v Godbold*, 230 Mich App 508; ___ NW2d ___ (1998). Finally, and perhaps most telling, defendant obviously did not feel unduly pressured, as he did not enter a plea nor did he waive his right to a jury trial. We find no error.

D. Questioning Of The Assistant Medical Examiner And Defense Expert

Defendant contends that the trial court's questioning of the assistant medical examiner and defendant's expert in biomechanics demonstrated that the trial court had dropped the mantle of impartiality. Defendant then reasons that the jury was unduly influenced. Defendant did not preserve this issue for review, as no objection to the questioning was placed on the record. MRE 614 requires a party objecting to the court's interrogation of a witness to place an objection on the record at the time of the questioning or at the next available opportunity when the jury is not present. Defendant did not comply with MRE 614. In any event, we disagree with defendant's argument.

After both parties examined and cross-examined Dr. Schmidt, the trial court questioned the witness as follows:

> *The Court:* Come on up here. And while they are doing that, just so that the jury understands I think what you're saying, you're saying I take it that within the realm of having a medically certain, that is, reasonably certain opinion, it is possible to examine injuries on live or dead bodies and draw an inference from the location of injuries in some cases that someone was the driver of a vehicle involved in an accident?
>
> *The Witness:* That's correct.
>
> *The Court:* Yeah, okay. What you're saying I take it is even though you did an autopsy on both Norman Cope and Debra Ann Berlin, at least with respect to Debra Ann Berlin you cannot come to any opinion as to whether she was the driver or not but there was one injury to the sternum that could have been caused by something like a steering column?
>
> *The Witness:* That's correct.
>
> *The Court:* Okay. But you're not -- but you're saying you simply don't have -- you don't have enough there to draw an inference she was the driver?
>
> *The Witness:* There were too many injuries to ascertain whether or not she was the driver.

The Court: So you're telling me you don't have any opinion as to whether or not she was the driver because of the state of the body?

The Witness: That's right.

With respect to Begeman, defendant's expert, the following exchange, which occurred during the prosecution's cross-examination, is at issue:

Q. You don't have an opinion as to who the driver was?

Mr. Wilson: Well I think he is saying he has an opinion but his opinion is that he could not determine who the driver was. That's his opinion.

The Court: I know. I know what you're saying but that's being a little overly semantic. I don't think Mr. Heimbuch was trying to mislead the witness and I suspect the witness couldn't be mislead in any event. Your opinion is you can't determine from what you examined who the driver was?

The Witness: That's correct.

A trial court may interrogate a witness whether called by itself or by a party. MRE 614(b). The principal limitation on a court's discretion over matters of trial conduct is that it not pierce the veil of judicial impartiality. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). If the trial court poses its questioning in a neutral manner and the trial court's comments and questions neither add to nor distort the evidence, the trial court has not engaged in misconduct. *Id.*

We find that the questioning did not indicate judicial partiality so that the jury would be unduly influenced. In a few questions, the trial court helped to summarize the opinions of both experts succinctly. With respect to Schmidt, the trial court managed to highlight the prosecution's point, that the witness couldn't tell whether the other occupant of the car was the driver, and defendant's point, that the occupant's fractured sternum could have been caused by the steering wheel. With respect to Begeman, defendant had placed an objection on the record that the prosecutor was, essentially, mischaracterizing the expert's opinion. The trial court's question was directly responsive to defense counsel's objection, and the expert's answer illustrated the point that defendant was attempting to make. On the whole, the questioning was fairly balanced and summarized the opinions. Therefore, the trial court's questioning did not deprive defendant of a fair trial.

E. Directions To Defense Counsel

During defendant's cross-examination of a police officer witness, defense counsel attempted to extract from the witness the fact that in his report he did not indicate that the driver was male, but that he was testifying in this manner at trial. The trial court told defense counsel that he was being repetitive, that he had "made the point about 10 times" and "let's get on with it." Defense counsel explained to the trial court that his questioning was necessary because it was a crucial point. The trial court

acknowledged this and said, "but once the point has been made let's get on where [sic] we can make that point all day long."

Although defense counsel took issue with the trial court's comments, at no time did he suggest that the trial court was partial, which is the issue being raised on appeal. Thus, this issue was not preserved. Nor would manifest injustice result if we declined to consider defendant's claim.

