

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY NEVERS,

Defendant-Appellant.

UNPUBLISHED

March 6, 2003

No. 227401

Wayne Circuit Court

LC No. 93-000667

Before: Cooper, P.J., and Bandstra and Talbot, JJ.

PER CURIAM.

Defendant was charged with second-degree murder, MCL 750.317. The jury was also instructed on the cognate lesser offense of involuntary manslaughter, MCL 750.321. The jury acquitted defendant of second-degree murder but convicted him of involuntary manslaughter. Defendant appeals his conviction as of right. We reverse.

Although defendant raises a number of issues, the first is dispositive. Defendant argues that the trial court erred by instructing the jurors, over objection, regarding the cognate lesser offense of involuntary manslaughter. We agree.

This issue is controlled by *People v Cornell*, 466 Mich 335, 353-359; 646 NW2d 127 (2002). “There, the Court reasoned that the statute on lesser offenses, MCL 768.32(1), does not authorize consideration of cognate lesser offenses.” *People v Alter*, ___ Mich App ___; ___ NW2d ___ (Docket No. 228005, issued January 24, 2003), slip op at 3-4. Because the instant case was pending on appeal when *Cornell* was decided and defendant objected to the involuntary manslaughter instruction, thus preserving this issue for appeal, *Cornell* applies here. See *Cornell*, *supra* at 367.¹

¹ The prosecutor argues that the issue was not properly preserved because, while objecting to the cognate lesser offense instruction, defendant failed to argue that cognate lesser offense instructions should never be given, but only argued that the evidence here did not support such an instruction. We do not read *Cornell* as requiring that, to preserve the issue and thus benefit from the *Cornell* ruling, defendants must have somehow been prescient in their objections and argued that cognate lesser offense instructions, which had been sanctioned in many precedents previously, were, nonetheless, inappropriate in all cases. As the prosecutor himself admits in his supplemental brief, defendant here did not make this argument “for good reason: at the time, the

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Under controlling precedents,² the involuntary manslaughter instruction here was obviously a cognate lesser offense instruction, not a necessarily included lesser offense instruction. “A necessarily included offense is one which must be committed as part of the greater offense; it would be ‘impossible to commit the greater offense without first having committed the lesser.’” *Alter, supra*, slip op at 3, quoting *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). “[I]t is incorrect to state that it is impossible to commit . . . second-degree murder without having first committed manslaughter.” *People v Van Wyck*, 402 Mich 266, 269; 262 NW2d 638 (1978). Thus, involuntary manslaughter is a cognate lesser included offense of second-degree murder. *People v Heflin*, 434 Mich 482, 496-497; 456 NW2d 10 (1990).

Under *Cornell*, the jury here should not have been instructed on involuntary manslaughter. We cannot conclude that it was harmless for the jury to be so instructed because this clearly affected the outcome of the trial; defendant was acquitted of the charged offense but convicted of the offense for which instruction should not have been given.

We reverse.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Michael J. Talbot

(...continued)

objection would have been ill-taken, and seemed ill-considered.” We conclude that sufficient preservation for application of the *Cornell* rule arises out of a defendant’s properly objecting to an instruction on a cognate lesser offense for whatever reason.

² The prosecutor argues that the precedents we find controlling on the issue whether involuntary manslaughter is a cognate lesser offense are themselves no longer binding under *Cornell*. Under principles of stare decisis, we do not have the latitude to reach that conclusion.