STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LACOURIS PACELY,

Defendant-Appellant.

UNPUBLISHED
May 7, 1996

No. 172906
LC No. 93-006338

Before: Jansen, P.J., and McDonald and D.C. Kolenda,* JJ.

PER CURIAM.

Following a jury trial in the Detroit Recorder's Court, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was subsequently sentenced to consecutive terms of eighteen to thirty years' imprisonment for the conviction of second-degree murder and the mandatory two years' imprisonment for felony-firearm. Defendant appeals as of right. We reverse and remand for a new trial.

Defendant, Charles Ray Stiltner, Jr., Francisco Giboyeaux, and Michael Giboyeaux were charged in connection with the firing of numerous gunshots into a house in the City of Detroit on May 15, 1993. Two of the gunshots struck and killed Edward Santiago. Edward was in his house that evening with his wife, Margaret, and his sixteen-year-old son, Eduardo. Defendant was ultimately arrested on May 19, 1993. After initially denying any involvement in the shooting, defendant admitted in his police statement that he fired shots into the house. Defendant was tried separately in a jury trial, and was convicted as charged.

Defendant now raises six issues on appeal. We reverse his convictions and remand for a new trial because of instructional error to the jury.

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

Defendant first argues that the trial court erred in its instruction to the jury regarding the intent element for second-degree murder. Defendant properly preserved this issue because he objected to the trial court's instruction on the basis that it failed to accurately define the third formulation of the requisite intent for second-degree murder.

Jury instructions are to be reviewed as a whole rather than extracted piecemeal to establish error. *City of Lansing v Hartsuff*, 213 Mich App 338, 348; 539 NW2d 781 (1995). A criminal defendant has the right to have a properly instructed jury consider the evidence presented against him. *People v Vaughn*, 447 Mich 217, 226; 524 NW2d 217 (1994) (Brickley, J.). Trial judges have the responsibility to instruct the jury regarding the general features of a case, define the offense, and explain what must be proven to establish that offense. *Id.*, p 227. Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if there is evidence to support them. *People v Harris*, 190 Mich App 652, 664; 476 NW2d 767 (1991). Even though the instructions may be imperfect, there is no error if they fairly presented to the jury the issues to be tried and sufficiently protected the rights of the defendant. *Id.*

The trial court instructed the jury regarding second-degree murder in the following manner:

> So Murder in the Second Degree is all other murder which is not Murder in the First Degree. So First Degree – so murder has been defined through case law to mean Murder in the Second Degree can be committed intentionally, one person intending to kill another person; or he intends to do great bodily harm to another person; he does a dangerous act the natural tendency of that act would be to cause death or great bodily harm.
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> So, there's three ways you can commit Second-degree Murder. You can intend to kill the person. You can intend to do great bodily harm to that person; or you can do a dangerous act, the natural tendencies of that act would be to cause death or great bodily harm.
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> * * *
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> Now, an example of doing a dangerous act the natural tendency of that act would be to cause death or great bodily harm. Suppose a person comes up to you and takes out a pistol and takes five of the bullets out and starts spinning the cylinder and pointing it at you and you don't want to have anything to do with it but the person does it anyway and he strikes a live round and someone is killed. The person can be heard to say, "Well, I didn't mean to kill anybody. I was just playing around." That particular sort of incident would fall under doing a dangerous act the natural tendencies of the act would be to cause death or great bodily harm. The same as pushing a person off of a 10-story building, "Oh, I was just playing around. I didn't mean to do it. I thought you would fly or something of that sort."

> So you take the facts as you heard from the witnesses and you decide whether or not those facts establish the elements of Murder in the Second Degree as the Court has defined it.

We agree with defendant that the trial court's instruction on the elements of second-degree murder is erroneous. The elements of second-degree murder are that the defendant caused the death of the victim and that the killing was done with malice and without justification or excuse. *Harris, supra,* p 659. Malice is the intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm with knowledge that such is the probable result. *Id.*; *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984). The trial court's instruction regarding the elements of second-degree murder is erroneous because the trial court failed to properly instruct regarding the intent element. The trial court did not instruct the jury properly because it did not instruct that under the third formulation of intent, malice is the intent to create a high risk of death or great bodily harm *with knowledge that such is the probable result*. Thus, the trial court completely omitted the mens rea element when instructing the jury.

We cannot agree with the prosecutor that the trial court's examples to the jury were sufficient to convey the intent requirement. Nowhere did the trial court instruct the jury that the defendant must have intended to create a high risk of death or great bodily harm with knowledge that such was the probable result. Therefore, we conclude that the trial court's instruction regarding the elements of second-degree murder was erroneous. However, such an error does not require automatic reversal, and we must determine whether the instruction on second-degree murder was harmless error. *People v Grant,* 445 Mich 535, 543; 520 NW2d 123 (1994); *People v Woods,* 416 Mich 581, 600-601; 331 NW2d 707 (1982); see also *Vaughn, supra,* pp 235-238.

We conclude that the erroneous instruction regarding second-degree murder was not harmless error because it was prejudicial to defendant. In his police statement, defendant admitted to shooting at the house, but denied that he went there to kill anyone. He stated that he just went to the house to shoot it up and damage it. Defendant did not testify at trial, and there was no other evidence directly linking defendant's involvement in the shooting. Moreover, defendant's police statement was the only evidence indicative of his intent and he denied intending to kill anyone. Although a jury could certainly reject this contention based on other evidence presented to it, there was no other direct evidence of defendant's intent. Therefore, the failure to properly instruct the jury on the intent element of second-degree murder under the third formulation essentially directed the jury to find defendant guilty of second-degree murder as it was defined because the instruction removed from the jury the factual determination of one essential element of the crime. See *People v Gaydosh,* 203 Mich App 235, 238; 512 NW2d 65 (1994).

Because the trial court's erroneous instruction dealt with a critical issue at trial, defendant's intent, we cannot conclude that the error was harmless. The trial court's failure to instruct the jury regarding the intent element was erroneous and it was not harmless error in this case.

Defendant also argues that the trial court erred in its instruction to the jury regarding aiding and abetting. Defendant contends that the trial court again failed to instruct the jury on the intent required for aiding and abetting. We again agree.

Defendant properly preserved this issue for review because he objected to the trial court's instructions on the basis that they failed to include an instruction regarding the intent required for aiding and abetting. The trial court instructed the jury on aiding and abetting in the following manner:

> Now, there's another statute that you have to consider and that is known as Aiding and Abetting. And bear with me, I have to give you complete instructions. I can't just cut it off and let you go.
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> The statute states that all persons who shall commit an offense, or any person who shall procure, counsel, aid and abet another person in the commission of an offense, shall be tried and if convicted, shall be punished as if he directly committed the offense himself. That is known as Aiding and Abetting. The statute further states that mere presence is not enough to convict a person as an aider and abettor. He must do some act which encourages, assists, or aids and abets another person in the commission of the offense. What that simply means in common everyday language, when you help somebody commit an offense, you're just as guilty as the person who did it. But if you are just there watching a person commit an offense, you haven't really done anything. You have to do some act which assists, encourages, or aids and abets another party in the commission of an offense.
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> If a group of people decide to rob a bank, three people or four people go in to commit the offense while there's one person who planned the whole thing, he knows the escape route, he knows when the guards are going to be out to lunch, and he also provides the means of getting rid of the money when it's brought in, he never even goes anywhere near the bank. Under the law of aiding and abetting, he's just as guilty of the bank robbery as the person who committed the offense.

To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728

(1995). Here, the trial court again failed to instruct the jury on an essential element of aiding and abetting. The trial court failed to instruct the jury on the intent element; that is, that defendant intended the commission of second-degree murder or had knowledge that the principal intended the commission of the offense at the time that defendant gave aid and encouragement.

The trial court's instruction on aiding and abetting was erroneous where the trial court failed to instruct the jury on an essential element of aiding and abetting, the intent element. We cannot conclude that such an error was harmless. Although defendant admitted in his police statement that he shot at the house, he denied intending to kill anyone. Thus, while defendant participated in the shooting, it was necessary for the prosecutor to prove beyond a reasonable doubt that defendant had the requisite intent to aid and abet in the commission of second-degree murder. Therefore, it is not enough to claim that defendant committed the act of shooting and that this is sufficient for aiding and abetting; he must have also had the requisite intent to commit the act of aiding and abetting second-degree murder. Without a proper instruction, the jury could have convicted defendant of aiding and abetting second-degree murder based on the act alone. However, in order to be properly convicted, defendant would have had to have the necessary intent for aiding and abetting second-degree murder.

Accordingly, the trial court's failure to instruct the jury on the intent element for aiding and abetting second-degree murder was error and was not harmless.

Next, defendant argues that the trial court erred when it failed to instruct the jury that the assistance necessary for aiding and abetting must be rendered before or during the crime. Defendant did not object to this instruction below, therefore, it is not preserved for appellate review. We would find no manifest injustice standing alone, *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993), however, in light of the other instructional error we will address this issue to avoid the duplication of error upon retrial.

The assistance underlying aiding and abetting must be given before or during the commission of the offense. *People v Crousore*, 159 Mich App 304, 317; 406 NW2d 280 (1987); CJI2d 8.1(3)(b). The trial court failed to instruct the jury on this aspect of aiding and abetting. That is, the trial court should have instructed the jury that the assistance underlying aiding and abetting must be given before or during the commission of the crime. On retrial, should the aiding and abetting instruction again be given, the trial court should properly instruct the jury on this aspect of aiding and abetting.

Defendant next argues that the trial court erred in failing to give his requested instructions of involuntary manslaughter and careless, reckless, or negligent use of a firearm. At trial, defendant requested that the trial court give an instruction under CJI2d 16.11 (involuntary manslaughter – firearm intentionally aimed). The trial court refused to give the instruction. Defendant did not request an

instruction under CJI2d 16.10 (involuntary manslaughter). Defendant also requested an instruction for careless, reckless, or negligent use of a firearm, and the trial court denied that request.

Voluntary manslaughter, involuntary manslaughter, statutory involuntary manslaughter, and careless, reckless, or negligent use of a firearm resulting in death are all cognate lesser included offenses of murder. *People v Pouncey,* 437 Mich 382, 388; 471 NW2d 346 (1991); *People v Heflin,* 434 Mich 482, 496-497; 456 NW2d 10 (1990); *People v Beach,* 429 Mich 450, 462-463; 418 NW2d 861 (1988). In order to determine whether an instruction on a cognate lesser offense must be given, the record must be examined and if there is evidence which would support a conviction of the cognate lesser offense, then the trial court, if requested, must instruct on the cognate lesser offense. *Pouncey, supra,* p 387.

We first note that defendant did not request an instruction on common-law involuntary manslaughter (CJI2d 16.10). Therefore, the verdict cannot be set aside on the trial court's failure to so instruct where defendant did not request the instruction. MCL 768.29; MSA 28.1052. We simply reiterate that if defendant requests cognate lesser included offenses, and there is evidence that would support a conviction of the cognate lesser offense, then the trial court must instruct on the cognate lesser offense. We note that because defendant denied intending to kill anyone, and shot a gun approximately 170 feet away from the house, there was evidence to support the lesser offense of common-law involuntary manslaughter, but not of statutory involuntary manslaughter because the evidence was uncontroverted that defendant shot at a house and not at a person. See CJI2d 16.11. However, there was no error in the trial court's decision, under the evidence presented at trial, to decline to instruct on careless, reckless, or negligent use of a firearm. See CJI2d 11.20.