In any event, however, we find that the trial court engaged in no misconduct. When the trial court told defense counsel to move on, it was after counsel had asked the same question five times. The trial court was attempting to keep control of the proceedings and keep the trial moving. MCL 768.29; MSA 28.1052. The trial court did not denigrate defense counsel or make disparaging remarks. In fact, the trial court highlighted the fact that defense counsel had successfully made the precise point he was attempting to make. We find no error.

F. Comments During Testimony

On direct examination, police officer James Robbins testified that defendant had bruising that would "possibly be caused by a steering wheel." He was then asked if he was telling the jury for sure whether defendant was driving the Mercury, to which Robbins responded, "[n]ot for sure." On redirect examination, Robbins was asked if he had an opinion as to whether defendant could have been the driver. At that point, defense counsel asked, "has he been declared to be an expert?" The trial court responded that it was going to allow a "lay opinion" from the witness. Defense counsel once again, objected. At that point, the trial court asked a series of questions eliciting Robbins' qualifications to testify. The trial court then ruled that it would take Robbins' opinion. The prosecution then asked the witness if, in his opinion, defendant could have been the driver, to which Robbins replied, "yes." This exchange followed:

> *The Court:* So what was there to object to?
>
> *Mr. Wilson:* Hey, people give their opinion all day, you know.
>
> *The Court:* If all you can ask is whether it's a possibility then we don't need to have him as an expert.
>
> *Q.* (By Mr. Heimbuch, continuing): Well you have already testified you don't know whether Mr. Friess was the driver right?
>
> *A.* Yes, sir.
>
> *Q.* Okay.
>
> *The Court:* No, listen. I went through the trouble of getting him qualified as an expert. Here is the question for you: Can you say with a reasonable degree of certitude based simply on the injuries you see in that photograph that those injuries were caused to Mr. Friess because he was the driver of the vehicle in question?

The Witness: I can say that, yes sir.

The Court: Okay. Now your objection is reinstated, Mr. Wilson.

Mr. Wilson: I don't know why people go to medical school.

As a preliminary matter, we note that defense counsel did not place an objection on the record that the trial court was engaging in judicial misconduct. Instead, defense counsel objected on the ground that the witness was not qualified to testify. Therefore, the issue was not preserved. However, we review the issue to determine whether manifest injustice occurred. We find that in the foregoing exchange the trial court did not abandon the mantle of impartiality so that defendant was denied a fair and impartial trial.

In *Davis, supra* at 49-50, this Court, citing with approval to the opinion in *United States v Dandy*, 998 F2d 1344, 1354 (CA 6, 1993), set forth the situations when a trial court has good reason to interject itself into the trial:

> (1) when the trial is lengthy and complex, (2) when attorneys are unprepared or obstreperous or if the facts become confused and neither side is able to resolve the confusion, and (3) when a witness is difficult or is not credible and the attorney fails to adequately probe the witness, or if a witness becomes confused. *Id. In addition, we note that there might be situations in which attorneys for both sides avoid asking a witness a material question on the (traditional in some quarters) ground that counsel never asks a question without first knowing the answer. In these and other appropriate instances, the court may have good reason to question a witness in order to enhance the role of the criminal trial as a search for substantive truth.* [Emphasis added.]

Here, the trial court's conduct fell within the later category of cases highlighted in the above quote. The prosecution attempted to qualify the witness. It then asked several questions regarding injuries that were typical to the driver of a car. It asked if those same type of injuries were seen in defendant, to which the witness replied in the affirmative. The question the trial court asked of Robbins was the question that the prosecution appeared to be leading up to, and it would have been the logical next step, but the prosecution never actually asked it. The trial court did so, by asking a few more foundational questions, and then asking the ultimate question. We find that the trial court had a "good reason to question a witness in order to enhance the role of the criminal trial as a search for substantive truth." *Id.*

G. Comments During Cross-Examination

Police officer Clarkson took the first statement from defendant at approximately 3:00 a.m. on August 17, 1996. Defense counsel spent, relatively speaking, a considerable amount of time addressing whether defendant was given and waived his *Miranda* rights. At the conclusion of the testimony, the trial court instructed the jury:

> So the jury understands what your role is with respect to this, once again I don't know what the lawyers are doing here in terms of their arguing. No I don't. I don't know why

> they are asking a lot of questions that they are asking but I want to tell you what your function is. I don't care whether he was ever advised of his Miranda Rights. I don't care anything about that and nor do you. That's my job outside this trial to determine admissibility of evidence, okay.
>
> Now I've determined that this evidence is admissible before you and can be considered by you in arriving at your verdict. Now what does that mean? That doesn't mean I am telling you that you believe everything. Do you understand what I'm saying? Here is what I'm telling you. Your job with respect – you are gonna hear not only from this witness but I presume other witnesses about things the defendant said.
>
> Your job is to determine first of all whether he in fact said that and then secondly whether if he said it it's true or false what he said. That's your job in the case. You determine whether he said it and then you go on, if you determine that he said it, then you go on to determine whether it's true or false. That's your job. I don't want you in the jury room later on talking about whether he understood Miranda or all of that kind of stuff. That's the job for the judge, not for the jury, okay.

