STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 28, 2009
v	No. 284631 Macomb Circuit Court
CHAD PETER HOPKINS, Defendant-Appellant.	LC No. 07-002730-FC

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

PER CURIAM.

Following a jury trial, defendant was acquitted of second-degree murder and the lesser offense of involuntary manslaughter, but was convicted of careless, reckless, or negligent use of a firearm resulting in death, MCL 752.861, which is a misdemeanor punishable by not more than two years in prison. Defendant was also convicted of possession of a firearm during the commission of a felony MCL 750.227b. Defendant was sentenced to concurrent terms of 16 to 24 months for the reckless use conviction, and two years for felony firearm. He appeals by right. We affirm defendant's conviction of careless, reckless, or negligent use of a firearm resulting in death but vacate his conviction and sentence for felony-firearm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court erred by instructing the jury on the reckless use charge, asserting that that offense was a cognate lesser offense of the murder and manslaughter charges. A cognate lesser offense "shares some common elements with, and is of the same nature as, the greater offense, but also has elements not found in the [greater] offense." *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). Defense counsel requested the reckless use instruction as a lesser-included offense of involuntary manslaughter. We agree that reckless use is a cognate lesser offense since it includes an element not found in involuntary manslaughter, i.e., causing or allowing a firearm under one's immediate control to be discharged. Cf. MCL 752.861 and *People v Holtschlag*, 471 Mich 1, 21-22; 684 NW2d 730, remanded on other grounds 471 Mich 1202 (2004). Instructions on cognate lesser offenses are not permitted. *People v Cornell*, 466 Mich 335, 355; 646 NW2d 127 (2003); *Lowery*, *supra* at 173. Involuntary manslaughter does not necessarily involve the use of a firearm. However, in *People v Williams*, 412 Mich 711; 316 NW2d 717 (1982), the defendant charged with first-degree murder requested an instruction on accessory after the fact. The *Williams* Court noted that, "[a]ccessory after the fact is a separate and distinct offense not included in the original charge." The Court held:

> We regard the defendant' action in prevailing upon the trial court to instruct the jury on the charge of accessory after the fact to have been the equivalent of a motion to amend the information pursuant to [MCL 767.76, which deals with amendments to indictments]. The prosecutor voiced no objection and the trial court agreed to so instruct the jury, thus effectively amending the information. The defendant will not be heard to complain of the fact that the jury ultimately convicted him of a crime which his attorney argued should be an option for conviction by the jury and which defense counsel urged upon the jury as the only possible crime of which the defendant might be guilty. Since it was the defendant himself who was urging the extension of this option to the jury, he certainly cannot argue that an amendment of the information in this respect was unfair because of a lack of notice. [*Id*. at 714-715.]

Based on *Williams*, we conclude that defendant's request for the instruction on reckless use was the equivalent of a request to amend the information. "Because error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence, defendant has waived appellate review of this issue." *People v Griffin*, 235 Mich App 27, 46, 597 NW2d 176 (1999), overruled on other grounds *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007).

Defendant next argues that his conviction of felony-firearm conviction must be reversed. We agree. As a misdemeanor punishable by up to two years in prison, the reckless use conviction could not support the felony-firearm conviction. See *People v Baker*, 207 Mich App 224, 225; 523 NW2d 882 (1994). It was error to instruct the jury that this misdemeanor could relate to reckless use of a firearm. *Id*. Because defense counsel failed to object, we review for plain error affecting a substantial right. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"Although the commission or attempted commission of a felony is an element of the felony-firearm offense, it is not required that defendant be convicted of a felony or the attempt to commit a felony in order to be convicted of felony-firearm." *People v Bonham*, 182 Mich App 130, 135-136; 451 NW2d 530 (1989). Similarly, a defendant may be convicted of felony-firearm when only convicted of a misdemeanor as a lesser-included offense of a charged felony. *Id*. at 136; *People v Hooper*, 152 Mich App 243, 247; 394 NW2d 27 (1986).

Here, had the jury been properly instructed that the felony-firearm charge could pertain only to one of the charged felonies, a conviction on felony firearm would be upheld. *Bonham*, *supra*. However, unlike *Bonham*, the jury in this case was expressly advised that it could convict defendant of felony-firearm if it found that he had used the firearm in the commission of the misdemeanor. Because the instructional error pertained to a basic and controlling issue in the case, *Baker*, *supra* at 225, it seriously affected the fairness, integrity or public reputation of judicial proceedings, *Carines*, *supra* at 763-764.[1] We conclude that plain error affected defendant's substantial rights. Accordingly, we vacate defendant's felony firearm conviction.[2]

[1] The prosecution admits that the instruction was error, but claims defendant is not entitled to any relief because he waived this issue, see *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000); (continued…)

We affirm defendant's conviction of careless, reckless, or negligent use of a firearm resulting in death but vacate his conviction and sentence for felony-firearm. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

(…continued)

People v Leuth, 253 Mich App 670; 660 NW2d 322 (2002) by affirmatively expressing satisfaction with the instruction. However, the portion of the record that it relies upon for this assertion arose in the context of the trial court's reinstructing the jury, at their request, after having commenced deliberation. More importantly, the record also shows that despite defendant's suggestion that the instruction was improper, the prosecution argued for the at-issue instruction and the trial court agreed to give it with the qualification that if the claim turned out to be incorrect "the Court can overturn the [felony firearm conviction"]. Consequently, this claim is without merit.

[2] Although the parties have not briefed or argued whether retrial of the felony-firearm charge is possible, and the issue is not technically before us, we briefly address it. The Double Jeopardy Clauses of both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Davis*, 472 Mich 156, 160-161; 695 NW2d 45 (2005). Michigan's guarantee is substantially identical to, and so, should be construed consistently with that found in the Fifth Amendment. *Id*. at 161. Moreover, the federal Double Jeopardy Clause applies to the states through the Fourteenth Amendment. *Benton* v *Maryland*, 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969).

The Double Jeopardy Clause also protects a defendant's interests in the finality of judgments. *Yeager v United States*, 557 US ___; 129 S Ct 2360; ___ L Ed 2d ___; 2009 US LEXIS 4538 *15 (2009); *People v Anderson*, 409 Mich 474, 482-483; 295 NW2d 482 (1980). In order to protect the finality of judgments, the Double Jeopardy Clause incorporates the principle of collateral estoppel as a constitutional requirement. *Ashe v Swenson*, 397 US 436, 443-445; 90 S Ct 1189; 25 L Ed 2d 469 (1970). This means "the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager*, *supra*, 2009 US LEXIS 4538 *17. Further, "'when an issue of ultimate fact has once been determined by a valid and final judgment' of acquittal, it 'cannot again be litigated' in a second trial for a separate offense." *Id*., quoting *Ashe*, *supra* at 443. In the present case, the jury found defendant not guilty as to the only possible felony-firearm predicate felonies of murder and involuntary manslaughter. Consequently, the collateral estoppel component of the Double Jeopardy Clause precludes retrial of the felony-firearm charge. Defendant may not be required to "run the gauntlet" twice regarding whether he committed murder or involuntary manslaughter. *Ashe*, *supra* at 446.