

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LANGSTON ROGERS,

Defendant-Appellant.

UNPUBLISHED

June 27, 1997

No. 184536

Recorder's Court

LC No. 94-009016

Before: Markman, P.J., and Holbrook, Jr., and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of and sentence for involuntary manslaughter, MCL 750.321; MSA 28.553. Defendant assaulted another man whom he accused of owing him money. A witness testified that, after defendant slapped the victim in the face and grabbed him by the feet and pulled him off of a porch, defendant grabbed the victim's cane, hit the victim in the back and then took a full swing and hit the victim in the jaw with the cane. The victim, whose jaw was fractured, died of a myocardial infarction caused by extensive hemorrhaging resulting from his neck and head injuries. The trial court sentenced defendant to eighty months to fifteen years and he appeals as of right. We affirm.

On appeal, defendant first contends that the trial court erred in its findings of fact where it ruled that the defendant's act of breaking the decedent's jaw was the cause of death, when the evidence established that decedent died of a heart attack. We review a trial court's findings of fact for clear error. *People v Fisk*, 62 Mich App 638; 233 NW2d 684 (1975).

Here, the testimony of the medical examiner, Dr. Lanning Davidson, established that the fracture of the decedent's jaw caused extensive hemorrhaging and swelling which impinged on the body of arteries that go to the heart and regulate heartbeat. Dr. Davidson also stated that he felt decedent's fatal heart attack was a natural consequence of the injuries to his neck and jaw and opined that the cause of death was a myocardial infarction with the contributing cause being the head and neck injuries that the decedent had sustained. On cross-examination, Dr. Davidson admitted that he could not say the trauma inflicted by defendant was the exclusive cause of death, but that it was clearly a contributing factor.

The proper test for determining proximate cause is whether a defendant's conduct has been "a" proximate cause of the harm. *People v Tims*, 449 Mich 83, 96; 534 NW2d 675 (1995). Joint and equal causes of a harm do not excuse one or the other culpable behavior. *Id.* at 97. Further, the defendant takes his victim in the physical condition in which he finds him. *People v Webb*, 163 Mich App 462, 465; 415 NW2d 9 (1987). Here, the testimony of Dr. Davidson clearly established that the breaking of the decedent's jaw by defendant was at least "a" proximate cause of the victim's death. Therefore, the trial court did not clearly err in its findings of fact.

Defendant next asserts that trial counsel's assistance was ineffective because he did not order the medical records which would have revealed that there was an intervening cause of death. In reviewing a claim of ineffective assistance of counsel, we will examine the record to determine if counsel's performance was deficient and whether, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993). However, a claim for ineffective assistance of counsel is preserved only where counsel makes a motion for an evidentiary hearing to establish a testimonial record in order to review defendant's claim. *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). When, as here, the motion for the evidentiary hearing has been denied, our review is limited to the existing record. *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987).

Defendant contends that he was denied effective assistance of counsel when trial counsel failed to request the medical records of the decedent in an effort to show that defendant's own conduct and past history, and the possibility that the decedent died because of medical malpractice, were intervening causes of the decedent's death. The concept of an intervening cause is predicated upon foreseeability. *Webb, supra*. A doctor's negligence in treating a wounded victim is foreseeable and cannot be used as an intervening, superseding cause of death. *Id.*

Further, the record reveals that Dr. Davidson testified that the victim had a sick heart and that it would not take too much to push it over into an infarction. In addition, as already noted, he stated that he would not state that the victim's trauma was the exclusive cause of victim's death. Therefore, the existing record in this case is devoid of any evidence that the medical records could have provided a basis upon which defendant could establish a claim of ineffective assistance of counsel.

Defendant next asserts that his sentence of eighty months to fifteen years violated the principle of proportionality. We review a trial court's sentencing of a defendant for an abuse of discretion, examining whether the sentence is proportionate to the seriousness of the offense and the characteristics of the offender. *People v Milbourn*, 435 Mich App 630, 636; 461 NW2d 1 (1990).

In this case, defendant was convicted of involuntary manslaughter, MCL 750.321; MSA 28.553, punishable by imprisonment for not more than fifteen years. Judge Hathaway sentenced defendant to eighty months to fifteen years. In making his sentencing determination, Judge Hathaway cited to the testimony elicited at trial which established that the victim, William Lovett, was an amputee with an artificial leg, who walked with the assistance of a cane. The testimony further established that

defendant came to Lovett's home where he found Lovett sitting on the porch steps. When Lovett could not repay defendant the ten dollars Lovett owed him, the testimony established that defendant grabbed Lovett by both feet and pulled him down the porch stairs. Defendant then picked up Lovett's cane, hit Lovett across the back, and then, taking a full swing, hit Lovett on the right side of his jaw.

Reviewing this testimony, and in light of the fact that the sentence of eighty months to fifteen years did not exceed the statutorily proscribed maximum sentence allowed under MCL 750.321; MSA 28.553, we are unable to conclude that the trial court abused its discretion by sentencing defendant in a disproportionate manner.

Defendant's final claim on appeal is that the trial court erred in calculating a sentencing guideline variable. The Supreme Court in *People v Mitchell*, ___ Mich ___ (Nos. 98984, 98985, issued 3/25/97), slip op at 31, has recently ruled that a claim of a miscalculated variable is not in itself a claim of legal error as the guidelines do not have the force of law. The *Mitchell* Court stated:

On postsentence review, guidelines departure is relevant solely for its bearing on the *Milbourn* claim that the sentence is disproportionate. Thus, application of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. [*Id.*, slip op pp 33-34.]

Therefore, as defendant's sentence is proportionate to the seriousness of the crime, this issue is precluded from further appellate review.

Affirmed.

/s/ Stephen J. Markman
/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell