

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARL CHARLES RUMPEL,

Defendant-Appellant.

UNPUBLISHED

August 15, 2000

No. 214031

Saginaw Circuit Court

LC No. 97-014453-FC

Before: Wilder, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Defendant appeals by right his convictions of voluntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two years' imprisonment for the felony-firearm conviction and to a consecutive term of seven to fifteen years' imprisonment for the manslaughter conviction. We affirm.

On appeal, defendant first argues that error requiring reversal occurred during the jury instructions because the court gave instructions for common-law involuntary manslaughter, MCL 750.321; MSA 28.553, and statutory involuntary manslaughter, firearm pointed intentionally, MCL 750.329; MSA 28.561, without explaining that each charge presented an alternative theory. We disagree. Defendant did not object to the involuntary manslaughter instructions at trial. To avoid forfeiture of this unpreserved nonconstitutional error, defendant must show plain error that affected his substantial rights, i.e., that affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994).

A trial court is required to instruct the jury concerning the law applicable to the case and to fully and fairly present the case to the jury in an understandable manner. MCL 768.29; MSA 28.1052; *People v Mills*, 450 Mich 61, 80; 537 NW2d 909, modified 450 Mich 1212 (1995). Jury instructions must include all elements of the charged offenses and must not exclude material issues, defenses, and theories if there is evidence to support them. *People v Harris*, 190 Mich App 652, 664; 476 NW2d 767 (1991). Jury instructions should be considered as a whole rather than extracted piecemeal to

establish error. *People v Daoust*, 228 Mich App 1, 14; 577 NW2d 179 (1998). Even if the instructions are somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

Here, after instructing the jury regarding first-degree murder, second-degree murder, and voluntary manslaughter, the court gave the following instructions regarding involuntary manslaughter:

You may also consider the lesser charge of involuntary manslaughter. To prove this charge, the prosecutor must prove of [sic] the following elements beyond a reasonable doubt:

First, that the defendant caused the death of Steven West; that is, Steven West died as a result of being shot to death.

Second, in doing the act that caused Steven West's death, the defendant intended to injure Steven West. The act charged in this case is assault and battery. The prosecution must prove the following beyond a reasonable doubt:

First, that the defendant committed a battery on Steven West. A battery is a forceful or a violent touching of the person or something closely connected with the person.

The touching must have been intended by the defendant; that is, not accidental, and it must have been against Steven West's will.

Second, that the defendant intended to injure Steven West.

Third, that the defendant caused the death without lawful excuse or justification.

You may also consider the lesser charge 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 Steven West; that is, Steven West died as a result of being shot to death.

Second, that death resulted from the discharge of a firearm. A firearm is an instrument from which a bullet is propelled by the explosion of gunpowder. A gun is a firearm.

Third, at the time the firearm went off, the defendant was pointing it at Steven West.

Fourth, at that time, the defendant intended to point the firearm at Steven West.

Fifth, that the defendant caused the death without lawful excuse or justification.

The crime of involuntary manslaughter requires proof of a specific intent. This means that the prosecution must prove not only that the defendant did certain acts, but that he did the acts with the intent to cause a particular result.

For the crime of involuntary manslaughter, this means that the prosecution must prove that the defendant intended to point the firearm at Steven West. The defendant's intent may be proved by what he said, what he did, how he did it, or by any other facts and circumstances in evidence.

The court then went on to give several other instructions. At the conclusion of the jury instructions, the court added:

Ladies and gentlemen of the jury, what I did, in – I neglected to do initially, I gave you two charges on involuntary manslaughter. One is a regular involuntary manslaughter charge, and the other is involuntary manslaughter, firearm, intentionally aimed. And I've put the firearm intentionally aimed to show you that I wasn't just repeating myself; that it was actually a different charge, okay?

Although the instructions regarding common-law involuntary manslaughter and statutory involuntary manslaughter, firearm pointed intentionally, were not perfect, when read as a whole, they fairly presented the offenses to the jury and sufficiently protected defendant's rights. *Daoust, supra* at 14. At the conclusion of the instructions, the court clarified that the two involuntary manslaughter instructions represented alternative theories and separate offenses. The court's final instruction cleared up any confusion regarding the intent required for the two involuntary manslaughter offenses. We find no plain error that affected defendant's substantial rights. *Carines, supra; Grant, supra.*

Finally, defendant argues that the trial court abused its discretion and violated the principle of proportionality when it exceeded the minimum sentence range recommended by the Sentencing Guidelines. Sentencing matters are reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 654; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it violates the principle of proportionality, which requires that a sentence be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* at 636.

The Sentencing Guidelines' recommended minimum sentence range was one to five years in prison. The sentencing court exceeded the guidelines and sentenced defendant to seven to fifteen years in prison. Sentencing departures from the guidelines ranges are allowed, but are suspect and will be carefully scrutinized on appeal. *Milbourn, supra* at 656-657; *People v Rockey*, 237 Mich App 74, 79; 601 NW2d 887 (1999). However, the key test of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995); *People v Cain*, 238 Mich App 95, 132; 605 NW2d 28 (1999). Therefore, a sentencing court may deviate from the guidelines range when the range is disproportionate to the seriousness of the crime. *Milbourn, supra* at 636. In departing from the sentencing guidelines, the court should consider what unique facts exist that are not already adequately reflected in the guidelines and why they justify any departure from the guidelines.

People v Harris, 190 Mich App 652, 668-669; 476 NW2d 767 (1991). A departure may be made on the basis of factors already considered in the guidelines, but such a departure must be made with caution. *Rockey, supra*. If a sentence falls outside the guidelines range, the sentencing court must explain the reason for the departure. *People v Kowalski*, 236 Mich App 470, 473; 601 NW2d 122 (1999).

Here, the transcript of the sentencing hearing indicates that the sentencing judge exceeded the guidelines on the basis of the evidence that, after the victim had already fallen to the ground after being shot twice, defendant walked over to the victim and shot him a third time in the back of the head. The departure was warranted because of the depravity of defendant's shooting of the victim in the head, at close range, while the victim was already on the ground, unarmed and suffering from two other bullet wounds, one to the chest. The sentence was proportionate to the seriousness of the crime and the attendant circumstances. We find no abuse of discretion.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Gary R. McDonald

/s/ Martin M. Doctoroff