

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRA BROOKS,

Defendant-Appellant.

UNPUBLISHED

March 14, 1997

No. 167476

Recorder's Court

LC No. 92-004562

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUDOLPH CARRIE,

Defendant-Appellant.

No. 167482

Recorder's Court

LC No. 92-004562

Before: Gribbs, P.J., and Young and W.J. Caprathe,* JJ.

PER CURIAM.

In these consolidated appeals, defendants were charged and convicted of offenses arising from the shooting death of Robert Reid. In the early morning hours of March 24, 1992, defendants Brooks and Carrie entered the bedroom of Lawrence Walker to rob him at gunpoint. Brooks carried a twelve-gauge shotgun; Carrie held a nine millimeter automatic pistol. Decedent Robert Reid was also present in the bedroom, and may have been a participant in the robbery. While the robbery was in progress, Detroit Police Sergeant Richard Ren entered the house and ordered the robbers to halt. At that point, Brooks' shotgun discharged. Ren testified that Brooks raised the shotgun and took aim at him before

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

firing. Brooks testified that he pulled the trigger by accident. Decedent's body was later found in the kitchen. He had died of a shotgun wound to the back.

Following a jury trial, defendant Brooks was convicted of first-degree felony murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during a felony, MCL 750.227b; MSA 28.424(2). Brooks was sentenced to mandatory life imprisonment for the felony murder conviction and sixteen to twenty-five years of imprisonment for the assault with intent to murder conviction, to be served concurrently. He also received a two year consecutive sentence for felony firearm, and the armed robbery conviction was vacated. Defendant Carrie was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, armed robbery and felony firearm. Carrie was given two concurrent terms of ten to fifteen years of imprisonment for both the second-degree murder and armed robbery convictions. He also received a two year consecutive sentence for felony firearm. Both defendants appeal as of right. We affirm.

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Defendant Brooks raises the following grounds on appeal: (1) ineffective assistance of counsel, (2) instructional error, (3) juror misconduct, and (3) insufficient evidence to support his convictions.

A. Ineffective Assistance of Counsel

Brooks first argues that he was denied the effective assistance of counsel. Because Brooks has not moved for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review is limited to mistakes apparent from the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). A defendant claiming ineffective assistance of counsel must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Brooks claims that his counsel should have provided the jury with a written statement of his defense theory, and that he erred in stipulating to the fact that gunshot residue tests performed on defendant's hands showed positive results. Defendant has not established that either alleged omissions falls below an objective standard of reasonableness.

Brooks next alleges that his counsel failed to request an instruction that a felony murder charge cannot be predicated on the death of a criminal participant. Again, this is not an error because such an instruction is not supported by law. Although a felon cannot be held liable for the death of a co-felon when that death was caused by a victim's act of self-defense, *People v Austin*, 370 Mich 12, 13-14; 120 NW2d 766 (1963), the rule does not extend to cases in which the co-felon is killed by the defendant. *People v Warren*, 44 Mich App 567, 568; 205 NW2d 599 (1973). The evidence adduced that decedent was killed by a shotgun wound to the back, and that Brooks shot at Officer Ren with a twelve gauge shotgun. Brooks therefore would not have been entitled to the instruction he desires.

Brooks next claims that his counsel failed to object to the qualifications of an expert witness who testified at defendant's *Walker*¹ hearing. The witness opined that Brooks was capable of understanding and waiving his rights at the time he made statements to the police. Brooks contends that his attorney should have argued that the witness was not qualified to make this assessment because his educational background in forensic psychology was weak. Given that the expert witness has been with Detroit Recorder's Psychiatric Clinic for over twenty years and has been qualified as an expert numerous times in the area of forensic psychology, any objection by defense counsel would have been meritless. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995) (defense counsel is not required to raise meritless motion or objection). Thus, we find no error.

