STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 3, 2009
v	No. 283455 Kent Circuit Court
BENNY LEE ROCHELLE, Defendant-Appellant.	LC No. 07-002599-FC

Before: Meter, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of second-degree murder, MCL 750.317. The trial court sentenced him to 25 to 65 years' imprisonment. We affirm.

Defendant and the victim were placed in a jail cell together in the Kent County Jail. Defendant accused the victim of stealing a snack cake from him, and the victim denied it. According to witnesses, defendant became angry and pulled at either the victim or his top-bunk mattress, and the victim fell to the floor. Defendant also punched the victim twice, once in the jaw and once in the head. After one of the punches, the victim fell back and hit his head. Defendant also struck the victim with a portable bunk. The victim did not hit defendant or fight back at all.

The victim complained of a headache to jail employees and was examined by medical personnel. Two weeks later, he died of trauma to his brain.

On appeal, defendant first argues that the trial court erred in rejecting his attempted plea to involuntary manslaughter. Defendant had refused to admit to the trial court that he intended to injure the victim, and the trial court therefore concluded that the attempted plea was involuntary. Defendant contends that the trial court misinterpreted the law, because involuntary manslaughter does not require an intent to injure but may also be based on gross negligence.

We find no basis for reversal. First, we note that in the trial court, defendant's attorney did argue that an intent to injure could be inferred from the facts of the case, even if defendant would not admit to intending to injure the victim. However, and significantly, counsel did not argue that the conviction could be based on a gross-negligence theory of involuntary manslaughter. Therefore, this issue is unpreserved. We review unpreserved issues using the plain-error doctrine. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Under

this doctrine, a defendant must demonstrate a plain – i.e., a clear or obvious – error that affected the outcome of the proceedings. *Id*. at 763. Even if this is demonstrated, reversal is warranted only if the error caused the conviction of an actually innocent person or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 763-764.

We find no clear or obvious error with respect to this issue. Defendant is correct that involuntary manslaughter can be based on a gross-negligence theory. See *People v Datema*, 448 Mich 585, 606; 533 NW2d 272 (1995) ("[a]n unlawful act committed with the intent to injure or in a grossly negligent manner that proximately causes death is involuntary manslaughter"). However, it is clear that the prosecution was proceeding under an intent-to-injure theory in this case. The amended charge as read at the plea hearing accused defendant of causing the death of the victim by committing a battery. Given the facts of this case and given the prosecutor's failure to argue for gross-negligence involuntary manslaughter at the plea-taking discussions, it cannot be seriously argued that the prosecutor was willing to accept the theory that defendant merely battered the victim in a grossly negligent fashion. Moreover, in *Datema*, the Court stated:

> An unlawful act committed with the intent to injure or in a grossly negligent manner that proximately causes death is involuntary manslaughter. In the former instance the defendant has consciously intended to injure in wanton disregard of the safety of others: conduct which if it causes death is (at least) involuntary manslaughter. In the latter instance, criminal liability is imposed because, although the defendant's acts are not inherently wrong, the defendant has acted or failed to act with awareness of the risk to safety and in wilful disregard of the safety of others. [*Id*.]

The facts of this case, involving a brutal beating, do not fit within the "latter instance" discussed in *Datema*. Accordingly, we find no clear or obvious error with regard to the trial court's conclusion that defendant's attempted plea was involuntary, in light of defendant's refusal to admit that he intended to injure the victim. Reversal is unwarranted.

Defendant next argues that there was insufficient evidence to support the conviction because the gross negligence of the jail personnel proximately caused the victim's death. When reviewing a challenge to the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a reasonable trier of fact could have found that all of the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

To prove causation in a criminal case, the defendant's conduct must be both the factual cause and the proximate cause of the result. *People v Schaefer*, 473 Mich 418, 435; 703 NW2d 774 (2005) overruled in part on other grounds in *People v Derror*, 485 Mich 316; 715 NW2d 822 (2006). Factual cause is established if the result would not have occurred "but for" the defendant's conduct. *Schaefer*, *supra* at 435-436. Proximate cause is established if the victim's injury is a "direct and natural result" of the defendant's conduct. *Id*. at 436. However, if there was an intervening cause that superseded the defendant's conduct, then the causal link between

the defendant's conduct and the victim's injury is broken, and the defendant's conduct is not deemed to be the proximate cause. *Id*. at 436-437.

An intervening cause supersedes a defendant's conduct as the proximate cause if it was not reasonably foreseeable. *Id*. at 437-438.

> While an act of God or the *gross* negligence or intentional misconduct by the victim or a third party will generally be considered a superseding cause, *ordinary* negligence by the victim or a third party will not be regarded as a superseding cause because ordinary negligence is reasonably foreseeable. [*Id*. at 438-439 (emphasis in original).]

Moreover,

> [i]n criminal law, "gross negligence" is not merely an elevated or enhanced form of ordinary negligence. . . . [I]n criminal jurisprudence, gross negligence means wantonness and disregard of the consequences that may ensue, and indifference to the rights of others that is equivalent to a criminal intent. [*Id*. at 438 (internal citation and quotation marks omitted.]

Defendant does not dispute that his conduct was the factual cause of the subdural hematoma that resulted in the victim's death. He only argues that the Kent County Jail's lack of appropriate medical care was grossly negligent and constituted a superseding intervening cause of the victim's death.

Viewing the evidence in the light most favorable to the prosecution, we conclude that a jury could reasonably conclude that the medical care provided by the Kent County Jail to the victim was not the result of gross negligence, but merely negligence, and therefore was foreseeable. There was clear evidence that the physicians who treated the victim while he was incarcerated were not negligent based on the information they had at the time. A crucial question is whether the substandard communication between the nurses and deputies, on the one hand, and the treating physicians, on the other hand, was merely negligent or grossly negligent. Two key pieces of information, that the victim had fallen and hit his head and that the victim had a persistent severe headache, were not relayed to the treating physicians until after the victim passed away. This vital information should have reached the treating physicians because at least one deputy knew the victim fell and hit his head and several individuals (nurses and deputies) knew the victim was suffering from persistent, severe headaches. However, viewing the record as a whole, we cannot conclude that the breakdown in communication constituted gross negligence as a matter of law. It is reasonably foreseeable that such communication mistakes would occur in a jail setting. In addition, the evidence, viewed in the light most favorable to the prosecution, does not show that the medical personnel or the deputies were indifferent to the rights of the victim or disregarded the consequences that would ensue from their actions. On the contrary, the evidence shows that the medical personnel and the deputies tried to help the victim, but that mistakes were made. Although mistakes were made that ultimately had catastrophic consequences for the victim, we cannot conclude that the actions of the medical personnel and the deputies necessarily were done with wantonness equal to criminal intent.

The jury's conviction was supported by sufficient evidence.

Defendant next argues that the prosecutor committed misconduct requiring reversal by referring to trial transcripts during her closing argument.

We review claims of prosecutorial misconduct de novo to determine whether the defendant received a fair and impartial trial. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). A defendant receives a fair and impartial trial as long as the claimed misconduct did not result in prejudice. See *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and we evaluate each allegedly improper remark in context. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). Prosecutors are afforded great latitude during argument, and they may argue the evidence and all reasonable inferences that arise from the evidence in relationship to their theory of the case. *People v Knapp*, 244 Mich App 361, 381 n 6; 624 NW2d 227 (2001). Challenged remarks must be evaluated in light of their relationship to the evidence admitted at trial. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995).

During the prosecutor's rebuttal closing argument, the following exchange took place:

> MS. BRINKMAN: [Defense counsel] said [Deputy Harold] Berrios told Dr. Yacob that [the victim] was pulled off the bed. Well, I pulled that transcript. Now, the only reason I have that transcript of his testimony is because I requested it days in advance, and it took me days to get this. So I want to make it clear that the only reason I have a transcript is because I requested it many days in advance.
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> MR. IDSINGA: Your Honor, I object. I think it's improper.
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> COURT: We'll cover it before we discharge the jury, as far as the transcript issue.
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> MR. IDSINGA: Okay.
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> MS. BRINKMAN: But [Deputy] Berrios testified repeatedly that he didn't have an independent recollection . . . . He doesn't remember what he said to the doctor versus the nurse, but he did say, I said whatever is in the medical chart to the doctor. That's what he said. He repeatedly said, I have to look at the record. I can't recall, actually what it was. And when asked specifically, did you tell Dr. Yacob, but [the victim] told – told the doctor without hesitation about things that had happened. Answer: Whatever was in the medical report I – is what I translated.

At the outset, defendant asks this Court to rule that trial transcripts may not be used in closing argument unless the side intending to use the transcript gives the other side advance notice that it arranged for transcription of the testimony and intends to use it in closing argument. However, defendant cites no binding authority for his proposition[1] and we therefore reject it.

[1] The one Michigan case cited by defendant, *People v Williams*, 179 Mich App 15; 445 NW2d (continued…)

Defendant argues that the prosecutor's use of the transcript denied defendant a fair trial because it unduly highlighted certain evidence and did not allow defense counsel to respond. However, we conclude that the prosecutor's quotation of a transcript of Deputy Berrios's trial testimony during rebuttal closing argument did not constitute misconduct because Deputy Berrios's trial testimony was evidence at trial. As stated above, the prosecution is permitted to argue the evidence and all reasonable inferences arising from it. Further, defendant invited the prosecutor's response, which tried to inform the jury that defense counsel's recitation of the facts was incorrect. "Under the doctrine of invited response, the proportionality of the response, as well as the invitation, must be considered to determine whether the error, which might otherwise require reversal, is shielded from appellate relief." *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003). Defense counsel misstated the record, and the prosecutor corrected the misrepresentation using the transcripts. There was nothing improper or unduly prejudicial to defendant in this action, considering that the prosecutor's argument was responsive and based on the evidence. Although defense counsel did not have a chance to respond specifically to the prosecutor's use of the transcript because the prosecutor used it during rebuttal, this fact is not inherently unfair or prejudicial. The prosecutor in a criminal trial is allowed to offer rebuttal, limited to issues raised in the defendant's argument. MCR 6.414(G). Defense counsel had his chance during closing argument to argue defendant's side using any and all of the evidence in this case, and the prosecutor was allowed to respond.

Defendant also argues that the prosecutor's use of the transcript and her statements regarding the transcript improperly enhanced the prosecution's credibility and denigrated defense counsel, thereby prejudicing defendant. We disagree. While the prosecutor's statements implied to the jury that she was diligent and had foresight and that her rendition of events was based on what was actually stated and conveyed to the jury, at no point during these statements did the prosecutor denigrate defense counsel. The prosecutor merely stated that she had acquired the transcripts and thus could explain to the jury what Deputy Berrios actually said.

Defendant also argues that the manner in which the transcript was used by the prosecutor allowed the jury to conclude that the prosecutor had access to all the trial transcripts, which inevitably added to the prosecutor's credibility and pulled the jury away from a reliance on its own memory. Contrary to defendant's assertion, however, the prosecutor told the jury only that she had the transcript of Deputy Berrios's testimony. The prosecutor said: "[Defense counsel] said [Deputy Berrios] told Dr. Yacob that he was pulled off the bed. Well, I pulled *that* transcript. Now, the only reason I have *that* transcript of his testimony is because I requested *it* days in advance . . ." (emphasis added). The prosecutor never told the jury that she had requested any other transcript and never read from any other transcript during her closing arguments. Further, to the extent that this statement allowed the jury to conclude that the prosecutor had *access* to all the trial transcripts, there was nothing incorrect about that. Both the prosecution and the defense had the ability to obtain transcripts. Also, contrary to defendant's argument on appeal, the prosecutor's comments did not imply that the jurors would have to wait "many days" to obtain transcripts if they wanted to review testimony. Moreover, and

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(…continued)

170 (1989), rev'd on other grounds 434 Mich 894 (1990), is inapposite. It did not involve the use of transcripts during closing arguments.

significantly, the trial court informed the jurors about the process of obtaining transcripts, and defense counsel agreed with the trial court's instructions.

There is no basis for reversal with regard to the transcript issue.

Defendant next argues that the prosecutor committed misconduct requiring reversal by implying that defense counsel was attempting to lie to the jury. This argument is unpreserved, and therefore the plain-error doctrine applies. See *Carines*, *supra* at 763.

The statement that defendant argues improperly characterized defense counsel as a liar is the following: "This housing inspector, [defense counsel], is not telling you the truth. Intent to injure. He wants you to believe there was no intent to injure when there was [sic] that many blows to the head."

We find no plain error with regard to this statement. The prosecutor's statement was made in response to defense counsel's characterization of the evidence. During closing argument, defense counsel said that defendant did not want to hurt the victim as evidenced by the fact that defendant tried to help the victim after the incident. He argued that defendant's only reason for attacking the victim was to "save face" and prevent the other inmates from attacking him. Defense counsel also argued that defendant's attack was less forceful than the prosecution wanted the jury to believe because there was evidence that the subdural hematoma was months old and that the incident in the cell simply caused additional bleeding. The reference to defense counsel as a "housing inspector" was in response to defense counsel's argument that the jury should think of this case as if

> [the prosecutor is] trying to sell you a house. She points out all the good things about it, and she wants you to buy it, and my job is more like a building inspector that you might hire to check the house out, and it's my job to point out the problems with the house that somebody's trying to sell you.

The prosecutor was simply responding, in kind, to defense counsel's argument, and we therefore find no clear or obvious error that requires reversal. See *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Defendant next argues that the trial court erred in instructing the jury regarding proximate cause. We review claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

The trial court instructed the jury as follows regarding proximate cause:

> There may be more than one cause of death. It is not enough that the defendant's act made it possible for the death to occur. In order to find that the death of [the victim] was caused by the defendant, you must find beyond a reasonable doubt that the death was *either a natural or necessary result* of the defendant's acts.
>
> In this case, there has been some evidence related to the medical treatment that was provided to [the victim] following October 29th, 2006. If the defendant

> unlawfully injured [the victim] and started a series of events that *naturally or necessarily resulted* in [the victim's] death, it is no defense that the immediate cause of death was the medical treatment or the lack of medical treatment.
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> It is a defense, however, if the medical treatment or lack of treatment was grossly erroneous or grossly unskillful and the injury might not have caused death if [the victim] had not received such treatment or lack of treatment. [Emphasis added.]

> In reviewing claims of instructional error, this Court adheres to the following principles: Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is supporting evidence. No error results from the absence of an instruction as long as the instructions as a whole cover the substance of the missing instruction. [*Id*. (citations omitted).]

In *Schaefer*, *supra* at 441, the Michigan Supreme Court held that the trial court erred in instructing the jury on causation because simply telling the jury that it had to find that the defendant's actions "caused" the death without any further explanation of what causation means was insufficient to inform the jury that it had to find "*both* factual causation and proximate causation" (emphasis in original). In *People v Rideout*, 272 Mich App 602, 604-608; 727 NW2d 630 (2006), reversed in part on other grounds 477 Mich 1062 (2007), this Court held that because the Supreme Court in *Schaefer* explained that cause consists of both factual cause and proximate cause and the trial court failed to instruct the jury on proximate cause, the trial court's jury instructions were erroneous.

Defendant contends that the trial court improperly instructed the jury on proximate cause by stating: "In order to find that the death of [the victim] was caused by the defendant, you must find beyond a reasonable doubt that the death was *either a natural or necessary result* of the defendant's acts" (emphasis added). He contends that the trial court should have instead stated that proximate cause requires that the death be the "direct and natural result" of the defendant's acts, as stated in *Schaefer*, *supra* at 436 (internal citation and quotation marks omitted). Defendant contends that the court's instructions somehow mixed the concepts of factual cause and proximate cause.

The trial court's instructions were based on CJI2d 16.15, and we find no error in the instructions. The court clearly stated that "[i]t is not enough that the defendant's act made it possible for the death to occur." The court also indicated that the death must have been a "natural or necessary result" of the defendant's acts. These instructions adequately informed the jury that it was required to find both factual *and* proximate cause. We cannot find a substantive

difference between something being a "direct and natural result" of an act and something being a "natural or necessary result" of an act.[2] No error requiring reversal occurred.[3]

Defendant lastly argues that the trial court improperly scored offense variable (OV) 5, MCL 777.35. Even assuming that this issue had been properly preserved, we find no basis for reversal. OV 5 may be scored at 15 points if a family member of the victim suffered serious psychological injury that may require professional treatment. MCL 777.35(1)(a). The fact that treatment has not been sought is not determinative. MCL 777.35(2).

In imposing sentence, a sentencing court may consider the contents of a presentence investigation report. *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003). In this case, the presentence investigation report stated the following:

> Ms. Garcia (the victim's wife) indicates that it is difficult to express how she feels after the loss of her husband. Ms. Garcia indicates that she has not recovered physically, mentally, or emotionally. Ms. Garcia indicates that since her husband's death she has suffered from depression and a stroke and is having trouble providing for herself due to the victim being the primary breadwinner in the family. . . . Ms. Garcia would also like Your Honor to know that her husband is a loss that is irreplaceable.
>
> As to sentencing Ms. Garcia indicates that "whatever I ask will not bring my husband back so I leave that to God and to the judge."

Based on this evidence, the sentencing court did not err in finding that the victim's wife suffered serious psychological injury that may require professional treatment. "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Christopher M. Murray

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[2] This Court has reached a similar conclusion in the past. See *People v Schmitt*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2009 (Docket No. 264176).

[3] At any rate, given that the evidence overwhelmingly proved that defendant caused the victim's injury, and given that the jury was properly instructed regarding the extent to which the Kent County Jail employees could have broken the chain of causation, we would find no basis to reverse even *if* the jury instruction on proximate cause were to be deemed inadequate. See *People v Anderson*, 446 Mich 392, 405-406; 521 NW2d 538 (1994) (discussing harmless error).