Defendant contends that the trial court's comments were improper because it "blunt[ed]" defense counsel's cross-examination concerning the statement taken. We disagree.

At a suppression hearing, the trial court determines the admissibility of a defendant's confession. "A resolution in favor of admissibility merely place[s] the confession on an equal footing with all other properly admitted evidence." *People v Gilbert*, 55 Mich App 168, 172; 222 NW2d 305 (1974). At the time of trial, a defendant is then free to "familiarize the jury with the circumstances that attended the taking of his confession, including facts bearing on voluntariness, to impeach its credibility or to challenge the fact that it was ever given at all." *Id.*

On several occasions, this Court has held that it is reversible error to deprive the defendant of the ability to present evidence that his confession was not voluntarily made. In *Gilbert, supra* at 172, the trial court instructed the jury that it had held a hearing to determine whether the defendant's confession was voluntarily made and in doing so it looked at the circumstances surrounding the taking of the confession. It then told the jury that it had determined that the confession was voluntarily made "so far as any conduct of the police officers were *[sic]* concerned." Finding that the trial court erroneously instructed the jury, this Court said:

> After such evidence has been admitted, the trial judge may instruct the jury that they should determine, on the basis of all the relevant evidence, 1) if the confession was made, and 2) if they so find, they should decide if the statement is true. *People v Williams*, 46 Mich App 165; 207 NW2d 480 (1973).
>
> The trial court should not, as happened in this case, go on to discuss anything more. For, to inform the jury of the existence, nature, and results of a *Walker* hearing not only makes it unlikely that the jury will thereafter decide the confession was never

> made, *Williams, supra,* but it also tends to unfairly discount the credibility of defendant's impeaching evidence, especially that properly admitted evidence that relates to voluntariness. The trial court thus would improperly impinge upon the province of the jury. [*Gilbert, supra* at 172-173.]

Similarly, the trial court in *People v Skowronski,* 61 Mich App 71, 77-78; 232 NW2d 306 (1975) was found to have erred when it instructed the jury that it was bound by the court's ruling that the confession was voluntarily made.

In this case, however, unlike *Gilbert* and *Skowronski,* the trial court did *not* tell the jury that it had determined that the confession was voluntary. All the trial court stated was that it had ruled that the confession was admissible. It then further instructed the jury that a finding of admissibility did not mean that the jurors must believe that the confession was true. The trial court additionally instructed the jurors pursuant to CJI2d 4.1 that it should determine whether the confession was actually made and, if it was made, the jurors must decide if it was true. This Court in *Gilbert* was concerned that a "binding ruling of voluntariness [would] effectively preclude[] a jury from questioning the credibility or truthfulness of the confession." *Skowronski, supra* at 78. In this case, that same concern is not present. Not only did the trial court not give a "binding ruling of voluntariness" instruction, it also specifically instructed the jury that a ruling of admissibility did not mean that the jury had to believe the confession.

Nor did the trial court's admonishment that the jurors should not concern themselves with whether defendant was properly *Mirandized* deprive defendant of the ability to attack the credibility of the statement. With respect to confessions, it is up to the jury to determine whether the defendant actually made the statement and, if so, whether the statement was true. CJI2d 4.1. By contrast, whether a defendant was properly *Mirandized* goes to the issue of whether he knowingly and intelligently waived his right to remain silent. Compliance with *Miranda* is necessary to establishing a valid waiver. It is not dispositive of the voluntariness issue. *Godboldo, supra* at 605-606. Because it was not for the jury to decide whether defendant knowingly and intelligently waived his right to remain silent, the trial court did not err when it instructed the jury that at the time of deliberations it should not concern itself with whether defendant was properly advised of his *Miranda* rights.

