

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN R. WALKER,

Defendant-Appellant.

UNPUBLISHED

March 9, 2001

No. 208777

Wayne Circuit Court

Criminal Division

LC No. 96-501393

Before: Kelly, P.J., and White and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of involuntary manslaughter, MCL 750.321; MSA 28.553, discharging a firearm in an occupied structure, MCL 750.234b; MSA 28.431(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of seven to fifteen years' imprisonment for the involuntary manslaughter conviction and one to four years' imprisonment for the discharging a firearm conviction, to be served consecutive to a two-year term for the felony-firearm conviction. We remand for either retrial of the felony-firearm charge or amendment of the judgment of sentence to reflect that the manslaughter sentence runs concurrent with the felony-firearm sentence. In all other respects, we affirm.

Defendant first claims that the involuntary manslaughter conviction must be vacated because there was insufficient evidence to allow the jury to consider the original charged offense of second-degree murder. We disagree. Factual conflicts are viewed in a light most favorable to the prosecution in determining if sufficient evidence exists. *People v Wolfe*, 440 Mich 508, 516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The prosecution need only prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence a defendant may provide. *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991). Viewed in this manner, the prosecution presented sufficient evidence to support its theory of malice, namely, that defendant acted in wanton and wilful disregard of the likelihood that the natural consequence of his behavior was to cause death or great bodily harm. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998); *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999).

Defendant next claims that he was denied his right to a fair trial because of prosecutorial misconduct. We disagree. First, because defendant failed to preserve his claim concerning the

testimony of the forensic pathologist regarding the manner of death, or the prosecution's closing argument based on that testimony, he must show plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Defendant's reliance on *People v Smith*, 425 Mich 98; 387 NW2d 814 (1986), is misplaced, given that the manner of death was within the forensic pathologist's field of expertise. Further, the forensic pathologist did not, in effect, render an opinion on credibility. Cf. *Sippio v State*, 350 Md 633, 652; 714 A2d 864 (1998).

Moreover, even if the prosecution's questions and arguments were improper, the error could have been cured by a timely objection or obtaining an appropriate cautionary instruction. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Instead of objecting, defense counsel cross-examined the forensic pathologist about the factual basis of his opinion, eliciting testimony regarding information that the pathologist did not have during his investigation and a scenario that would have caused him to classify the manner of death as suicide, and then using that testimony to argue before the jury that the forensic pathologist might have labeled the situation a suicide had he had complete information. Viewing the record in its entirety, we are not persuaded that defendant has established any basis for relief based on prosecutorial misconduct. Defendant was not prejudiced by the forensic pathologist's testimony regarding the manner of death.

Defendant next claims that the prosecution engaged in misconduct by eliciting testimony that the victim sold marijuana for defendant. Defendant has not shown that the prosecution acted in bad faith in asking the question, or that the brief testimony elicited before the defense objection caused prejudice. The testimony in question was responsive to testimony elicited by defense counsel from the witness about her prior statement concerning the victim's depression and drug activities. Although the witness' testimony about the victim's drug activities was prompted by the prosecution's objection, under the rule of completeness, it was appropriate for the prosecution to ask for the full text of that prior statement. *People v McReavy*, 436 Mich 197, 215; 462 NW2d 1 (1990). In any event, the trial court's decision to preclude any further questioning was sufficient to cure any prejudice under the circumstances of this case. See *People v Bahoda*, 448 Mich 261, 280; 531 NW2d 659 (1995). Hence, defendant's claim affords no basis for relief.

Defendant's final claim of prosecutorial misconduct is, in substance, a challenge to the trial court's evidentiary ruling to allow the prosecution to introduce extrinsic evidence of a witness' prior statement as both a prior consistent statement to rehabilitate credibility and a prior inconsistent statement to impeach his credibility.

Assuming, arguendo, that the trial court abused its discretion in allowing the extrinsic evidence of the prior statement for rehabilitative and impeachment purposes, no relief is warranted because defendant has not shown that it is more probable than not that the result would have been different had the statement not been before the jury. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Defendant next claims that reversal is required because the jury instructions for involuntary manslaughter did not require the jury to agree unanimously on a specific act that

caused the victim's death. We disagree. The jury was not required to agree on every fact supporting the verdict. *People v Gadomski*, 232 Mich App 24, 31; 592 NW2d 75 (1998). In this case, the involuntary manslaughter conviction stemmed from evidence of a single cause of the victim's death, namely, a gunshot wound to the head. Although alternative theories were presented on the manner of death (e.g., which acts caused the gun to discharge), each alternative was based on defendant acting in a grossly negligent manner. It was not necessary that the jury agree unanimously on the alternative theories. Cf. *Gadomski, supra* (first-degree criminal sexual conduct based on single penetration, but different aggravating circumstances, is permitted). Hence, defendant has not established the requisite error to avoid forfeiture of this unpreserved issue. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant also claims error in sentencing. Defendant asserts that because the trial court permitted the jury to consider and return a verdict on the felony-firearm charge that did not specify which charge constituted the underlying felony, the trial court could not properly assume that the felony-firearm conviction pertained to both charges, and therefore erred in making the manslaughter sentence consecutive to the felony-firearm sentence. We agree. The jury returned only one felony-firearm verdict. Given the evidence at trial,¹ the jury could have based the felony-firearm verdict on either the involuntary manslaughter charge or the discharging a firearm charge, or both, inasmuch as the jury was instructed that defendant must have knowingly carried or possessed a firearm “at the time [he] committed one of those three crimes [including second-degree murder], or all of those three crimes,” and the jury verdict form did not differentiate between the underlying offenses.

Because the jury instruction and verdict form were such that it is unclear whether the jury found that defendant possessed a firearm in conjunction with the involuntary manslaughter offense, and the testimony was such that the jury reasonably could have found that while defendant possessed the firearm earlier, when he was waiting to see the decedent, and acted with willful and wanton disregard with respect to the decedent, he did not possess the firearm when the decedent was shot. Thus, because it is uncertain whether the felony-firearm conviction was based on the greater or lesser charge, the court erred in making the sentences for both offenses consecutive to the felony-firearm sentence. We therefore vacate the felony-firearm sentence and remand for further proceedings. On remand, the prosecutor is to be given the option of retrying defendant on the felony-firearm charge with involuntary manslaughter as the underlying offense, or accepting an amended judgment of sentence ordering that the felony-firearm sentence run consecutive to the discharging a firearm sentence but concurrent with the manslaughter sentence.

Defendant also claims that the trial court, in fashioning its sentence for involuntary manslaughter, considered inaccurate information about the homicide and suicide theories of the victim's death. Although the trial court did not accurately state the theories, having reviewed the trial court's sentencing decision in its entirety, we are satisfied that the asserted inaccuracy did not have a determinative effect on the sentence. Hence, any error was harmless. *People v Daniels*, 192 Mich App 658; 675-676; 482 NW2d 176 (1992).

¹ There was evidence that defendant intentionally discharged the firearm several times before entering decedent's room. There was also evidence that decedent had control of the gun when he was shot.

Finally, defendant claims that his involuntary manslaughter sentence is excessive and disproportionate. We disagree. The sentence is within the sentencing guidelines recommended minimum sentence range. A review of the record reveals that the trial court did not abuse its discretion in imposing a minimum sentence of seven years' imprisonment. *People v St John*, 230 Mich App 644, 649-650; 585 NW2d 849 (1998).

Affirmed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White

/s/ Kurtis T. Wilder