

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS C. COTTON,

Defendant-Appellant.

UNPUBLISHED

December 28, 1999

No. 211332

Wayne Circuit Court

LC No. 97-004769

Before: Neff, P.J., Murphy and J.B.Sullivan*, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b(1); MSA 28.424(2)(1). He was sentenced to sixteen to twenty-five years' imprisonment for the second-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first contends that he was denied a fair trial because of improper remarks and argument by the prosecutor. Claims of prosecutorial misconduct are decided on a case-by-case basis. 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 Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Because defendant did not object to the alleged misconduct at trial, this Court will reverse only if a curative instruction could not have eliminated the prejudicial effect or if failure to consider the issue would result in manifest injustice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Most of the challenged remarks constituted proper commentary on the evidence and reasonable inferences drawn therefrom as related to the prosecutor's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The trial court's instructions to the jury were sufficient to dispel any prejudice resulting from the few arguably improper comments. *Id.* at 281. Accordingly, a failure to review this issue will not result in a miscarriage of justice.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defendant next argues that the trial court erred in its instructions to the jury. This Court

reviews a claim of instructional error de novo, *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996), and reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). Here, defendant failed to preserve the various allegations of instructional error by requesting any omitted instructions at trial or objecting to the instructions given. *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996). Therefore, “review is limited to the issue whether relief is necessary to avoid manifest injustice.” *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

We conclude that defendant has abandoned his claims that the trial court erred when it failed to expand upon CJI2d 4.1, or that it misstated the law regarding the defense of accident, because he has failed to cite authority in support of his positions. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). Defendant’s contention that the court failed to specifically instruct the jury when second-degree murder is “justified, excused, or done under circumstances that reduce it to a lesser crime,” CJI2d 16.5, is without merit, because the court instructed the jury on the defense of accident and the lesser included offenses of involuntary manslaughter and negligent use of a firearm resulting in death. The court’s failure to instruct on voluntary manslaughter is not grounds for reversal because defendant did not request the instruction and, further, it was not consistent with the evidence or defendant’s theory of the case. *People v Sullivan*, 231 Mich App 510, 517-518; 586 NW2d 578 (1998), lv grtd ___ Mich ___; ___ NW2d ___ (1999); MCL 768.29; MSA 28.1052. Finally, the trial court’s statement regarding the circumstances under which defendant claimed the gun accidentally discharged did not result in manifest injustice in light of defendant’s implausible explanation for the crime.

Defendant next argues that the trial court erred in admitting his statement to police regarding the circumstances of the offense. Defendant contends that the statement constituted hearsay because it did not amount to a confession of guilt. We review a trial court’s decision to admit evidence for an abuse of discretion. *People v Gould*, 225 Mich App 79, 88; 570 NW2d 140 (1997). Because defendant failed to raise an objection at trial as required by MRE 103(a)(1), appellate review is precluded unless the failure to consider the issue would result in a miscarriage of justice. *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997). The statement would have been hearsay if offered by defendant, MRE 801(c), and thus could not have been admitted unless defendant was unavailable as a witness and the statement was contrary to his pecuniary or proprietary interests or tended to subject him to criminal liability. MRE 804(b)(3). However, because it was defendant’s own statement and was offered against him, it was not inadmissible hearsay. MRE 801(d)(2)(A); *People v Armstrong*, 175 Mich App 181, 186; 437 NW2d 343 (1989). We find defendant’s claim to be without merit and thus manifest injustice would not result from our failure to review it.

Defendant finally contends that he was denied the effective assistance of counsel because his trial attorney failed to object to the prosecutor’s improper remarks, failed to object to the court’s erroneous instructions, and failed to request an instruction on voluntary manslaughter. Because defendant failed to preserve this issue by moving for a new trial or an evidentiary hearing below, review is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). The general rule is that effective assistance of counsel is presumed and the defendant bears

a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, the defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deprive him of a fair trial. *Price, supra*. The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy and show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Stanaway, supra* at 687-688. Having reviewed the record in light of this standard, we find that defendant has failed to establish ineffective assistance of counsel.

Affirmed.

/s/ Janet T. Neff

/s/ William B. Murphy

/s/ Joseph B. Sullivan