

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD J. MENDOZA,

Defendant-Appellant.

UNPUBLISHED

October 9, 2001

No. 220272

Wayne Circuit Court

LC No. 97-010292

Before: Bandstra, C.J., and Whitbeck and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a term of twenty-five to forty-five years' imprisonment for the murder conviction, to be preceded by the mandatory two-year term for felony-firearm. He appeals as of right. We reverse and remand for a new trial.

I

Defendant argues that the trial court erred when it refused to instruct on the lesser offenses of voluntary manslaughter, involuntary manslaughter, and careless, reckless, or negligent discharge of a firearm. With regard to requested lesser offense instructions, "[t]his Court reviews the record adduced at trial to determine whether the evidence was sufficient to convict the defendant of a cognate lesser included offense." *People v Sullivan*, 231 Mich App 510, 517; 586 NW2d 578 (1998). If the evidence would have supported conviction of a cognate lesser offense, the trial court is required to instruct on that offense if requested. *Id.* at 517-518.

With respect to defendant's claim concerning instruction on the offense of involuntary manslaughter, we disagree with defendant that the elements of voluntary manslaughter were supported by the evidence at trial, and thus do not find that the trial court erred in refusing to give that instruction. "Voluntary manslaughter is an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to cool." *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995). It is the element of provocation that distinguishes the offense of manslaughter from murder. "The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason." *Sullivan, supra* at 518. Where there is no

evidence from which a reasonable person could find such provocation, a voluntary manslaughter instruction is not supported. In this case, there was no evidence from which a reasonable person could find adequate provocation.

Contrary to defendant's contention, nothing in witness Jess Fuson's testimony, or any reasonable inference to be drawn from it, indicates that the victim provoked either defendant or his codefendant, Ivan Tims, to kill in the heat of passion. Fuson had no direct knowledge concerning the events which transpired inside the house. He simply heard noises and a gunshot, then witnessed defendant and Tims being forcefully pushed from the home. While additional shots were fired thereafter, it is pure speculation to conclude that the shooting was a result of reasonable provocation. Defendant cites no authority to support the proposition that the victim's actions in self-defense, i.e., ejecting defendant and his codefendant from the house, is an act that can constitute adequate provocation to reduce murder to manslaughter. Similarly, neither defendant's statement nor the testimony of the victim's nephew, Thurman Chillers, supports a finding that there was adequate provocation to sustain a conviction for voluntary manslaughter. Chillers specifically testified that defendant entered the house and asked the price of an ounce of marijuana. After learning the price, he left the house allegedly to get more money and returned only a few moments later with Tims. Defendant then immediately drew a weapon and pointed it at the victim, who was unarmed. Such testimony is insufficient to support a finding that the victim provoked the shooting of the weapon in a manner contemplated by a voluntary manslaughter instruction.

Defendant's statement also revealed no evidence of provocation or a hot-blooded killing. He claimed that he heard tussling while engaged in a drug transaction and that, when he turned around, he saw the victim and Tims struggling over a gun. Defendant claimed he did not know whose gun they were fighting over and made no statement about how or why the fight started. The evidence could not have supported a finding that there was an intentional killing, which occurred as the result of adequate provocation. The trial court did not err in failing to give an instruction on voluntary manslaughter.

The trial court did err, however, when it refused to instruct on involuntary manslaughter. The elements of involuntary manslaughter are defined by common law:

Involuntary manslaughter is the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty. [*People v Clark*, 453 Mich 572, 577-578; 556 NW2d 820 (1996), quoting *People v Ryczek*, 224 Mich 106, 110; 194 NW 609 (1923).]

Defendant's request for an instruction on common-law involuntary manslaughter was premised on his theory of the case, i.e., that the fatal bullet was discharged accidentally. Therefore, we consider whether there was sufficient evidence from which the jury could have concluded that the victim's death was unintended and occurred while defendant was engaged in an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm. See *People v Beach*, 429 Mich 450, 455; 418 NW2d 861 (1988).

