

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL FOSTER,

Defendant-Appellant.

UNPUBLISHED

January 25, 2002

No. 226302

Wayne Circuit Court

LC No. 98-008061

Before: Cooper, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.317, and assault with intent to do great bodily harm, MCL 750.84. Defendant was sentenced to life imprisonment for the murder conviction and to six to ten years' imprisonment for the assault conviction. We affirm.

Defendant first argues that the trial court erred in refusing to instruct the jury on the cognate lesser included offense of involuntary manslaughter. We disagree. This Court must review the trial record to determine whether the evidence presented was sufficient to convict defendant of the cognate lesser included offense. *People v Sullivan*, 231 Mich App 510, 517; 586 NW2d 578 (1998).

The trial court instructed the jury on second degree murder but refused defendant's request for an instruction on involuntary manslaughter. The difference between second-degree murder and involuntary manslaughter is one of degree. Specifically, second-degree murder involves the *natural tendency* of an act to cause death or great bodily harm; whereas, involuntary manslaughter merely involves the *possibility* that death or great bodily harm will follow. *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998).

In the instant case, defendant stabbed an eight-month old baby in the neck with a knife and then tightly tied a bib around the infant's neck to allegedly try and stop the bleeding. According to one witnesses' testimony, the bib was tied so tightly that it had to be cut off the baby's neck. Moreover, both plaintiff's and defendant's experts testified that death or great bodily harm was the natural result of using a bib as a tourniquet around the neck. We further note that defendant was certified in first aid and CPR. We find no evidence to suggest that death was only a mere possibility under these circumstances. Consequently, we conclude that the trial court properly denied defendant's request for an instruction on involuntary manslaughter.

Defendant next claims that the prosecutor committed prosecutorial misconduct by injecting her personal belief of defendant's guilt into her closing argument. We disagree. Claims of prosecutorial misconduct are reviewed on a case by case basis to determine if the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Because defendant failed to object at trial we look for plain error affecting defendant's substantial rights. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

As a rule, prosecutors are afforded great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *Id.*, quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). Nevertheless, a prosecutor may not assert any personal beliefs of a defendant's guilt during the closing arguments. *Bahoda*, *supra* at 282-283.

Defendant suggests that the following comments made by the prosecutor during closing arguments were improper:

The [d]efendant did one of the most cowardly acts a human being can do, he killed a helpless, defenseless, beautiful, healthy baby. And the worst thing a person can do to a woman, a mother, is to kill her child. And he did that because he was retaliating. He was so angry that she was breaking up with him and then tried to take her life. Tell him with your verdict that he's guilty of both counts because that's exactly what he is.

When reviewed in context, the prosecutor's statements appear to be proper argument based on the evidence presented. There was no dispute in this case that defendant caused the death of the baby. Thus, it was proper for the prosecutor to argue that the death was murder. Additionally, the prosecutor commented on her "duty to prove" the elements of the crimes charged beyond a reasonable doubt throughout her closing argument.

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Henry William Saad