STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2005
v	No. 256066 Oakland Circuit Court
RANDY R. SMITH, Defendant-Appellant.	LC No. 2003-193910-FC

Before: Cooper, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant Randy R. Smith appeals as of right his jury trial convictions of second-degree murder[1] and possession of a firearm during the commission of a felony.[2] Defendant was sentenced to 30 to 50 years' imprisonment for the murder conviction and to a consecutive term of two years' imprisonment for the felony-firearm conviction. As the trial court improperly failed to instruct the jury regarding the necessarily included lesser offense of involuntary manslaughter under MCL 750.329, we reverse defendant's convictions and remand for a new trial.

I. Factual Background

Defendant's convictions arose from the fatal shooting of sixteen-year-old Ashleigh Moomaw at his home in the early morning hours of December 7, 2003. Ms. Moomaw came to defendant's home that night with her friend, Jaimie Crawford, upon defendant's invitation. When Ms. Moomaw and Ms. Crawford first arrived, defendant had other guests, including Darrin Teed. Defendant showed Mr. Teed a .22 caliber gun that he kept in a kitchen drawer. Defendant then removed another handgun from his pocket. Defendant described the weapon to Mr. Teed as a .25 caliber that held six shots in the clip and a seventh in the barrel. Defendant removed the clip and Mr. Teed observed that the clip was fully loaded.

[1] MCL 750.317.

[2] MCL 750.227b.

Shortly thereafter, everyone departed, leaving Ms. Moomaw and Ms. Crawford alone with defendant. Defendant and Ms. Moomaw sat together on a couch in the living room. Ms. Crawford testified that she twice saw defendant point a gun at Ms. Moomaw's head and heard him tell her to repeat, "Say I won't do it." Although Ms. Crawford testified that defendant's conduct made her feel uncomfortable, she testified that Ms. Moomaw did not appear frightened. Ms. Crawford testified that she glanced away briefly and heard a single gunshot. When she looked back, Ms. Crawford saw Ms. Moomaw lying motionless on the floor while defendant stood over her with the gun still in his hand. Defendant told Ms. Crawford that they needed to leave the house and asked her to tell people that Ms. Moomaw shot herself. Defendant and Ms. Crawford initially left the house together on foot. They eventually separated and Ms. Crawford ran to the home of a friend where she called the police.

The medical examiner testified that Ms. Moomaw died within minutes of being shot. Investigators later discovered .25 and .22 caliber ammunition in defendant's living room and a .22 caliber pistol in his backyard. Five houses away, they discovered the discarded .25 caliber gun, a paper towel, and $110. The .25 caliber gun still had four live rounds in the clip and one in the chamber, and the safety was off. Subsequent tests revealed that the weapon functioned properly and only fired when at least seven pounds of pressure was applied to the trigger.

II. Other Act Evidence

Defendant first challenges the trial court's admission of evidence that he shot at and threatened others with guns on prior occasions.[3] The prosecution sought the admission of this evidence prior to trial to challenge defendant's assertion that he was inexperienced with firearms and that the shooting was accidental. The prosecution further argued that it intended to use this evidence to establish defendant's knowledge and familiarity with firearms.

Generally, a trial court's decision to admit evidence will be reversed only for an abuse of discretion.[4] However, when a trial court's decision regarding the admission of evidence involves a preliminary question of law, this Court reviews the issue de novo.[5] Evidence of other bad acts is inadmissible to prove an individual's propensity to act in conformity therewith.[6] But such evidence may be admissible to show "proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ."[7] We evaluate the admission of other acts evidence by considering if: (1)

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[3] Defendant also argues in his brief on appeal that the prosecutor improperly and repeatedly attempted to elicit testimony from Ms. Crawford that Ms. Moomaw told her that defendant had once shot a firearm from the window of her car. Defendant failed to properly present this issue for our review by raising it in the statement of questions presented. See *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). However, we note that the trial court sustained defense counsel's objections and cautioned the prosecutor to change his line of questioning.

[4] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[5] *Id.*

[6] MRE 404(b)(1); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

[7] MRE 404(b)(1).

it was offered for a proper purpose under MRE 404(b); (2) it was relevant; (3) its probative value was not substantially outweighed by unfair prejudice; and (4) a limiting instruction was requested and provided by the trial court.[8]

The trial court granted the prosecution's motion to present evidence regarding three prior incidents in which defendant threatened other individuals. At trial, however, the prosecution only questioned witness Nathan Pellow regarding an incident in November of 2003.[9] Mr. Pellow testified that he confronted defendant at a party regarding an ongoing dispute. As Mr. Pellow walked toward his car, defendant called out to him. When Mr. Pellow turned around, defendant fired three shots over Mr. Pellow's head. The trial court immediately cautioned the jury that Mr. Pellow's testimony was only admissible to establish that defendant acted with purpose (rather than by mistake or accident) and to show that defendant was knowledgeable and familiar with firearms.

As defendant alleged that his inexperience with firearms resulted in Ms. Moomaw's accidental shooting, contradictory evidence establishing that he intentionally and knowingly shot a gun in the past was relevant and material.[10] As defendant has not established that the prejudicial effect of this evidence substantially outweighed its probative value, the trial court properly granted defendant's motion to elicit this testimony.

III. Appeal to the Jury's Sympathy

Defendant also asserts that the prosecutor improperly appealed to the jury's sympathy for the victim in opening statement and closing argument. Defendant further contends that defense counsel was ineffective for failing to object. During opening statement, the prosecutor informed the jury that Ms. Moomaw was buried on her seventeenth birthday and accused defendant of causing "the tragic death of a young girl with a bright future." In closing, the prosecutor argued that Ms. Moomaw had been "a daughter, a granddaughter, a sister, a friend" during her life, but was now only a memory.

We review claims of prosecutorial misconduct on a case by case basis, examining any remarks in context, to determine if the defendant received a fair and impartial trial.[11] A prosecutor is not permitted to appeal to the jury's sympathy for a victim.[12] However, a

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[8] *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994); see also *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

[9] The prosecution also sought to elicit testimony from defendant's former girlfriend, Christina Lauria, that defendant had previously pointed a gun at her and said, "Say I won't." The prosecution also intended to question Ms. Lauria about an incident in which defendant threatened another young woman in her presence. At trial, the prosecution only asked Ms. Lauria whether she saw defendant with a weapon on the evening of the murder. On cross-examination, however, defense counsel elicited testimony regarding defendant's prior similar acts.

[10] See *People v Golochowicz*, 413 Mich 298, 315-316; 319 NW2d 518 (1982).

[11] *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

[12] *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001).

prosecutor is not required to couch his or her arguments in the blandest terms.[13] While these comments were emotionally charged, they formed only a small portion of the prosecutor's overall argument. The prosecutor properly argued that the evidence established defendant's guilt beyond a reasonable doubt.[14] Therefore, these isolated comments did not deprive defendant of a fair trial.

Furthermore, defendant has not overcome the presumption that defense counsel provided effective assistance. Absent a *Ginther*[15] hearing, our review is limited to plain error on the existing record affecting defendant's substantial rights.[16] To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently.[17] Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.[18] Although defense counsel did not object to the prosecutor's comments, he adequately addressed them in his own arguments.[19] We will not second-guess that strategy with the benefit of hindsight.[20]

IV. Lesser Included Offense Instruction

We agree with the defendant that the trial court's denial of his requested jury instruction for involuntary manslaughter, pursuant to MCL 750.329, amounts to reversible error. We review a defendant's claim of instructional error de novo.[21] Pursuant to the Michigan Supreme Court's opinion in *People v Cornell*,[22] a trial court may only instruct the jury on necessarily included lesser offenses, *not* cognate lesser offenses.[23] The determination of whether an offense is a necessarily included lesser offense is a question of law that we also review de novo.[24] "Necessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense," and, therefore, it would be impossible to commit the greater offense without first committing the lesser.[25] A cognate lesser offense shares several

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[13] *Aldrich*, *supra* at 112.

[14] *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

[15] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[16] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

[17] *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

[18] *Id.* at 600.

[19] Defense counsel argued that the jury's verdict must be based on the evidence, not sympathy.

[20] *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

[21] *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005).

[22] *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002).

[23] *Id.* at 357-359; *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002).

[24] *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

[25] *Mendoza*, *supra* at 532; *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001).

of the same elements with, and is of the same class as, the greater offense, but contains some elements distinct from the greater offense.[26]

The trial court properly instructed the jury regarding the charged offense of second-degree murder. The court also instructed the jury regarding the prosecution's alternate charge of involuntary manslaughter under MCL 750.321[27] based on the theory of gross negligence.[28] However, the trial court denied defendant's requested instruction regarding involuntary manslaughter under MCL 750.329. We note that the prosecution initially charged defendant with violating this statutory section, as an additional lesser offense to murder, but dismissed the charge prior to trial. The prosecution has broad discretion to choose what charges to bring against a defendant.[29] In this case, however, the trial court was required to instruct the jury regarding this dismissed charge upon defendant's request.

In *People v Mendoza*,[30] the Michigan Supreme Court reversed long-standing precedent and determined that manslaughter, both voluntary and involuntary, is a necessarily included, rather than cognate, lesser offense of murder.[31] The Court found that the lesser mens rea

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[26] *Mendoza*, *supra* at 532; *Bearss*, *supra* at 627.

[27] The common-law offense of involuntary manslaughter is codified in this statutory section.

[28] The court instructed the jury as follows:

> You may also consider the lesser charge of involuntary manslaughter. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the Defendant caused the death of Ashley (sic) Ann Moomaw. That is that Ashley Ann Moomaw died as a result of a gunshot wound to the head. Second, in doing the act that caused Ashley Ann Moomaw's death, the Defendant acted in a grossly negligent manner.
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> Gross negligent (sic) means more than carelessness. It means wilfully disregarding results to others that might follow from an act or failure to act. In order to find that the Defendant was grossly negligent, you must find each of the following three things beyond a reasonable doubt. First, that the Defendant knew of the danger to another. That is he knew there was a situation that required him to take ordinary care to avoid injuring another. Second, that the Defendant could have avoided injuring another by using ordinary care. Third, the Defendant failed to use ordinary care to prevent injuring another reasonable (sic). When, to a reasonable person, must have been apparent (sic) that the result was likely to be serious injury.

[29] *People v Venticinque*, 459 Mich 90, 100-101; 586 NW2d 732 (1998); *People v Yeoman*, 218 Mich App 406, 413-414; 554 NW2d 577 (1996).

[30] *Mendoza*, *supra*.

[31] *Id.* at 536 n 7, 540. See *People v Heflin*, 434 Mich 482, 496-497 & n 10; 456 NW2d 10 (1990), citing *People v Jones*, 395 Mich 379, 392-393; 236 NW2d 461 (1975); *People v Beach*, 429 Mich 450, 476; 418 NW2d 861 (1988); *People v Van Wyck*, 402 Mich 266, 269; 262 NW2d

(continued…)

required for involuntary manslaughter is included in the greater mens rea of murder.[32] Pursuant to *Mendoza*, "[w]hen 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."[33]

While the court's instruction regarding involuntary manslaughter under MCL 750.321 was based upon the charges brought by the prosecution, defendant's requested instruction was supported by a rational view of the evidence. Involuntary manslaughter under MCL 750.321 "'is a catch-all concept including all manslaughter not characterized as voluntary.'"[34] It includes every unintentional killing, committed without malice and without justification or excuse.[35] MCL 750.329 provides:

> Death from wound, etc., from firearm pointed intentionally, but without malice—Any person who shall wound, maim or injure any other person by the discharge of any firearm, pointed or aimed, intentionally but without malice, at any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter.[36]

The statute provides that a particular act—intentionally aiming a firearm—that results in an unintentional death falls within the general category of involuntary manslaughter.[37] Defendant

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(…continued)

638 (1978) (all finding manslaughter to be a cognate lesser offense of murder).

[32] *Mendoza*, *supra* at 540-541. According to pre-*Mendoza* caselaw, the mens rea for each offense was separate and distinct, making the offenses cognate. See *Van Wyck*, *supra* at 269.

[33] *Mendoza, supra* at 541 (emphasis added).

[34] *People v Holtschlag*, 471 Mich 1, 6-7; 684 NW2d 730 (2004), quoting Perkins & Boyce, Criminal Law (3d ed), p 105.

[35] *Id.* at 7.

[36] MCL 750.329.

[37] The standard jury instruction for involuntary manslaughter under MCL 750.329 provides:

> (1) [The defendant is charged with the crime of/You may also consider the lesser charge of] involuntary manslaughter. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
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> (2) First, that the defendant caused the death of [*name deceased*], that is, [*name deceased*] died as a result of [*state alleged act causing d*eath].
>
> (3) Second, that death resulted from the discharge of a firearm. . . .
>
> (4) Third, at the time the firearm went off, the defendant was pointing it at [*name deceased*].
>
> (5) Fourth, at that time, the defendant intended to point the firearm at [*name deceased*].

(continued…)

committed that particular act in this case. Although defendant's state of mind was in dispute, Ms. Moomaw was killed when defendant intentionally aimed a firearm at her head. Had the requested instruction been given, the jury could have determined from the evidence that defenant intentionally aimed the firearm without intending to harm Ms. Moomaw.

We note that *Mendoza* appears to contradict *Cornell*; however, we are bound by these rulings of the Supreme Court and are not permitted to question their apparent inconsistency.[38] The trial court violated the mandate of *Mendoza* by rejecting defendant's requested manslaughter instruction. Accordingly, we must reverse defendant's convictions and remand for a new trial. On remand, the prosecutor has the authority to charge the defendant with any applicable lesser offense.[39] Yet, that authority does not limit the defendant's right to request, and the trial court's duty to give, an instruction regarding necessarily included lesser offenses supported by a rational view of the evidence. The court must instruct the jury regarding involuntary manslaughter based on a theory of gross negligence should the prosecutor again raise that charge. Consistent with *Mendoza*, however, the trial court must also instruct the jury regarding the more specific, and more appropriate, charge of involuntary manslaughter under MCL 750.329.[40]

V. Sentencing

Although we are reversing defendant's convictions, we will address defendant's challenge to the scoring of his sentencing guidelines, as the issue will likely arise on remand. Defendant contends that the trial court violated the dictates of *Blakely v Washington*[41] by basing his sentence on facts that had not been determined by the jury beyond a reasonable doubt.[42] Defendant challenges his score of twenty-five points for offense variable (OV) 13, continuing pattern of criminal behavior, based on the testimony of Mr. Pellow and Ms. Lauria regarding defendant's alleged, uncharged assaults against them.[43] The trial court also scored OV 5,

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(…continued)

> (6) Fifth, that the defendant caused the death without lawful excuse or justification. [CJI2d 16.11.]

[38] *People v Mitchell*, 428 Mich 364, 369; 408 NW2d 798 (1987).

[39] *Venticinque*, *supra* at 100-101; *Yeoman*, *supra* at 413-414.

[40] As we have determined that defendant is entitled to a new trial, we need not consider his challenge to the sufficiency of the evidence.

[41] *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

[42] The trial judge indicated at sentencing that defendant was sentenced to 31 to 50 years' imprisonment. However, defendant's judgment of sentence indicates that his minimum sentence is only 30 years. As defendant is entitled to a new trial and subsequent resentencing, we need not consider this error.

[43] MCL 777.43(1)(b). OV 13 may be scored twenty-five points when "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." *Id.* In scoring this variable, the court may consider all offenses committed within five years of the sentencing offense, regardless of whether they resulted in a conviction. MCL 777.43(2)(a).

psychological injury to the victim's family, at fifteen points, based on the testimony of Ms. Moomaw's father regarding the pain he has felt since his daughter's death.[44]

Contrary to defendant's assertion, the trial court could properly consider this evidence in scoring the guidelines variables. A majority of the Michigan Supreme Court has decided that *Blakely* does not apply to Michigan's indeterminate sentencing guidelines in which the maximum sentence is set by law.[45] Furthermore, the rules of evidence are inapplicable at sentencing proceedings.[46] Therefore, even if defendant successfully challenged the admission of this evidence at trial, it could still form a basis for his ultimate sentence. Accordingly, should defendant be convicted on remand, the trial court may consider these factors in determining his sentence.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello

[44] MCL 777.35. OV 5 may be scored at fifteen points when defendant's conduct caused "serious psychological injury" to the victim's family that "may require professional treatment," regardless of whether treatment was actually sought. *Id.*

[45] *People v Claypool,* 470 Mich 715, 730 n 14; 684 NW2d 278 (2004) (Justices Corrigan, Cavanagh, Weaver, and Young concurred with Justices Taylor and Markman writing for the Court); *People v Drohan,* 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005).

[46] MRE 1101(b)(3) (only privileges apply at sentencing).