

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENRY PAUL HILL,

Defendant-Appellant.

UNPUBLISHED
October 15, 1996

No. 184258
LC No. 94-133645

Before: McDonald, P.J., and White and P.J. Conlin,* JJ.

PER CURIAM.

Defendant was convicted by a jury of involuntary manslaughter¹, MCL 750.321; MSA 28.553, felonious assault, MCL 750.82; MSA 28.277, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to two years for each of the felony firearm convictions, to be followed by concurrent terms of two to four years for the felonious assault conviction and three to fifteen years for the involuntary manslaughter conviction. Defendant appeals of right and we remand for an evidentiary hearing.

Defendant first argues that he was denied a fair trial and the right to confront all witnesses against him because he did not have the opportunity to cross-examine spectators who made comments audible to the jury during the course of trial. We disagree. Spectators are generally not considered witnesses, even if they make audible comments during trial. See *People v Van Epps*, 59 Mich App 277, 284-285; 229 NW 2d 414 (1975). Further, defendant's right to confront the witnesses against him extends only to those witnesses whose testimony is considered in some form by the jury. *People v Lee*, 212 Mich App 228, 257; 537 NW 2d 233 (1995). In this case, the jury was instructed to consider only the information defined by the trial court as evidence and the spectators' comments did not fit within this definition. The jury is presumed to have followed this instruction. *People v McAlister*, 203 Mich App 495, 504; 513 NW 2d 431 (1994). Further, defendant has failed to show that he was precluded from calling these spectators as witnesses. Finally, the outbursts do not appear to have been sufficiently prejudicial as to deny defendant a fair trial.

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

Defendant next contends that he was prejudiced by ex parte communication between the trial court and the jury. Defendant alleges that without participation of counsel, the trial court complied with a jury request to review exhibits or trial transcript tapes. Defendant has submitted the affidavit of the trial prosecutor in support of this assertion. In its brief on appeal, the prosecution denies that any ex parte communication occurred. There is insufficient information before us to resolve the question and we therefore remand to the trial court for further proceedings. *People v Sledge*, 200 Mich App 326, 330; 503 NW 2d 672 (1993). The trial court shall make a record regarding whether any ex parte communication occurred, the nature and scope of any ex parte communication, specifically whether it was substantive or administrative, *People v France*, 436 Mich 138, 143-144, 461 NW2d 62 (1990), whether defendant was informed of the communication and thereby afforded the opportunity to object, and whether the communication was prejudicial.

Defendant also argues that the trial court erred in scoring five points for Offense Variable 13 based solely on the testimony of the decedent's sister regarding psychological injury suffered as a result of the decedent's death. Review of guidelines calculations is limited and this court will uphold scoring decisions if there is any evidence in support. *People v Ayers*, 213 Mich App 708, 723; 540 NW2d 791 (1995). Defendant was assessed five points for OV 13 (serious psychological injury to victim or victim's family necessitating professional treatment.) The victim's sister testified that she went to her internist shortly after her brother's death and was placed on an anti-depressant drug. She conceded that she did not treat with and was not referred to a psychologist or psychiatrist. We conclude that an internist's prescription of an anti-depressant drug is sufficient to support a score of five points. We further conclude that the trial court did not abuse its discretion in denying defendant's request for an in camera review of the sister's medical records where the court ruled that it found the sister's sworn testimony sufficiently credible.

Finally, defendant argues that his conviction for involuntary manslaughter is inconsistent with his conviction for felonious assault and, therefore, both the involuntary manslaughter conviction and the felony firearm conviction predicated thereon must be reversed. We disagree. Initially, we observe that a jury may properly render inconsistent verdicts. *People v Goss*, 446 Mich 587, 597; 521 NW 2d 312 (1994). Further, the verdicts are not inconsistent. Involuntary manslaughter requires only that defendant have committed an unlawful act in a grossly negligent manner. *People v Datema*, 448 Mich 585, 606; 533 NW 2d 272 (1995). Thus, the jury need not have relied on the doctrine of transferred intent to convict defendant of involuntary manslaughter, as argued by defendant. The jury could have concluded that defendant intended to place Peters in fear, a sufficient intent to convict of felonious assault, and that in doing so he acted in a grossly negligent manner causing Manning's death.

We remand this case to the trial court for a hearing regarding whether an ex parte communication occurred, the nature and scope of any ex parte communication, whether defendant was aware of that communication, and whether the communication was prejudicial. In all other respects defendant's convictions and sentences are affirmed, except that we order the trial court to amend the

judgment of sentence which erroneously states that defendant was convicted of voluntary manslaughter, rather than involuntary manslaughter. We do not retain jurisdiction.

/s/ Gary R. McDonald

/s/ Helene N. White

/s/ Patrick J. Conlin

¹ Although the judgment of sentence indicates that defendant was convicted of voluntary manslaughter, the jury actually found defendant guilty of involuntary manslaughter.