

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WOODSON MEASHUN MISTER,

Defendant-Appellant.

UNPUBLISHED

December 9, 1997

No. 194829

Berrien Circuit Court

LC No. 95-003522

Before: White, P. J., and Cavanagh and Reilly, JJ

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316; MSA 28.548, and was convicted by a jury of the lesser included offense of statutory involuntary manslaughter. Although the judgment of sentence indicates that defendant was convicted of involuntary manslaughter under MCL 750.321; MSA 28.553, he was actually found guilty of statutory involuntary manslaughter under MCL 750.329; MSA 28.561. Defendant was also convicted as charged of carrying a concealed weapon, MCL 750.227; MSA 28.424, and of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to serve concurrent prison terms of eight to fifteen years for involuntary manslaughter and three to five years for carrying a concealed weapon, to be served consecutively to a two year term for felony firearm. Defendant appeals as of right. We affirm his convictions and sentences, but remand for the purpose of amending defendant's judgment of sentence.

This case arises from an incident in which Dover Scott, Jr. was shot to death. Although defendant admitted at trial that he was holding the gun when it fired the fatal shot, he testified that he did not intentionally point the gun at Scott or pull the trigger. According to defendant, the gun accidentally "went off" while he was waving it around in Scott's presence.

On appeal, defendant first contends that the evidence was not sufficient to support his conviction of involuntary manslaughter. We disagree. When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Specifically, defendant argues that the evidence was insufficient to support a finding of gross negligence necessary for a conviction of involuntary manslaughter under MCL 750.321; MSA 28.553. See *People v Datema*, 448 Mich 585, 595-596; 533 NW2d 272 (1995). However, because the jury was not instructed on the

elements of common law involuntary manslaughter, but rather on the elements of statutory involuntary manslaughter pursuant to CJI2d 16.11, we conclude that the jury actually found defendant guilty of statutory involuntary manslaughter. Gross negligence is not an element of statutory involuntary manslaughter. See *People v Fiedler*, 194 Mich App 682, 693; 487 NW2d 831 (1992).

The elements of statutory involuntary manslaughter are (1) that the defendant caused the death of the victim, (2) that the death resulted from the discharge of a firearm, (3) that the defendant was pointing the firearm at the victim at the time it discharged, (4) that the defendant intended to point the firearm at the victim at the time it discharged, and (5) that the defendant caused the death without lawful justification or excuse. *Fiedler*, *supra* at 693. On direct examination, defendant testified that while he was playing with the gun, he waved it in Scott's direction and it "went off," at which time Scott fell to the ground and did not get up. David Gibbs testified that defendant "aimed his gun at [Scott] and shot him." Finally, Marcus Mister, defendant's brother, testified that defendant picked up the gun, pointed it at Scott, and the gun "just went off" without defendant pulling the trigger. Scott died of a single gunshot wound to the head. No evidence suggested that the shooting was justified.

The only evidence suggesting that the shooting was excusable was defendant's claim on cross-examination that the shooting was accidental because he did not intend to point the gun at Scott. Criminal homicides that include intent as an element are excusable if the killing was accidental. *People v Hess*, 214 Mich App 33, 37-38; 543 NW2d 332 (1995). To support a conviction of statutory involuntary manslaughter, the prosecution need only show that the defendant intentionally *pointed* a firearm at the victim, not that the defendant intentionally discharged the firearm. *People v Khoury*, 181 Mich App 320, 324; 448 NW2d 836 (1989), amended, 437 Mich 954; 467 NW2d 810 (1991). In this case, when viewed in a light most favorable to the prosecution, defendant's testimony on direct-examination, as well as the testimony of Gibbs and Marcus Mister, was sufficient to justify a rational trier of fact in finding that Scott's death resulted from the discharge of a firearm intentionally pointed at him by defendant. Accordingly, the evidence was sufficient to support the jury's verdict. *Wolfe*, *supra* at 515.

Next, defendant argues that the trial court erred in delaying its ruling on defendant's motion for a directed verdict and in its subsequent denial of that motion. We disagree with both contentions. Defendant moved for a directed verdict on the first-degree murder charge after presenting a defense witness and the trial court reserved ruling on the motion. On the following day, defendant testified on his own behalf. Then, after both parties gave closing arguments, the trial court denied defendant's motion, stating that there was sufficient evidence from which a reasonable trier of fact could conclude that the necessary elements of deliberation and premeditation were proved. Because defendant's motion was not made until after defendant had presented proofs, the trial court did not err in reserving its decision. See MCR 6.419(A). However, if the evidence was insufficient to support a charge of first-degree murder, allowing the jury to consider the charge during deliberations may have resulted in a compromise verdict. *People v Vail*, 393 Mich 460, 463-464; 227 NW2d 535 (1975).

When reviewing a trial court's ruling on a motion for a directed verdict, this Court views all of the evidence presented up to the time of the motion in a light most favorable to the prosecution 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 Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996). Conviction of first-degree murder requires a showing that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation require sufficient time to "take a second look" and may be inferred from the circumstances surrounding the killing. *Id.* Premeditation may be established through evidence of the following factors: (1) The prior relationship of the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing itself, and (4) the defendant's conduct after the homicide. *Id.*

In this case, testimony was presented that, if believed by the jury, established (1) that defendant was angry with the victim just before the shooting, (2) that after getting angry, defendant walked into the house for a

moment, returned, and pointed the gun directly at the victim before the gun fired, and (3) that immediately following the shooting, defendant left the scene and hid the gun. Viewing this evidence and all reasonable inferences from it in the light most favorable to the prosecution, the evidence was sufficient for a reasonable jury to find premeditation and deliberation. Therefore, considering the evidence presented up to the time that defendant moved for a directed verdict, the trial court's denial of defendant's motion was proper. *Peebles, supra* at 664.

Defendant next raises several challenges to the trial court's jury instructions. Because defendant failed to object to the instructions given at trial or to request further instructions, we review this issue only to determine if manifest injustice resulted. *People v Maleski*, 220 Mich App 518, 521 (1996). Jury instructions are to be considered as a whole, rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). No error results from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997).

First, defendant contends that the trial court effectively directed a verdict of guilt when, after correctly instructing the jury on the elements of statutory involuntary manslaughter, it stated, "And I don't believe there's any claim here of – of lawful excuse or justification in this case." Because a criminal defendant is entitled to a jury determination of all of the elements of an offense, it is reversible error for a trial court to instruct the jury that an essential element of a criminal offense exists as a matter of law. *People v Reed*, 393 Mich 342, 351; 224 NW2d 867 (1975). Moreover, an instruction must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them. *Id.* at 349-350. Error occurs when an instruction relieves the jury of its responsibility to make factual determinations regarding an element of the crime, see *People v Gaydosh*, 203 Mich App 235, 238-239; 512 NW2d 65 (1994), or to reach its verdict without considering the defendant's testimony, evidence, and theory, see *People v Hess*, 214 Mich App 33, 39-40; 543 NW2d 332 (1995).

As noted, *supra*, the absence of lawful justification or excuse is an element of statutory involuntary manslaughter. However, positive proof of the absence of lawful justification or excuse is not required in every case. Only when a claim of justification or excuse is raised by the evidence is the prosecution required to disprove the defense beyond a reasonable doubt. See CJI2d 16.1, Commentary, p 16-5; cf. *People v Van Wyck*, 402 Mich 266, 269; 262 NW2d 638 (1978) ("The absence of mitigating circumstances need not be established in order to convict one of first- or second-degree murder."). Accordingly, the Michigan Criminal Jury Instructions provide that the trial court need not instruct the jury on the element of the absence of lawful justification or excuse unless there is a claim by the defense that the killing was justified or excused. CJI2d 16.11, Use Note 2. In this case, the only evidence suggesting any justification or excuse for the killing was defendant's claim on cross-examination that the shooting was accidental. Because the trial court specifically instructed the jury, on two occasions, that in order to find defendant guilty of involuntary manslaughter it would have to find that he intentionally pointed the gun at the victim, the trial court did not relieve the jury of its duty to make a factual determination regarding the issue of whether the gun was pointed in Scott's direction because of defendant's intent or by accident. Therefore, the instructions regarding the offense of statutory involuntary manslaughter, when taken as a whole, did not result in manifest injustice to defendant. Cf. *Hess, supra* at 40; *Gaydosh, supra* at 238-239.

Second, defendant contends that the trial court erred in giving the instruction on the lesser offense of careless use of a firearm resulting in injury or death, MCL 752.861; MSA 28.436(21), at a different time during the instructions than when the trial court instructed the jury on the other possible homicide offenses. Because the trial court properly instructed the jury on the elements of the offense

and because it was listed on the verdict form as a possible verdict only for Count I, the trial court's somewhat disorganized presentation did not amount to manifest injustice.

Third, defendant contends that the trial court erred in failing to instruct the jury on the defense of accident. Because the trial court twice instructed the jury that it must find that defendant intentionally pointed the gun at the victim in order to find him guilty of involuntary manslaughter, the charge as a whole covered the substance of the omitted instruction. *Messenger, supra* at 177-178. Accordingly, manifest injustice did not result from the absence of a specific instruction on accident.

Fourth, defendant contends that the trial court erred in failing to instruct the jury on the lesser offense of "common law" involuntary manslaughter, MCL 750.321; MSA 28.553.¹ However, no reversible error occurred because no such instruction was requested. *People v Jones*, 395 Mich 379, 393; 236 NW2d 461 (1975). Moreover, because accident is not a defense to "common law" involuntary manslaughter, *Hess, supra* at 39, an instruction on "common law" involuntary manslaughter would only have provided an additional avenue of conviction and weakened defendant's accident defense.

Fifth, defendant contends that the trial court erred in trivializing the defense theory of the case when it instructed the jury that, "the defense argues the prosecutor has failed in his burden of proof and that the Defendant is not guilty and asks that you return a verdict of not guilty as to all three counts in this Information." Immediately before this instruction, the trial court informed the jury that, "the prosecutor believes that he has proved the Defendant guilty beyond a reasonable doubt of all three of the principle [sic] charges in the Information and asks that you find Defendant guilty as charged as to all three counts." When viewed in context, the trial court's summation of the defendant's request for a not guilty verdict did not in any way diminish defendant's theory of the case. Accordingly, manifest injustice did not result from the challenged instruction.

Defendant next argues that he was denied effective assistance when defense counsel (1) failed to object to the instructions now challenged on appeal and (2) failed to request the instructions which defendant now claims to have been erroneously omitted. Because defendant failed to make a testimonial record at the trial court level in connection with his claim of ineffective assistance of counsel, our review is limited to mistakes apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). To justify reversal on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland, supra* at 694; *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Here, defendant fails to explain precisely how he was prejudiced as a result of the alleged deficiencies. In any event, we hold that defendant has failed to satisfy the "prejudice" prong of the *Strickland* test, because the trial court twice instructed the jury that, in order to find defendant guilty of involuntary manslaughter it must find that he intentionally pointed the gun at Scott. Accordingly, defendant is not entitled to the relief requested.

Finally, defendant argues that the trial court failed to articulate valid reasons for the sentence imposed and that defendant's eight to fifteen year sentence for involuntary manslaughter was disproportionately severe, given the circumstances surrounding the offense and the offender. We disagree. Sentencing decisions by are subject to review by this Court on an abuse of discretion standard. *Milbourn, supra* at 461. A sentence constitutes an abuse of the trial court's discretion if it violates the principle of proportionality. The principle of proportionality requires sentences to be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* at 636.

The record of the sentencing hearing shows that the trial court based defendant's sentence on the particular circumstances surrounding the offense. The circumstances surrounding the offense are a permissible consideration. *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985). Defendant's minimum sentence of eight years was within the minimum sentence range recommended by the sentencing guidelines. A sentence within the sentencing guidelines can only be disproportionate if unusual circumstances exist. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). If a defendant believes that such unusual circumstances exist, the defendant must present those circumstances in open court to be considered by the sentencing judge before

sentencing. If this is not done, the defendant may not raise the issue on appeal. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). In this case, defendant failed to present any unusual circumstances apart from the fact that the victim was a friend of his. Therefore, defendant has only preserved this particular circumstance for consideration on appeal. *Sharp, supra* at 505-506. While a previous relationship between the victim and the offender may be either a mitigating or an aggravating factor, *Milbourn, supra* at 660-661, defendant failed to explain how his prior relationship with Scott should have affected his sentence in this case. Accordingly, we hold that trial court did not abuse its discretion in sentencing defendant to eight to fifteen years' imprisonment for the crime of involuntary manslaughter.

Defendants' convictions and sentences are affirmed. However, we remand with instructions to the trial court to amend defendant's judgment of sentence to reflect his conviction of statutory involuntary manslaughter pursuant to MCL 750.329; MSA 28.561, rather than "common law" involuntary manslaughter pursuant to MCL 750.321; MSA 28.553.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly

¹ Although it is not entirely clear, defendant also apparently contends that the trial court erred in failing to instruct the jury pursuant to CJI2d 7.3 on the lesser offenses of "intentional aiming of a firearm" (statutory involuntary manslaughter), careless use of a firearm, and negligent homicide, MCL 750.325; MSA 28.557. However, the record indicates that the trial court did instruct the jury on statutory involuntary manslaughter and careless use of a firearm. Moreover, negligent homicide, an offense which requires that the defendant have been operating a motor vehicle, see CJI2d 16.14, was not supported by the evidence.