Defendant next argues that the trial court erred when it denied his requested instruction of the offense of discharge of a firearm at a dwelling. MCL 750.234b; MSA 28.431(2). Although defendant properly requested this instruction below, we find no error because the offense of discharge of a firearm at a dwelling is not a cognate lesser included offense of murder.

In order to require a properly requested instruction for a cognate lesser included offense, two elements must be satisfied. First, the principal offense and the lesser offense must be of the same class or category. Second, the evidence adduced at trial must be examined to determine whether that evidence would support a conviction of the lesser offense. *People v Hendricks,* 446 Mich 435, 444; 521 NW2d 546 (1994). Cognate lesser included offenses are those that share some common elements, and are of the same class or category as the greater offense, but have some additional elements not found in the greater offense. *Id.,* p 443. In the case of cognate lesser offenses, the method of management adopted by our Supreme Court is to "limit instruction to those offenses that bear a sufficient relationship to the principal charge in that they are in the same class or category, protect

the same societal interests as that offense, and are supported by the evidence adduced at trial." *Id.*, p 447.

The offense of murder is an offense against the person, and its purpose is to protect against death and injury. *People v Ora Jones*, 395 Mich 379, 389; 236 NW2d 461 (1975). The elements of second-degree murder require that the defendant cause the death of a victim and that the killing be done with malice and without justification or excuse. *Harris, supra*, p 659. The offense of discharge of a firearm at a dwelling falls under the chapter of "firearms" in our criminal statutes. It is apparent that the offense of discharge of a firearm at a dwelling is meant to protect society from the unlawful use of firearms. Second-degree murder, on the other hand, does not require a firearm, and a murder can be committed in a variety of ways. Ultimately, the offense of second-degree murder is meant to protect against death and injury.

Therefore, under the test enunciated in *Hendricks*, we find that the offenses of second-degree murder and discharge of a firearm at a dwelling are not meant to protect the same societal interests and are not in the same class or category. Accordingly, we conclude that discharge of a firearm at a dwelling is not a cognate lesser offense of second-degree murder. The trial court did not err in denying defendant's request to instruct the jury on discharge of a firearm at a dwelling.

Last, defendant argues that the trial court erred in admitting his police statement because it was involuntary and was taken in violation of his right to counsel.

The issue of voluntariness is a question of law for the court's determination. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). In reviewing the trial court's findings, this Court examines the entire record and makes an independent determination regarding voluntariness. *Id.* However, this Court recognizes the trial court's superior ability to view the evidence and gives deference to the trial court's factual findings. The trial court's factual findings will not be reversed unless they are clearly erroneous. *Id.*

The trial court's finding that defendant's statement was voluntary is not clearly erroneous. In reviewing the evidentiary hearing held below, we find that the totality of the circumstances surrounding the statement indicates that it was freely and voluntarily made. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). There were differing versions of events from defendant and the police officer who took the statement. The trial court specifically stated that it rejected defendant's testimony. Because credibility was critical to the determination of voluntariness, we defer to the trial court's superior ability to judge the credibility of the witnesses on this issue. *Etheridge, supra*, p 57.

We also reject defendant's claim that the statement was taken in violation of his right to counsel. The record indicates that defendant was read his rights pursuant to *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966) by the police officer, and the officer testified that defendant never requested an attorney. Defendant testified that, although he was given his *Miranda* rights, he later requested an attorney. This was again a credibility issue. The trial court found that defendant was not credible and that it did not believe defendant's testimony. Accordingly, there is no affirmative showing that defendant's statement was taken in violation of his right to counsel.

The trial court did not clearly err in admitting the police statement into evidence because its finding that the statement was voluntarily made and was not taken in violation of the right to counsel is supported by the record.

Defendant's convictions are reversed due to instructional error. This case is remanded for a new trial.

/s/ Kathleen Jansen
/s/ Gary R. McDonald
/s/ Dennis C. Kolenda