

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNATHAN POSEY,

Defendant-Appellant.

UNPUBLISHED

September 11, 1998

No. 198858

Recorder's Court

LC No. 96-000936

Before: Holbrook, Jr., P.J., and Wahls and Cavanagh, JJ.

MEMORANDUM.

Defendant appeals by right his conviction after a jury trial of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony ("hereinafter felony-firearm"), MCL 750.227b; MSA 28.424(2). We reverse and remand.

The charges arose out of the shooting death of Sean Mayers on September 14, 1995. Defendant admitted to shooting Mayers, but claimed he acted in self-defense. The jury was instructed as to the elements of second-degree murder, but the trial court erroneously gave SJI2d 16.8 on voluntary manslaughter, rather than SJI2d 16.9, which is the proper instruction when the manslaughter instruction is given as a lesser included offense. The instructions given did not differentiate between manslaughter and second-degree murder. Defendant failed to object to the instructions.

When read as a whole, jury instructions must adequately convey all the elements of the charged offenses, and must not exclude material issues, defenses, or theories if there is evidence to support them. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052; *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Manifest injustice occurs when an erroneous instruction pertained "to a basic and controlling issue in the case." *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

We conclude that there was evidence to support the manslaughter instruction under a theory of imperfect self-defense. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). Indeed, at trial the court and the prosecutor both acknowledged that the instructions on manslaughter as a lesser

included offense were applicable and should be given. The instructions given, however, did not explain the difference between second-degree murder and voluntary manslaughter. Therefore, given that the erroneous instructions concerned a basic issue in the case, defendant is entitled to a new trial before a properly instructed jury.¹

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ Myron H. Wahls

/s/ Mark J. Cavanagh

¹ Given our resolution of the jury instruction issue, defendant's challenge to the sentence imposed is moot and will not be addressed.