

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT DANIELS,

Defendant-Appellant.

UNPUBLISHED

April 20, 2001

No. 216053

Wayne Circuit Court

LC No. 97-007318

Before: McDonald, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316(1)(a); MSA 28.548(1)(a), first-degree felony-murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court vacated defendant's life sentence for the first-degree murder conviction and sentenced him to nonparolable life in prison for the felony-murder conviction, to be served consecutively to a two-year sentence for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant was tried for the murder of Robert Piestrak. Piestrak's body was found in his apartment in Melvindale on August 26, 1997. He had been shot in the back with a shotgun fired at close range and suffered blunt force trauma to the back of his head. His apartment appeared to have been ransacked and a water jug, in which he saved coins, was missing.

I

On appeal, defendant argues that the trial court deprived him of his right to counsel in denying his attorney's motion to withdraw where there was a serious conflict of interest, which warrants reversal of defendant's conviction. We disagree. This Court reviews for abuse of discretion a trial court's decision regarding a motion to withdraw or substitution of counsel. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999); *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

Defendant relies on *People v Charles O Williams*, 386 Mich 565, 577; 194 NW2d 337 (1972), in which our Supreme Court held that the desire of trial courts to expedite court dockets is not a sufficient reason to deny an otherwise proper request for a continuance. In *Williams*, *id.*

at 578, our Supreme Court held that the trial court abused its discretion by denying trial counsel's motion to withdraw as counsel. The Court's decision was based on the following facts:

1) [the] defendant was asserting a constitutional right—the right to counsel; 2) he had a legitimate reason for asserting this right—an irreconcilable *bona fide* dispute with his attorney over whether to call his alibi witnesses; 3) he was not guilty of negligence; and 4) the trial court was incorrect in stating that [the] defendant had caused the trial to be adjourned several times [*Id.* at 578.]

In *People v Wilson*, 397 Mich 76, 81; 243 NW2d 257 (1976), the Court affirmed the guidelines set forth in *Williams* and added the additional requirement that a defendant appealing a trial court's refusal to grant a continuance must demonstrate prejudice resulting from the trial court's abuse of discretion. See also *Echavarria*, *supra* at 369.

In the present case, in denying counsel's motion to withdraw, the court expressed concern about delays in the case and two previous adjournments, noting that defendant's trial was only five weeks away.¹ The court noted defendant's prior motion for substitute counsel, just before a previous trial date, which defendant withdrew at the hearing on the motion, on March 27, 1998. At the March hearing, defendant informed the court that his concerns regarding discovery had been resolved, and both defendant and his counsel expressed that their relationship was amicable. Under these circumstances, the court suggested that defendant was developing a pattern of requesting new counsel each time the case got close to the trial date.

We find no error requiring reversal. In seeking to withdraw, defense counsel acknowledged that there had been a breakdown in the attorney-client relationship since the resolution of defendant's previous complaints about counsel, stating that defendant had filed a grievance against him with the Attorney Grievance Commission:

We were here ... a couple of weeks ago [Defendant] indicated a concern about my fairly representing him at that time, but things seemed to work out at that point.

Since then, there has been a breakdown in the relationship. Even though this may not be grounds in and of itself for a withdrawal, [defendant] has filed a grievance againce [sic] me that I just got the other day.

* * *

In any event, [defendant's] main complaint it appears is that he was never provided his own copy of the Discovery, which I've just given him now.

¹ Defense counsel's motion to withdraw was heard on June 12, 1998, and the trial was scheduled for July 23, 1998.

He's had numerous opportunities ... to review the Discovery over all of these months, but then I would take it back, and ... while it's true I never made a copy for him, he's always had access to it.

As far as the other concern about motions being filed, we've talked about this. In my opinion, there are really no motions to be filed in this case.

[Defendant] himself filed a couple motions if the Court will recall a couple weeks ago, which were dealt with at that time.

In any event, [this] is a first degree murder case [Defendant] feels that there's been a breakdown. So do I.

In all fairness to him, I think he would feel more comfortable with someone other [than] myself at this time.

Under the *Williams* factors, we find no bona fide dispute, and given the court's prior consideration of these issues and the previous delays occasioned by defendant, we find no abuse of discretion in the court's denial of counsel's motion. A primary basis of defendant's grievance was, as before, counsel's failure to provide defendant a copy of discovery, which was apparently resolved, for a second time, before the hearing. With respect to other matters, e.g., filing motions or calling witnesses, defendant points to no error in these regards on appeal, and we find no indication that defendant was hindered in his defense, such that he was prejudiced. *Wilson, supra* at 81. Further, we find no indication that defendant's relationship with his trial counsel affected counsel's performance; the evidence against defendant was overwhelming, and, for the most part, undisputed. See, e.g., *People v Smith*, 456 Mich 543, 555-558; 581 NW2d 654 (1998). A defendant entitled to appointed counsel is not entitled to the attorney of his choice; substitution of counsel is warranted only upon a showing of good cause and where it will not unreasonably disrupt the judicial process. *Mack, supra* at 14.

II

In his next issue, defendant argues that, by allowing the prosecution to cross-examine defendant regarding the reasons for sawing off a shotgun, the trial court committed error requiring reversal. We disagree. This Court reviews a trial court's decision concerning the admission of evidence or the scope of cross-examination for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996); *People v Dale Williams*, 191 Mich App 269, 275; 477 NW2d 877 (1991). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *Ullah, supra*. Whether erroneously admitted evidence requires reversal depends on the nature of the error and its effect in light of the weight of the properly admitted evidence. *Smith, supra* at 554-555.

On direct examination, defendant maintained that he sawed off his shotgun because it was rusted and he wanted to refurbish it. On cross-examination, the prosecutor questioned defendant whether other persons might saw off a shotgun to conceal it in committing robbery. Defendant objected to this line of questioning on the basis that it was irrelevant. We find no abuse of

discretion in the admission of this evidence, which was relevant to defendant's credibility and responded to defendant's own testimony. *People v Figgures*, 451 Mich 390, 401; 547 NW2d 673 (1996); *People v Bahoda*, 448 Mich 261, 290-291; 531 NW2d 659 (1995).

Even if the trial court erred in admitting this evidence, defendant has not established error requiring reversal of defendant's conviction because a review of the entire case does not reveal that it is more probable than not that the questioning was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The jury heard defendant's reason for sawing off the shotgun, and his explanation that the shooting was accidental, both of which could be fairly weighed in light of any relatively minor evidence concerning why others might saw off a shotgun. Similarly, defendant has not established error requiring reversal with regard to the prosecutor's conduct in engaging in an irrelevant line of questioning. *People v Brownridge (On Remand)*, 237 Mich App 210, 215- 216; 602 NW2d 584 (1999).

III

In his final issue on appeal, defendant contends that the trial court committed error requiring reversal when it refused defendant's requested instruction to the jury regarding the lesser cognate offense of involuntary manslaughter. We disagree. This Court reviews jury instructions in their entirety, rather than piecemeal, to determine whether error requiring reversal occurred. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995).

To determine whether the trial court erred in denying an instruction on involuntary manslaughter, it is necessary to ascertain whether there was evidence to support a conviction of involuntary manslaughter. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). The instruction trial counsel requested, CJI2d 16.10, states:

(1) [The defendant is charged with the crime of / 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:

(2) First, that the defendant caused the death of [*name deceased*], that is, that [*name deceased*] died as a result of [*state alleged act causing death*].

* * *

(3) Second, in doing the act that caused [*name deceased*]'s death, the defendant acted in a grossly negligent manner.

* * *

[(5) Third, that the defendant caused the death without lawful excuse or justification.]

In *People v Ryczek*, 224 Mich 106, 110; 194 NW 609 (1923), the case relied on by the trial court in denying trial counsel's request for an instruction on involuntary manslaughter, our Supreme Court defined involuntary manslaughter as the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending

to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty.

