

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 26, 2013

v

DEON EUGENE ROY,

No. 306600
Oakland Circuit Court
LC No. 2010-232804-FH

Defendant-Appellant.

Before: RIORDAN, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of manslaughter, MCL 750.321, assaulting, resisting, or obstructing a police officer, MCL 750.81d(1), and possession of a switchblade knife, MCL 750.226a. Defendant was sentenced to concurrent sentences of 55 months to 15 years' imprisonment for the manslaughter conviction, one to two years' imprisonment for the resisting arrest conviction, and one year for the possession of a switchblade knife conviction. For the reasons stated in this opinion, we affirm.

Defendant's convictions are the result of an argument that occurred on June 26, 2010. Defendant and James Lucas, the victim, were at a "bike party" at a Hampton Inn. Defendant and Lucas were in a room at the hotel with Sylvester Evans and Rawl Miller. Defendant and Lucas started arguing about a bottle of liquor. Evans testified that he thought they were joking, and that the argument did not seem heated. Evans did not see the switchblade knife at any point, but heard Lucas say "oh man, you stuck me." Lucas stumbled toward the bathroom, and at that point, everyone noticed that his chest was bleeding. Evans testified that defendant was "frantic," and he believed that defendant called 911. Evans said that defendant stayed with Lucas trying to help him. Miller similarly testified that he believed defendant and Lucas were just joking around, and that he did not see defendant stab Lucas. However, Miller testified that he did see defendant with the switchblade knife. Miller also heard Lucas say that defendant "stabbed" him. Lucas was declared dead later that night at the emergency room after it was discovered that his heart was not beating and he could not be revived.

I. MOTION FOR DIRECTED VERDICT

Defendant first argues that the trial court clearly erred by denying his motion for directed verdict. We disagree.

We review de novo a trial court's decision on a motion for a directed verdict. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). We must view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Parker*, 288 Mich App 500, 504; 795 NW2d 596 (2010). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Witness credibility and weight of the evidence determinations are reserved for the fact-finder. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

Defendant contends that the evidence was insufficient to support the element of gross negligence required for a conviction of involuntary manslaughter. To prove gross negligence amounting to involuntary manslaughter, the prosecutor must establish:

(1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another.

(2) Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand.

(3) The omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. [*People v McCoy*, 223 Mich App 500, 503; 566 NW2d 667 (1997).]

The evidence before the court at the time of defendant's motion for directed verdict was sufficient to establish that defendant clearly had knowledge that his knife was razor sharp, that it had accidentally opened in the past, and that pulling his knife out of his pocket and pointing it at another person required "the exercise of ordinary care and diligence to avert injury to another." The evidence further showed that defendant had the ability to avoid the resulting harm by keeping his dangerous razor sharp knife in his pocket, especially during situations where he and his friends had been consuming alcohol. Finally, the evidence was sufficient to show that defendant failed to use the ordinary care and diligence required to keep his knife in his pocket. Had he done so, the threatened danger would have been averted. The possibility that a disaster could result from pulling out a switchblade knife and pointing it at another individual would be apparent to the "ordinary mind." Defendant failed to use ordinary care and diligence to avert the threatened danger. Whether defendant was joking around, was not angry, and did not intend to injure the victim does not negate a finding of involuntary manslaughter. *People v Herron*, 464 Mich 593, 604-605; 628 NW2d 528 (2001); *McCoy*, 223 Mich App at 503.

Viewing the evidence in the light most favorable to the prosecutor, upon de novo review, we conclude that a rational trier of fact could find that the gross negligence element of involuntary manslaughter was proven beyond a reasonable doubt.

II. RIGHT TO A FAIR AND IMPARTIAL JURY

Next, defendant contends that he was denied his constitutional right to a fair and impartial jury when the court permitted Juror 113 to remain on the jury. We disagree.

We review de novo alleged errors in the seating of jurors. *People v Manser*, 250 Mich App 21, 24; 645 NW2d 65 (2002), overruled in part on other grounds by *People v Miller*, 482 Mich 540, 561 n 26; 759 NW2d 850 (2008). Whether a juror is sufficiently free from prejudice and otherwise competent to serve is a question for the trial court to decide. *Manser*, 250 Mich App at 26 n 2. We review for an abuse of discretion the trial court’s decision whether to remove a juror. *People v Unger*, 278 Mich App 210, 259; 749 NW2d 272 (2008). “An abuse of discretion occurs only when the trial court chooses an outcome falling outside the principled range of outcomes.” *Miller*, 482 Mich at 544 (quotation marks and citation omitted). A trial court’s factual findings are reviewed for clear error. *Id.* “Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made.” *Id.* (quotation marks and citation omitted).

A criminal defendant has a constitutional right to be tried by an impartial jury. *Id.* at 547. A juror’s failure to disclose information that the juror should have disclosed warrants a new trial only if the defendant is actually prejudiced, and the failure to disclose information is not presumed to be prejudicial. *Id.* at 548. Prejudice occurs only if defendant is denied an impartial jury. *Id.* Moreover, the fact that a juror would have been removable for cause does not require a new trial. *Id.* at 561. Rather, “the proper inquiry is whether the defendant was denied his right to an impartial jury.” *Id.* Regardless of the circumstances, if defendant was not denied the right to an impartial jury, a new trial is not warranted. *Id.*

