

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SANDOR OLAH,

Defendant-Appellant.

UNPUBLISHED

June 6, 2000

No. 215389

Allegan Circuit Court

LC No. 97-01570-FH

Before: Smolenski, P.J., and Markey and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for involuntary manslaughter, MCL 750.321; MSA 28.553, for the death of Petra Hall on February 6, 1996, which occurred after Hall received an intravenous injection of an herbal tea mixture in defendant’s office. The trial court sentenced defendant to sixty months’ probation. We affirm.

First, defendant contends that his conviction should be reversed because of improper jury instructions. This Court reviews de novo claims of instructional error. *People v Bartlett*, 231 Mich App 139, 143; 583 NW2d 341 (1998). “This Court reviews jury instructions as a whole to determine whether there is error requiring reversal.” *Id.* Jury instructions in a criminal case must include all the elements of the charged offense and must not omit material issues, defenses and theories if the evidence supports them. *Id.* “Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant’s rights.” *Id.* at 143-144. In reviewing a claim that the jury was improperly instructed, this Court will not reverse a verdict or order a new trial unless, after reviewing the record, it appears to this Court that the error resulted in a miscarriage of justice. *Id.* at 144; MCL 769.26; MSA 28.1096.

Involuntary manslaughter was defined in *People v Datema*, 448 Mich 585, 595-596; 533 NW2d 272 (1995), quoting *People v Ryczek*, 224 Mich 106, 110; 194 NW 609 (1923) as:

the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in

negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty.

Where the involuntary manslaughter arises from a lawful act carelessly performed, the carelessness must be gross, implying an indifference to the consequences. *Datema, supra* at 596.

Defendant contends that the trial court erred when it rejected his proposed instruction regarding the elements of manslaughter and gave the following instruction:

The defendant is charged with the crime of involuntary manslaughter. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the defendant caused the death of Petra Hall, that is, that Petra Hall died as a result of medically treating Petra Hall for leukemia by performing an intravenous injection of an herbal tea mixture.

Second, in doing the act that caused Petra Hall's death, the defendant acted in a grossly negligent manner.

There may be more than one cause of death. It is not enough that the defendant's act made it possible for the death to occur. In order to find that the death of Petra Hall was caused by the defendant, you must find beyond a reasonable doubt that the death was the natural or necessary result of the defendant's act.

There must be such a relation between the commission of the defendant's act and the death that it logically follows that the death occurred as a result of the defendant's act. The death must be due to the act of the accused and not due to the intervening act or negligence of a third person, which was unforeseeable, or due to an independent intervening cause in which the accused did not participate and which he could not foresee. Refusing medical treatment is foreseeable.

Defendant raised three objections to this instruction. First, that the court removed the word "lawful" from the instruction, even though the prosecutor's complaint alleged that defendant committed a "lawful act" in treating Hall. Second, defendant objected to the court's use of the word "death" for "killing," claiming that the two words are not synonymous. Third, the trial court refused to delete that portion of the instruction that stated "Refusing medical treatment is foreseeable," or to amend the sentence to read, "Negligent refusal of medical treatment is foreseeable." Defendant does not address his first two objections beyond making a bare assertion of error. As a result, he has abandoned these claims on appeal for failure to adequately brief them. See *Dresden v Detroit Macomb Hospital Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996).

The crux of defendant's third objection is that Hall's refusal to accept medical treatment was "foreseeable" as an intervening cause of death so as to break the causal connection between defendant's act and Hall's death. Defendant contends that Hall's actual and direct cause of death was

her own refusal to be reintubated with the respirator after her admission to the hospital rather than defendant's act in administering the herbal mixture. We disagree with this contention. At the time Hall refused to be reintubated, she was incapable of breathing without the assistance of a respirator. The decision to remove a victim from a respirator is not an unforeseeable "independent intervening cause [of death]" to absolve a defendant of liability for homicide. *People v Bowles*, 234 Mich App 345, 349-351; 594 NW2d 100 (1999), affirmed in part, 461 Mich 555; 607 NW2d 715 (2000). As this Court noted in *Bowles*, "the discontinuance of life-support measures merely allows the patient's injury or illness to take its natural and inevitable course." *Id.* at 351, quoting *In re Rosebush*, 195 Mich App 675, 692; 491 NW2d 633 (1992). Accordingly, the trial court did not err in giving an instruction that Hall's refusal to accept medical treatment was foreseeable.

In his next issue, defendant contends that his conviction should be reversed because of insufficient evidence. Defendant raises three claims within this issue: a claim of insufficient evidence; a claim that the trial court failed to grant his motion for directed verdict; and, a claim that the verdict was against the great weight of the evidence. We reject defendant's claim that the prosecution failed to present sufficient evidence to support a conviction. The insufficient evidence standard reviews the evidence in the manner most favorable to the prosecution to determine "whether a rational trier of fact could have found that the essential elements of the charged crime were proven beyond a reasonable doubt." *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995). Contrary to defendant's contention, we conclude that the prosecution presented sufficient evidence that defendant caused Hall's death by providing her with medical treatment in a grossly negligent manner.

The uncontradicted testimony established that defendant started the intravenous (IV) injection. Dr. Paul Wilson, clinical pathologist at Hackley Hospital, testified that the cause of death was lung damage that was the direct result of shock induced by the injection received in defendant's office. When asked, "What killed her?" Dr. Wilson responded, "[t]he diffuse alveolar damage in her lungs, secondary to shock." Dr. Wilson further testified, "based on the history that I read in the medical chart I know of no other cause of diffuse alveolar damage than shock, and that is consistent with a patient having been given an IV infusion of an unknown herbal drug."

The prosecution also presented sufficient evidence that defendant acted in a grossly negligent manner. Generally, expert testimony is required to establish a medical professional's applicable standard of care and to demonstrate that the professional breached that standard. *Sullivan v Russell*, 417 Mich 398, 407; 338 NW2d 181 (1983). See, e.g., *People v Clark*, 26 Mich App 475, 479-480; 182 NW2d 632 (1970), in which the prosecution used expert testimony to establish that the defendant physician failed to supervise a patient being infused with sodium pentathol in violation of accepted medical standards. However, an exception to this general rule exists when "the lack of professional care is so manifest that it would be within the common knowledge and experience of the ordinary layman that the conduct was careless and not conformable to the standards of professional practice and care employed in the community." *Sullivan, supra* at 407, quoting *Lince v Monson*, 363 Mich 135, 141; 108 NW2d 845 (1961).

Here, the prosecution established gross negligence through the testimony of the witnesses to the occurrence and defendant's admissions made during a previous administrative hearing. Defendant

admitted at the hearing that he did not know what was in the herbal mixture until the day after Hall received the injection. Christina Domont, an assistant in defendant's office, with no formal medical training or certification, testified that she prepared the herbal mixture for the intravenous solution. Domont further testified that defendant did not discuss the concentration of the mixture with her. In short, defendant allowed an untrained individual to prepare an intravenous solution and then he administered this unknown solution into Hall's body. Based on this testimony, an ordinary layman could conclude that defendant's lack of professional care was so manifest as to constitute gross negligence.

Next, defendant contends that the jury's verdict was against the great weight of the evidence and that the trial court erred in denying his motion for a directed verdict. Defendant's "great weight" argument is misplaced. The "great weight" standard applies to the review of whether the trial court abused its discretion in denying defendants' motion for a new trial. See *People v Gadomski*, 232 Mich App 24, 27-28; 592 NW2d 75 (1998). Here, defendant failed to move for a new trial, or a judgment notwithstanding the verdict, so this issue was not preserved for appeal.

In reviewing whether the trial court abused its discretion in denying defendant's motion for a directed verdict, "this Court views the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime were proved beyond a reasonable doubt." *People v Crawford*, 232 Mich App 608, 615-616; 591 NW2d 669 (1998). All of the evidence referred to in our discussion of defendant's insufficient evidence claim was presented by the prosecutor before defendant moved for a directed verdict. For the same reasons as stated in our sufficiency analysis, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a directed verdict.

Next, defendant contends that his conviction should be reversed because of improper and inflammatory statements made by the prosecutor to the jury. We disagree. In reviewing alleged prosecutorial misconduct, this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *Id.*

While defendant contends that the prosecution engaged in a continuous barrage of inflammatory comments during closing argument, defendant only objected to the prosecution's statement that Hall "felt like she was dying in [defendant's] office." The discussion between defense counsel (Mr. Kallman), the prosecutor (Mr. Blumer), and the court reads in part as follows:

MR. BLUMER: [Hall] was within one hour of death when she got to the hospital. She told everybody she felt like she was dying in his office. She was right.

It was unconscionable --

MR. KALLMAN: Your Honor, I'd object to the last statement. There's no evidence she told anybody at Dr. Olah's office she was dying.

MR. BLUMER: That's not what I said.

MR. KALLMAN: The testimony was she told –

THE COURT: I understood what he said was that she said at the emergency room at Hackley Hospital the evening in question.

MR. KALLMAN: Oh, alright. I misunderstood. I apologize.

The prosecutor's brief remarks, taken in context, did not deny defendant a fair and impartial trial.

Because defendant did not object to any other remarks, appellate relief is precluded unless an instruction could not have cured the prejudicial effect or if the failure to consider the issue would result in a miscarriage of justice. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). Defendant sets forth numerous statements made by the prosecutor that he contends are improper, false and inflammatory.¹ After reviewing these statements, we cannot conclude that the prosecutor engaged in misconduct or referred to facts unsupported by the record. While the prosecutor in this case was a zealous advocate, his conduct was not improper. Prosecutors are accorded great latitude regarding their arguments and are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant also contends that the prosecutor made an inflammatory appeal to sympathize with the jurors when he improperly asked the jurors to put themselves in Hall's role. Defendant's contention is without merit. A defendant is not entitled to appellate relief when the defendant fails to object to a remark by a prosecutor that allegedly asked jurors to place themselves in the victim's position, because this remark can be cured by a cautionary instruction. *People v Cooper*, 236 Mich App 643, 652-654; 601 NW2d 409 (1999).

Next, defendant contends that the prosecutor made an improper comment on defendant's right to remain silent. The prosecutor, Mr. Blumer, stated in pertinent part:

I used inflammatory language. Why? Because what Dr. Olah did is unforgivable. It's unforgivable on so many different levels that I'm not going to bore you by counting them, but I think you know where they are. But, what's even more unforgivable is now his complete refusal – well, it is unforgivable for someone like Doreen Bueno [defendant's office nurse] to come in here and try to play down the terror and the suffering that Petra Hall went through in that office.

While the prosecutor's remark contained a reference to defendant's failure to testify, any prejudice caused by this fleeting comment could have been cured by a cautionary instruction.

Next, defendant contends that the prosecutor denigrated its expert, Dr. DelBoccio, by questioning his honesty. We disagree. The prosecutor summarized Dr. DelBoccio's conclusion that Hall died of pneumonia, that the pneumonia was unrelated to the shock, and that there was no shock as "a rather stunning revelation." The prosecutor went on to state:

If he were trying to be honest with you he would have said boy, I didn't know that, now that I know that it's painfully honest to me that she went in shock within 3 to 5 minutes of the start of this drug. That's what every other doctor in this case has said who knew the facts.

The prosecutor's closing argument did not denigrate Dr. DelBoccio's testimony; rather, it merely placed his testimony in the context of the other evidence presented during the trial and was not improper.

Next, defendant contends that the prosecutor improperly caused the jury to use the civil standard, rather than the criminal standard, in deciding the case. Again, we disagree. The prosecutor made a reference to the judge's instruction that the situation could have been avoided using ordinary care, which "brings the civil standard into the case." Defendant could have avoided any confusion created by this remark with a curative instruction. Furthermore, the trial court's final instructions indicating that counsel's statements and arguments were not evidence was itself a general curative instruction. See *People v Pegenau*, 447 Mich 278, 298-300; 523 NW2d 325 (1994) (Mallet, J). It is clear from the jury instructions that while a "gross negligence" finding was necessary, the jury had to make its finding using the criminal standard of guilt beyond a reasonable doubt.

Next, defendant contends that the trial court erred when it allowed the prosecution to proceed at trial on an "additional theory" without stating the substance of the additional theory or how that theory differed from the charge in the information and complaint. Defendant has failed to present a coherent argument to support his contention and, therefore, abandoned this issue for failure to adequately brief it. *Dresden, supra* at 300.

Next, defendant contends that the admission of the evidence violated his constitutional right against self-incrimination, citing US Const, Am VI; Const 1963, art 1, § 17; MCL 600.2154; MSA 27A.2154. Defendant's contention is without merit. Defendant sought an order to prevent the trial court from admitting into evidence defendant's statements made during an administrative hearing in which defendant essentially admitted his negligent conduct. The trial court ruled that these statements were admissible as admissions by a party-opponent, presumably under MRE 801(D)(2). Based upon this record, we find that the trial court's order was a denial of a motion to suppress evidence. This Court will not disturb a trial court's ruling at a suppression hearing unless it is clearly erroneous. *People v Payton*, 166 Mich App 428, 430; 421 NW2d 191 (1988).

Defendant's administrative hearing, while not a criminal trial, dealt with defendant's role in Hall's death. Defendant had the fundamental right to invoke his Fifth Amendment privilege against compulsory self-incrimination and could have chosen to remain silent. A witness may invoke the Fifth Amendment "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." *Kastigar v United States*, 406 US 441, 444-445; 92 S Ct 1653; 32 L Ed 2d 212 (1972). However, here, defendant waived his right to remain silent when he testified at the administrative hearing with respect to his treatment of Hall. Although defendant asserted his privilege against self-incrimination in the present criminal case, his assertion of the privilege does not preclude the admission into evidence of his voluntary statements made in the previous administrative proceeding. See *People v Hunley*, 63 Mich App 97, 101; 234 NW2d 169 (1975) ("the defendant's assertion at his trial of his privilege against self-

incrimination does not preclude the admission as substantive evidence of voluntary statements made by the defendant at [a previous trial]”). Accordingly, we conclude that the trial court did not commit clear error in allowing the prosecutor to introduce portions of the transcript of defendant’s administrative hearing to the jury.

Finally, defendant contends that his attorney at the administrative proceeding was ineffective for failing to adequately inform him of the possible use of his testimony at a subsequent criminal trial. However, defendant has abandoned this claim for failure to adequately brief it. *Dresden, supra* at 300.

Affirmed.

/s/ Michael R. Smolenski

/s/ Jane E. Markey

/s/ Peter D. O’Connell

¹ These numerous statements appear in defendant’s brief at pp 34-37.