

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS DON PONCE,

Defendant-Appellant.

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UNPUBLISHED

April 4, 2000

No. 200612

Recorder's Court

LC No. 95-000940

Before: Cavanagh, P.J. and White and Talbot

PER CURIAM.

White, J. (dissenting).

I agree with the majority's recitation of the law, but respectfully come to a different conclusion regarding its application to the instant case. I conclude that defendant was entitled to the lesser offense instructions and that the failure to give the instructions cannot be regarded as harmless. The prosecution's theory was that defendant was attempting to rob the victim when the victim attempted an escape and defendant then shot him. While defendant's basic theory was accident, he acknowledged that he was carrying a loaded gun that was accessible to others. He asserted that the victim called him over to his car, and that when he approached, the victim grabbed his gun. A struggle ensued inside the car, one or the other of them hit the gear shift, the car lurched backwards, and the gun discharged, causing the victim's death.

The jury apparently rejected the prosecution's theory, because defendant was convicted of second-degree, rather than felony, murder. Neither side's version of the events was consistent with the lesser charge of voluntary manslaughter, which was given. The jury may have believed defendant's testimony but nevertheless have been reluctant to acquit on the basis of accident, where defendant was the one who created the situation by approaching a stranger with a visible, accessible and loaded gun, albeit at the stranger's request,<sup>1</sup> and then engaging in a physical

struggle over the gun in close quarters. Had the jury been given the option of convicting defendant of a lesser charge consistent with his theory of the case, it might have done so. *People v Richardson*, 409 Mich 126; 293 NW2d 332 (1980).

/s/ Helene N. White

<sup>1</sup> While subject to different interpretations, part of the prosecutor's argument could have been understood to urge that the requisite mental state for murder, including "creating a risk of death or great bodily harm" could be supported by defendant's having carried a loaded gun to the bar with him. The prosecutor argued:

. . . We know that the Defendant had been of those three state [sic] of mind, either the intent to do great bodily harm or attempt to create a risk of death or great bodily harm because the Defendant told us that he had a deadly and dangerous weapon that he carried with him to the bar. That deadly and dangerous weapon was pulled with one in the chamber and in addition to that the Defendant had ammunition to back him up in the event he ran out of ammunition already loaded in the firearm.

To the extent such an argument was implied, it supported giving the lesser offense instructions.