

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS GOVER,

Defendant-Appellant.

UNPUBLISHED

August 17, 1999

No. 203768

Wayne Circuit Court

LC No. 94-013688

Before: Sawyer, P.J., and Griffin and Talbot, JJ.

TALBOT, J. (*concurring*).

I agree with the majority that defendant's conviction and sentence should be affirmed, but write separately because I would reach that result for different reasons.

First, in response to defendant's claim that defense counsel was ineffective for not requesting an instruction on involuntary manslaughter, the majority opinion asserts that counsel was not ineffective for failing to request a jury instruction on voluntary manslaughter. It appears to me that counsel asked for both instructions when, as part of his request, he told the trial court, "It's not just voluntary manslaughter...there's involuntary manslaughter, too." I agree with the majority, however, that counsel was not ineffective and that the trial court did not err in refusing the instructions, which were not supported by the evidence.

I disagree with the majority that there were no errors in defendant's trial. I believe defendant correctly identifies a number of errors: the prosecutor improperly insinuated through her questions that defendant had threatened witnesses, when there was no evidence to support the prosecutor's suggestion; the trial court repeatedly and incorrectly blamed defendant for firing his retained attorney when, in fact, defendant's retained counsel quit; and the trial court patently erred in the admission of statements by codefendants and the police where their state of mind was clearly not at issue. Despite these errors, I would find that reversal is not required because defendant has not demonstrated in this case that it is more probable than not that the errors asserted resulted in a miscarriage of justice. *People v Lukity*, ___ Mich ___, ___ NW2d ___ (1999)(Docket No. 110737, issued 7-13-99), slip op at 15.

As the majority notes in passing, this case arose from a drive-by shooting that resulted in the death of a nine-year-old child. The untainted evidence against defendant was overwhelming. Witnesses present at the shooting testified that defendant fired 19-22 shots from a 9mm weapon; the child victim was killed by a 9mm bullet; defendant was seen holding a smoking 9mm gun immediately after the shooting; defendant was arrested shortly after the shooting, still wearing the clothing described by witnesses at the scene; and defendant was identified by an eyewitness, both at a line-up and in the courtroom, as the shooter. In light of the evidence against him, defendant has not demonstrated that it is more probable than not that the errors complained of resulted in a miscarriage of justice. *Id.* Because I am convinced that the cumulative effect of the trial court's errors in this case was harmless, I concur in the result reached by the majority.

/s/ Michael J. Talbot