

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW BERNARD BLAKELY,

Defendant-Appellant.

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UNPUBLISHED

July 24, 1998

No. 198502

Washtenaw Circuit Court

LC No. 95-005484-FC

Before: Jansen, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of manslaughter, MCL 750.321; MSA 28.553, assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, assault with a dangerous weapon, MCL 750.82; MSA 28.277, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to ten to fifteen years' imprisonment for the manslaughter conviction, six to ten years' imprisonment for the assault with intent to do great bodily harm conviction, two to four years' imprisonment for the assault with a dangerous weapon conviction, and two years' imprisonment for each of the felony-firearm convictions. Defendant appeals as of right and we affirm.

I

Defendant first claims that the evidence was insufficient to sustain his convictions. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The trial court found defendant guilty of manslaughter, but did not specify whether such was voluntary or involuntary manslaughter. Voluntary manslaughter is an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to cool. *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995). An essential element of the crime of voluntary manslaughter is the intent to kill or commit serious bodily harm. *Id.* The trial court specifically found on the record that defendant did not intend to kill LaQuana Jones. Therefore, defendant's argument (posed as issue four in defendant's appellate brief) that he was

denied due process where the trial court did not specify the type of manslaughter of which it was convicting defendant fails. Based on the trial court's factual findings on the record, it clearly convicted defendant of involuntary manslaughter.

The elements of involuntary manslaughter are: (1) a death caused by the defendant, (2) without legal justification or excuse, (3) while the defendant was acting in a grossly negligent manner or while committing an unlawful act that was inherently dangerous to human life. *In re Gillis*, 203 Mich App 320, 321; 512 NW2d 79 (1994); CJI2d 16.10. Defendant argues that he did not act in a grossly negligent manner, but rather in an ordinarily negligent manner, and that therefore the degree of negligence mandates a finding of the misdemeanor crime of careless, reckless, or negligent discharge of a firearm.

Gross negligence, for the purposes of an involuntary manslaughter conviction, occurs where the defendant's acts are not inherently wrong, but where the defendant has acted or failed to act with awareness of the risk to safety and in willful disregard of the safety of others. *People v Datema*, 448 Mich 585, 606; 533 NW2d 272 (1995). In contrast, careless, reckless, or negligent use of a firearm requires a person to cause a firearm to be discharged and kill someone while acting negligently, but not with the willful disregard for the safety of others. See CJI2d 11.20. Thus, if the trial court found, based on the evidence, that defendant acted with an awareness of the risk to safety and in willful disregard of the safety of others, the requisite element of gross negligence is met and the trial court's finding of involuntary manslaughter is proper.

The trial court found that defendant deliberately had his hand on the gun and had his hand on the trigger when the gun was fired, ultimately causing LaQuana's death. The trial court stated that, contrary to defendant's theory that the gun accidentally fired, the evidence showed that it was not some object that caused the gun to fire, but the fact that defendant's finger was on the trigger and the safety was off. The trial court also stated that defendant's reckless act was what precipitated LaQuana's death. The evidence supports these findings.

The shootings arose out of an altercation involving defendant, his girlfriend, LaQuana Jones, and her mother, Beverly Jones. The shootings occurred in Beverly Jones' house. Beverly arrived home to find defendant and LaQuana in her living room. Beverly told defendant to leave, but he refused. Beverly sent LaQuana to her room. Beverly's son, Tremaine, entered the living room and reiterated his mother's request for defendant to leave. Defendant pulled a gun, fired it, but hit no one. As defendant headed down the hall toward LaQuana's room, Beverly got in front of him. Tremaine came down the hall with a telephone in his hand because he was calling the police. Defendant looked at Tremaine and said, "Since you all calling the so-and-so police, everybody up in this so-and-so going to die." Tremaine testified that defendant turned and fired the gun at him, but that he was not hit. Defendant then turned and shot Beverly while she was standing in front of LaQuana's bedroom door. Beverly testified that defendant was standing only about two feet from her and that she was hit by the bullet in the shoulder. She also stated that she saw defendant point the gun at her and fire. Beverly testified that defendant turned to LaQuana and LaQuana (who was pregnant) told him that if he killed her, he would kill the baby. Tremaine testified that he dropped the phone and ran at defendant when he saw defendant fire in LaQuana's direction and that he pushed defendant into the wall.

The autopsy revealed a wound that did not appear to have been made by a straight-on shot from several feet away from LaQuana, and the trial court concluded that the evidence supported a finding that LaQuana was actually shot accidentally during the scuffle between defendant and Tremaine. However, the testimony that defendant had first fired the gun in the living room, threatened the boys with “catching a mug shot” and stated that if the police had been called, he would kill them all, also reveals the willful character of defendant’s behavior. Additionally, the expert testimony of the police officer about the type of gun used by defendant indicated that defendant’s version of events, that the gun was knocked against various objects inadvertently causing it to fire, was not consistent with the mechanism of that gun.

Accordingly, the evidence was sufficient to support a finding that defendant committed a grossly negligent act. Therefore, the evidence was sufficient to support a conviction for involuntary manslaughter.

Defendant also argues that the prosecution did not prove the elements of assault with intent to do great bodily harm less than murder. The elements of that crime are that a defendant attempt or offer with force or violence to do corporal harm to another, coupled with an intent to do great bodily harm less than murder. *People v Harrington*, 194 Mich App 424; 487 NW2d 479 (1992).

Beverly testified that defendant looked at Tremaine and said, “Since you all calling the so-and-so police, everybody up in this so-and-so going to die.” Ricky Lewis heard defendant state that as long as they had already called the police, he might as well go ahead and kill everyone there. Tremaine testified that defendant then turned and shot Jones while she was standing in front of LaQuana’s bedroom door. Ricky, who was behind the bedroom door, also saw defendant turn toward Beverly and shoot her, hitting her in the shoulder. Beverly testified that defendant was standing only about two feet from her and that she was hit by the bullet in the shoulder. She also stated that she saw him point the gun at her and shoot.

Thus, the evidence supports a finding that defendant deliberately shot Beverly in the arm from close range, and that he had the intent to do so, given his threats. Accordingly, there is sufficient evidence to sustain defendant’s conviction of assault with intent to do great bodily harm.

Because the evidence was sufficient to sustain defendant’s convictions of involuntary manslaughter and assault with intent to do great bodily harm, his convictions of felony-firearm are also upheld.

## II

Next, defendant contends that the trial court abused its discretion in departing from the sentencing guidelines and that his sentence is disproportionate. Although the trial court exceeded the guidelines range of three to eight years for the manslaughter conviction, we find no abuse of the sentencing court’s discretion and specifically find that defendant’s sentence of ten to fifteen years is proportionate.

The sentencing court may deviate from the guidelines range when the range is disproportionate to the seriousness of the crime. *People v Milbourn*, 435 Mich 630, 657; 461 NW2d 1 (1990). The

trial court listed the following reasons for departure on the sentencing information report departure evaluation: (1) history of domestic violence, (2) psychological injury to the victim's family, including those who were also victims, and (3) the pregnancy of the victim. We agree with the trial court that these factors were not adequately embodied in the guidelines. Further, in light of the circumstances of this case, the departure from the guidelines range did not result in a disproportionate sentence. *People v Houston*, 448 Mich 312; 532 NW2d 508 (1995).

### III

Defendant next argues that the trial court erred in failing to strike certain disputed information from the presentence investigation report.

Defendant argues that the presentence report contained statements of the probation officer's personal opinion in that the officer wrote "what is most troublesome to this writer is that the Defendant denies any intent to injure anyone whatsoever." However, this statement does not constitute a statement of the officer's personal bias, but rather a comment on the defendant's unwillingness to admit his guilt or any remorse for the shootings. In *People v Gray*, 66 Mich App 101, 110; 238 NW2d 540 (1975), this Court held that a defendant's failure to express regret concerning a crime which he does not deny is a relevant facet of his character for the purpose of the statute setting forth the items into which the probation officer may inquire in preparing his presentence report. Accordingly, this statement was proper and need not be stricken.

Defendant next contends that the statements of alleged domestic abuse should not have been included. First, a presentence report may include any information concerning defendant's illegal activities even though such activity may not have resulted in a charge or conviction. *People v Gunter*, 76 Mich App 483; 257 NW2d 133 (1977). Though the ambit of the presentence report is necessarily broad, it may not contain inaccuracies or clear misinformation. *Id.* However, the information contained in the present report was not inaccurate, but rather was based on both a police report filed by LaQuana Jones and testimony by Beverly Jones that these events occurred. Defendant did not present any evidence to the contrary, and thus, his argument does not contest a factual inaccuracy in the report. Furthermore, defendant's objection to the officer's characterization of defendant as a "ticking time bomb that eventually exploded" was not an objection to an alleged factual inaccuracy in the report, but to a conclusion drawn from the undisputed facts. This Court has held that such an objection does not require the trial court to respond by striking the information. *Greene, supra*, pp 210-211.

Accordingly, defendant does not raise any issue which mandates resentencing.

### IV

Finally, defendant argues that the trial court abused its discretion by ordering \$8,320 in restitution without inquiring into defendant's ability to pay or verifying whether the total amount was accurate. A defendant's ability to pay when restitution is imposed need only be determined if a defendant timely asserts either an objection to the amount of restitution or inability to make such payments. *People v Grant*, 455 Mich 221, 243; 565 NW2d 389 (1997). Defendant made no such objection and this issue is therefore waived.

Affirmed.

/s/ Kathleen Jansen

/s/ Jane E. Markey

/s/ Peter D. O'Connell