

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CAMERON JOSEPH TIETZ,

Defendant-Appellant.

UNPUBLISHED

June 20, 2013

No. 309767

Genesee Circuit Court

LC No. 10-026871-FC

Before: WHITBECK, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant, Cameron Tietz, appeals as of right his convictions, following a jury trial, of second-degree murder,¹ possession of a firearm during the commission of a felony (felony-firearm),² and carrying a concealed weapon.³ The trial court sentenced defendant to serve 18 to 36 years' imprisonment for the second-degree murder conviction, two years' imprisonment for the felony-firearm conviction, and two to five years' imprisonment for the carrying a concealed weapon conviction. We affirm Tietz's convictions and sentence, but remand for the trial court to correct a clerical error in the judgment of sentence.

I. FACTS

On April 17, 2010, Tietz shot James Miller in the chest in Miller's home. Jade Okoneski, Alisha Harris, and Brenton Dow were at the home at that time. Okoneski and Dow both testified that Miller and Tietz started to talk about \$10 that Miller's father owed Tietz. Harris testified that Miller and Tietz were speaking "in a playful manner," and Okoneski testified that Miller appeared relaxed and not angry. Harris testified that Tietz asked Miller if he was going to pay him, and that Miller smiled and asked Tietz what would happen if he did not pay him. Okoneski testified that she saw Tietz reach into his waist, remove a gun, and cock it.

Okoneski, Harris, and Dow each testified that Tietz pointed the gun at Miller and fired it. Okoneski testified that both Miller and Tietz appeared "shocked" when the gun discharged.

¹ MCL 750.317.

² MCL 750.227b.

³ MCL 750.227.

Okoneski testified that everyone ran out of the house. Dow testified as Tietz ran to his truck, he told Dow to “cover him.” Dow testified that he returned to call the police and attempt to stop Miller’s bleeding.

Detective Terry Coon arrested Tietz. According to Detective Coon, Tietz stated that he found the gun in a car that he had recently purchased, and did not look in the chamber. Tietz claimed that he was sitting at the dining room table and passing the gun around when a dog ran through the room and bumped into him. At that point, the gun went off.

Detective Coon testified that when he informed Tietz that his story was inconsistent with the other witnesses’ accounts, Tietz told him that Miller was teasing him about \$10, that they were joking, and that he wanted to “dry-fire” the gun without any bullets in the chamber to scare Okoneski and Harris. Tietz told Detective Coon that he obtained the gun the day before because he was concerned for his safety, and he did not think that any bullets were in the chamber.

Tietz’s testimony was consistent with that of the other witnesses. He testified that he and Miller were being playful, and that he thought the gun would dry-fire and scare the girls. Tietz insisted that the shooting was an accident.

Detective-Sergeant Ryan Larrison of the Michigan State Police testified that he tested the gun that shot Miller, and determined that it would not fire accidentally. He also testified that there were no functional problems with the weapon, and that a person would have to cock the weapon and then pull the trigger for it to fire. Officer Kenneth Shingleton of the Michigan State Police testified that on November 3, 2009, he searched Tietz and removed a different nine millimeter semi-automatic gun from his waistband. The prosecution argued that this evidence showed that the shooting was not an accident or a mistake.

The jury found Tietz guilty of second-degree murder, carrying a concealed weapon, and felony-firearm.

II. JURY INSTRUCTIONS

A. STANDARD OF REVIEW

This Court reviews de novo a defendant’s claim of instructional error.⁴

B. LEGAL STANDARDS

When a defendant requests a jury instruction on a lesser offense, the trial court must provide the instruction if the instruction is on a lesser included offense and it is supported by a rational view of the evidence.⁵ To be an included lesser offense, the elements necessary for commission of the greater offense must subsume the elements necessary for commission of the

⁴ *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

⁵ MCL 768.32(1); *People v Cornell*, 466 Mich 335, 354-355; 646 NW2d 127 (2002).

lesser offense.⁶ The trier of fact may *not* consider cognate lesser offenses: those offenses that contain an element not found in the greater offense.⁷

C. APPLYING THE STANDARDS

Tietz contends that the trial court erroneously failed to instruct the jury on reckless discharge of a firearm.⁸ Tietz concedes that reckless discharge of a firearm is not an included offense of second-degree murder, but contends that a rational view of the evidence supported the instruction.

We disagree. The trial court may not instruct the jury on cognate lesser offenses.⁹ The trial court must only instruct the jury on an offense that is supported by a rational view of the evidence when that offense is a lesser included offense.¹⁰

Here, Tietz concedes that reckless discharge of a firearm is a cognate lesser offense of second-degree murder. Presuming that it is a cognate lesser offense, Tietz was not entitled to any instruction on it. Further, the jury was instructed on—and rejected—the lesser included offense of involuntary manslaughter. Thus, even if we presume that reckless discharge of a firearm is not a cognate lesser offense, any error was harmless.¹¹ We conclude that the trial court did not err when it refused to instruct the jury on reckless discharge of a firearm, regardless of whether an instruction on it might be supported by a rational view of the evidence.

III. CONCLUSION

Tietz additionally contends that the trial court erred in its judgment of sentence. The trial court orally ruled that Tietz’s sentence for carrying a concealed weapon “is not consecutive to felony[-]firearm[.]” but the judgment of sentence is silent concerning the relationship between those two sentences. The state concedes that Tietz’s judgment of sentence should be corrected to reflect that Tietz’s terms for carrying a concealed weapon and for felony-firearm are concurrent.

We remand for the trial court to correct its clerical error in the judgment of sentence. In all other respects, we affirm Tietz’s convictions and sentence. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Patrick M. Meter

/s/ Pat M. Donofrio

⁶ *People v Wilder*, 485 Mich 35, 41; 780 NW2d 265 (2010).

⁷ *Cornell*, 466 Mich at 355.

⁸ MCL 752.861.

⁹ *Cornell*, 466 Mich at 355.

¹⁰ *Apgar*, 264 Mich App at 326-327.

¹¹ See *People v Sullivan*, 231 Mich App 510, 520; 586 NW2d 578 (1998).