

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

June 28, 1996

Plaintiff-Appellee,

v

No. 178610

LC No. 93-010788

JAMES EARL WASHINGTON,

Defendant-Appellant.

Before: Reilly, P.J., and Cavanagh and R.C. Anderson,* JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317; MSA 28.549, and felonious driving, MCL 752.191; MSA 28.661. Defendant was sentenced to fifteen to twenty-five years' imprisonment for the second-degree murder conviction and one and a half to two years' imprisonment for the felonious driving conviction. We affirm.

Defendant first argues he was denied a fair trial because he was charged with first-degree felony murder, MCL 750.316; MSA 28.548. Defendant contends that there was insufficient evidence to support a conviction of either felony murder or second-degree murder because there is no evidence that he possessed the requisite intent.

The prosecutor has wide discretion over what charges to file, and that discretion will not be disturbed absent a showing of clear and intentional discrimination based on an unjustifiable standard such as race, religion, or some other arbitrary classification. *People v Oxendine*, 201 Mich App 372, 377; 506 NW2d 885 (1993). Defendant does not claim that the prosecutor charged him with felony murder based on an arbitrary classification. Accordingly, we do not find that the prosecutor abused his discretion in charging defendant with felony murder. Moreover, as discussed below, defendant's argument lacks merit because the prosecutor presented sufficient evidence of malice.

Defendant also contends that the evidence was insufficient to support the conviction of second-degree murder. When ascertaining whether sufficient evidence was presented at trial to support a

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

conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

To obtain a conviction of second-degree murder, the prosecutor must show that: (1) a death occurred; (2) defendant caused the death; (3) the killing was done with malice; and (4) it was done without justification or excuse. *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991). “Malice” is defined as the intent to kill, the intent to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of the defendant’s behavior is to cause death or great bodily harm. *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980); *Harris, supra* at 659. Malice can be inferred from the facts or circumstances surrounding the death. *Harris, supra* at 659; *People v Porter*, 169 Mich App 190, 192-193; 425 NW2d 514 (1988).

This Court has held that causing the death of another while operating a motor vehicle in an intoxicated state does not by itself establish that a defendant acted with malice sufficient to support a charge of second-degree murder. *People v Goecke*, 215 Mich App 623, 631-632; ___ NW2d ___ (1996). In other words, evidence of drunk driving and the attendant erratic behaviors alone cannot support a finding of malice. *People v Baker*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 176907, issued 5/17/96). For malice to exist to support a conviction of second-degree murder, the prosecution must show that the defendant performed an act in wanton and willful disregard that the natural tendency of the act is to cause death or great bodily harm. *Aaron, supra; Baker, supra*. Thus, a defendant can possess the requisite malice for second-degree murder when he is driving an automobile in a reckless manner. *Goecke, supra* at 631. Furthermore, this Court has affirmed convictions of second-degree murder where the defendants were driving at high speeds to elude capture by pursuing police officers. See *People v Vasquez*, 129 Mich App 691, 694; 341 NW2d 873 (1983); *People v Goodchild*, 68 Mich App 226, 236; 242 NW2d 465 (1976).

In the present case, defendant was legally intoxicated and drove a car down a residential street in excess of the speed limit, after dark, with his lights off, in an attempt to evade pursuing police officers. A rational factfinder could conclude that defendant acted in wanton and willful disregard that the natural tendency of his actions was to cause death or great bodily harm. *Aaron, supra; Baker, supra*. Accordingly, there was sufficient evidence of malice to support the conviction of second-degree murder.

Defendant also argues that the trial court erred when it failed to instruct the jury on justification or excuse. We disagree. Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). Even if somewhat imperfect, instructions will not create error if they fairly presented the issues to be tried and sufficiently protected the defendant’s rights. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991). Jury instructions must include all elements of the crime charged and must not exclude

consideration of material issues, defenses, and theories for which there is evidence in support. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

Here, there was no evidence of justification, excuse or any other circumstance which would reduce the crimes charged to a lesser offense and the lower court properly omitted an instruction on justification or excuse. See *id.*; see also Use Notes, CJI2d 16.4 and CJI2d 16.5. Furthermore, the instructions as given fairly presented the issues to be tried and sufficiently protected defendant's rights. *Wolford, supra* at 481.

Defendant next argues that the trial court erred when it refused to instruct the jury on the crime of negligent homicide. Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052; *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Defendant did not object to the lower court's failure to instruct on negligent homicide, and therefore this Court need not review this issue unless relief is necessary to avoid manifest injustice. *Id.* Because the jury had the option of convicting defendant of the lesser offense of involuntary manslaughter and instead convicted defendant of second-degree murder, we find that any error in failing to instruct on negligent homicide was harmless. See *People v Beach*, 429 Mich 450, 490-491; 418 NW2d 861 (1988). Accordingly, manifest injustice did not result.

Finally, defendant alleges that the lower court erred when it failed to instruct the jury that its comments, rulings, questions and instructions were not to be considered as evidence. We disagree. Here, the lower court, over defendant's objections, failed to include CJI2d 3.5(6), which instructs the jury that the judge's "comments, rulings, questions, and instructions" are not evidence and informs the jury that they are the factfinders in the case. The Use Note to CJI2d 3.5 states: "This instruction should be given in every case." The lower court did instruct the jury that the *lawyers'* comments, questions, and arguments were not evidence.

In *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985), the Supreme Court cautioned: "[W]e remind the bench and bar once again that the Michigan Criminal Jury Instructions do not have the official sanction of this Court. Their use is not required, and trial judges are encouraged to examine them carefully before using them, in order to ensure their accuracy and appropriateness to the case at hand." We conclude that the lower court's failure to utilize CJI2d 3.5(6) was not fatal to the instructions as a whole. The lower court was not required to use the standard jury instructions and therefore was not required to follow the Use Notes attached to the instructions. *Petrella, supra*. Furthermore, a reading of the instructions as given show that they fairly presented to the jury the issues to be tried and adequately protected defendant's rights. *Wolford, supra* at 481. The instructions included all the elements of the crimes charged and did not exclude consideration of material issues, defenses, and theories for which there was evidence in support. *Daniel, supra* at 53.

Affirmed.

/s/ Maureen Pulte Reilly

/s/ Mark J. Cavanagh

/s/ Robert C. Anderson