STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION June 2, 2009
v	No. 281844 Genesee Circuit Court
ANGELO ROCHELLE MCMULLAN, Defendant-Appellant.	LC No. 01-008582-FC Advance Sheets Version

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

BANDSTRA, J. (*concurring in part and dissenting in part*).

I respectfully dissent from the majority's conclusion that the trial court did not err by failing to provide the jury the requested instruction on involuntary manslaughter as a necessarily included lesser offense. In all other respects, I concur with the majority opinion.

The Supreme Court most recently and comprehensively articulated our standard of review in *People v Silver*, 466 Mich 386; 646 NW2d 150 (2002). "[T]he failure to instruct the jury regarding . . . a necessarily lesser included offense is error requiring reversal . . . if, after reviewing the entire cause, the reviewing court is satisfied that the evidence presented at trial 'clearly' supported the lesser included instruction," *id*. at 388, meaning that there was "substantial evidence to support the requested lesser instruction" at trial. *Id*. at 388 n 2.

Reviewing the "entire cause," I begin by noting that the trial court erred by considering the request for the instruction on involuntary manslaughter under *People v Ryczek*, 224 Mich 106; 194 NW 609 (1923). The trial court relied on *Ryczek*'s description of the elements of involuntary manslaughter and concluded that, under the facts of this case, those elements could not be satisfied. However, as explained in *People v Holtschlag*, 471 Mich 1, 11; 684 NW2d 730 (2004), "*Ryczek's* description of involuntary manslaughter was never meant to define the *elements* of the crime of manslaughter." (Emphasis in original.) Most notably, the trial court here concluded that *Ryczek* prohibited an involuntary manslaughter instruction because the victim was killed in the context of a felony.[1] *Holtschlag* reasoned that, at least since *People v*

[1] The felony was defendant's alleged taking of money from the victim's pockets following the shooting. However, even if the *Ryczek* rule that a killing in the context of a felony could not be involuntary manslaughter was still good law, the jury might nonetheless have properly found
(continued…)

Aaron, 409 Mich 672; 299 NW2d 304 (1980), whether "a 'felony' has been committed is simply not dispositive in determining whether either 'murder' or 'manslaughter' has been committed and, thus, the 'felony' language in *Ryczek's* manslaughter description is essentially irrelevant." *Holtschlag*, *supra* at 10.

The crucial difference between second-degree murder (of which defendant was convicted) and involuntary manslaughter (concerning which the requested instruction was denied) is the presence or absence of malice. "[T]he only element distinguishing murder from manslaughter is malice. . . . [T]he elements of voluntary manslaughter are included in murder, with murder possessing the single additional element of malice." *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003).

"Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). In contrast, the killing of another, "committed with a lesser mens rea of gross negligence or an intent to injure, and not malice . . . is not murder, but only involuntary manslaughter." *Holtschlag*, *supra* at 21-22. In other words, conviction of involuntary manslaughter rather than murder is appropriate in such a "lesser mens rea" case because "the offender's mental state is not sufficiently culpable to reach the traditional malice requirements." *Mendoza*, *supra* at 541 (quotation marks and citation omitted).

Reviewing the evidence presented at trial, I conclude that no reasonable fact-finder could find that defendant did not shoot and kill the victim. However, the crucial question that remained was his state of mind in doing so.[2] There was ample evidence in the record from which a reasonable fact-finder could have concluded that defendant acted without malice. He and the victim, Jimmy Smith, had been longtime associates, using and selling controlled substances together for 30 years. On the evening of the altercation that resulted in Smith's death, he and defendant were arguing about a previous transaction in which Smith claimed that defendant had supplied him with fake Vicodin pills. Smith claimed that, as a result and in compensation for that, Smith should not be required to pay for cocaine that defendant had supplied to him, a proposition with which defendant vociferously disagreed. The resulting fistfight did not settle the matter as Smith still refused to give defendant the money he thought he was owed for the cocaine.

Defendant testified that he wanted to scare Smith into giving him the money, by threatening him with a gun. He testified that, at the time, he had ingested rock cocaine and that this made him feel like "a big man." Further, he testified that, earlier in the day, he had taken a dose of methadone, which he claimed provided a "high." A witness, Gregory McDowell,

(…continued)

defendant guilty of involuntary manslaughter if it believed his account that he did not take money from the victim.

[2] To the extent the trial court considered the malice question at all, it merely concluded, "Well, here, we know they're in a fight situation. Where there's a fight, there's malice." While the fact of the altercation between defendant and the victim is relevant in determining defendant's state of mind at the time he brandished the gun, it does not necessarily establish malice in that regard.

testified that he considered defendant to be under the influence of controlled substances because he fidgeted and paced. Further, the director of a methadone treatment center confirmed that defendant was in treatment at the time of the shooting. Defendant testified that he did not intend to shoot Smith and that he could not recall cocking the hammer or pulling the trigger to do so. He claimed that the gun merely "went off."

Following the shooting, the record shows that defendant took steps to assist Smith. Together with William Henry Russell, Jr., defendant laid Smith on the rear passenger seat of a car and took him to the emergency room entrance of a hospital. Russell testified that defendant had tears in his eyes at the time.

Notwithstanding all of this, a rational fact-finder could certainly have disbelieved defendant with respect to his intent and state of mind and concluded that the malice necessary to support a second-degree murder conviction existed at the time the gun was fired. That would be the proper analysis if defendant claimed that there was insufficient evidence to support the conclusion that he was guilty of second-degree murder. As the majority points out, for example, malice can be inferred simply from the use of a deadly weapon such as occurred here and a challenge to the second-degree murder conviction would properly be rejected. There was ample evidence to conclude that defendant acted with malice.

However, considering the argument defendant actually raises, I conclude that the evidence here was sufficient to allow a rational fact-finder to conclude otherwise, i.e., that defendant acted with a "lesser mens rea" and that his "mental state [was] not sufficiently culpable to reach the traditional malice requirements." *Holtschlag*, *supra* at 21-22; *Mendoza*, *supra* at 541 (quotation marks and citation omitted). Malice may be inferred from the use of a deadly weapon, but it does not have to be. A rational fact-finder could have believed defendant when he said that he did not intend to fire the weapon he was using merely to scare Smith, i.e., that he did not intend to do the act (firing the weapon) that caused Smith's death. That conclusion would be consistent with the long history defendant had with Smith, his attempts to help Smith following the shooting, his apparent grief at what had occurred and especially his corroborated accounts of being under the influence of drugs at the time the shooting occurred. As was the case with the defendant's "intoxication" in *People v Droste*, 160 Mich 66, 78-79; 125 NW 87 (1910), the fact-finder here might have concluded that, "at the moment" the gun discharged, defendant's drug use was sufficient "to rob his act of the necessary elements of murder." While *Droste* is an ancient precedent, its conclusion in this regard was recently cited with approval in *Mendoza*, *supra* at 542-543. This is not to say, of course, that the jury would have found a lack of malice; it is merely to say that, given the record, it could have. By failing to instruct the jury on involuntary manslaughter and thus precluding that possible outcome, the trial court erred.

I reject the prosecutor's arguments that any error in this regard was without prejudice to defendant. The prosecutor argues that "defendant fails to show plain error affecting his substantial rights" because "the trial court instructed the jury on the lesser offense of voluntary manslaughter." Apparently, the argument is that, because the fact-finder did not find defendant guilty of voluntary manslaughter, it would necessarily have also rejected involuntary manslaughter if it had been instructed to consider it. That argument overlooks the fact that voluntary manslaughter and involuntary manslaughter are different offenses with different elements. "In contrast to the case of voluntary manslaughter . . . the absence of malice in

involuntary manslaughter arises not because of provocation induced passion, but rather because the offender's mental state is not sufficiently culpable to reach the traditional malice requirements." *Mendoza*, *supra* at 541, quoting *United States v Browner*, 889 F2d 549, 553 (CA 5, 1989). The jury might well have concluded that there was no "provocation induced passion" to support a voluntary manslaughter conviction but that defendant's mental state nonetheless warranted a conviction of involuntary manslaughter.

Further, I reject the prosecutor's claim that, because the jury convicted defendant of second-degree murder, it necessarily found that defendant acted with malice, so that "an instruction on common law involuntary manslaughter would not have produced a different result." The prosecutor's argument here is that the jury would simply have acquitted defendant if it concluded that he acted without malice. That argument has been specifically rejected by our Supreme Court in *Silver*, *supra* at 393 n 7:

> One might argue that the jury would have acquitted defendant if it believed his testimony. However, this is too facile. The United States Supreme Court rejected such an argument in *Keeble v United States*, 412 US 205, 212-213; 93 S Ct 1993; 36 L Ed 2d 844 (1973), when it stated:
>
> "[I]f the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction . . . precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction."

The facts of this case are somewhat similar to those in *Silver*. At issue there was the state of mind of a defendant who had clearly and admittedly entered a residence without permission. *Id*. at 392. Nonetheless, the defendant claimed that he had no intent to steal or commit any other offense while in the dwelling. The trial court instructed the jury regarding first-degree home invasion but denied defendant's request for an instruction on the lesser included offense of breaking and entering without permission. *Id*. at 390. The Supreme Court reasoned that "[i]f the jurors believed defendant [acted without the appropriate criminal motive], they realistically could not act on [that belief] unless they had an instruction that gave them that choice. Not to give them an instruction that allowed them to agree with defendant's view of the events in this case undermines the reliability of the verdict." *Id*. at 393.

The same is true here. Consistently with the result in *Silver*, I would reverse defendant's conviction of second-degree murder and remand the case for a new trial by a properly instructed jury. *Id*. at 394.

/s/ Richard A. Bandstra