If the jury believed defendant's statement, which was admitted into evidence by the prosecutor, there was sufficient evidence to support an instruction under this theory. In his statement, defendant indicated that he was not engaged in any activity that would naturally tend to cause death or great bodily harm. Specifically, defendant claimed that after entering the house he heard tussling and turned to see the victim and Tims engaged in a struggle over a gun. Defendant apparently did not know whose gun the two were struggling over or what instigated the scuffle. As the two fought, however, defendant heard shots and then watched as the victim's nephew produced a silver revolver, which he pointed toward both Tims and the victim. According to defendant, as he attempted to knock the revolver away, the victim's nephew pulled the trigger.¹ These facts, if believed by the jury, could support a finding that the victim's killing was an unintended death, without malice, and not caused by any action of defendant naturally tending to cause death. In both *People v Richardson*, 409 Mich 126, 131-133; 293 NW2d 332 (1980), and *People v Ora Jones*, 395 Mich 379, 384-385; 236 NW2d 461 (1975), the defendants claimed that the shootings were accidental while the prosecutors charged that the shootings were intentional. The Court found in both cases that an involuntary manslaughter instruction was warranted. Similarly, based on the record here, an involuntary manslaughter instruction was warranted as well, and the trial court's failure to give such instruction was not harmless.

Generally, constitutional errors that are not structural in nature do not require automatic reversal, but are reviewed to determine if the beneficiary of the error can prove that the error is harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994). In order to demonstrate that an error is harmless beyond a reasonable doubt, it must be proved that, when assessed in the context of the other evidence presented at trial, there was no reasonable possibility that the error contributed to the conviction. *Id.* at 406.

In this case, the prosecutor has made no attempt to demonstrate that the failure to give the requested instruction was harmless beyond a reasonable doubt. We conclude that there is a reasonable possibility that the error contributed to the conviction. Defendant was denied the opportunity to be held criminally culpable of a lesser offense that was supported by the evidence and which encompassed his theory of the case. *Richardson, supra*; *Jones, supra*. It is equally possible that the jury convicted defendant, not because they believed him to have committed murder, but because they believed him to be criminally culpable and had no choice but to convict of second-degree murder or allow him to go free. The error is not harmless where the jury rejected the primary charge and found defendant guilty of the least serious charge on which it was instructed. *People v Malach*, 202 Mich App 266, 277; 507 NW2d 834 (1993). Accordingly, the error requires reversal and a new trial.

We note that defendant also claims that the trial court should have instructed the jury in accordance with the elements of statutory involuntary manslaughter, MCL 750.329. We disagree.

¹ Additional evidence admitted at trial indicated that the victim was killed by a .22 caliber bullet that was traced to a nickel-plated revolver found in codefendant Tims' car.

Initially, we note that defendant failed to request an instruction based on MCL 750.329. “The failure of a trial court to instruct on any point of law is not grounds for setting aside a jury verdict unless such an instruction is requested by the accused.” *People v Truong*, 218 Mich App 325, 341; 553 NW2d 692 (1996), citing MCL 768.29; see also *People v Todd*, 186 Mich App 625, 631; 465 NW2d 380 (1990) (failure to request an instruction waives the issue whether such instruction should have been given). Further, we find that even had defendant requested such instruction, it was not supported by the evidence. As defined in MCL 750.329, statutory involuntary manslaughter is a very narrow criminal offense that occurs only where the victim died as a result of a wound from a weapon that was intentionally aimed, without malice, and accidentally discharged. See *People v Heflin*, 434 Mich 482, 504-505; 456 NW2d 10 (1990). In the instant case, whether accepting the sequence of events as testified to by the victim’s nephew, or that given by defendant in his statement to police, the evidence was not consistent with instruction on this offense. Under Chillers’ description of the incident, defendant intentionally pointed the weapon at the victim with malice. Under defendant’s description of the events, there was no intentional pointing of the weapon. Accordingly, the trial court was not required to present a jury instruction regarding statutory involuntary manslaughter.