B. Instructional Error

Brooks also claims that the trial court erred in failing to give an accident instruction sua sponte, and alternatively, that his counsel was ineffective for not requesting the same. This Court reviews jury instructions in their entirety to determine whether there is reversible error. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). The instructions "must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them." *Id.* An imperfection in the instructions will not constitute error if the instructions "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.*

A defendant is only entitled to an instruction regarding accident as a defense to murder, even absent a request, if the issue was central to the defendant's case. *People v Glover*, 154 Mich App 22, 35; 397 NW2d 199 (1986). Rather than claiming the gun fired accidentally, defendant testified at trial that after hearing Officer Ren's voice, he turned around and pulled the trigger on the shotgun, but had not intended to shoot nor kill anyone. Hence, defendant's main defense was that he did not intend to shoot anyone when the gun was fired, rather than the gun misfiring accidentally. Consistent with defendant's testimony and theory of what happened, the trial court instructed the jury regarding involuntary manslaughter, advising the jury that defendant could be guilty of involuntary manslaughter, rather than murder, if they found that defendant had not intended to kill anyone, and that the killing resulted from a grossly negligent act. Thus, failure to instruct the jury sua sponte on an accident theory was not error.

Brooks also claims that the trial court erred in refusing his request for an instruction on reckless discharge of a firearm. MCL 752.861; MSA 28.436(21). Reckless discharge of a firearm, depending on the facts of a given case, may be a cognate lesser included offense of second-degree murder. *People v Ora Jones*, 395 Mich 379, 389-390; 236 NW2d 461 (1975). A cognate lesser included offense is of the same class and category as, and shares some common elements with the greater offense but may contain some additional elements not found in the greater offense. *People v Beach*, 429 Mich 450, 461; 418 NW2d 861 (1988). A trial court is not required to instruct the jury regarding a cognate lesser included offense, if requested, unless there is evidence adduced at trial that would support a conviction for the requested lesser offense. *Id.* at 464-465. If the evidence would have supported the requested instruction, a trial court's refusal to instruct on a cognate lesser offense would not automatically mandate reversal. *Id.* at 491. Reversal is not required if the trial court instructs the

jury regarding an intermediate offense that the jury rejects, electing instead to convict the defendant for the greater offense. *Id.* This rule only applies if the rejected charge is closely related to the requested charge such that the jury's verdict provides a reliable indication that the requested instruction would have also been rejected. *Id.*

The trial court rejected defendant's request for an instruction regarding reckless discharge of a firearm, reasoning that the record was insufficient to support the charge and that the involuntary manslaughter instruction addressed the same issues. Our review of the evidence indicates that if defendant's testimony was believed, the jury could have concluded that defendant discharged the firearm in a reckless, careless or negligent manner. MCL 752.861; MSA 28.436(21). However, the trial court's error in not giving the instruction was harmless because the jury was instructed regarding involuntary manslaughter. Involuntary manslaughter is defined as an unintentional killing of another without malice which is the result of negligence or which results from the commission of a misdemeanor. *People v Richardson*, 409 Mich 126, 136; 293 NW2d 332 (1980). Both involuntary manslaughter and reckless discharge of a firearm involve conduct which is careless reckless, or criminally negligent, and results in injury or death. *Id.* at 140-141. Consequently, the jury's rejection of the involuntary manslaughter charge provides a reliable indication that a reckless discharge charge would also have been rejected. *Beach, supra*, at 491. Accordingly, the court's refusal to give the requested instruction was harmless error.

Therefore, as a whole, the instructions fairly represented defendant's theory of the case, and adequately protected his rights.

C. Juror Misconduct

Brooks also appeals from the trial court's denial of his motion for a new trial and request for an evidentiary hearing. Defendant argued in his motion that one juror improperly communicated with defendant Carrie's mother during the trial, attaching Carrie's mother's affidavit attesting to alleged conversations between herself and the juror.² The trial court observed that the affidavit only indicated that Carrie's mother and the juror spoke *before* voir dire. Moreover, the court noted that defendants were permitted unlimited voir dire of prospective jurors, and that the affiant was present throughout trial and did not disclose this information to the court or her son's counsel. From this, the court concluded that juror misconduct had not been established.

This Court reviews a trial court's decision regarding a motion for a new trial for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). Evidence of juror misconduct does not automatically warrant a new trial. *People v Strand*, 213 Mich App 100, 103; 539 NW2d 739 (1995). A new trial will not be granted unless the misconduct affects the juror's impartiality. *Id.* at 103-104. After reviewing the affidavit, we concur with the lower court's assessment that defendant has not established juror misconduct to warrant an evidentiary hearing or a new trial, and conclude that the court properly denied the motion for a new trial.

D. Insufficient Evidence

Brooks lastly argues that the evidence was insufficient to support a conviction of first-degree felony murder. To determine whether sufficient evidence has been presented, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v McMillan*, 213 Mich App 134, 139; 539 NW2d 553 (1995). Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

Brooks argues that the evidence was insufficient to establish that he fired the shot that killed decedent. We disagree. Brooks admitted that he was armed with a twelve-gauge shotgun and that he pulled the trigger when Officer Ren arrived suddenly during the robbery. The decedent's body was found in the kitchen, a short distance from the hallway where the shooting occurred. According to the medical examiner, decedent died as the result of a shotgun wound in his back and decedent could have staggered a short distance after being shot. From these facts, a reasonable trier of fact could infer from this evidence that Brooks fired from the bedroom, into the hallway, intending to strike Ren, but hitting decedent by mistake.

E. Conclusion

In conclusion, we find that defendant has failed to allege any error warranting reversal of his convictions. As such, we also reject defendant's claim that he was denied a fair trial by the cumulative effect of multiple errors. *People v Miller (After Remand)*, 211 Mich App 30, 44; 535 NW2d 518 (1995).

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Defendant Carrie claims that there was insufficient evidence to support his conviction for second-degree murder. Since defendant Brooks' actions caused the killing, defendant Carrie was prosecuted for first degree felony murder under an aiding and abetting theory.³ In *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980), our Supreme Court disapproved of finding vicarious liability for co-felons, based solely on the liability of the principal. Instead, the Court instructed, the individual liability of each felon must be shown, reasoning that it would violate fundamental notions of fairness to convict someone for unforeseen or unagreed to results of his or her co-felon. *Id.* at 731. Nonetheless, the Court recognized that liability may be based upon agency principles in cases where the felons are acting intentionally or recklessly in pursuit of a common plan. *Id.* If the aider and abettor participates in a crime with knowledge of his principal's intent to kill or to cause great bodily harm, he is acting with "wanton and willful disregard" sufficient to support a finding of malice under *Aaron*. *People v Kelly*, 423 Mich 261, 278-279; 378 NW2d 365 (1985).

Although there was no evidence to establish that Carrie aided or encouraged Brooks specifically in shooting at Officer Ren, there was evidence that Carrie assisted Brooks in the armed robbery with knowledge that Brooks was armed. Moreover, Carrie was armed with a nine millimeter automatic pistol, and the robbery victim, Walker, testified that both Brooks and Carrie pointed their

guns at his head as Brooks initiated a “countdown” before both men were to shoot. This evidence established that Carrie participated in the robbery with knowledge of Brooks’ intent to kill or cause great bodily harm, and permitted the inference that Carrie himself acted with the requisite malice for murder. *Kelly, supra; People v Turner*, 213 Mich App 558, 572-573; 540 NW2d 728 (1995). Therefore, sufficient evidence was presented from which a reasonable trier of fact could infer malice beyond a reasonable doubt, since Carrie participated with knowledge of Brooks’ intent to kill, and thus, find Carrie guilty of aiding and abetting murder. *Kelly, supra*, 423 Mich 278-279; *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979), cert den 449 US 885; 101 S Ct 239; 66 L Ed 2d 110 (1980).

Because felony murder is second-degree murder which has been elevated to first-degree by the fact that it was committed during the commission of a felony, *People v Harding*, 443 Mich 693, 710 n 18; 506 NW2d 482 (1993), it may seem contradictory that the jury convicted Carrie of second degree murder and not felony murder. However, because the evidence supported a second degree murder conviction, defendant’s conviction should be affirmed. *Compare People v Feldmann*, 181 Mich App 523, 536-537; 449 NW2d 692 (1989) (disagreeing with the notion that a conviction for second degree murder should be overturned because a defendant may have also been guilty of felony murder).

Affirmed.

/s/ Roman S. Gribbs
/s/ Robert P. Young, Jr.
/s/ William J. Caprathe

¹ *People v Walker(On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965)

² Defendant Carrie also moved for a new trial on this basis, but does not appeal from the court’s denial of that motion.

³ A person who aids or abets in the commission of a crime may be prosecuted, tried and sentenced as though he had directly committed the offense. MCL 767.39; MSA 28.979.