

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD POMPEY,

Defendant-Appellant.

UNPUBLISHED

August 18, 2000

No. 213404

Wayne Circuit Court

LC No. 97-006863

Before: White, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two years' imprisonment for the felony-firearm conviction and to thirty-five to fifty-five years' imprisonment for the second-degree murder conviction, the sentences to run consecutively. We affirm.

On appeal, defendant first argues that the trial court erred in denying defendant's request to instruct the jury on statutory involuntary manslaughter. We disagree. We review this claim of an instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

A trial court, if requested, must instruct the jury on a cognate lesser included offense if the evidence adduced at trial would support a conviction of the lesser offense. *People v Hendricks*, 446 Mich 435, 444; 521 NW2d 546 (1994); *People v Pouncy*, 437 Mich 382, 387; 471 NW2d 346 (1991). Statutory involuntary manslaughter is a cognate lesser included offense of murder. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). However, there must be more than a modicum of evidence to warrant giving the instruction; there must be sufficient evidence to justify a conviction of the lesser offense. *Pouncy, supra* at 387.

MCL 750.329; MSA 28.561 defines statutory involuntary manslaughter as:

Any person who shall wound, maim or injure any other person by the discharge of any firearm, pointed or aimed, intentionally but without malice, at any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter.

“[I]n promulgating the involuntary manslaughter statute, the Legislature intended to punish the intentional pointing of a firearm which results in death even though the defendant did not act with the criminal intent sufficient for conviction under common-law involuntary manslaughter.” *Heflin, supra* at 504. The intent required for a common law involuntary manslaughter conviction is gross negligence or the intent to injure. *People v Datema*, 448 Mich 585, 606; 533 NW2d 272 (1995).

Here, the evidence did not support the giving of the statutory manslaughter instruction. Defendant testified that he retrieved the gun from the trunk of his car with the intent to scare the decedent with the gun. When the decedent ran behind the gas station, defendant followed, pulled out the gun, and demanded his money. The decedent refused to return the money, and defendant fired one shot into the ground. The decedent then returned defendant's money. According to defendant, the decedent then grabbed the gun from defendant's hand and, when he grabbed the gun back from the decedent, the gun discharged, striking the decedent in the face. Defendant testified that he became scared and fired the gun again, but he did not know how many times he fired the gun. Witnesses testified that they heard a total of four or five gunshots. Defendant then left the scene. He testified that he did not intend to injure the decedent. According to the uncontroverted testimony of the Wayne County Chief Medical Examiner, although the decedent suffered a grazing gunshot wound to the side of her face, she died from a gunshot wound to the top of her head. The medical examiner testified that the decedent's head was either bent forward, or the shooter was standing over her head, when she was shot.

Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999). The evidence indicated that defendant knew the gun was loaded and that, after the first shot discharged and struck the decedent in the face, defendant intentionally fired the gun at least one more time, striking the decedent in the head. Even if defendant's testimony that the initial discharge was accidental is believed, his testimony that he subsequently intentionally fired the gun during an argument with the decedent, striking her in the head, and then drove off, leaving decedent on the ground with two gunshot wounds, demonstrated that he did not act without malice. We therefore conclude that the trial court properly denied defendant's request for a statutory manslaughter instruction.

Finally, defendant argues that the trial court violated the principle of proportionality when it deviated upward from the sentencing guidelines and sentenced him to a prison term of thirty-five to fifty-five years for the second-degree murder conviction. We disagree. We review sentencing decisions under the abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993).

Sentences that depart from the sentencing guidelines are subject to careful scrutiny on appeal. *People v Coultier (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). The key test of proportionality is whether the sentence reflects the seriousness of the matter, and not whether it departs from or adheres to the recommended range. *Coultier, supra* at 456. Furthermore, departures are appropriate where the guidelines do not adequately account for factors that legitimately can be considered at sentencing. *Milbourn, supra* at 659-660.

Here, the trial court noted at sentencing that the guidelines for this case were between ninety-six and three hundred months. See MCR 6.425(D)(2); *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). However, after commenting that this was a cruel and vicious crime, the trial court stated that defendant's lack of remorse, his lack of sympathy for the son he shared with decedent, and his failure to take responsibility for ending the decedent's life over a mere sixty dollars warranted a departure from the sentencing guidelines.

We reject defendant's argument that the trial court considered factors that were already accounted for in the guidelines as its reasons for the upward departure. Defendant had a child with the decedent and he completely disregarded that familial relationship when he shot and killed her. See *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995) (defendant's relationship with the victim is an important factor not included in the guidelines calculations). Furthermore, despite defendant's argument that defendant expressed remorse, the trial court was free to assess defendant's credibility of his expressed remorse when he said that he was "sorry for taking Rashida's life" and that he "didn't mean to harm her at all." See *Houston, supra*. Despite defendant's claims that he did not mean to injure or kill the decedent, the trial court noted the evidence that he did not seek help for decedent after the shooting, but "left her to die in the mud." Finally, defendant's assertion that the trial court improperly considered factors not supported by the evidence carries no weight. The sentencing court may use a broad range of information when weighing the sentencing factors. *People v Adams*, 430 Mich 679, 686; 425 NW2d 437 (1988). Such information can include hearsay information and other alleged crimes. *Fleming, supra* at 418. Accordingly, the trial court properly considered factors such as the prior personal protection order taken against defendant, and the alleged threats that he made against the decedent's family.

We therefore conclude that defendant's sentence does not violate the principle of proportionality and the trial court did not err in departing from the sentencing guidelines.

Affirmed.

/s/ Helene N. White
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell