

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK A. JACKSON,

Defendant-Appellant.

UNPUBLISHED

September 18, 2001

No. 202140

Recorder's Court

LC No. 96-002797

Before: Markey, P.J., and Jansen and Zahra, JJ.

JANSEN, J. (*dissenting*).

I must respectfully dissent from part IV of the majority's opinion. I conclude that the missing jury instruction transcript constitutes an issue that compels reversal for a new trial.

As noted by the majority, the entire jury instruction transcript is missing and obviously can no longer be reproduced since the court reporter transcribing the stenographer's notes averred that the entire third pack containing the jury instructions in defendant's case were missing. Moreover, the parties have not been able to settle the record. As also noted by the majority, Judge Kenny's ruling that codefendant Holston's jury instructions shall serve as the settled record of defendant Jackson's jury instruction is clearly erroneous for the obvious reasons that defendant and codefendant Holston were not charged with identical offenses, and that defendant did not testify at trial while codefendant Holston testified in his own behalf before his jury.

I cannot, however, accept the majority's conclusion that "there is only one reasonable conclusion regarding the settlement of the record of the jury instructions." The majority's analysis is based on assumptions and inferences upon inferences. I note the following testimony taken from the evidentiary hearing held in May and June 2000. Nancy Westveld, the trial prosecutor, acknowledged that defense counsel objected to the false exculpatory statement as evidence instruction requested by the prosecutor. However, Westveld also indicated that she was *not* present during trial when the trial court gave the jury instructions. Lawrence Shulman, the trial prosecutor who stood in for Westveld for the jury instructions, indicated that he had no independent recollection of the jury instructions. Wright Blake, trial counsel for defendant, stated that he had no independent recollection of the jury instructions. Blake, however, did recall that he requested an instruction on voluntary manslaughter as a lesser included offense that was not given and that he objected to the false exculpatory statement instruction as requested by the prosecutor. Finally, Judge Kym Worthy, the trial judge, testified that she had no independent

recollection of the jury instructions. Judge Worthy, however, did recall that defense counsel requested a voluntary manslaughter instruction (that was not given) and that defense counsel objected to the false exculpatory statement instruction. It should perhaps be emphasized that the hearing was held 3 ½ years after the trial; therefore, it is hardly surprising that there was really no independent recollection of the jury instructions by any of the parties involved.

The rules surrounding a missing trial transcript were most recently summarized in *People v Federico*, 146 Mich App 776, 799-800; NW2d (1985):

The inability to obtain the transcripts of a criminal proceeding may impede a defendant's right to appeal to an extent that a new trial must be ordered. . . . Where only a portion of the trial transcript is missing, the surviving record must be reviewed in terms of whether it is sufficient to allow evaluation of defendant's claim of appeal. The sufficiency of the record depends on the questions that must be asked of it.

There need not be a rule mandating a new trial when a jury instruction transcript cannot be provided to justify reversal in this case. Here, it is clear that the record was not successfully settled on remand because defendant's jury instructions could not have been identical to codefendant Holston's jury instructions. Moreover, there is no transcript available, nor is there any transcript whatsoever for this Court to review relative to the jury instructions. The instructions that Judge Worthy *intended* to give is, with all due respect, irrelevant since it is the task of a reviewing court to review the actual record for error. I do not see how this Court can hold as a matter of law, with no record to review, that Judge Worthy gave the instructions that she indicated at the hearing she would have given. Thus, the surviving record is simply insufficient for any type of meaningful review. See, *United States v Malady*, 960 F2d 57, 59 (CA 8, 1992) (To obtain reversal, a defendant must show that the missing part of the transcript specifically prejudices the appeal and prejudice exists when the appellate court cannot determine whether the trial court committed reversible error).

Consequently, I find that it is impossible for either defendant or this Court to review the regularity of the jury instructions. This is not a situation where the record can be reconstructed, where the surviving record is sufficient to evaluate a claim of instructional error, or where it is clear that there were no objections posed below to the trial court's instructions. Therefore, to insure defendant's constitutional right to a trial by jury and his right to appeal in a criminal case, Const 1963, art 1, § 20, I would reverse defendant's convictions and remand for a new trial. See *People v Horton (After Remand)*, 105 Mich App 329, 331; 306 NW2d 500 (1981).

/s/ Kathleen Jansen