

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK EDWARD TELLO,

Defendant-Appellant.

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UNPUBLISHED

May 24, 1996

No. 176799

LC No. 94-067904-FH

Before: MacKenzie, P.J., and Saad and C.F. Youngblood\*, JJ.

PER CURIAM.

Following a jury 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), in the shooting death of his wife, Ronda. He was sentenced to five to fifteen years' imprisonment for the manslaughter conviction, to be served consecutively to the mandatory two-year sentence for the felony-firearm conviction. Defendant appeals as of right and we affirm.

Defendant claims that there was insufficient evidence to sustain his convictions. When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Involuntary manslaughter is established if the defendant acts in a grossly negligent, wanton, or reckless manner, causing the death of another. *People v Moseler*, 202 Mich App 296, 298; 508 NW2d 192 (1993). Here, the evidence viewed in a light most favorable to the prosecution established that defendant awoke in bed at approximately 1:30 a.m. on September 29, 1993, when he heard a noise at the bedroom door. Defendant reached for a .22 automatic handgun he kept at the foot of the

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

bed, loaded a clip in the gun, chambered a round, and shot at a figure. When he turned on the bedroom light, he discovered he had shot his wife in the chest; she died less than an hour later. Defendant stated that he thought the person was an intruder. He did not check to see if his wife was in bed or verify who was at the door before he fired the shot. Under these circumstances, there is no question that defendant caused the death of his wife. Further, a reasonable jury could infer that defendant's conduct in shooting in the dark at the chest area of an unknown individual standing approximately two to four feet away was grossly negligent. There was sufficient evidence to sustain defendant's conviction. *Wolfe, supra*.

Defendant also contends that reversal is required because the prosecutor ushered the victim's mother and step-father onto an elevator with members of the deliberating jury. We strongly disapprove of the prosecutor's action, since it was tantamount to inviting jurors to come into contact with the victim's family. Nevertheless, we must conclude that, on this record, reversal is not warranted. A reviewing court must reverse a conviction if it determines that a defendant has been prejudiced by an ex parte communication with the jury. *People v France*, 436 Mich 138, 163; 461 NW2d 621 (1990). While defendant characterized the family as "bereaved" during the incident, the victim's step-father testified at defendant's motion for new trial that his wife was neither weeping nor unusually emotional. He also indicated that no words were spoken by anyone on the elevator. Given the absence of any evidence that the jurors were affected in any way by the elevator ride, we find no prejudice and decline to reverse.

Defendant argues that he was denied a fair trial due to prosecutorial misconduct. Appellate review of improper prosecutorial remarks is precluded absent an objection unless failure to review the claim would result in a miscarriage of justice, or if a cautionary instruction could not have cured the prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In this case, defendant failed to object to all but one of the alleged instances of improper remarks by the prosecutor in closing and rebuttal argument. Failure to further review those remarks would not result in a miscarriage of justice since the statements defendant challenges were proper comments on facts in evidence, see *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), or were made in response to an issue raised by defense counsel, *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977), and the jury was instructed on the burden of proof, the standard of proof, the defendant's right not to testify, and that the prosecutor's closing argument was not evidence. Moreover, the remark to which defendant objected, concerning the failure to offer as evidence the results of an atomic absorption test, did not deny defendant a fair and impartial trial requiring reversal. *Bahoda, supra*. The comment was made in response to an issue raised by defense counsel, *Duncan, supra*, and there is nothing to suggest that the remark prejudiced defendant in any manner. We find no error requiring reversal.

Defendant asserts that the court's jury instructions were confusing. However, defendant made no objection to the instructions, and defense counsel expressed satisfaction with the instructions as given. The claim is therefore not preserved for review. See *People v Paquette*, 214 Mich App 336; \_\_\_ NW2d \_\_\_ (1995). In any event, we note that the court used the standard jury instructions, and there is no indication on the record that the jury was confused or based its decision on a lack of understanding of the law. Again, we find no error.

Defendant's remaining claims concern his sentence. First, he argues that the trial court should not have scored ten points under Offense Variable 3 for involuntary manslaughter. The claim is without merit since this was a homicide involving gross negligence amounting to an unreasonable disregard for human life. *People v Abbett*, 443 Mich 863; 503 NW2d 656 (1993). Next, he argues that his sentence was disproportionate under the standard set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Again, we disagree. Defendant's minimum sentence was within the guidelines' recommended range and hence was presumptively proportionate. *People v Broden*, 428 Mich 343, 354; 408 NW2d 789 (1987). Defendant has not presented mitigating factors related to his criminal history or the circumstances of the offense that are of sufficient significance to overcome that presumption of proportionality. We find no abuse of discretion in the sentence imposed. *Milbourn, supra*. Finally, we reject defendant's claim that his sentence is disproportionate because the trial court did not take into account the consecutive nature of his sentences. The cumulative effect of consecutive sentences does not affect proportionality. *People v Clark*, 207 Mich App 500, 502; 526 NW2d 357 (1994).

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Henry William Saad

/s/ Carole F. Youngblood