STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2000
v	No. 217599 Wayne Circuit Court
ANTONIO E. HAMMONS, Defendant-Appellant.	LC No. 98-002067

Before: Saad, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted by jury of two counts of second-degree murder, MCL 750.317; MSA 28.549, and one count of unlawfully driving away an automobile, MCL 750.413; MSA 28.645. The trial court sentenced defendant to serve two terms of 40 to 75 years' imprisonment for his murder convictions, and 2 to 5 years for his conviction of unlawfully driving away an automobile. Defendant appeals as of right. We affirm.

Defendant first challenges the sufficiency of the evidence supporting his murder conviction, arguing that the evidence at trial was insufficient to establish the mens rea, or malice element, of second-degree murder. We disagree.

When determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Godbold*, 230 Mich App 508, 522; 585 NW2d 13 (1998). Malice, an element of second-degree murder, is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Here, we are concerned with the third form of malice. Such malice can be inferred from evidence that the defendant "intentionally set in motion a force likely to cause death or great bodily harm." *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998). Thus, the offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences. *Goecke, supra* at 466.

In the present case, the evidence at trial indicated that defendant, after stealing a Chevrolet Blazer from the parking lot of a grocery store, drove at a high rate of speed along the wet and icy streets of a residential neighborhood while the owner of the Blazer clung to the rear of the vehicle yelling for someone to telephone police. A resident of that neighborhood testified that after nearly being struck by the Blazer himself, he got into a car and followed defendant for approximately two blocks before witnessing the Blazer shoot through a four-way stop and collide with another car. As a result of the collision, two of the passengers in the car that the Blazer struck, a four-year-old boy and his thirteen-month-old brother, were killed. According to this witness, during the short pursuit defendant was traveling at a high rate of speed and passed through several stop signs, including the stop sign located at the fatal intersection, without stopping or even slowing down. Consistent with this testimony was that of an accident reconstructionist, who opined at trial that his review of the evidence collected at the scene revealed nothing to indicate braking by the Blazer before striking the decedents' vehicle at 44 miles per hour in a 25 miles per hour zone.

Considering this evidence, where defendant was driving at a high rate of speed in a residential neighborhood, disregarding the speed limit and traffic signs, we find that a jury could reasonably infer that by driving in this manner defendant knowingly created a situation the results of which a reasonable person would know had the natural tendency to cause death or great bodily harm. Thus, defendant's challenge to the sufficiency of the evidence is without merit.

Defendant next argues that he was denied a fair trial by two instances of misconduct by the prosecutor during closing argument. Again, we disagree. When reviewing allegations of prosecutorial misconduct, this Court examines the alleged misconduct in context to determine whether it denied defendant a fair trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

Defendant first claims that the prosecutor erroneously informed the jury that it could find the malice necessary to convict him for the murders of the two children based solely on his conduct and state of mind with respect to the car owner who clung to the vehicle and was not killed in the incident. Assuming, arguendo, defendant has accurately characterized the prosecutor's argument, his assertion in this regard is in essence a claim that in order to garner a valid conviction of second-degree "depraved heart" murder, the prosecutor was required to show malice specifically directed at the decedents. That, however, is not the state of the law.

As a necessary element of murder, malice simply reflects the principle that criminal culpability must be tied to the actor's state of mind. *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980). Nonetheless, the mens rea for second-degree murder does not mandate a finding of specific intent to directly harm or kill any one individual. See *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996); *Goecke, supra* at 466. Rather, as explained above, it is sufficient that the defendant possessed the intent to do an act evincing a depraved heart, i.e., an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Aaron, supra* at 728. Thus, where the killing is premised on a defendant's allegedly depraved heart, it is not incumbent upon the prosecution to show malice specifically directed toward the decedent. Rather, to satisfy the malice element in such situations, the prosecutor need show only that the defendant intended

to undertake the act causing death, with a wanton and willful disregard for the obvious life-endangering consequence of such conduct. See, e.g., *Goecke*, *supra* at 466 ("depraved heart murder is a general intent crime"). Here, as previously explained, the prosecutor presented evidence sufficient to meet this burden and thus we reject defendant's claim that he was denied a fair trial on the basis of the challenged remarks.

Defendant's next claim of misconduct, that the prosecutor improperly commented on his assertion of the right against self-incrimination when she remarked that the only way to directly prove whether defendant was aided by his codefendant's conduct in this matter was to ask defendant himself, is also without merit.

The constitutional privilege against self-incrimination and the right of due process restrict the use of a defendant's silence in a criminal trial. *People v Sutton (After Remand)*, 436 Mich 575, 592; 464 NW2d 276 (1990), amended 437 Mich 1208 (1990). Therefore, it is generally inappropriate for the prosecution to comment regarding an accused's exercise of the privilege. *People v Sain*, 407 Mich 412, 415-416; 285 NW2d 772 (1979). Here, however, we see no such impropriety in the remarks challenged by defendant.

Prosecutorial comments must be evaluated in light of defense arguments and the relation they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). In the present case, the prosecutor was not commenting on defendant's failure to testify or otherwise make a statement in this matter, but was rather responding to his codefendant's counsel's argument that the prosecution had failed to produce evidence directly establishing his codefendant's guilt on a theory of aiding and abetting. We find no error here.

Nonetheless, even assuming the prosecutor's comments in this regard to have been outside the bounds of constitutionally proper argument, prosecutorial misconduct alone does not require reversal. See *Smith v Phillips*, 455 US 209, 219; 102 S Ct 940; 71 L Ed 2d 78 (1982) ("the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."). Here, during final instructions the trial court struck the challenged comments from the record and issued a cautionary instruction to the jury. Therefore, given that the challenged comments were not specifically directed toward defendant's right against self-incrimination, and, in any event, were stricken by the trial court in conjunction with a mandate that when determining guilt, the jury not consider defendant's silence, we do not believe that defendant was denied a fair trial as a result of the prosecutor's remarks.

Defendant next asserts several errors with respect to the trial court's instructions to the jury. First, defendant argues that the trial court improperly instructed the jury concerning the malice necessary to support a conviction of murder. In making this argument, defendant asserts that because the instruction given by the trial court differed in its language from that employed by our Supreme Court in *Aaron*, *supra*, the instruction failed to adequately apprise the jury of the law it was to apply in this case. We disagree.

In *Aaron*, *supra*, the Court held:

> malice is the intention to kill, the intention to do great bodily harm, or the *wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm.* [*Id*. at 728 (emphasis added).]

With respect to the third form of malice emphasized above, the trial court in the instant matter instructed the jury that the mens rea for murder could be found if it believed that defendant "*knowingly created a very high risk of death or great bodily harm, knowing that death or such harm would be the likely result of his actions*" (emphasis added). Although defendant failed to raise an objection to this language at trial, he now claims that the language used by the trial court does not carry the same "legal import" as that found in *Aaron*, *supra*, and thus he was denied a fair trial.

Because defendant failed to object, this Court's review is limited to determining whether defendant has demonstrated a plain error that affected substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Here, given that the language used by the trial court was consistent with the standard jury instruction on malice, CJI2d 16.5(3), and considering that since its decision in *Aaron*, *supra*, when defining malice our Supreme Court has employed language similar to that used here, we believe that defendant has failed in his burden of establishing plain error. See *People v Williams*, 422 Mich 381, 390; 373 NW2d 567 (1985) ("an intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm would be the probable result"); *People v Dykhouse*, 418 Mich 488, 509; 345 NW2d 150 (1984) ("an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm").

Defendant next argues that the trial court erred in orally instructing the jury twice as to the elements of each of the charged crimes while giving such preliminary instructions as presumption of innocence and burden of proof only once, and that the court later compounded this error by providing the jury with written copies of the instructions on the elements without also providing copies of the remainder of the instructions. Again, we disagree.

Because defendant failed to object to the court's dual-charge as to the elements of the charged crimes, this Court's review is again limited to a determination whether defendant has demonstrated plain error affecting substantial rights, i.e., whether the claimed error affected the outcome of the lower court proceedings. *Carines*, *supra* at 763. Here, given that the trial court appears to have repeated these instructions in an effort to ensure that the jury considered the guilt or innocence of each codefendant individually, and considering that the jurors later requested additional instruction with respect to the elements of the crimes, we do not believe that such prejudice has been shown. Therefore, defendant is not entitled to relief on this alleged error.

Similarly, we do not believe that defendant's next contention of error, i.e., the trial court's providing the jury with a written copy of the instructions pertaining to the elements of the charged crimes, warrants reversal of his convictions. The trial court's action in this regard stemmed from a request by the jury for additional instruction, which came only shortly after the jurors began their deliberations, in the form of a note requesting supplemental instruction of the

"elements of the law."[1] This Court has previously held that a trial court does not err when, in response to a jury request for written definitions of the various offenses it is to consider, the trial court provides a set of written instructions on the charged and included offenses without also providing a written copy of the remainder of the instructions. *People v Parker*, 133 Mich App 358, 362; 349 NW2d 514 (1984); *People v Medrano*, 101 Mich App 577, 583-584; 300 NW2d 636 (1980). Here, despite the initially vague nature of the jury's request, the record indicates that the additional instruction sought was limited to the elements of the charged crimes. Thus, the trial court's failure to provide written instructions on the remainder of the instructions was not error.

Defendant's final contention of instructional error relates to the trial court's instructions concerning the lesser included common-law offense of involuntary manslaughter with a motor vehicle. Defendant argues that given the facts of this case, the "exonerative connotation" evinced by the term "involuntary" may have prevented the jury from properly considering this crime, and that because the punishment provided for manslaughter, whether voluntary or involuntary, is a prison term of up to fifteen years or a fine of $7,500, the court should have refrained from use of the less culpable term and characterized the offense simply as manslaughter. See MCL 750.321; MSA 28.553. This argument is without merit.

Although the Legislature does not distinguish between the voluntary or involuntary nature of a manslaughter conviction for purposes of establishing a maximum penalty, there is no general crime of manslaughter recognized under the common law. Given that the evidence produced at trial was sufficient to support instruction on the lesser included offense of involuntary manslaughter with a motor vehicle, and considering that the instruction given accurately stated the elements of this offense, it was not error for the court to instruct the jury in this manner.

Affirmed.

/s/ Henry William Saad
/s/ Helene N. White
/s/ Joel P. Hoekstra

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[1] We note that although the jurors' note simply indicated that they sought supplemental instruction on "the elements of the law," the court, recognizing the vague nature of the request, clarified the intent of the note before providing the instructions. The court further informed the jury that should it desire additional instruction, it need only submit another note. Despite these words from the trial court, no additional instructions were ever requested by the jury or given by the court.