STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN JAMES HUNT,

Defendant-Appellant.

UNPUBLISHED
September 26, 2000

No. 209755
Macomb Circuit Court
LC No. 970000378 FC

Before: Kelly, P.J., and Doctoroff and Collins, JJ.

PER CURIAM.

Defendant was charged with first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), for the death of a four-year-old child, Jessie Brusati, from injuries suffered while in defendant's care. A jury found defendant guilty of voluntary manslaughter, MCL 750.321; MSA 28.553. Defendant was sentenced to eight to fifteen years in prison. He appeals as of right. We affirm.

Defendant first challenges the trial court's finding that the statements he made to the police were made voluntarily. We disagree. Whether a statement was voluntarily made must be determined by analyzing the totality of the circumstances surrounding the making of the statement. *People v Sexton*, 458 Mich 43, 67-68; 580 NW2d 404 (1998). This Court examines the entire record and makes an independent determination of voluntariness. *Id.* at 68. However, a trial court's determination that a statement was voluntary will not be disturbed by this Court unless it was clearly erroneous. *Id.*

Statements of an accused made during a custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). Here, defendant does not argue that his waiver of his Fifth Amendment rights was not knowing and intelligent, but argues only that his statement was not voluntary. When evaluating the voluntariness of a confession, a court must determine whether "considering the totality of all the surrounding circumstances, the confession [was] 'the product of an essentially free and unconstrained choice by its maker,' or whether the defendant's 'will [was] overborne and his capacity for self-determination critically impaired.'" *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct

1860; 6 L Ed 2d 1037 (1961). When considering the totality of the circumstances, the following factors should be considered:

> The age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Cipriano, supra* at 334.]

After having reviewed the testimony presented at the *Walker*[1] hearing, we cannot conclude that the trial court clearly erred in finding that defendant's statements were voluntarily made. The evidence indicated that defendant was a twenty-two year old man who could read and write. Although defendant testified that he had no prior police contact before his involvement in the instant case, the police officers testified that defendant indicated that he understood the *Miranda* rights. While defendant testified that he did not understand the *Miranda*[2] rights, we give deference to the trial court's findings regarding the credibility of the witnesses that appeared before it. *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996). The two interviews were not prolonged in nature, as the first interview lasted approximately forty-five minutes and the second interview lasted approximately one hour and fifteen minutes. There was no indication that defendant was injured, intoxicated, or drugged during the interviews. Nor was there any indication that defendant was deprived of food, sleep, or medical attention, or that he was physically abused or threatened with abuse. While defendant asserts that he was upset and confused at the time of the interviews, the police testimony indicated that defendant was calm throughout the majority of the interviews and that he did not appear confused.

In short, considering the totality of the circumstances surrounding the giving of the statements, we are convinced that the trial court did not clearly err in finding that the statements were voluntarily given.

Defendant next argues that the trial court erred when it limited his cross-examination of the prosecutor's expert, Dr. Cheryl Loewe, with respect to a scientific journal article on shaken-baby syndrome. We disagree. A trial court's decision to limit cross-examination is reviewed for an abuse of discretion. *People v Sammons*, 191 Mich App 351, 367; 478 NW2d 901 (1991).

A defendant has a constitutional right to confront his accusers, which includes the right of cross-examination. US Const, Am VI; Const 1963, art 1, § 20; *People v Adamski*, 198 Mich App 133, 137-138; 497 NW2d 546 (1993). However, the right of cross-examination is not unlimited, and neither the Confrontation Clause nor due process guarantees an unlimited right to admit all relevant evidence or cross-examine on any subject. *Adamski, supra* at 138. A trial judge has wide latitude to limit cross-examination to prevent, among other things, harassment of a witness, confusion of the issues, prejudice, and questioning that is repetitive or only marginally relevant. *Id.* Moreover, Michigan Rule of

Evidence 611(a) provides that a trial court has a duty to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, 2) avoid needless consumption of time, and 3) protect witnesses from harassment or undue embarrassment."

Here, the trial court properly exercised its discretion to limit defense counsel's cross-examination of Dr. Loewe regarding her familiarity with the medical journals in which a particular article on shaken-baby syndrome appeared. Defense counsel had already questioned Dr. Loewe the day before regarding her familiarity with the medical journals. In light of Dr. Loewe's testimony that she did not know whether the journals were reliable, continued cross-examination on the subject was unnecessary and a needless consumption of time. MRE 611(a).