Although defendant also raises the issue whether the trial court should have additionally instructed the jury on the lesser offense of careless, reckless, or negligent discharge of a firearm, MCL 752.861, we note that he has not briefed this issue and thus we are not obligated to address it. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). We nevertheless briefly address defendant’s concerns for the benefit of the parties on retrial.

MCL 752.861 provides that “[a]ny person who, because of carelessness, recklessness or negligence, but not wilfully or wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor” As noted above, a trial court need not accede to a request to instruct on a cognate lesser offense unless the evidence supports a conviction of that offense. *Sullivan, supra* at 517-518. Nothing in the description of events as testified to by Chillers or given by defendant in his statement to police would support defendant’s conviction of the requested offense, as a principal or otherwise. Under neither version of events was defendant in “immediate control” of the .22 caliber revolver from which the fatal shot was fired. Moreover, even accepting defendant’s description of the events as true, because he was not participating in a common criminal enterprise with Chillers, he cannot be held responsible under an accomplice theory of culpability. See *People v Pitts*, 84 Mich App 656, 659-660 (1978). Accordingly, the trial court did not err in refusing to instruct the jury on the lesser offense of careless, reckless, or negligent discharge.

II

Defendant next argues that the trial court abused its discretion when it failed to grant his challenge for cause concerning a juror whose brother and two close friends had been murdered. This issue is moot in light of our decision to reverse and remand for a new trial, as is defendant’s claim that the trial court improperly refused to allow him an additional peremptory challenge.

III

Defendant also argues that the prosecutor committed misconduct in her opening statement when she referred to the Columbine High School shootings, which occurred the day before trial in this matter began. We agree that the prosecutor's comments were improper. However, given our decision to remand for a new trial, we merely caution against such references on retrial.

IV

Defendant next argues that the trial court abused its discretion in refusing to admit certain exculpatory statements made by defendant in response to questioning by an officer collecting gunshot residue test samples. Defendant contends that MRE 106 allowed for admission of these statements. We do not agree.

MRE 106 provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

In *Moody v Pulte Homes, Inc.*, 423 Mich 150; 161-162; 378 NW2d 319 (1985), our Supreme Court quoted with approval this Court's observation that MRE 106 was "designed to prevent unfairness which may result if a statement is taken out of context." See *Moody v Pulte Homes, Inc.*, 125 Mich App 739, 747; 337 NW2d 283 (1983).

In this case, the statements at issue were exculpatory. Defendant completely denied possessing a weapon although he admitted to being around a weapon when it was fired. The statements were made in response to questions posed two days before defendant made his formal statement to police. Defendant argues on appeal that his answers to these questions, made for purposes of background information needed for the gunshot residue testing, put his formal statement into context. Defendant fails, however, to explain this leap of logic. The statements made when the gunshot residue samples were taken did not put defendant's formal statement into context. The statements had nothing to do with one another, and the former were not necessary to understand the latter. Fairness did not require that the test form, or defendant's statements set out therein, be admitted into evidence or that defendant's responses be considered along with the formal statement. The trial court's decision was not an abuse of discretion.²

² Defendant also argues that MRE 106 required admission of defense exhibit eight, defendant's medical records. Defendant argues that the trial court abused its discretion when it failed to admit the exhibit. This argument is wholly without merit as the trial court in fact admitted defense exhibit eight without objection from the prosecutor.

V

Finally, defendant argues that the trial court gave an erroneous instruction on reasonable doubt. We disagree. The trial court's instruction was identical to CJI2d 3.2. Recently this Court affirmed that use of CJI2d 3.2, even though it does not contain "moral certainty" language, does not constitute error. *People v Snider*, 239 Mich App 393, 420-421; 608 NW2d 502 (2000).

We reverse and remand for a new trial. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Donald S. Owens