H. Opinion Testimony

Defendant argues that police officer Gregory Hughes was allowed to give an opinion before he had been adequately qualified as an expert and that this additional event further supports defendant's theory that the trial court abandoned its mantle of impartiality. Once again, defendant failed to object at the time of trial on the ground asserted on appeal. Thus, this issue has been waived. In addition, manifest injustice would not result if this Court refused to address the issue.

We further note that police officer Hughes testified that in his experience, defendant's injuries were consistent with someone who may have been the driver of a car. He was then asked if he had an opinion as to whether defendant's injuries were caused as a result of him being the driver. Before he was permitted to give his opinion, defense counsel objected that police officer Hughes had not been qualified as an expert. The trial court then indicated that a ruling on the objection would be taken under

advisement in order for the trial court to see if the prosecution would go back and properly qualify the witness. The prosecution then attempted to qualify police officer Hughes, and the trial court gave defense counsel an opportunity to voir dire. The trial court then ruled that police officer Hughes' opinion would be allowed to stand. Any error that may have occurred by the trial court permitting police officer Hughes to give his opinion before being qualified was harmless as the prosecution eventually laid the foundation and the trial court ruled that police officer Hughes would be permitted to testify as an expert. Pursuant to MCL 769.26; MSA 28.1096, no verdict shall be set aside or reversed or a new trial granted in any criminal case on the grounds of the improper admission of evidence, unless the error complained of resulted in a miscarriage of justice, i.e., effected the outcome of the case. *People v Parcha,* 227 Mich App 236, 248; 575 NW2d 316 (1998), lv pending. Because there was no miscarriage of justice, we hold that the verdict must stand.

With respect to police officer Hughes' testimony, defendant also contends that the during the process of qualifying the witness as an expert, the trial court engaged in questioning that exhibited its partiality. We find that the trial court was simply asking neutral questions relative to the witness' qualifications as an expert. Because a trial court may ask questions of a witness in order to clarify testimony or elicit additional relevant information, *People v Conyers,* 194 Mich App 395, 404; 487 NW2d 787 (1992), we find no error in the trial court's conduct.

At the conclusion of defendant's argument, defendant contends that all of the foregoing actions by the trial court evidenced its bias against him. Defendant postulates that the trial court possessed a bias because it had a strong feeling about defendant's guilt and that it believed defendant had been undercharged. Indeed, defendant mentions in passing that the trial court "eventually told the jury that the conduct here was murder in the second degree." Defendant fails to mention that the trial court told this to the jury *after* it had rendered its verdict and been discharged. Therefore, this particular remark to the jury could not have possibly influenced the verdict. In any event, regardless of the trial court's personal beliefs, there is no evidence on the record that the trial court's personal beliefs interfered with its ability to remain impartial.

V. Jury Instructions

A. Introduction

Defendant contends that the trial court's instructions regarding the prosecution's burden of proof were erroneous and had the effect of lessening the prosecution's burden, discouraging consideration of a lesser offense and unduly emphasizing testimony in favor of the prosecution. In order to preserve an instructional issue for appellate review, a party must make an objection on the record before the jury retires to consider the verdict, stating specifically the matter to which the party objects and the grounds for the objection. *People v Van Dorsten,* 441 Mich 540, 544-545; 494 NW2d 737 (1993). Absent an objection, relief will be granted only to avoid manifest injustice. *Id.* Because the instructions were proper, we are not persuaded that relief is necessary to prevent manifest injustice.

B. Denigrating The Importance Of Instructions.

The trial court instructed the jury that:

> I will now give you the elements of Involuntary Manslaughter with a Motor Vehicle. So that I make sure that anybody who reads this transcript later on, if there should be any occasion to read it, will make sure that I dotted every "I" and crossed every "T" I'm going to give you a form instruction here for Involuntary Manslaughter and a form instruction for Negligent Homicide. You're gonna find that they're identical except for the degree of negligence involved.

Defendant contends that the foregoing instruction was improper because it denigrated the importance of the legal instructions and evidenced a sarcastic view of the role of the Court of Appeals.[4] We find that the trial court's comment did not denigrate the instruction, but rather, emphasized that the instruction was proper. Rather than deviate from the standard jury instructions and thereby risk creating error requiring reversal, the trial court scrupulously adhered to the standard instructions by reading from the form. We find no error.

