

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 17, 2011

v

JAVORRIS LYMONT JACKSON,

Defendant-Appellant.

No. 296236
Wayne Circuit Court
LC No. 09-019624-01-FC

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

In December 2009, a jury convicted defendant Javorris Jackson of second-degree murder¹ and felony firearm.² The trial court sentenced Jackson to a term of 20 to 50 years in prison for second-degree murder, and the mandatory consecutive two years in prison for felony firearm. Jackson now appeals as of right. We affirm.

I. FACTS

In the early evening of May 2, 2009, Jackson picked up his fiancée, Courtney Solomon, from her mother's home in Southfield, Michigan. He drove Solomon to a friend's house, where they were meeting another friend before going to a local nightclub. Jackson knew that Solomon and her friends were going to the nightclub. Jackson and his friends also made plans to go to the same nightclub, arriving several hours before Solomon.

While at the nightclub, Jackson and Solomon argued, and Jackson asked Solomon to return the engagement ring that he gave her. Solomon returned Jackson's engagement ring, and the two had no further interaction with each other while at the nightclub. After leaving the nightclub, Jackson called Solomon, and they arranged to meet at a nearby Meijer. When Jackson arrived, Solomon got into the car that Jackson was driving, and they drove to Town Place Suites

¹ MCL 750.317.

² MCL 750.227b.

in Dearborn, Michigan. Jackson lived in room 236 of the hotel with his brother, who was out of town.

Hotel security video showed Jackson and Solomon park the car and enter the building through a side entrance. At trial, Jackson testified that when he and Solomon returned to the hotel, Solomon was upset that Jackson asked for his ring back and embarrassed her in front of her friends. After returning to the hotel room, Jackson entered the bathroom and saw Solomon walk toward his bedroom. Jackson testified that when he came out of the bathroom, Solomon was crying and holding his brother's gun. Jackson testified that because she had previously tried to kill herself, he was afraid that Solomon may try again, so he attempted to disarm Solomon. Jackson testified that the gun fired as he was trying to take it from Solomon.

Approximately 12 minutes after Jackson and Solomon parked the car, the front desk clerk received an emergency call from room 236. Jackson told the desk clerk to call for an ambulance as soon as possible, but would not tell him the nature of the emergency. The desk clerk called 911 and requested an ambulance, then called Jackson's room to notify him that the ambulance was on its way. Again the desk clerk asked Jackson about the nature of his emergency, but Jackson merely repeated his request for an ambulance. The desk clerk testified that during both conversations Jackson's request sounded urgent.

Shortly after the calls to the hotel front desk, hotel security videos showed Jackson descend the side entry stairs, leave the building, and go to the car. The video showed Jackson open the passenger door, retrieve something from the car, and then run back up the stairs. Approximately 14 minutes later, the security video showed Jackson at the door waving his arms to signal the paramedics. Jackson then ran back up the stairs. The security video showed that Jackson came to the door a third time, but before running up the stairs, he depressed a push bar on the door to unlock it for the paramedics. After several trips up and down the stairs, letting the paramedics inside the hotel, and writing a suicide note that he left on the coffee table, Jackson shot himself in the chest.

When the paramedics entered the hotel, they heard a male voice coming from the second floor. Upon reaching the second floor, paramedics did not see anyone in need of medical assistance, but they did hear the same male voice calling to them from room 236. When paramedics entered Jackson's suite, they found Jackson and Solomon lying next to each other on their backs. Paramedics observed a gun lying near Jackson and kicked it to the corner of the room. The paramedics then called the police.

Solomon was unresponsive to the paramedics' attempts to revive her. Because Solomon was not breathing and had no pulse, paramedics removed her clothing in order to administer an electrical shock to her heart with a defibrillator. The paramedics noticed a gunshot wound in Solomon's chest and applied an occlusive dressing to seal the wound. Paramedics intubated Solomon and began chest compressions, but she did not respond.

Jackson's shirt was soaked with blood from a self-inflicted gunshot wound to the chest, and he was only somewhat responsive to the paramedics' questions. Jackson testified that he remembered paramedics entering the room. Jackson faded in and out of consciousness, but responded to sternal rubbing when the paramedics wanted to ask him questions. Jackson

testified that when paramedics began tending to his wounds, he told them to help Solomon and let him die. After approximately ten minutes of emergency care at the hotel, Jackson and Solomon were placed on stretchers and taken to the hospital. Solomon was dead upon arrival at the hospital.

In the hotel room, police found two bullet casings and a hand written note. The note read: "Every 1 I'm sorry. She ran me crazy. Love you guys." Police located the note on a coffee table in the living room, recovered one bullet casing from near the dinette table, and the other casing from the floor in front of the sofa. The police found the gun on the floor near the television and recovered the bullet that caused Jackson's self-inflicted wound.

At trial, firefighter/paramedic Ryan Walsh testified that he provided emergency care to Jackson at Town Place Suites. On cross-examination, defense counsel asked Walsh if Jackson had said, "Help, help her, let me die." The prosecution objected on the ground that Walsh's potential answer would be hearsay. Defense counsel responded that Jackson's words were an "excited utterance or perhaps a dying declaration." Then trial court sustained the objection, excluding the testimony.

The trial record reflects that before jury deliberation there were at least two documented discussions regarding jury instructions. In the first discussion regarding jury instructions, the trial court indicated that it would instruct the jury on first-degree murder, and it would also give the second-degree murder instruction if either party so desired. The trial court also stated that it would instruct the jury on felony firearm. Defense counsel requested jury instructions on voluntary and involuntary manslaughter.

During a second discussion regarding jury instructions, the trial court agreed to give the first-degree murder instruction, as well as the second-degree murder instruction as a lesser included offense of first-degree murder. The parties agreed that an instruction for voluntary manslaughter was not appropriate. The trial court stated that an instruction of involuntary manslaughter with a firearm was an "open question," although the court was "not inclined" to do so. The record does not reflect any further discussion regarding jury instructions.

The trial court instructed the jury on first-degree murder; second-degree murder; careless, reckless, or negligent discharge of a firearm causing death; felony firearm; and the defense of accident. After the jury was excused for deliberation, defense counsel objected to the trial court's failure to instruct the jury on involuntary manslaughter. The trial court declined to instruct the jury on involuntary manslaughter, ruling that Jackson's testimony did not establish facts that would support such an instruction. Jackson now appeals.

II. JACKSON'S COMMENT TO THE PARAMEDICS

A. STANDARD OF REVIEW

Regarding firefighter/paramedic Walsh's testimony, Jackson argues that the trial court erred when it sustained the prosecutor's hearsay objection concerning Jackson's comment at the scene of Solomon's murder. Jackson argues that Walsh would have testified that Jackson told the paramedics not to help him, but to instead help the mortally wounded Solomon. Jackson argues that his comment was not hearsay. Jackson further claims that if the jury had been

allowed to hear Walsh's testimony, they would have heard that Jackson's concern for Solomon's life was contrary to the prosecution's theory that Jackson deliberately shot her.

"We review a trial court's admission of evidence under a hearsay exception to determine whether there has been an abuse of discretion."³ Accordingly, "[a] trial court's discretionary decisions concerning whether to admit or exclude evidence 'will not be disturbed absent an abuse of that discretion.'"⁴ "When the decision involves a preliminary question of law however, such as whether a rule of evidence precludes admission, we review the question de novo."⁵

B. LEGAL STANDARDS

Hearsay is not admissible except as provided by the Michigan Rules of Evidence.⁶ "'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."⁷ The "'declarant' is a person who makes a statement."⁸ And "[a] 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."⁹

A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person.^[10]

C. APPLYING THE STANDARDS

As we have stated, under MRE 801(a), "[a] 'statement' is . . . an oral . . . assertion[.]"¹¹ And the prosecution admits on appeal that Walsh's testimony regarding Jackson's comment was

³ *People v Stamper*, 480 Mich 1, 4; 742 NW2d 607 (2007).

⁴ *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010), quoting *People v McDaniel* 469 Mich 409, 412; 670 NW2d 659 (2003).

⁵ *Mardlin*, 487 Mich at 614.

⁶ MRE 802.

⁷ MRE 801(c).

⁸ MRE 801(b).

⁹ MRE 801(a).

¹⁰ MRE 801(d)(1).

¹¹ MRE 801(a)(1).

not hearsay because Jackson’s comment was not a “statement,” as MRE 801(a) defines that term, because it was not an “assertion.” As the prosecution explains, Jackson’s comment was not an assertion because it was a command or imperative: “words that order, instruct, or request someone else to perform an act are not capable of being true or false, nor do they expressly assert anything, and therefore they are not hearsay under the rules of evidence.”¹²

Additionally, even assuming that Walsh’s testimony regarding Jackson’s comment was a “statement,” it would still not constitute hearsay because Jackson testified at the trial and was subject to cross-examination concerning the statement, the statement was consistent with Jackson’s testimony, and the statement was offered to rebut the prosecution’s theory that Jackson deliberately shot Solomon.¹³ Accordingly, we conclude that the trial court erred in sustaining the prosecutor’s objection and excluding Walsh’s testimony regarding the comment.

However, we also conclude that the error was not outcome determinative. Jackson testified at trial regarding his comment to the paramedics. Specifically, Jackson testified:

And from there he [Walsh] was like, well, who shot you and I said I did it. And then from there I told them to—because he—they started to tending to me and I, I didn’t see them attending to her. *At the time I told them to help her. Let me die.*¹⁴

When, as here, wrongfully excluded evidence is admitted into trial another way, the evidence would have been cumulative and the error is not outcome determinative.¹⁵

Further, to the extent that Jackson argues that Walsh’s testimony was necessary to corroborate Jackson’s testimony, his argument is without merit. It is the province of the jury to assess witness credibility,¹⁶ and the prosecution never challenged or otherwise called into question Jackson’s own testimony regarding this comment to the paramedics. Therefore, we conclude that the trial court’s error in sustaining the prosecutor’s objection to Walsh’s testimony was not outcome determinative.

¹² See e.g., *People v Jones* (On Rehearing After Remand), 228 Mich App 191, 204-205; 579 NW2d 82, mod in part and rev in part on other grounds and remanded 458 Mich 862 (1998) (holding that the words, “Bitch, come out[.]” were a command, not an assertion); *United States v Hayes*, 369 F3d 564, 568 (2004) (holding that the words, “Tell the truth[.]” did not expressly assert anything).

¹³ MRE 801(d)(1)(B).

¹⁴ Emphasis added.

¹⁵ See e.g., *People v Fortson*, 202 Mich App 13, 18; 507 NW2d 763 (1993).

¹⁶ *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

III. INVOLUNTARY MANSLAUGHTER AS A NECESSARY LESSER INCLUDED OFFENSE OF SECOND-DEGREE MURDER

A. STANDARD OF REVIEW

Jackson argues that he was entitled to a jury instruction regarding involuntary manslaughter as a lesser included offense of murder. “We review de novo claims of instructional error and determinations whether an offense is a necessarily included lesser offense.”¹⁷

B. LEGAL STANDARDS

“A necessarily included lesser offense is an offense in which all its elements are included in the elements of the greater offense such that it would be impossible to commit the greater offense without first having committed the lesser offense.”¹⁸ Involuntary manslaughter is “[a]n unlawful act committed with the intent to injure or in a grossly negligent manner that proximately causes death”¹⁹ “Both voluntary and involuntary manslaughter are cognate lesser included offenses of murder.”²⁰

“A cognate lesser offense shares several of the same elements and same class or category as the greater offense but contains some elements distinct from the greater offense.”²¹ “Instructions on cognate lesser offenses are not permitted, while instructions on necessarily included offenses are proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.”²² “The trial court is required to give an instruction for a cognate lesser included offense if: (1) the principal offense and the lesser offense are of the same class or category, and (2) the evidence adduced at trial would support a conviction of the lesser offense.”²³

C. APPLYING THE STANDARDS

This Court previously addressed the issue of jury instructions for cognate lesser included murder offenses in *People v Cheeks*. In that case, the defendant was convicted of first-degree murder and felony firearm.²⁴ The defendant claimed that the shooting of the victim was

¹⁷ *People v Apgar*, 264 Mich App 321, 326; 690 NW2d 312 (2004).

¹⁸ *Id.*

¹⁹ *People v Datema*, 448 Mich 585, 606; 533 NW2d 272 (1995).

²⁰ *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996).

²¹ *Apgar*, 264 Mich App at 326.

²² *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003).

²³ *Cheeks*, 216 Mich App at 479.

²⁴ *Id.* at 471.

accidental and argued that the trial court erred in failing to instruct the jury on the cognate lesser included offenses of murder—voluntary and involuntary manslaughter.²⁵ This Court held that because the defendant did not call any witnesses, nor present any evidence in support of the cognate lesser included offenses, he was not entitled to the instructions.²⁶

While common-law involuntary manslaughter is a cognate lesser included offense of murder, “[t]here must be more than a modicum of evidence; there must be sufficient evidence that the defendant could be convicted of the lesser offense.”²⁷ Aside from his own testimony, Jackson presented no evidence to support the instruction. Jackson testified that he never touched the gun before Solomon was shot. In fact, he maintained that Solomon shot herself when he attempted to take the gun from her. Jackson’s testimony does not indicate negligence. Jackson’s testimony also reflects that he had no intent to injure Solomon and that he considered her death an accident. Because a rational view of the evidence does not support the instruction, Jackson has failed to support a jury instruction for common-law involuntary manslaughter.

IV. REVERSAL BASED ON CUMULATIVE TRIAL ERRORS

A. STANDARD OF REVIEW

Jackson argues that his conviction for second-degree murder should be reversed because of the cumulative effect of the errors at his trial. “We review this issue to determine if the combination of alleged errors denied defendant a fair trial.”²⁸

B. LEGAL STANDARDS

“The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted.”²⁹ “Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal.”³⁰

C. APPLYING THE STANDARDS

Although Jackson established that the trial court’s adverse hearsay ruling was erroneous, that error alone was not outcome determinative, and a rational view of the evidence does not support a finding that he was entitled to a jury instruction on common law involuntary

²⁵ *Id.* at 479.

²⁶ *Id.* at 480.

²⁷ *Id.*

²⁸ *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007).

²⁹ *Id.*

³⁰ *Id.*

manslaughter. Therefore, there were no evidentiary or instructional errors that were so cumulatively prejudicial that they deprived Jackson of a fair trial.

We affirm.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly