

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNLANIS CORTEZ ERVIN,

Defendant-Appellant.

UNPUBLISHED

September 14, 2004

No. 249826

Berrien Circuit Court

LC No. 02-404013-FC

Before: Griffin, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, and felony-firearm, MCL 750.227b. The trial court sentenced defendant to twenty-four to sixty years' imprisonment for his second-degree murder conviction, to be served consecutive to two years' imprisonment for his felony-firearm conviction. Defendant appeals as of right. We reverse.¹

I. Basic Facts and Proceedings

The instant cases arises from the shooting death of Rick Jackson at 871 Pavone, in the City of Benton Harbor. On July 11, 2002, fifteen to twenty people were at that address shooting dice on the front porch. Defendant's brother, Michael Ervin, arrived and joined the game. Michael lost money to Jason Bell and accused Bell of cheating. Bell slapped Michael's face. Michael left, indicating he would return. About twenty minutes after Michael left, Ricky Jackson arrived at 871 Pavone with Calvin Hill. Hill played dice and Jackson watched.

Meanwhile, defendant and Charles Cornelius were about three blocks away at 791 Odgen. Soon after Michael had left 871 Pavone, he arrived at 791 Odgen. Michael told defendant that Bell had threatened him with a shotgun. Defendant and Cornelius agreed to walk over to 871 Pavone to "even the odds" so that Michael could fight Bell. Michael started to follow defendant and Cornelius to 871 Pavone, but broke away from them before reaching

¹ We note that the prosecution asked this Court for additional time to file its brief on appeal. This Court granted the request, and the prosecution failed to timely file a brief on appeal. Instead, the prosecution filed its untimely brief one week before oral argument. Regardless, we have reviewed the prosecution's argument on appeal, and find it unpersuasive.

Pavone. Michael had a gun at 791 Odgen, which he gave to Cornelius, who in turn gave the gun to defendant before reaching Pavone.

Instead of going to 871 Pavone, defendant and Cornelius went to 877 Pavone, an abandoned house located immediately south of 871 Pavone. There, they hid behind the southern end of the porch, at the southwest corner of the house. Michael did not arrive, and defendant claims that he and Cornelius decided to scare the people playing dice on the porch at 871 Pavone. So defendant positioned his hand holding the gun over the porch post, which was about his height, and fired the gun several times. Defendant claims he fired only four shots, but witnesses heard between four and six shots. Defendant also claims he intended to shoot into the porch ceiling at 877 Pavone.

Jackson was struck in the head by one the bullets and died shortly afterward. The wound was not typical, and in the forensic pathology expert's opinion, it "most certainly" indicates the bullet was deflected or ricocheted before it struck Jackson.

Detective Dale Easton, a crime scene technician, testified that two bullets ricocheted off the floor of the porch at 877 Pavone and then embedded into an adjacent railing. Another bullet was found embedded in the railing at the southern end of the 877 Pavone porch, the area from which defendant shot the gun. Another bullet passed through that railing, but could not be located. One bullet was fired into the porch ceiling at 871 Pavone, and then ricocheted into fascia below. A partial bullet was found in the porch ceiling of 871 Pavone behind a light fixture. Its location behind the light fixture indicates that it did not travel directly into the ceiling from the southwest corner of 877 Pavone, but ricocheted up into the ceiling. Easton admitted that the bullet that struck Jackson could have been the same bullet that had passed through the porch southern railing, which then may have ricocheted into the ceiling behind the light fixture after hitting Jackson.

Easton also opined that the gun was fired using only one hand, the gun was not fixed, and there did not appear to be any control. Further, there was "no bullets or sign of damage to the left edge of the porch at 871 [Pavone] [to indicate that the bullets] would have come as a straight shot right off from the corner of 877 [Pavone]." Defendant claims that he intended to fire the gun into the ceiling at 877 Pavone, and attributes any inaccuracy to the gun having a powerful kick, the position he held the gun, and his inexperience firing a gun.

At trial, defendant requested an instruction on involuntary manslaughter. On appeal, defendant contends that his conviction must be reversed because the trial court erred in refusing to instruct the jury on involuntary manslaughter as a lesser-included-offense of murder. The trial court's holding was indirectly based on Supreme Court precedent holding that MCL 768.32 only permits instruction on necessarily-lesser-included-offenses, not cognate-lesser-included-offenses. *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002). Because at that time involuntary manslaughter was considered a cognate-lesser-included-offense of murder, *People v Van Wyck*, 402 Mich 266; 262 NW2d 638 (1978), overruled in part by *People v Mendoza*, 468 Mich 527, 529; 664 NW2d 685 (2003), the trial court held it could not give the instruction.

II. Involuntary Manslaughter Instruction

A. Standard of Review

Defendant preserved, by timely objection, the trial court's refusal to instruct the jury on involuntary manslaughter. *People v Fletcher*, 260 Mich App 531, 558; 679 NW2d 127 (2004). This Court reviews de novo preserved claims of instructional error. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253, rem'd 467 Mich 888; 653 NW2d 406 (2002).

In addition, harmless error analysis is applicable to instructional errors involving necessarily included lesser-offenses. *Cornell, supra* at 361. The instant case involves nonconstitutional error that has been preserved by defendant's request for the lesser included instruction. *Id.* at 356.

A preserved, nonconstitutional error is not a ground for reversal, unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative. Stated another way, the analysis focuses on whether the error undermined reliability in the verdict. Therefore, to prevail, defendant must demonstrate that it is more probable than not that the failure to give the requested lesser included [] instruction undermined reliability in the verdict. [*Cornell, supra* at 363-364 (internal citations omitted).]