C. Instructing The Jury Regarding "The Real Issue In The Case"

Defendant takes issue with the trial court's instruction on the burden of proof. Because defendant takes the instruction out of context, we place it back in context by adding the remarks that preceded and followed the language defendant finds objectionable, which we italicize:

> This burden of proof means that every element of the crime charged must be proved by evidence beyond a reasonable doubt.
>
> *Sometimes jurors even leave a courthouse after a verdict confused about that unless a judge takes the pains to explain what I'm going to try to explain to you. Sometimes jurors have a notion that the burden on the prosecution is to prove every fact in the case beyond a reasonable doubt. That simply is not true. Now I'm gonna tell you what he has to prove.*
>
> *I mean we all understand I think what's a real issue in this case. We heard Mr. Wilson from the time he made his opening statement to you tell you what the defense was. The real material matters between the parties is a dispute as to whether or not the prosecutor proved beyond a reasonable doubt that the defendant was driving the car, okay. That's the real factual issue that was tried during the case.*
>
> But even though that's the issue between the parties, I tell you that the prosecutor has a burden of proving beyond a reasonable doubt the elements of the offense which I will later define for you. The identity of the defendant as the perpetrator of that offense, that is in this that he was the driver of the vehicle in question, and that the crime as charged occurred on or about the date alleged in the information and within the City of Detroit.

* * *

> Nevertheless, I go on to instruct you he has to prove beyond a reasonable doubt the elements of the offense, the identity of the defendant as the perpetrator of the offense and that the crime as charged occurred on or about the date alleged in the Information and within the City of Detroit.

Defendant contends that the foregoing instruction failed to instruct the jury that it was obligated to find each element of the offense beyond a reasonable doubt and that it should also consider the lesser included offense. We disagree.

The trial court's instructions were in conformity with defendant's theory of the case. Defense counsel repeatedly told the jury that the only real issue was whether defendant was the driver. In fact, defendant's opening statement and closing argument were almost entirely devoted to his theory that the prosecution could not prove that defendant was the driver. Counsel only digressed briefly to argue that the "rookie" cops were responsible for the deaths because they engaged in a high speed pursuit. Thus, the trial court's instruction that identity was the real issue in the case was consistent with defendant's own theory.

Further, contrary to defendant's representation, the trial court's instruction did not tell the jury that the only issue in the case was the identity of the driver. The trial court specifically reminded the jury that *all* the elements of the offense must be proven by the prosecution beyond a reasonable doubt.

Finally, the trial court's instruction did not discourage the jurors from considering the lesser offense of negligent homicide. The trial court spent a considerable amount of time instructing the jury on the offenses of involuntary manslaughter with a motor vehicle and negligent homicide. It then reminded the jury that there were three possible verdicts: "guilty of manslaughter, or guilty of negligent homicide or not guilty." We find that the trial court did not discourage the jury from considering the lesser offense of negligent homicide. Rather, considered as a whole, the jury instructions fairly presented the law applicable to this matter. *Bell, supra* at 276.

D. Placing Undue Emphasis On The Evidence Presented By The Prosecution.

Lastly, defendant contends that the trial court improperly singled out evidence in support of the notion of gross negligence and, therefore, encouraged the jury to find defendant guilty of involuntary manslaughter with a motor vehicle. We disagree.

After explaining to the jury the difference between gross negligence and ordinary negligence, the trial court addressed some of the evidence that was presented. Once again, we place the instruction in context and italicize the particular language defendant cites as objectionable:

> Again the degree of negligence separates Negligent Homicide from Manslaughter. For Manslaughter there must be gross negligence. For Negligent Homicide there must be ordinary negligence.

If the defendant were not negligent at all, or if he was only slightly negligent, then he is not guilty of either Manslaughter or Negligent Homicide. The fact that an accident occurs or that someone's even killed does not in and of itself mean that the defendant was negligent.

In this case the prosecutor offered evidence in the case in support of the charge of gross negligence that included -- I mean what do you focus on to determine whether or not the prosecutor proves beyond a reasonable doubt gross negligence? The evidence offered as I think he commented on in final argument, although it's not clear to me, is there is a statute in the State of Michigan that makes it a crime to flee and elude the police.

In other words, a citizen even if the citizen is doing nothing wrong, if there is a marked police car that either by siren or flashing he signals somebody to pull over, it is a crime to fail to pull over. And in this case there was evidence offered of fleeing and eluding by whomever was the driver of the car. In addition to that, there was evidence offered that the car was traveling at rates of speed up to 95 miles per hour in posted 30 or 35 mile an hour zones. There was evidence offered as well that the car went through an intersection, disregarded a red light at an intersection of State Fair and the I-75 service drive and struck another vehicle.

