STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD AUSTIN ELY,

Defendant-Appellant.

UNPUBLISHED
May 29, 1998

No. 200000
Macomb Circuit Court
LC No. 95-002476 FC

Before: Hood, P.J., and MacKenzie and Doctoroff, JJ.

PER CURIAM.

Following a three-day jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and unlawful driving away an automobile (UDAA), MCL 750.413; MSA 28.645. He was sentenced to four hundred to six hundred months' imprisonment for the second-degree murder conviction, to run concurrently with a forty- to sixty-month sentence for the UDAA conviction. Defendant appeals as of right. We affirm.

This case involves the theft of a pick-up truck and a subsequent police chase that resulted in the death of a motorist. A confidential informant testified that a friend named "Joe" knew of a body shop in St. Clair Shores that bought stolen vehicles. On August 2 or 3, 1995, Joe introduced the informant to defendant and instructed them to steal a vehicle. The informant drove defendant to a motel parking lot where defendant stole a pick-up truck. Later, defendant, driving the stolen truck, followed the informant to St. Clair Shores. Before leaving, however, the informant called the St. Clair Shores police and told them he and another person were bringing a stolen truck to the city. The police then set up a marked car, with back-up cars, along the route to the body shop. When defendant refused to stop the truck, the police gave chase at speeds of fifty to sixty miles per hour. During the pursuit, defendant ran a number of red lights and ultimately swerved into oncoming traffic, striking a vehicle and killing its occupant.

On appeal, defendant first argues that the trial court erred in determining that he was not entrapped. Defendant has the burden of proving entrapment by a preponderance of the evidence. *People v Butler*, 199 Mich App 474, 479, 481; 502 NW2d 333 (1993), rev'd and remanded on

other grounds 444 Mich 965; 512 NW2d 583 (1994). Entrapment is established if: (1) the police engaged in impermissible conduct that would have induced a person similarly situated as the defendant, though otherwise law-abiding, to commit the crime, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated. *People v Fabiano*, 192 Mich App 523, 526; 482 NW2d 467 (1992). Entrapment does not exist if the conduct would induce only those persons who are ready and willing to commit the offense to do so. *Butler, supra,* p 481. This Court reviews a trial court's finding that a defendant was not entrapped under the clearly erroneous standard. *Fabiano, supra,* p 525.

We find no clear error in the trial court's ruling that defendant was not entrapped. Defendant was ready and willing to commit theft. By his own admission, defendant instructed the informant where to go so that he could steal a truck, and told the informant that he wanted to return and steal another after returning from the first theft. Furthermore, there is nothing to indicate that the police conduct was reprehensible or improper. Accordingly, the trial court properly denied defendant's motion to dismiss on the basis that he was entrapped.

Defendant next argues that the trial court erred in refusing to instruct the jury on negligent homicide. A defendant has a right upon request to have the jury instructed on necessarily included offenses. *People v Mosko*, 441 Mich 496, 501; 495 NW2d 534 (1992). Further, a defendant has a right, upon request, to jury instructions on those cognate lesser included offenses which are supported by record evidence. *Id*. If evidence has been presented that would support a conviction of a lesser included offense, refusal to give a requested instruction regarding the lesser included offense is error requiring reversal. *People v Torres (On Remand)*, 222 Mich App 411, 416; 564 NW2d 149 (1997). If jurors are permitted to consider manslaughter committed with a motor vehicle, then, pursuant to MCL 750.325; MSA 28.557, they also should be permitted to consider negligent homicide. *People v McIntosh*, 400 Mich 1, 7; 252 NW2d 779 (1977); see also *People v Malach*, 202 Mich App 266, 277; 507 NW2d 834 (1993).

Because the trial court instructed the jury on involuntary manslaughter, it erred in refusing to also instruct on negligent homicide. However, because the jury was instructed on involuntary manslaughter, but nevertheless convicted defendant of second-degree murder, the court's error in refusing to give the negligent homicide instruction was harmless. See *Mosko, supra,* pp 504-505. Accordingly, the trial court's error in refusing to instruct the jury on negligent homicide does not warrant reversal.

Defendant next argues that the trial court erroneously determined that the prosecution used due diligence to locate "Joe" as a witness. Prior to the entrapment hearing, defendant unsuccessfully moved to dismiss on the basis that the prosecution did not make an adequate effort to locate "Joe." However, the only relevant inquiry after entry of a guilty verdict is whether the prosecutor's failure to produce a witness resulted in prejudice to the defendant. *People v Rode,* 196 Mich App 58, 68; 492 NW2d 483 (1992); *People v Jackson*, 178 Mich App 62, 66; 443 NW2d 423 (1989). In order to preserve the issue of prejudice for appellate review, a defendant must move for a new trial in the trial court on this basis or raise it in a motion for a post-trial evidentiary hearing. *Id.*; *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). Because defendant did not do so, this issue is not preserved.

Defendant next argues that the trial court erred in limiting defense counsel's closing argument and preventing him from arguing that the actions of the confidential informant absolved defendant of guilt. We find no error.

This Court has recognized a trial court's broad discretion in matters of trial conduct, including limiting arguments of counsel. *Warden v Fenton Lanes, Inc*, 197 Mich App 618, 625; 495 NW2d 849 (1992). Technical errors will not justify reversal unless prejudice is demonstrated sufficient to amount to a miscarriage of justice. *People v Grace*, 50 Mich App 604, 607; 213 NW2d 853 (1973). See also *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

Throughout his closing argument, defense counsel focused on the conduct of the confidential informant and implied that the informant was responsible for the events leading to the death of the motorist. The argument was basically an attempt to demonstrate that defendant was entrapped. The issue of entrapment was decided by the court prior to trial, however, and was not an issue for the jury. Further, counsel was allowed to argue to the jury that the actions of the informant were essentially unconscionable and that justice required sending a message to the police that they should not use confidential informants in the manner that they did in this case. Because it does not appear that defendant was prejudiced by any limitation placed on his attorney's closing argument, we find no error.

Finally, defendant argues that there was insufficient evidence to support his second-degree murder conviction. In reviewing the sufficiency of the evidence, this Court must view the evidence in the 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 proven beyond a reasonable doubt. *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996). The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). Here, defendant claims that there was insufficient evidence that he intended to kill, inflict great bodily harm, or create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm. The claim is without merit.

While attempting to flee from the police, defendant drove in a left-hand turn lane at high speeds for approximately three miles, ran red lights, and swerved into a lane of oncoming traffic. When he approached the intersection of Nine Mile and Beechwood, he apparently did not attempt to stop at the red light and swerved into the lane of oncoming traffic even though there were cars in that lane. The impact of defendant's truck hitting a car was so forceful that it broke the occupant's neck. Based on this evidence, rational jurors could reasonably infer from defendant's manner of driving that he intentionally created a very high risk of death with the knowledge that his driving probably would cause death or great bodily harm. Accordingly, there was sufficient evidence to sustain defendant's second-degree murder conviction.

Affirmed.

/s/ Harold Hood
/s/ Barbara B. MacKenzie
/s/ Martin M. Doctoroff