"[I]t is only when there is substantial evidence to support the requested instruction that an appellate court should reverse the conviction." *Cornell, supra* at 365. [T]his 'substantial evidence' standard for determining whether reversal is required on the basis of instructional error differs from the standard for determining whether the error occurred," "because more than an evidentiary dispute . . . is required to *reverse* a conviction; pursuant to MCL 769.26, the 'entire cause' must be surveyed." *Id.* at 365-366 (emphasis in original).

B. Analysis

Defendant argues the trial court's refusal to instruct the jury on involuntary manslaughter is error requiring reversal. We agree.

Our Supreme Court recently held:

. . . the elements of voluntary and involuntary manslaughter are included in the elements of murder. Thus, both forms of manslaughter are necessarily included lesser offenses of murder. Because voluntary and involuntary manslaughter are necessarily included lesser offenses, they are also "inferior" offenses within the scope of MCL 768.32. Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence. [*Mendoza, supra* at 541, citing *Cornell, supra* at 356.]

In this case, defendant was charged with murder, and an instruction for involuntary manslaughter should be given if supported by a rational view of the evidence.

Our Supreme Court also recently addressed the offense of involuntary manslaughter as it relates to other homicides, and summarized that:

. . . it must be kept in mind that “the sole element distinguishing manslaughter and murder is malice,”[] and that “[i]nvoluntary manslaughter is a catch-all concept including all manslaughter not characterized as voluntary: ‘Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse.’“ If a homicide is not voluntary manslaughter or excused or justified, it is, generally, either murder or involuntary manslaughter. If the homicide was committed with malice, it is murder. If it was committed with a lesser mens rea of gross negligence or an intent to injure, and not malice, it is not murder, but only involuntary manslaughter. [*People v Holtschlag*, ___ Mich ___; ___ NW2d ___ (2004) (internal citations omitted).]

Here, there is no evidence to characterize the homicide as voluntary manslaughter, or allegations that the homicide is excused or justified. Thus, it is either murder or involuntary manslaughter. “If the homicide was committed with malice, it is murder. If it was committed with a lesser mens rea of gross negligence or an intent to injure, and not malice, it is not murder, but only involuntary manslaughter.” *Holtschlag, supra*.

We conclude that defendant’s claim that he did not intend to shoot at 871 Pavone is supported by substantial evidence. First, the bullet that struck Jackson “most certainly” deflected or ricocheted before it had struck him. Notably, Easton conceded that the bullet that struck Jackson was possibly the same bullet that had passed through the southernmost railing at the 877 Pavone porch. Also, all but one of the shots hit the 877 Pavone porch. Further, the only bullet that appears to have directly struck 871 Pavone was in the ceiling of the porch, which arguably reflects defendant’s intent to aim the gun too high to hit anyone. Thus, the evidence supports defendant’s claim that he did not intend to shoot at 871 Pavone, but that, as the result of his grossly negligent use of the gun, Jackson was killed.² This evidence concomitantly negates a finding that defendant intended to kill, do great bodily harm, or create a very high risk that death of great bodily harm will probably result. See *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980).

Further, defendant has shown that the failure to instruct on involuntary manslaughter undermines the verdict in this case. As opposed to cases where a claim of involuntary

² The absence of bullets found in the ceiling of 877 Pavone does not mean that defendant’s claim is unsupported. Rather, the focus of defendant’s claim is that he did not intend to shoot at persons at 871 Pavone. In comparison, the prosecution claimed that defendant maliciously aimed at 871 Pavone. The prosecution alleged this claim even though there was “no bullets or sign of damage to the left edge of the porch at 871 [Pavone] [to indicate that the bullets] would have come as a straight shot right off from the corner of 877 [Pavone].” Thus, the prosecutor’s claim that defendant maliciously shot at persons on the porch at 871 Pavone is supported by as little evidence as defendant’s claim that he intended to fire the gun into the ceiling at 877 Pavone. Moreover, that neither party can definitively show that defendant intended to shoot at a particular place underscores defendant’s claim that he did not have control of the gun.

manslaughter is inconsistent with the rational view of the evidence at trial, such as where defendant claims someone else is responsible for the death, *Mendoza, supra* at 545-5478, or a claim of self-defense, *People v Heard*, 103 Mich App 571, 576; 303 NW2d 240 (1981), defendant's only claim was that he did not intend to hurt or kill anyone. "[T]he denial of a proper request for instructions on a lesser included offense exposes a defendant to a possible conviction on a charged offense simply because a jury may be reluctant to acquit a person who is really guilty only of a lesser crime." *People v Garrett*, 161 Mich App 649, 651; 411 NW2d 812 (1987). Here, the circumstances of this risk are clearly present when considering that the jury rejected the charge of first-degree murder and was thus left to decide whether to convict defendant of second-degree murder or to acquit, notwithstanding defendant's admitted criminal recklessness in firing the gun and causing the horrific death of an innocent person.

Therefore, we reverse defendant's conviction for second-degree murder, and remand for entry of a conviction of involuntary manslaughter and for resentencing, with the prosecutor having the option to retry the defendant on the charge of second-degree murder. *People v Gridiron*, 185 Mich App 395, 404; 460 NW2d 908 (1990), on reh 190 Mich App 366; 475 NW2d 879, amended 439 Mich 880; 476 NW2d 411 (1991). We do not retain jurisdiction.

Reversed.

/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra