

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH D. CUNNINGHAM,

Defendant-Appellant.

UNPUBLISHED
September 7, 1999

No. 209532
Wayne Circuit Court
LC No. 97-500239

Before: Hoekstra, P.J., and O’Connell and R.J. Danhof,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We affirm.

Defendant first argues that the trial court erred when it failed to instruct the jury that intent was an essential element of voluntary manslaughter. Because defendant failed to object to and, in fact, expressed satisfaction with the trial court’s instructions, this issue is not preserved for appellate review absent manifest injustice. *People v Hess*, 214 Mich App 33; 543 NW2d 332 (1995). Viewing the trial court’s instructions as a whole, we find no error. The trial court instructed the jury regarding the crime of second-degree murder and then immediately thereafter instructed the jury regarding the crime of voluntary manslaughter. Because the manslaughter instruction—which was consistent with CJI2d 16.9—directly followed the second-degree murder instruction, we find it highly unlikely that the jury would have been confused or misled in finding the necessary intent for manslaughter. *People v Vicuna*, 141 Mich App 486; 367 NW2d 887 (1985). Accordingly, no manifest injustice occurred.

Defendant also argues that the trial court erred in failing to instruct the jury sua sponte as to the offense of involuntary manslaughter. Again, we find no error. Defendant’s theory of the case was that he acted in self-defense.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

A defendant who relies entirely upon the defense of self-defense cannot expect the trial judge to instruct the jury regarding . . . involuntary manslaughter, a

crime neither supported by the evidence nor presented to the jury by the defendant or prosecutor. A holding to the contrary defies both logic and common sense. We do not imply that a defendant may not maintain inconsistent defenses. However, a trial court need not instruct the jury on inconsistent theories when neither party produces a modicum of evidence in support of a particular theory. [*People v Heflin*, 434 Mich 482, 503-504; 456 NW2d 10 (1990). Citations omitted.]

Accordingly, the trial court did not err in failing to instruct the jury on the offense of involuntary manslaughter, where no evidence was presented to support such a charge.

Defendant also argues that the trial court erred when it re-instructed the jury, pursuant to its request, on the offense of second-degree murder without, at the same time, re-instructing the jury on the offense of voluntary manslaughter. Defendant is mistaken. The jury initially requested re-instruction on the offense of voluntary manslaughter and then, fifteen minutes later, requested re-instruction on the offense of second-degree murder. Under the circumstances, the trial court did not abuse its discretion in denying defendant's request to re-instruct the jury on the offense of voluntary manslaughter at the time it re-instructed the jury on the offense of second-degree murder. See *People v Parker*, 230 Mich App 677, 681; 584 NW2d 753 (1998).

Lastly, defendant argues that the trial court erred in denying his motion for a mistrial after a prosecution witness testified, in response to a question whether defendant had instructed her to "take the fifth" to avoid testifying against him, that defendant had threatened her life in an attempt to dissuade her from testifying. We find no error. A defendant's threat against a witness is generally admissible as evidence of conduct that demonstrates consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell
/s/ Robert J. Danhof