

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTOINE DESHAWN JORDAN,

Defendant-Appellant.

UNPUBLISHED

December 19, 2006

No. 264331

Wayne Circuit Court

LC No. 05-002786-01

Before: Owens, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree felony murder, MCL 750.315(1)(b). Defendant was sentenced to life in prison. We affirm.

Defendant first argues that he was denied the effective assistance of counsel due to trial counsel's failure to request a jury instruction on involuntary manslaughter, an available lesser offense. Defendant claims that trial counsel erred when he requested a jury instruction on voluntary manslaughter instead of involuntary manslaughter, and there is a reasonable probability that, but for counsel's mistake, the jury would have convicted defendant of involuntary manslaughter. We disagree.

To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness according to the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different and the attendant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (citing *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 ([1984])).

Defendant was convicted of first-degree felony murder. The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the felony murder statute. *People v*

Novack, 462 Mich 392, 401; 614 NW2d 78 (2000); *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999). MCL 750.316 provides:

(1) A person who commits any of the following is guilty of first-degree murder and shall be punished by imprisonment for life:

* * *

(b) Murder committed in the perpetration of, or attempt to perpetrate . . . child abuse in the first degree. . . . [See also *People v McCrady*, 244 Mich App 27, 30; 624 NW2d 761 (2000).]

To establish first-degree child abuse, a prosecutor must show beyond a reasonable doubt that the defendant knowingly or intentionally caused serious physical or serious mental harm to a child. *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004); MCL 760.136b(2).

A homicide occurring during the commission of a felony can constitute murder or manslaughter. *People v Holtschlag*, 471 Mich 1, 12; 684 NW2d 730 (2004). Manslaughter is a necessarily included lesser offense of murder. *People v Mendoza*, 468 Mich 527, 544; 664 NW2d 685 (2003). When a defendant is charged with murder, instructions on voluntary manslaughter and involuntary manslaughter must be given if supported by a rational view of the evidence. *Id.* at 541. The element that distinguishes manslaughter and murder is malice. *Id.* at 536. If a homicide was committed with malice, it is murder, but if it was committed with gross negligence or an intent to injure, it is manslaughter. *People v Gillis*, 474 Mich 105, 138; 712 NW2d 419 (2006). Involuntary manslaughter is the “catch-all” homicide crime and includes every unintentional killing of a human being that is not murder or voluntary manslaughter or subject to a recognized justification or excuse. *Holtschlag*, *supra* at 6-7. An instruction on the lesser-included offense of involuntary manslaughter is merited only if a rational view of the evidence would support a finding that the victim's death was caused by gross negligence or an intent to injure that did not amount to malice. *Gillis*, *supra* at 138.

The trial court instructed the jury regarding the elements of first-degree felony murder and second-degree murder. Defendant’s counsel requested an instruction on voluntary manslaughter although he believed “it [was] a stretch perhaps to say that losing control over the reason he say [sic] he lost control was justified. . . .” The trial court denied the voluntary manslaughter instruction because defendant’s testimony in court was that he did not do anything to the victim, and there was no adequate provocation. Defendant argues that, although there was no evidence to support a conviction of voluntary manslaughter, involuntary manslaughter was an available lesser offense because a rational view of the evidence supported such an instruction. Thus, defendant argues, defense counsel’s failure to request an instruction on involuntary manslaughter amounts to deficient performance.

We will assume that counsel committed a serious mistake and was ineffective in failing to request an instruction on involuntary manslaughter. Nevertheless, we conclude that because the jury rejected the opportunity to convict defendant of the intermediate offense of second-degree murder, defendant is unable to show that a reasonable probability exists that, but for counsel’s error, the jury would have convicted him of involuntary manslaughter. Where the trial court instructs on a lesser included offense, which is intermediate between the greater offense

and a second lesser included offense, and the jury convicts on the greater offense, the failure to instruct on that second lesser included offense is harmless if the jury's verdict reflects an unwillingness to have convicted on the offense for which instructions were not given. *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990). Where the defendant was charged with both first and second-degree murder, and the jury convicted the defendant of first-degree murder and declined to convict of the lesser offense, the trial court's failure to instruct on involuntary manslaughter was harmless, and defendant failed to show a "miscarriage of justice." *Gillis*, *supra* at 140 n 18.

Here, the jury had the option of convicting defendant of second-degree murder if it had a reasonable doubt whether defendant committed the underlying felony, i.e., whether defendant knowingly or intentionally caused serious physical or serious mental harm to the child. The jury, however, affirmatively found that defendant knowingly or intentionally caused serious physical harm to the victim, and thus, committed first-degree child abuse which lead to the victim's death. The jury's rejection of second-degree murder in favor of first-degree murder reflected an unwillingness to convict of a lesser-included offense such as involuntary manslaughter. *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709 (1997). Having rejected the option of second-degree murder, it is highly unlikely that the jury would have concluded that defendant acted not with intent to kill, do great bodily harm or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, but with gross negligence. Thus, defendant was not prejudiced by his counsel's failure to request instructions on involuntary manslaughter.

Defendant's remaining arguments assert prosecutorial misconduct during opening statement and closing argument, and during the questioning of witnesses. While we are troubled by the prosecutor's remarks, we conclude that defendant was not denied a fair trial. A preserved claim of prosecutorial misconduct is reviewed de novo to determine if the defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). An unpreserved error requires reversal where error occurred, the error was plain, and the plain error resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003). Appellate review of allegedly improper conduct is precluded if the defendant fails to timely object, and we will not reverse if the prejudicial effect of the remark could have been cured by a timely instruction. *People v Williams*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005), *aff'd* 475 Mich 101 (2006). The cumulative effect of several minor instances of misconduct may warrant reversal although the individual errors would not. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003).

We agree with defendant that the prosecutor distorted defendant's testimony concerning whether the victim jumped on the bed, both during the cross-examination of Virani, the defense medical examiner, and during argument to the jury. Additionally, the prosecutor incorrectly argued to the jury that Somerset and Virani agreed about the force necessary to cause the victim's fatal injuries. In her closing argument, the prosecutor argued that Virani and Somerset agreed that "the kind of force needed to cause these injuries to the [victim's] head [was] consistent with a car accident or a fall from several stories or being smashed into the ground with tremendous force." While the medical examiners agreed that a car accident could have been a cause of the victim's injury, they disagreed regarding whether a several-story fall could have

been a cause of the victim's injury--Virani believing that such a fall could not cause this injury in the absence of a skull fracture. We also agree that the prosecutor's reference to the fact that defendant was wearing a cross at trial, but was not wearing it when he confessed to the officer, was improper. Defendant's additional claims of misconduct were not objected to and were capable of being cured with an appropriate instruction.

A review of the record convinces us that the alleged errors and misconduct, individually and collectively, did not affect the outcome of the proceedings, and did not result in the conviction of an innocent person or seriously affect the fairness, integrity or public reputation of the proceedings. *Carines, supra* at 763. Defense counsel addressed the issues adequately in argument, and all recognized that the real question for the jury was whether it would credit defendant's alleged statement to Officer Newman. The medical evidence was clearly inconclusive, and the question was whether defendant was being truthful at trial, or had given an accurate statement to Newman. That question was not impacted by the prosecutor's statements or actions in any significant respect. Thus, we reject the claim that the prosecutor's conduct deprived defendant of a fair trial. For the same reasons, we reject the argument that defendant was deprived of the effective assistance of counsel through his trial lawyer's failure to object to the various instances of prosecutorial misconduct, because defendant cannot show that the result of the trial would have been different.

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Joel P. Hoekstra