The kind of negligence required for manslaughter is something more than ordinary or simple negligence and is often described as “criminal negligence” or “gross negligence.” *People v Townes*, 391 Mich 578, 590 n 4; 218 NW2d 136 (1974). For a defendant’s behavior to be considered grossly negligent, three elements, embodied in CJI2d 16.18, must be satisfied:

(1) Gross negligence means more than carelessness. It means willfully disregarding the results to others that might follow from an act or failure to act. In order to find that the defendant was grossly negligent, you must find each of the following three things beyond a reasonable doubt:

(2) First, that the defendant knew of the danger to another, that is, he knew there was a situation that required him to take ordinary care to avoid injuring another.

(3) Second, that the defendant could have avoided injuring another by using ordinary care.

(4) Third, 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. [*People v Clark*, 453 Mich 572, 578-579; 556 NW2d 820 (1996).]

Gross negligence requires a culpable mental state. *People v Datema*, 448 Mich 585, 596, 602; 533 NW2d 272 (1995). In a case in which the theory of involuntary manslaughter is a lawful act carelessly performed, the carelessness must be gross, implying an indifference to consequences. *Id.* at 596. Accordingly, if death results from negligence that shows a culpable indifference to the safety of others, the negligence is said to be gross or wanton or wilful, and is equivalent to criminal intent, a necessary element of every common law crime. *Id.* at 597.

In this case, the evidence did not support an instruction on involuntary manslaughter, which would require that defendant knew of the danger to another and acted with indifference in regard to that danger. It must have been apparent to the defendant that serious injury would likely result. *Clark, supra* at 578-579. Those circumstances did not exist.

At trial, defendant testified that the gun was a single-shot shotgun, that he had fired it once, before the shooting, to see how it worked, and he did not reload the gun. Thereafter, he kept it unloaded, in a locked case. He testified that he shot Piestrak while repairing the gun and that he did not pull the trigger when the gun fired. Although he did not check whether the gun was loaded before taking it to Piestrak’s home, he “was shocked” that it was loaded.

This testimony is inconsistent with a claim of gross negligence. Defendant did not act “with awareness of the risk to safety and in wilful disregard of the safety of others,” which is the hallmark of gross negligence. *Datema, supra* at 606. To the contrary, defendant’s testimony indicates that he was unaware of any danger because he thought the gun was unloaded. The gun

discharged unexpectedly when defendant had his back to Piestrak. At most, this evidence indicates actions that were careless, which is ordinary negligence, not gross negligence, i.e., a culpable indifference to the safety of others. *People v Campbell*, 237 Mich 424, 428-429; 212 NW 97 (1927). Because the evidence did not support a finding of gross negligence, the trial court committed no error in denying defendant's request to instruct on involuntary manslaughter.

Further, defendant's theory, and his testimony, was that the shooting was accidental. The trial court properly instructed the jury on the defense of accident, CJI2d 7.1. That instruction provided:

The Defendant says that he's not guilty of murder because Mr. Piestrak's death was accidental. That is, that the Defendant says that Mr. Piestrak died because the gun went off as he was screwing the two pieces together. If the Defendant did not mean to cause the gun to discharge then he is not guilty of murder.

When viewed in their entirety, the instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *Bell, supra* at 276. If the jury found defendant's testimony credible and chose to accept his theory of accident, then it could not have found defendant guilty of murder, pursuant to the court's instruction.

Even if the court erred in denying the request for an involuntary manslaughter instruction, any error was harmless. See *People v Reese*, 242 Mich App 626, 635; 619 NW2d 708 (2000). As noted, defendant's theory was one of accident, and the court properly instructed the jury in this regard. The jury found defendant guilty of first-degree premeditated murder and first-degree felony-murder and rejected a finding of second-degree murder. Thus, it is unlikely that the jury would have adopted the lesser requested charge, and the refusal to instruct did not foreclose the jury's option to convict defendant consistent with his own testimony, evidence and theory. *People v Beach*, 429 Mich 450, 491-492; 418 NW2d 861 (1988).

For the same reasons, we find no error requiring reversal concerning the trial court's denial of an instruction on unintended consequences of a voluntary act, CJI2d 7.2.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald