

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMETRIUS ROBINSON,

Defendant-Appellant.

UNPUBLISHED

December 29, 1998

No. 195952

Recorder's Court

LC No. 95-009110

Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Defendant, who had been charged with open murder, MCL 750.316; MSA 28.548, was convicted by a jury of involuntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to consecutive terms of two years' imprisonment for the felony-firearm conviction and eight to fifteen years' imprisonment for the manslaughter conviction. He appeals as of right and we affirm.

Defendant first argues that his sentence for manslaughter is disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), and also cruel or unusual, contrary to Const 1963, art 1, § 16, because it constitutes a one-year departure from the recommended range under the sentencing guidelines, as revised and corrected at the hearing on his motion for resentencing. Defendant further argues that he should be resentenced by a different judge. We find no merit in the first of these arguments, and thus need not reach the second.

It was not improper for the trial court to consider, as an aggravating factor, that defendant's actions reflected a more serious crime where that determination was supported by a preponderance of the evidence. *People v Coulter (After Remand)*, 205 Mich App 453, 456-457; 517 NW2d 827 (1994); *People v Ratkov (After Remand)*, 201 Mich App 123, 126-127; 505 NW2d 886 (1993), remanded on other grounds 447 Mich 984 (1994). "[W]here . . . there is record support that a greater offense has been committed by a defendant, it may constitute an aggravating factor to be considered by the judge at sentencing . . ." *People v Purcell*, 174 Mich App 126, 130; 435 NW2d 782 (1989). We note that the trial court below used its finding that defendant committed a more grievous homicide

than manslaughter, along with defendant's record as a juvenile offender, to justify raising defendant's minimum sentence to eight years; the court did not attempt to impose the maximum possible sentence for involuntary manslaughter, as if trying to graft a sentence appropriate for murder onto a conviction of involuntary manslaughter. The court well articulated a proper basis for its one-year upward departure from the highest minimum sentence in the guidelines range. In light of the circumstances surrounding the offense and the offender, defendant's sentence is neither disproportionate nor cruel or unusual punishment. See *Milbourn, supra* at 636 (sentences must be "proportionate to the seriousness of the circumstances surrounding the offense and the offender"); *People v Fernandez*, 427 Mich 321, 335; 398 NW2d 311 (1986) (whether a sentence constitutes cruel and unusual punishment depends upon the gravity of the offense, the sentences imposed for other statutory offenses, and the sentences that other jurisdictions impose for the same offense). Because our disposition of this issue obviates any need for resentencing, we need not reach the question whether defendant should be resentenced by a different judge.

Defendant next argues that the trial court pierced the veil of judicial impartiality and denied him a fair trial. Defendant never moved for a new trial on this ground, nor objected at trial to any of the instances of alleged judicial misconduct. However, this Court may consider allegations of serious errors even where the appealing party raised no objections at trial. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994); MRE 103(d). Additionally, this Court understands that counsel may be reluctant to challenge the judge's own behavior on the bench. *People v Sterling*, 154 Mich App 223, 231; 397 NW2d 182 (1986). We review a judge's general conduct of a trial for an abuse of discretion. See *People v Cole*, 349 Mich 175, 200; 84 NW2d 711 (1957); *People v Wigfall*, 160 Mich App 765, 773; 408 NW2d 551 (1987).

A trial court may question witnesses in order to clarify testimony or elicit additional relevant information. MRE 615(b). However, the court must not take over the role of prosecutor, or unjustifiably arouse suspicion in the mind of the jury regarding a witness' credibility. *Sterling, supra* at 229. Further, a court should treat counsel with "the consideration due an officer of the court. Belittling observations aimed at defense counsel are necessarily injurious to the one he represents." *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989).

Our review of the trial transcript persuades us that the trial judge conducted the proceedings below properly in all respects at issue. Indeed, most of the incidents about which defendant complains on appeal arose from misconduct on the part of defense counsel, not the judge. Counsel's behavior in court was needlessly antagonistic in general and disrespectful of the judge in particular. The judge properly admonished counsel outside the presence of the jury to improve his demeanor, and cautioned him that further admonishments would take place before the jury. In any event, the record indicates that none of the trial judge's questions or comments in the presence of the jury were improper or likely to prejudice the jury. For these reasons, defendant's argument that the trial court denied defendant a fair trial by displaying bias against him must fail.

Finally, defendant argues that reversal is required because the trial court erred in failing to give a misdemeanor instruction, by instructing the jury that accident is not a defense to voluntary manslaughter,

and by telling the jurors that they “should” consider both the voluntary and involuntary manslaughter charges if they concluded that the shooting was an accident. We disagree.

Appellate review of the trial court’s failure to instruct on reckless discharge of a firearm, MCL 752.861; MSA 28.436(21), is waived because defense counsel specifically withdrew his request for that instruction at trial. MCL 768.29; MSA 28.1052. Further, we reject defendant’s claim that trial counsel was ineffective for withdrawing that request. Counsel’s choice of instructions was a matter of trial strategy, which this Court will not second guess with the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Defendant has failed to overcome the presumption that counsel acted in furtherance of sound trial strategy. *Id.*

There was no defense objection to the trial court’s instructions concerning accident as a defense to manslaughter. Thus this issue is waived on appeal, and we consider it only to the extent necessary to avoid manifest injustice. MCL 769.26; MSA 28.1096; *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). There is no manifest injustice here. Although the trial court erred in instructing the jury that accident is not a defense to *voluntary* manslaughter, it did not err in instructing the jury that accident is not a defense to *involuntary* manslaughter. *People v Hess*, 214 Mich App 33, 37-39; 543 NW2d 332 (1995). Because defendant was not convicted of voluntary manslaughter, but was convicted of involuntary manslaughter for which the instruction concerning accident was correct, the court’s instructional error was harmless and did not result in a miscarriage of justice. Therefore, reversal is not warranted. MCL 769.26; MSA 28.1096.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O’Connell
/s/ William C. Whitbeck