

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 204294

ERVIN EUGENE BELL,

Kalamazoo Circuit Court

LC No. 96-001154 FC

Defendant-Appellant.

Before: Whitbeck, P.J., and Cavanagh and Neff, JJ.

CAVANAGH, J. (concurring).

I concur in the result reached by the majority. I write separately, however, because I believe that the trial court erred in failing to instruct the jury on the defense of accident.

Jury instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is evidence in support. *People v Lynn*, 229 Mich App 116, 120; 580 NW2d 472 (1998). In reviewing an unpreserved claim of instructional error, we determine whether the erroneous or omitted instruction pertains to a basic and controlling issue in the case. See *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

The majority concludes that the defense of accident was not a basic and controlling issue in the case because the defense focused on the lack of premeditation in an effort to avoid a first-degree murder conviction. However, defendants in criminal cases are entitled to raise inconsistent defenses. *People v Hansma*, 84 Mich App 138, 145; 269 NW2d 504 (1978). Furthermore, at trial, defense counsel argued that the gun discharged accidentally during both opening and closing arguments. Defendant testified that the shooting was an accident; he had “slapped” the victim with the gun and it went off. Accordingly, I disagree with the majority’s conclusion that whether the shooting was accidental was not a basic and controlling issue in the case.

The majority also finds that an accident instruction would not have been appropriate because defendant’s own version of the events at issue demonstrate the mens rea for second-degree murder. However, defendant did not testify that he acted in wanton and wilful disregard

of the obvious likelihood of causing death or great bodily injury. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Defendant was entitled to have the question of his intent determined by a properly instructed jury.

However, despite my belief that the trial court erred in failing to instruct on the defense of accident, I agree with the majority that reversal is not warranted. A plain, unpreserved error is harmless unless the error could have been decisive of the outcome. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994). In the present case, three witnesses testified that defendant fired the gun intentionally, the forensic evidence indicated that the gun was not in contact with the victim's head when the fatal shot was fired, and an expert testified that a safety feature prevented the gun from being fired without the trigger being pulled. After considering this evidence, I conclude that the trial court's failure to instruct on the defense of accident, while error, was not decisive of the outcome, and hence reversal is not required.

/s/ Mark J. Cavanagh