In this case, defendant’s jury was sworn in without objection. However, on the first day that evidence was presented in defendant’s trial, Juror 113 sent a note to the court during a break. The note indicated that the juror’s brother had been killed by his best friend “supposedly by accident,” which was similar enough to the circumstances of the present case that the juror was concerned about her ability to be objective.¹ The court brought Juror 113 into the courtroom, where she was questioned by defense counsel and the court about her ability to set aside her feelings about her brother’s death and be fair to defendant. She indicated that she could be fair and would follow the law and the court’s instructions. Although defense counsel wanted the juror excused, the court held that the juror had “expressed quite unequivocally on the [r]ecord that she could be fair and impartial in this case, that she’ll follow my directions and instructions with regard to the law and judge this case based on the facts before the court as opposed to her previous experiences,” and overruled the defense objection. Defense counsel argued that defendant’s peremptory challenges had not all been exercised during voir dire, and had defense counsel known about the manner of death of Juror 113’s brother, the juror would have been peremptorily excused from the jury. The court asked defense counsel to provide legal authority

¹ Before the jury was sworn in, the trial court questioned the potential jurors who had been seated, including Juror 113, and one of the questions it asked was: “Anybody here have an experience with the courts or the criminal justice system that would affect your ability to be fair and impartial?” None of the jurors responded. Both the prosecutor and defense counsel asked the potential jurors questions regarding whether they could be impartial, and defense counsel even explained that the defense in the case was accident. None of the jurors indicated any issues.

to allow peremptory challenges to be reopened during trial based on newly discovered information and counsel could provide none. Juror 113 remained on the jury.

On appeal, defendant argues that he is entitled to a new trial because the trial court erred by not dismissing Juror 113 after the jury had been impaneled.² We disagree.

A new trial is not required unless defendant can prove that he was “denied his right to an impartial jury.” *Miller*, 482 Mich at 561. In this case, Juror 113 was questioned by the court, and stated that she could put aside her sympathies and be fair, and that she would follow the law and the court’s instructions. In light of the juror’s unequivocal statement that she could impartially follow the law, and the fact that there is no record evidence to suggest that Juror 113 was not in fact impartial, we cannot conclude that defendant was denied his right to an impartial jury. The trial court is in the best position to judge, on the basis of credibility and demeanor, whether a juror could render a fair and impartial verdict. *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001); *People v Lee*, 212 Mich App 228, 251; 537 NW2d 233 (1995). Defendant has failed to demonstrate that he was actually prejudiced as a result of Juror 113’s failure to come forward with her concerns during voir dire. Upon de novo review, we hold that the trial court did not clearly err or abuse its discretion in finding that Juror 113 could be fair and impartial, follow the court’s directions, and judge the case based on the facts before the court. Thus, defendant was not denied a fair and impartial jury.

III. JURY INSTRUCTIONS

Next, defendant contends that the trial court abused its discretion by granting the prosecutor’s request to omit CJI2d 16.17 from the jury instructions. We disagree.

A claim of instructional error is reviewed de novo. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). Jury instructions must clearly present the case and the applicable law to the jury. *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence. *Id.* at 162-163. There is no error requiring reversal if, on balance, the instructions fairly present the issues to be tried and sufficiently protect the defendant’s rights. *People v McFall*, 224 Mich App 403, 414; 569 NW2d 828 (1997).

Here, the trial court’s decision to omit CJI2d 16.17 (“Degrees of Negligence”) from its instructions to the jury was based on three factors: (1) CJI2d 16.18 (“Gross Negligence”) adequately covered the definition of gross negligence, (2) CJI2d 16.17 could be confusing to the jury, and (3) it was unnecessary in light of the very specific definition of gross negligence in CJI2d 16.18. Reading the instructions as a whole, we find that no error occurred. We find that it

² We find defendant’s reliance on *Manser*, 250 Mich App at 21, unavailing in light of our Supreme Court’s opinion in *Miller*, 482 Mich at 561 n 26, overruling *Manser*.

was not an abuse of discretion for the trial court to conclude that the jury could become confused by hearing the definitions in CJI2d 16.17, which included unrelated crimes such as those involving a motor vehicle. CJI2d 16.18 clearly presented the definition that the jury needed to consider. The jury instructions presented the applicable law to the jury and included all of the elements of the charged offenses. Under the instructions given, the jury could find that defendant acted with more than gross negligence, that he acted with gross negligence, or that his actions did not meet the definition of gross negligence and therefore acquit him. Accordingly, we hold that the trial court did not err when it granted the prosecutor's motion to omit CJI2d 16.17 because the issues to be tried were fairly presented and the trial court's determination that CJI2d 16.17 was not applicable in this case was not an abuse of discretion.

IV. SENTENCING GUIDELINES

Finally, defendant contends that the trial court violated his due process rights when scoring offense variable 12 (OV 12) of the sentencing guidelines. We disagree.

We review scoring decisions under the sentencing guidelines for an abuse of discretion. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). However, "trial courts are afforded broad discretion in calculating sentencing guidelines, and appellate review of those calculations is very limited." *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996). A defendant is entitled to resentencing when the trial court erred in scoring an offense variable, and the error affected the statutory sentencing guidelines range. *People v Jackson*, 487 Mich 783, 793; 790 NW2d 340 (2010), citing *People v Francisco*, 474 Mich 82, 91; 711 NW2d 44 (2006). "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *Francisco*, 474 Mich at 89 n 8. "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

We find that there was sufficient evidence to support the court's decision to score OV 12 at ten points. Defendant was charged with and convicted of one count of resisting and obstructing a police officer for his conduct when being arrested shortly after the stabbing. Despite the fact that he was only charged with one count of resisting and obstructing, the evidence showed that it took four police officers to subdue and handcuff him. Under OV 12, defendant could have been scored 25 points for three or more contemporaneous felonious criminal acts against a person. Thus, the scoring of ten points was well within the discretion of the trial court. Furthermore, subtracting ten points from OV 12 would not alter the appropriate guidelines range. Accordingly, even if there was error, resentencing would not be required. *Francisco*, 474 Mich at 89 n 8.

Affirmed.

/s/ Michael J. Riordan
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell