

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

PHILLIP GONZALEZ,

Defendant-Appellee.

UNPUBLISHED

August 11, 1998

No. 199230

Muskegon Circuit Court

LC No. 96-139373-FC

Before: Doctoroff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of three counts of second-degree murder, MCL 750.317; MSA 28.549. He was subsequently convicted of being an habitual offender, second offense, MCL 769.10; MSA 28.1082. Defendant was sentenced to three concurrent sentences of life imprisonment. He now appeals as of right. We affirm.

A car being driven by defendant collided with a sport utility vehicle, killing three of its passengers. The accident occurred after defendant led police on a chase at speeds in excess of ninety miles per hour. After the accident, defendant's blood alcohol level was 0.135.

Defendant first argues on appeal that the evidence was insufficient to support his convictions. Specifically, defendant argues that the prosecution did not produce sufficient evidence from which to infer that defendant acted with malice. We disagree.

In reviewing the sufficiency of the evidence in a jury trial, this Court reviews the evidence in a light most favorable to the prosecution to 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 McCoy*, 223 Mich App 500, 501; 566 NW2d 667 (1997). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, (4) without justification or excuse. *People v Goecke*, 457 Mich 442; ___ NW2d ___

(1998). Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Id.* “[M]alice may be implied when the defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with wanton disregard for human life.” *Id.* at 467, quoting *People v Fuller*, 86 Cal App 3d 618, 628; 150 Cal Rptr 515 (1978).

It is undisputed that defendant had been intoxicated and had driven from Holland Township into Muskegon County. Additionally, defendant drove recklessly in order to elude capture by the police. Defendant drove in excess of the speed limit and disregarded several stop signs. Defendant drove at speeds of up to 103 miles per hour, and his blood alcohol level was .13. Furthermore, the evidence indicated that defendant did not apply his brakes before the accident. At trial, defendant expressed hatred toward law enforcement officers. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that defendant acted with a wilful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. Therefore, the evidence was sufficient to support defendant’s convictions of three counts of second-degree murder.

Defendant next argues he was denied a fair trial when the prosecutor misstated the law regarding the difference between second-degree murder and manslaughter, and the trial court failed to sua sponte give a curative instruction. We disagree.

In reviewing a claim of prosecutorial misconduct, this Court examines the record and evaluates the alleged improper remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). Because defendant failed to object to the prosecutor’s statements, appellate review is foreclosed unless the misconduct was so egregious that no curative instruction could have removed the prejudice to the defendant or if manifest injustice would result from our failure to review the alleged misconduct. *Id.* On review of the record, we conclude that no manifest injustice would result from our failure to review this issue. Nevertheless, defendant argues that the trial court had a duty to sua sponte give a curative instruction. We disagree.

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant’s rights. *Id.*

The trial court correctly instructed the jury on the elements of second-degree murder, operating a motor vehicle under the influence of intoxicating liquor (OUIL) causing death, involuntary manslaughter with a motor vehicle, and negligent homicide. The court also instructed the jury on the difference between gross negligence, ordinary negligence and slight negligence. Furthermore, the court stated that it is the duty of the court to instruct the jury on the law, and that “[i]f a lawyer says something different about the law, follow what I say.” Read as a whole, these instructions fairly presented the issues to be tried and sufficiently protected defendant’s rights. Therefore, no error occurred. *Bell, supra* at 276.

Defendant next argues that he was denied the effective assistance of counsel by his trial counsel's failure to object to the prosecutor's allegedly improper remarks. A defendant claiming ineffective assistance of counsel has the burden of showing that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for the unprofessional errors the result of the proceeding would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997). Because any prejudice that was caused by the prosecutor's remarks was cured by the court's instructions to the jury, defendant was not prejudiced by trial counsel's failure to object. Therefore, defendant was not denied the effective assistance of counsel.

Defendant next argues that the trial court's exclusion of evidence that the victims were not wearing seat belts at the time of the accident denied him his right to present a defense. We disagree. Whether or not the victims were wearing seat belts has no bearing on the criminal conduct of defendant. *People v Richardson*, 170 Mich App 470, 473; 428 NW2d 698 (1988). Therefore, no error occurred.

Defendant next argues that the trial court abused its discretion in sentencing him. This Court reviews a sentencing court's decision for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it is not proportionate to the seriousness of circumstances surrounding the offense and offender. *Id.* at 436.

The trial court did not abuse its discretion in sentencing defendant to three concurrent life sentences for his three counts of second-degree murder. Defendant committed three vehicular homicides while attempting to elude capture by the police. He led the police on a substantial chase covering more than one county. Defendant was legally intoxicated and drove recklessly. He disregarded a number of traffic signals, including one at the intersection where the accident occurred. Defendant's presentence investigation report indicates that he was convicted of one prior felony, and that he has a flagrant disregard for the law and the authorities. On this record, we find that defendant's sentences were proportionate.

Affirmed.

/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot