

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLESANDRE REYES CARDENAS,

Defendant-Appellant.

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UNPUBLISHED

August 6, 1996

No. 173184

LC No. 92-001946

Before: Neff, P.J., and Fitzgerald and C. A. Nelson,\* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, for the killing of Ron Peltier, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to twenty-three to thirty-four years' imprisonment and two years' imprisonment for defendant's conviction for felony-firearm. Defendant appeals of right. We affirm, but strongly admonish the prosecutor for his trial tactics.

I

The testimony in this case unequivocally demonstrated defendant's guilt. Just prior to the shootings in question defendant was involved in an altercation at a party held at the apartment below his own. After leaving, defendant and at least one other man began shooting from the balcony of defendant's second story apartment. Several witnesses testified to seeing defendant load and shoot his shotgun.

Two men were killed as a result of the shooting spree, and two others were wounded. One of the decedents received seven gunshot wounds over his lower back and one additional shot to the middle of his abdomen. The other decedent, Peltier, died from three gunshot wounds, one to his chest,

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

one to his lower back, and a third to the right side of his head. Shotgun pellets were retrieved from both decedents' bodies. Defendant's shotgun was the only weapon of that type used in the melee.

## II

On appeal, defendant first argues that the prosecutor committed various instances of misconduct at trial. While we find that the prosecutors comments were improper, we conclude that reversal is not required in light of the overwhelming evidence of defendant's guilt.

### A

In lieu of setting forth the frequent instances of misconduct by the prosecutor in this case, we simply note that the prosecutor was repeatedly argumentative with the witnesses, even yelling at them. The prosecutor also used, at times, inappropriately heavy sarcasm with various witnesses. Further, the prosecutor, at one point swore at opposing counsel in front of the jury. Needless to say, many defense objections were lodged against the prosecutor's trial tactics, and the trial court repeatedly instructed the prosecutor that he was going too far. Even if each individual instance of misconduct by the prosecutor did not in itself constitute error, we conclude that the cumulative nature of misconduct certainly did.

### B

The question in this case revolves around the test for harmless error. Two inquiries arise when, as here, we must determine whether an error of constitutional proportion is harmless. *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995). First, it must be determined whether the error was harmless beyond a reasonable doubt; or in other words, whether it had any effect on the verdict. *Id.* Second, it must be determined whether the error is so offensive to the maintenance of a sound judicial process that it can never be regarded as harmless. *Id.* at 685-686.

#### 1

Here, we conclude that the first prong of this test is easily met. In light of the overwhelming evidence of defendant's guilt, it would have been virtually impossible for the jury to reach any other conclusion than the one it reached.

#### 2

The difficult question in this case, is whether the prosecutor's egregious behavior offends the maintenance of our judicial system. In reaching the conclusion that reversal is not required, we are struck by the fact that in a case such as this, where the evidence of guilt is strong, tactics such as those used by the prosecutor are more inexplicable than if he were grasping at straws (albeit improperly). Indeed, this is a classic case in which, by his conduct at trial, the prosecutor nearly snatched defeat from the jaws of victory. See *People v Hurt*, 211 Mich App 345; 536 NW2d 227 (1995).<sup>1</sup>

Ultimately, we conclude that reversal is not required because the prosecutor's misconduct here did not involve injecting improper issues into the trial, such as knowingly false evidence, or openly vouching for the credibility of a witness, or even calling on the jurors to convict as part of their civic duty. See, e.g., *People v Robinson*, 386 Mich 551; 194 NW2d 709 (1972). Rather, the prosecutor seems to have been overly emotionally involved in this case, which led to his overzealous approach. While such overzealousness can constitute error requiring reversal, here, we balance against the prosecutor's assault to our judicial system, the injustice of letting a clearly guilty man go free. We simply cannot conclude that defendant was denied a fair trial. On that basis we must conclude that the prosecutor's misconduct could be and was harmless, and under the circumstances was not reversibly offensive to the sound maintenance of our judicial system. As defendant points out in his appellate brief, he was convicted of only two of eight counts. In light of overwhelming evidence against defendant, we conclude that, even considering the prosecutor's misconduct, the jury verdict went in his favor.

Although the prosecutor committed misconduct in this case, we conclude that the error was harmless. Defendant's convictions are affirmed.

### III

Defendant also asserts that his sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We disagree. After our careful review of the sentencing record, defendant has failed to persuade us that his sentence was not proportionate to him or to his crime. *Id.* Accordingly, the trial court did not abuse its discretion in imposing this sentence.

Defendant's convictions and sentences are affirmed.

/s/ Janet T. Neff  
/s/ E. Thomas Fitzgerald  
/s/ Charles A. Nelson

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<sup>1</sup> Although we acknowledge that the Supreme Court declared this case has no precedential force or effect, *People v Hurt*, 450 Mich 958 (1996), we use it not as controlling authority, but merely for illustrative purposes.