There is also evidence offered in the case that the defendant, if you find the defendant was the driver of the car, had ingested opiates so that opiates were still in his system. All of those, all of that evidence is evidence which you may consider on the issue of whether or not the defendant should be found guilty of gross negligence or satisfies that element.

Pursuant to MCL 768.29; MSA 28.1052, a trial court may "make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the interest of justice may require." In *People v Parker*, 50 Mich App 537, 540; 213 NW2d 576 (1973), this Court found no error where: "The trial court's comment on the positive nature of the testimony by the prosecution's witnesses was made within the context of explaining the defendant's claim of self defense." In this case, the trial court identified particular pieces of the evidence while explaining the prosecution's theory of gross negligence. The trial court did not instruct the jury that the evidence conclusively established gross negligence but rather that it could consider the evidence when making its decision. We find no error in the court's instructions.

VI. Expert Witness Qualification

Defendant contends that the trial court abused its discretion when it permitted an investigating officer and an evidence technician to give their opinion that the injuries sustained by defendant were consistent with hitting the steering wheel and, thereafter, opining that defendant was the driver of the vehicle. We disagree.

Before permitting expert testimony, the trial court must find that the evidence is from a recognized discipline, as well as relevant and helpful to the trier of fact, and presented by a witness qualified by "knowledge, skill, experience, training, or education." MRE 702; *People v Beckley*, 434 Mich 691, 711; 456 NW2d 391 (1990) (Brickley, J., joined by Levin and Griffin, JJ.). We find no abuse of discretion by the trial court. Both police officers had training and experience in investigating accidents and examining injuries received by vehicle occupants. Moreover, even if the opinions were erroneously admitted, it was harmless as there was overwhelming evidence that defendant was the driver of the Mercury, including defendant's own statements, admissions he made to an EMS driver, the fact that the car was registered in his name and evidence that the female occupant was found leaning out of the passenger side window.

Defendant also argues that the cumulative effect of several errors denied him a fair trial. Because we find that there were no errors in the trial requiring reversal, this final argument in support of defendant's claim that he is entitled to a new trial is without merit. See *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995).

VII. Sentencing

Defendant claims that errors occurred during sentencing. We disagree. Defendant contends that defendant's enhanced sentence of twenty to forty years' imprisonment was a product of the trial court's personal belief that defendant should have been tried and convicted of second-degree murder. Although the trial court clearly believed that defendant was undercharged, there is no indication on the record that the trial court sentenced defendant as if the jury had convicted him of second-degree murder. Indeed, the trial court specifically rejected that notion and assured defendant that had he been charged and convicted of second-degree murder, his sentence would have been much more severe.

We review defendant's sentence for an abuse of discretion. *Hansford, supra* at 323-324. In this case, defendant's sentence of twenty to forty years' imprisonment was not an abuse of discretion. Manslaughter is a felony punishable by imprisonment for not more than fifteen years. MCL 750.321; MSA 28.553. The notice of intent to enhance sentence listed three prior felony convictions. Therefore, an enhanced sentence could be for life or for a lesser term. MCL 769.12; MSA 28.1084. Thus, defendant's sentence was within the limits authorized by the Legislature for a fourth habitual offender – and substantially below the highest possible sentence. Moreover, the underlying felonies, in the context of his previous felonies, demonstrate that defendant has an inability to conform his conduct to the laws of society. *Hansford, supra* at 326.

In this regard, we note that defendant has actually been convicted of ten prior felonies. He has served two adult jail terms, three adult prison terms and one adult probation. Defendant has escaped from incarceration on one occasion. He also has five prior misdemeanors and was on parole at the time of the instant offense. In addition, defendant admitted to being a heroin addict for over thirty years and was using heroin on the date of the accident. Also, the police initiated their pursuit in this case after observing defendant participating in what appeared to be a drug

transaction. Defendant's history indicates that he is unable to conform his conduct to the requirements of the law. Under these circumstances, defendant's sentence of twenty to forty years' imprisonment as a fourth habitual offender was clearly not an abuse of discretion.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 644 (1966).

[2] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

[3] We include the remarks from the *Walker* hearing for purposes of completeness. Defendant only made reference to the comments from the *Walker* hearing in a footnote in his brief.

[4] We find the trial court's reference to "anybody who reads this transcript later on" to be both sensible and the furthest thing from a sarcastic view of this Court's role on review.