

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN CHARLES FUDGE,

Defendant-Appellant.

UNPUBLISHED

December 26, 2000

No. 215408

Wayne Circuit Court

LC No. 97-501837

Before: Gribbs, P.J., and Kelly and Sawyer, JJ.

PER CURIAM.

Defendant was charged with felony murder in connection with the death of his five-week-old son, Austin Fudge. He was convicted by a jury of the lesser included offense of involuntary manslaughter. MCL 750.321; MSA 28.553. Defendant was sentenced within the guidelines range to ten to fifteen years' imprisonment. He appeals by right. We affirm.

Defendant was alone with his five-week-old son when the baby stopped breathing. Defendant attempted CPR, tried to telephone the child's mother, and called 911. At the hospital, doctors determined that the child was brain dead. There was evidence that the infant had a fractured leg and a severe head injury, with bleeding to the brain and inside the eyes. Doctors testified that the injuries were caused by severe, violent shaking. The baby later died.

Defendant argues on appeal that the trial court's failure to define gross negligence when instructing the jury on involuntary manslaughter violated his due process rights and requires a new trial. Defendant failed to object to the trial court's failure to instruct the jury on the definition of gross negligence. Accordingly, we will reverse only when a "plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence." *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We find no such error here.

This Court reviews jury instructions in their entirety to determine if there was error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Even if the jury was imperfectly instructed, there is no error if the instructions fairly presented the issues to be tried and adequately protected the defendant's rights. *Id.* If the trial court omits an

instruction, there is no error provided the instructions as a whole cover the substance of an omitted instruction. *People v Seabrooks*, 135 Mich App 442, 452; 354 NW2d 374 (1984).

Involuntary manslaughter has been defined as the killing of another without malice and unintentionally, and our Supreme Court has stated three theories on which liability for involuntary manslaughter may be premised; the misdemeanor-manslaughter rule, gross negligence, and failure to perform a legal duty. *People v Booker (After Remand)*, 208 Mich App 163, 170-171; 527 NW2d 42 (1994). In the instant case, the trial court instructed the jury on felony murder, second-degree murder, voluntary manslaughter, and involuntary manslaughter. Of particular relevance here was the court's instruction on involuntary manslaughter that stated the jury would have to find that the prosecutor proved each of the following elements beyond a reasonable doubt:

First that defendant caused the death of Austin Fudge. That is that Austin Fudge died as a result of being forcefully shaken.

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

The evidence in this case overwhelmingly demonstrated that a five-week-old baby died while in defendant's care from injuries caused by a violent or forceful shaking that was inconsistent with the routine handling of a baby or with improperly administered CPR. Accordingly, we are satisfied that the trial court's failure to define gross negligence in this case was not plain error that seriously affected the fairness, integrity, or public reputation of judicial proceedings or resulted in the conviction of an innocent person.

Defendant also argues that the trial court improperly considered his refusal to admit guilt in imposing sentence. Although a trial court may not base a sentence on the defendant's refusal to admit guilt, *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977), the defendant's lack of remorse is a proper sentencing consideration. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995). Here although defendant continued to maintain at sentencing that the baby died as a result of improperly administered CPR and expressed sorrow that his son was dead, there is no indication in the record that the trial court attempted to elicit an admission of guilt from defendant or that an admission of guilt would have resulted in a lighter sentence. See *People v Wesley*, 428 Mich 708, 712-714; 411 NW2d 159 (1987). Rather, the court's comments related directly to defendant's failure to take responsibility for his actions. We find no error.

Affirmed.

/s/ Roman S. Gribbs
/s/ Michael J. Kelly
/s/ David H. Sawyer