

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 15, 2014

v

CHRISTOPHER DANIEL JACKSON,

Defendant-Appellant.

No. 314007
Wayne Circuit Court
LC No. 12-003008-FC

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for negligent discharge of a firearm causing death, MCL 752.861, felony-firearm (third offense), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f.¹ He was sentenced as a fourth habitual offender, MCL 769.12, to time served for the discharge of a firearm conviction, 6 to 10 years' imprisonment for the felon in possession conviction, and 10 years' imprisonment for the felony firearm conviction. We affirm.

I. BASIC FACTS

This case arises from a shooting death that took place on March 7, 2012, in Detroit. The decedent was shot in the head. At issue at trial was whether the gun accidentally discharged or whether defendant, who was dating the decedent's sister, Cassandra Thompson, purposefully shot decedent. At trial, Thompson testified that defendant held a gun to the decedent's head and fired it on purpose. In his statement to police, defendant admitted that he and Thompson struggled over control of the gun and that it accidentally discharged. The autopsy revealed that the gun could not have been held directly against the victim's head. Instead, it was "at the edge of close range."

Defendant was acquitted of many charges, but convicted of negligent discharge of a firearm causing death, felony-firearm (third offense), and felon in possession of a firearm. He was sentenced as outlined above and now appeals as of right.

¹ Defendant was acquitted of second-degree murder, MCL 750.317, kidnapping, MCL 750.349, and felonious assault, MCL 750.82.

II. PAROLE STATUS

Defendant first argues that the trial court abused its discretion when it twice allowed reference to defendant's status as a parolee.

"The decision whether to admit evidence falls within a trial court's discretion and will be reversed only when there is an abuse of that discretion. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013).

Under MCL 769.26, a preserved, nonconstitutional error is not grounds for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. Similarly, MCR 2.613(A) provides that an error is not grounds for disturbing a judgment unless refusal to take this action appears to the court inconsistent with substantial justice. [*People v Williams*, 483 Mich 226, 243; 769 NW2d 605 (2009) (internal quotation marks and citations omitted).]²

There are two instances about which defendant complains. During a discussion about playing the DVD of defendant's statement to police, the following exchange took place:

MS. SHACKELFORD [defense counsel]: The only other issue is, Your Honor, there is one time on the tape, at least that we can hear, where my client makes a statement that shouldn't be admitted. So we're just going to ask –

THE COURT: Like what? What does he say?

MS. JAMES [prosecutor]: He says, "I'm on parole."

MS. SHACKELFORD: Can we just skip that?

THE COURT: No, because he's charged with IP too, isn't he?

MS. JAMES: Yes, he is, Your Honor.

THE COURT: Felon in possession, so what's the loss? Let's go.

Also, after the parties examined Thompson, the trial court had a number of its own questions, including:

THE COURT: Had you ever said anything to Mr. Jackson that he should not have that gun in his possession?

² We reject defendant's attempt to couch the issue as one of constitutional magnitude. Defendant's appellate brief cites case law applicable to when a jury is apprised of a defendant's status as a prisoner, i.e., prison garb or shackles.

THE WITNESS: You're just saying in general?

THE COURT: Yeah.

THE WITNESS: Yeah.

THE COURT: Why?

THE WITNESS: Because he wasn't supposed to handle a gun.

THE COURT: Why is that?

THE WITNESS: Because he was on parole.

THE COURT: You knew that he had previously been convicted of a felony, right?

THE WITNESS: Correct.

THE COURT: And you had told him not to carry a gun, true?

THE WITNESS: Correct.

“Generally, all relevant evidence is admissible, and irrelevant evidence is not. To be relevant, evidence must have any tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence.” *People v Coy*, 258 Mich App 1, 3; 669 NW2d 831 (2003). “The fact that defendant was a parolee is irrelevant to his guilt or innocence....” *People v DeBlauwe*, 60 Mich App 103, 105; 230 NW2d 328 (1975).

Defendant's parole status had no bearing on his guilt or innocence of any of the crimes charged and the trial court erred in equating defendant's prior felony conviction with his status as an active parolee. Nevertheless, any error did not result in prejudice to defendant. The parties entered into a stipulation at the close of proofs: “It is hereby stipulated and agreed between the parties that the defendant, Christopher Jackson, has previously been convicted of a specified felony. Pursuant to Michigan law, defendant is not eligible to possess or use a firearm in this state.” Additionally, the trial court instructed the jury:

There is evidence that the defendant has been convicted of a crime in the past. You may consider this evidence only as to count 5, weapons firearms, possession by felon, only. You may not use it for any other purpose. A past conviction is not evidence that the defendant committed the alleged crimes in this case.

Defendant's status as a parolee, therefore, did not come as a surprise to the jury and defendant fails to show how the error was outcome determinative.

III. INSTRUCTION ON A COGNATE LESSER OFFENSE

Defendant next argues that the trial court erred in giving a jury instruction on negligent discharge of a firearm, which was a cognate lesser offense of second-degree murder.

A cognate lesser offense is one that shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater. *People v Wilder*, 485 Mich 35, 41; 780 NW2d 265 (2010). An instruction on a cognate lesser included offense is not permissible. *People v Heft*, 299 Mich App 69, 74; 829 NW2d 266 (2012).

The prosecutor concedes error, but correctly argues that any claim of error has been waived.

This Court has defined “waiver” as “the intentional relinquishment or abandonment of a known right.” “One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.” When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver. [*People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) (footnotes omitted).]

At the close of proofs, the trial court suggested that a voluntary manslaughter instruction be given in light of the fact that there was evidence to support that the gun accidentally discharged. The following discussion took place:

THE COURT: Okay, and so I mean who is in a better position to decide as to who's telling the truth in that regard? I don't believe that you or Ms. Shackelford or I can make that decision. That's up to the jury to make that decision. It could very well be that he never pointed the gun at the child and got into the car, and then they struggled over the use of the gun, and of course the gun discharged. Now, whether it be a revolver or a semi-automatic, he had the gun in his hand at some point in time. Otherwise it wouldn't have discharged. And that if it was a semi-automatic, he would have had to have racked it, he would have had to have cocked it or he at least would have had to have pulled the trigger.

Now we never got the testimony of the sergeant in regard to the difference in the amount of weight that would have to be associated with the discharge of a semi-automatic as opposed to a revolver. But the jury got the impression that this may have also been a revolver based on the question that no shell casing was found. I mean they could very well come to the conclusion that it was the struggle over this gun that ultimately led to the discharging of the weapon, her pulling the handgun with his finger still on the trigger, and it discharging because the gun would have been pulled forward, and his hand would have been pulled backward. So that means that the trigger may very well have been pulled at that particular time, even though he says that he was getting out of the car. Now I think voluntary manslaughter is an appropriate lesser included offense of this crime based on that.

Now, you got to take this one step further too. What about the negligent use of a firearm? There's no question in my mind that both of these people are

responsible for Felicia Barga's death, both of them, both Cassandra Thompson and Mr. Jackson. And that's the reason for her, in my opinion, the cold water, hot water testimony that she gave. Tears, no tears, tears, no tears, because she knows in her own mind that she was responsible for her own sister's death, and her family knows that too. So what she's trying to do is ameliorate that situation, placate that situation, find some rational excuse for avoiding her responsibility for her death. That's my own take on the situation. But the facts tend to agree with that, and that's why even negligent use of a firearm might be applicable. Now I understand that's a misdemeanor, but it does comport with the facts of this case, that it was an accident as opposed to something that was intended. Who is in a better position to make – to draw a line other than the jury?

MS. JAMES: Your Honor, if the Court is going to give those instructions, would the Court give me a few minutes so that I can go upstairs to retrieve a couple things?

THE COURT: Yeah, sure, absolutely. I would like this to be in the hands of the jury, though, today. I mean how much time do you want?

MS. JAMES: If I can have like 15 minutes, that should be sufficient.

THE COURT: Okay.

MS. SHACKELFORD: And, Your Honor, I brought some of them with me.

THE COURT: Now, you know, if the defense doesn't want these lesser included offenses given to the jury, you put me into a quandary. But if you don't want those lesser included offenses, I'll reconsider my position.

MS. SHACKELFORD: Can I take the same 15 minutes she is taking to think, Your Honor?

THE COURT: Sure.

The trial court agreed to delay closing statements until the following day.

When trial resumed and after the parties made their closing arguments, the following discussion took place:

MS. JAMES: Your Honor, People just want to place the objection on the record with respect to the Court giving the negligent or reckless discharge of a firearm instruction. It's the People's position that this is not necessarily a lesser included. That it is a cognate offense, and therefore because it has some elements that are not shared by the second degree murder, that the defendant is not entitled to such an offense to this instruction.

And this is what we have in this case with the reckless or negligent discharge of a firearm and second degree murder. They both require different levels of intent, making the reckless or negligent discharge a cognate offense, and therefore, it is the People's position that this instruction should not be given.

THE COURT: Okay. And what's the position of the defense?

MS. SHACKELFORD: Your Honor, as we discussed in chambers, I do think it's an appropriate [instruction].

THE COURT: It is or is not?

MS. SHACKELFORD: I do believe that it is an appropriate jury instruction, and we would defer to the Court.

THE COURT: Okay, the Court is going to give it, because based upon the testimony of Mr. Jackson himself in the statement which he gave to the police, it was accidental in his opinion, accidental discharge of a the firearm. And in regard to his conduct as to whether or not it constituted negligence at that time, actually potentially gross negligence, I think that's up to the jury to decide. So that instruction is going to be given. Anything else we will need to discuss?

MS. JAMES: Your Honor, the only other thing I want to say is the difference is that the reckless or negligent discharge requires a weapon, whereas second degree murder does not, again making it a cognate offense. We still believe that it shouldn't be given.

THE COURT: Well, the Court believes that it is a cognate offense, but that there is more than sufficient testimony elicited during the course of trial to warrant and mandate that instruction being given.

The trial court instructed the jury as to second-degree murder, voluntary manslaughter and negligent use of a firearm.

It is obvious from the record that defense counsel explicitly supported the instruction. As such, any error is waived.

Affirmed.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly