

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE C. GILFORD,

Defendant-Appellant.

UNPUBLISHED

February 8, 2000

No. 211833

Recorder's Court

LC No. 96-008940

Before: Jansen, P.J., and Saad and Gage, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of involuntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant fired several shotgun blasts toward two occupants of a vehicle, striking the victim in the back of his neck. The victim was rendered a quadriplegic, and died from complications approximately fourteen months after the shooting. The trial court sentenced defendant to a mandatory two year prison term for the felony-firearm conviction, to be served consecutively with a five to fifteen year prison term for the manslaughter conviction. Defendant appeals as of right, and we affirm.

Defendant first contends that insufficient evidence showed that his actions caused the victim's death. In reviewing a challenge to the sufficiency of evidence, we view the evidence presented in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the elements of the crime were established beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985).

Involuntary manslaughter consists of an unlawful act, committed with the intent to injure or in a grossly negligent manner, that proximately causes death. *People v McCoy*, 223 Mich App 500, 502; 566 NW2d 667 (1997). To prove a defendant guilty, the prosecutor must show that the defendant's actions were a substantial cause in bringing about the victim's death, but is not required to establish that the defendant's actions were the proximate cause. *People v Tims*, 449 Mich 83, 95-97; 534 NW2d 675 (1995).

Defendant does not dispute that he discharged a shotgun in a manner that was at least grossly negligent. While defendant suggests that it is possible that the victim's companion, and not defendant, fired from a revolver the shot that paralyzed the victim, the medical examiner testified that he removed shotgun pellets, not bullet fragments, from the neck of the victim's corpse. Furthermore, a police officer testified that he was provided with a vial containing shotgun pellets and wadding that were removed from the victim during an operation the day after the shooting. From this evidence, a rational trier of fact could have determined beyond any reasonable doubt that defendant's shotgun blast struck the victim. *Petrella, supra*.

Defendant further challenges causation by arguing that the victim's desire to die rather than live as a quadriplegic, his election not to have his septic condition aggressively treated, along with his refusal to accept food and water combined to form an independent and intervening cause of his death. When an independent act "intervenes between the act of a criminal defendant and the harm to a victim, that act may only serve to cut off the defendant's criminal liability where the intervening act is the sole cause of harm." *People v Bailey*, 451 Mich 657, 677; 549 NW2d 325 (1996). In the instant case, while testimony indicated that the victim refused sustenance shortly before having his treatment status changed and limited to support care only, no evidence showed that the victim died from dehydration or starvation. Both the doctor who treated the victim and the medical examiner who autopsied the body opined that the victim died because of complications resulting from his quadriplegia, which itself was caused by the shotgun wound to his neck. The victim's failure to continue aggressive treatment of his infections cannot be considered the sole cause of his death. Here, the victim merely ceased struggling to survive and capitulated to the natural consequences of the injuries inflicted by defendant. We find sufficient evidence from which a rational trier of fact could have found beyond a reasonable doubt that defendant's unlawful conduct constituted a substantial cause of the victim's death. *Petrella, supra*.

Lastly, defendant challenges the trial court's decision to permit the prosecutor at trial to strike from her witness list an endorsed res gestae witness, Steven Adams, who together with the victim occupied the car at which defendant shot. We review for an abuse of discretion a trial court's decision to permit the deletion of a witness from the prosecutor's witness list for good cause shown. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995).

There is no dispute that Steven Adams was a res gestae witness. See *People v Calhoun*, 178 Mich App 517, 521; 444 NW2d 232 (1989) (A res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts.). Nor do the parties dispute that Adams appeared on the prosecutor's witness list as a witness that the prosecutor intended to produce at trial. Accordingly, the prosecutor could only strike Adams from the witness list at trial with leave of the court and for good cause shown, or by stipulation of the parties. MCL 767.40a(4); MSA 28.980(1)(4). Because defendant objected to the striking of Adams from the prosecutor's witness list, the prosecutor was required to show good cause and obtain leave from the court. Had defendant so requested, the prosecutor also would have been obligated to provide defendant reasonable assistance in locating Adams and compelling his presence. MCL 767.40a(5); MSA 28.980(1)(5).¹

To establish good cause for striking Adams from the witness list, the prosecutor presented the officer in charge of the case, who testified that Adams initially represented that he would appear in court voluntarily. When Adams did not appear, the police made reasonable efforts to locate him, none of which met with any success. Specifically, the officer in charge testified that on several occasions he went to a reported address for Adams where he spoke with Adams' mother and sister, and also spoke with Adams' mother over the telephone. Adams' mother and sister provided the officer with an alleged address for Adams, which the officer subsequently discovered was a vacant lot. The officer tried Adams' pager, which had been disconnected. The officer checked for Adams at the Wayne County morgue, area hospitals and within the jail system. The officer also searched phone and gas company listings. The officer gave a copy of the material witness detainer and Adams' photograph to a major crimes mobile unit of the Detroit police, which likewise made several visits to Adams' alleged address. Finally, during a recess after the officer's testimony, the prosecutor called Adams' mother again, and also called two of Adams' alleged former employers. Considering these unsuccessful efforts of the prosecutor, we cannot conclude that the trial court abused its discretion in finding that the prosecutor had demonstrated good cause for striking Adams from the witness list.

We further note that defendant engaged in the type of gamesmanship the Legislature tried to abolish when it amended the relevant statute. See *Burwick, supra* at 290. Had defendant truly wished to have this witness produced, he could have made a request pursuant to MCL 767.40a(5); MSA 28.980(1)(5), and the prosecution and the police would then have been obligated to use reasonable efforts to assist defense counsel in procuring the witness.

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Hilda R. Gage

¹ Prior the enactment of 1986 PA 46, a prosecutor owed a duty to exercise due diligence in endorsing and producing all res gestae witnesses. After the 1986 amendment to MCL 767.40a; MSA 28.980(1), however, the prosecutor must "give initial and continuing notice of all known res gestae witnesses, identify witnesses the prosecutor intends to produce, and provide law enforcement assistance to investigate and produce witnesses the defense requests." *Burwick, supra* at 287-289.