Defendant next argues that the trial court made several errors when instructing the jury. We disagree. 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 1052; *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995); *People v Daoust*, 228 Mich App 1, 14; 577 NW2d 179 (1998). Jury instructions should be considered as a whole rather than extracted piecemeal to establish error. *Daoust*, *supra* at 14. Even if the instructions were somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

Defendant first argues that the trial court erred when it instructed the jury that voluntary manslaughter and second-degree murder had the same elements. Defendant requested that the trial court give CJI2d 6.8, which sets forth the elements of voluntary manslaughter, and objected to the prosecutor's request that the court give CJI2d 6.9, which explains the circumstances under which the crime of murder may be reduced to voluntary manslaughter. Granting defendant's request, the trial court gave CJI2d 6.8, but not CJI2d 6.9. Because defense counsel specifically requested CJI2d 6.8 and objected to CJI2d 6.9, defendant cannot now complain that the giving of CJI2d 6.8 rather than CJI2d 6.9 requires reversal. A defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). "To do so would allow a defendant to harbor error as an appellate parachute." *Id.* The same principle applies to the extent that defendant argues that the jury should not have been instructed with respect to voluntary manslaughter at all.

Defendant next argues that the trial court erred in instructing the jury on involuntary manslaughter because it failed to define gross negligence. Because defendant did not object to the involuntary manslaughter instruction at trial, to avoid forfeiture of this unpreserved issue, defendant must show a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). A plain error is an error that was clear and obvious. *Id.* To show that the error affected defendant's substantial rights, defendant must persuade the reviewing court that the error was prejudicial, that is, that the error affected the outcome of the lower court proceedings. *Id.*

The trial court's involuntary manslaughter instruction defined gross negligence as an act that was "naturally dangerous to human life." The standard definition of gross negligence requires 1) knowledge

of a situation requiring the exercise of ordinary care and diligence to avert injury to another, 2) ability to avoid injury by using reasonable care, and 3) that the defendant failed to use ordinary care to prevent injuring another when, to a reasonable person, it must have been apparent that the result was likely to be serious injury. CJI2d 16.18; *People v Orr,* 243 Mich 300, 307; 220 NW 77 (1928); *People v Rettelle,* 173 Mich App 196, 199; 433 NW2d 401 (1988). While the trial court did not provide a complete definition of gross negligence, when read as a whole, the instruction adequately presented the issues to be tried and sufficiently protected defendant's rights. In addition to the court's definition of gross negligence as an act that was "naturally dangerous to human life," the court instructed the jury that involuntary manslaughter required a showing that defendant "acted with unreasonable disregard for life." Furthermore, where the jury found defendant guilty of voluntary manslaughter, which requires an intent to kill, to do great bodily harm, or to knowingly create a very high risk of death or great bodily harm, it would not have found him guilty of involuntary manslaughter, where the involuntary manslaughter instruction specifically stated that "[m]urder is reduced to involuntary manslaughter if the Defendant did not intend to kill or did not intend to do great bodily harm or did not knowingly create a very high risk of death," despite any error in the definition of gross negligence. Thus, defendant has not demonstrated a plain error that affected his substantial rights.

Defendant next argues that the trial court failed to instruct the jury on the definition of the term "accident" when instructing the jury regarding defendant's theory of the case. However, defendant did not object to the instruction, which was taken directly from CJI2d 7.2. The instruction sufficiently defined the term "accident" and we find no error.

Next, defendant claims that the trial court erred when it refused his request for an instruction on fourth-degree child abuse. Fourth-degree child abuse is a misdemeanor that results when a person's "omission or reckless act causes physical harm to a child." MCL 750.136b(5); MSA 28.331(2)(5); *People v Gregg,* 206 Mich App 208, 210; 520 NW2d 690 (1994). "Whenever an adequate request for an appropriate misdemeanor instruction is supported by a rational view of the evidence adduced at trial, the trial judge shall give the requested instruction unless to do so would result in violation of due process, undue confusion, or some other injustice." *People v Stephens,* 416 Mich 252, 255; 330 NW2d 675 (1982). The test to determine whether a misdemeanor instruction should be given can be broken down into five parts. *Id.* at 261-265; *People v Steele,* 429 Mich 13, 19-22; 412 NW2d 206 (1987). First, a proper request for the instruction must be made. Second, an "appropriate" or "inherent" relationship must exist between the charged offense and the requested misdemeanor. An "appropriate" or "inherent" relationship exists if 1) the greater and lesser offenses relate to the protection of the same interests, and 2) the offenses are related in an evidentiary manner so that, generally, proof of the misdemeanor is necessarily presented as part of the proof of the greater charged offense. Third, the requested misdemeanor must be supported by a rational view of the evidence. Fourth, if the prosecutor requests the instruction, the defendant must be given adequate notice of the misdemeanor as one of the charges against which he may have to defend. Fifth, the requested misdemeanor instruction must not result in undue confusion or injustice. The trial court has "substantial discretion" to determine whether the cause of justice would be served by giving the instruction. *Steele, supra.*

Here, the trial court properly denied defendant's request for a fourth-degree child abuse instruction because an "appropriate relationship" does not exist between the charged offense, felony murder, and the requested misdemeanor, fourth-degree child abuse. The two offenses do not have an "appropriate relationship" because they do not relate to the protection of the same societal interests. *Steele, supra* at 19. The societal interest in making murder a crime is "deterring the killing of human beings by other human beings." *People v Flowers,* 222 Mich App 732, 734; 565 NW2d 12 (1997). The societal interest in making child abuse a crime is "the protection of children from the abuses and excesses of an adult to whose authority the children have been subordinated." *Id.* at 735. Accordingly, the trial court did not err in denying defendant's request for an instruction on fourth-degree child abuse.

Next, defendant argues that prosecutorial misconduct denied him a fair trial. We disagree. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v McElhaney,* 215 Mich App 269, 283; 545 NW2d 18 (1996). When reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portions of the record and evaluate the prosecutor's remarks in context. *Id.* While review of allegedly improper prosecutorial remarks generally is precluded absent an objection, an exception exists if a curative instruction could not have eliminated the prejudicial effect or if failure to consider the issue would result in a miscarriage of justice. *People v Stanaway,* 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant contends that the prosecutor vouched for the credibility of her witnesses and indicated her personal belief in defendant's guilt by repeatedly using the phrase "we know" throughout her closing arguments. It is improper for a prosecutor to vouch for the credibility of her witnesses to the effect that she has some special knowledge of the witnesses' truthfulness. *People v Bahoda,* 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Enos,* 168 Mich App 490, 492; 425 NW2d 104 (1988). It is also improper for the prosecutor to ask the jury to convict on the basis of the credibility and prestige of the prosecutor's office or the police. *People v Kulick,* 209 Mich App 258, 260; 530 NW2d 163 (1995).

After reviewing the prosecutor's closing arguments, we conclude that the prosecutor's use of the phrase "we know" did not suggest that the prosecutor had special knowledge regarding the witnesses' truthfulness and did not urge the jury to convict on the basis of the prestige and credibility of the prosecutor's office or the police. See *People v Reed,* 449 Mich 375, 399; 535 NW2d 496 (1995) (Boyle, J). Rather, the prosecutor's statements were merely an attempt to encourage the jury to make certain inferences from the evidence. *Bahoda, supra* at 282. We are not convinced that a curative instruction could not have eliminated any prejudicial effect of the remarks or that failure to further consider the issue would result in a miscarriage of justice. *Stanaway, supra.*

Defendant next claims that the trial court abused its discretion when imposing sentence. We disagree. Sentencing decisions are reviewed under the abuse of discretion standard. *People v Milbourn,* 435 Mich 630, 635-636; 461 NW2d 1 (1990).

First, defendant contends that the trial court erred in considering his lack of employment and economic status to determine that he had limited potential for rehabilitation. However, it is proper for the sentencing court to consider the defendant's social and personal history and the defendant's potential

for rehabilitation when imposing sentence. *People v Ross,* 145 Mich App 483, 495; 378 NW2d 517 (1985). Defendant's lack of employment is a valid factor to consider when determining a defendant's capacity for rehabilitation.

Next, we find no merit in defendant's argument that the trial court erred in considering his failure to admit guilt. It is improper for a court to consider a defendant's refusal to admit guilt when imposing sentence. *People v Yennior,* 399 Mich 892; 282 NW2d 920 (1997). Here, although the prosecutor argued that the court should consider defendant's refusal to admit that he caused Jessie's death by shaking him, there is nothing in the record to indicate that the court considered the prosecutor's argument when imposing sentence. Thus, defendant has not shown that the trial court considered an improper factor.

Next, defendant argues that the trial court impermissibly determined that defendant was guilty of first-degree murder and first-degree child abuse, and sentenced him on that basis, when it stated:

> Of course, it would be very important to deter others from committing like offenses because this was a shaking of a baby that the expert testimony indicated was in fact the cause of death in this matter.

The trial court's statements did not indicate that it had determined that defendant was guilty of first-degree murder or first-degree child abuse. The jury's finding that defendant was guilty of voluntary manslaughter did not negate a finding that defendant shook Jessie or that shaking caused Jessie's death. Voluntary manslaughter requires an intentional killing. *Booker, supra; Hess, supra.* Thus, the sentencing judge's remarks do not indicate that it determined that defendant was guilty of a more serious offense and sentenced him on that basis.

Finally, defendant contends that his sentence violates the principle of proportionality. We disagree. The principle of proportionality requires that a sentence be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn, supra* at 636. Defendant's sentence was within the guidelines and, therefore, is presumed to be proportionate. *Id.* at 661. A sentence that is within the guidelines can be disproportionate only if unusual circumstances exist. *People v Rivera,* 216 Mich App 648, 652; 550 NW2d 593 (1996). Defendant must present the unusual circumstances in open court before sentencing to preserve this issue for appeal. *People v Sharp,* 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Although defendant contends that his sentence was disproportionate because he immediately expressed concern for Jessie's injuries, he admitted that he accidentally injured Jessie, and he had strong support from his friends and family, these circumstances do not overcome the presumption that defendant's sentence was proportionate. The trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Michael J. Kelly
/s/ Martin M. Doctoroff
/s/ Jeffrey G. Collins

[1] *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

[2] *Miranda v Arizona*, 384 US 436, 444 86 S Ct 1602; 16 L Ed 2d 694 (1966).