STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFERY J. WIGGINS,

Defendant-Appellant.

UNPUBLISHED
December 7, 1999

No. 209523
Recorder's Court
LC No. 97-003456

Before: White, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to consecutive terms of 7 to 22 ½years' imprisonment for the manslaughter conviction and two years' imprisonment for the felony-firearm conviction. We reverse and remand for a new trial.

On appeal, defendant argues that the trial court's instructions to the jury were erroneous and that the trial court's instructions pierced the veil of impartiality. Specifically, defendant takes issue with the trial court's emphasis on the fact that defendant could have been charged with first-degree murder and that the trial court erred in instructing that defendant could be found guilty if the jury determined that his use of a gun created a high risk of death or great bodily harm and by using a hypothetical based on his alleged actions. We agree with defendant that the trial court's instructions were erroneous and that the error was not harmless.

This case arises out of an incident that occurred on April 17, 1997, in the city of Detroit. Defendant was married to Onita Wiggins, however, Wiggins was allegedly involved in a relationship with another man, Nathaniel Jones. On the evening in question, Wiggins and Jones were at a friend's (Laveena Blue) apartment. Defendant arrived at the apartment looking for Wiggins, and Jones hid in the bathroom. Defendant and Wiggins left the apartment for a few minutes to talk. Wiggins returned to the apartment about five minutes later and defendant then drove away. When Wiggins returned to the apartment, Wiggins and Jones got into an argument. Shortly thereafter, defendant returned to the apartment. Blue saw defendant returning, expected trouble, ran out of the apartment with Wiggins to

find help, and then heard approximately three gunshots when she (Blue) was at the back of the apartment complex. Jones was lying in the street next to the curb. An autopsy revealed that Jones had been shot once in the back and there was no evidence of close range firing.

Defendant gave a police statement which was admitted into evidence. Defendant indicated in the statement that he had had previous altercations with Jones regarding Wiggins' and Jones' relationship with each other. In response to the police officer's question as to how many times he shot Jones, defendant replied, "I think twice. Once while we shuffled over it." Defendant also testified on his own behalf at trial. Defendant testified that when he went to Blue's apartment, he found Wiggins lying down on a bed with her pants unzipped. He and Wiggins then left Blue's apartment to talk. Wiggins returned to the apartment and defendant stated that he parked his car at the street corner, got out, and could hear Wiggins arguing with a man. Defendant returned to the apartment and was rushed by Jones. Defendant testified that there was a struggle and that his gun fell from his waistband. Both defendant and Jones went for the gun and a struggle ensued. Jones attempted to run away when the gun fell again and discharged. Defendant panicked and fled the scene. He later turned himself in to the police and denied at trial that he told the police that he shot Jones twice. Rather, defendant stated that he thought he heard the gun discharge twice. Defendant's defense at trial was accident.

Defendant was charged with voluntary manslaughter and felony-firearm. Before the jury instructions were given, there were discussions concerning the giving of the voluntary manslaughter elements. The trial court concluded that it would give the jury the elements of second-degree murder manslaughter and inform the jury that if it found that the prosecutor had proven the elements of second-degree murder, it should convict defendant of manslaughter. The trial court also stated that it would instruct the jury that if it found that the gun had discharged accidentally, the jury would have to find defendant not guilty. However, the trial court went far beyond this when it actually instructed the jury and interjected several improper comments, thereby misinstructing the jury. We reprint the trial court's erroneous comments and instructions here:

> Now, what's the complication here? The complication here is that the Prosecutor charged Manslaughter in the first instance. He didn't charge Murder in the Second Degree; he charged Manslaughter in the first instance.
>
> * * *
>
> So, what I'm telling you is, you'd ordinarily get a case like this. This is the first case I've ever seen like this in 31 years of experience in the Detroit Criminal Justice System. Where the Prosecutor charged Voluntary Manslaughter from the get go. Now, maybe their office has done it before. But, I was part of that office for 17 and a half years, and I never knew them to do that.
>
> They might well have charged Murder in the First Degree in this case.
>
> * * *

> I've seen cases with less evidence that are charged murder in the first degree on such a case. Why? Everything I told you that a murder two is, all you add is premeditation and deliberation. If somebody thinks about it, plans, and then acts, that's a first degree murder.
>
> A second degree murder is ordinarily – every first degree murder has within it a second degree murder. Why? Because a first degree murder is a second degree murder, plus premeditation and deliberation. You got that? Okay?
>
> Every second degree murder has within it a manslaughter. Okay? Why? Because voluntary manslaughter is a second degree murder, but you subtract something out of it.
>
> * * *
>
> Now, does that help at all, in what I'm saying to you? But here they charged the Voluntary Manslaughter to begin with. And, I'm sure, acting off the best instincts in the world, that's what they charged.

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error, and even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). 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. *Id*. With regard to defendant's claim that the trial court pierced the veil of impartiality, whether defendant received a fair and impartial trial is the test for determining whether the trial court's actions were proper. *People v Cole*, 349 Mich 175, 187; 84 NW2d 711 (1957); *People v Cheeks*, 216 Mich App 470, 480-481; 549 NW2d 584 (1996).

We have reviewed the trial court's instructions as a whole and find that they were erroneous. We reiterate that the prosecutor charged defendant with voluntary manslaughter, not murder. It was not necessary to instruct the jury on second-degree murder. The trial court was only required to instruct the jury on the charged offense, that being voluntary manslaughter. See CJI2d 16.8.[1] Moreover, the trial court stated "second-degree murder" or "murder" to the jurors no less than eighteen times during its instructions, and informed the jurors that the prosecutor could have charged first-degree murder in this case. Further, it was highly improper for the trial court to state that the prosecutor could have charged defendant with first-degree murder and that it had never seen a case where the defendant was first charged with voluntary manslaughter in thirty-one years of experience. Thus, in reviewing the instructions, we agree with defendant that the trial court unnecessarily dwelt upon the crimes of first- and second-degree murder; crimes of which defendant was not charged.

Further, it is clear that by instructing the jury on the elements of second-degree murder and stating that the prosecutor was not required to prove provocation, rather than simply instructing the jury

by using CJI2d 16.8, the trial court confused the jury. The following colloquy occurred between one of the jurors and the trial court:

> JUROR BANDROWSKI: Can I ask a question?
>
> THE COURT: Yes, ma'am. And, let me just say on the record so it's clear, that is Mrs. Cheryl Bandrowski.
>
> JUROR BANDROWSKI: Yes. You said if the jury decides that the gun discharged accidentally, then the defendant is not guilty?
>
> THE COURT: That's correct.
>
> JUROR BANDROWSKI: Couldn't the jury decide that even if it did discharge – I mean, . . .
>
> THE COURT: Go ahead. No, go ahead. I'm just looking at the Prosecutor to see whether [the prosecutor is] going to turn around and say, "I told you [s]o." But, go ahead. Go ahead. What's your question?
>
> JUROR BANDROWSKI: Couldn't the jury decide that even if the gun discharged accidentally, that the defendant created an environment that was – I can't remember how you put it.
>
> THE COURT: Go ahead. A very high risk of death or great bodily harm or some result is likely.
>
> JUROR BANDROWSKI: And, therefore it's guilty?
>
> THE COURT: If you find that the defendant knowingly and intentionally created a very high risk of death or great bodily harm where death or great bodily harm was clearly likely, by his having the gun and the use of the gun, then you could find that the defendant was guilty. Okay?

It is shortly following this colloquy that the trial court went on to state that the prosecutor might well have charged first-degree murder and that he had seen cases with less evidence where the charge was first-degree murder.

The trial court's above-stated comments and instructions to the jury were clearly erroneous and improper. We cannot deem this error to be harmless. First, the error was not forfeited because defense counsel objected to the trial court's comments to the juror and the mention of first- and second-degree murder to the jury following the instructions. Under the standard for "preserved, nonconstitutional" error, we find that the trial court's improper comments and instructions to the jury resulted in a miscarriage of justice because after an examination of the instructions, it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 496; 597 NW2d

130 (1999). The trial court's comments regarding first-degree murder could well have directed the jury to convict defendant. As noted by both trial and appellate counsel, because the trial court told the jury that the prosecutor could have charged defendant with first-degree murder, this comment would have left an impression that defendant already received a "break" by the prosecutor and that the jury was obliged to convict defendant of manslaughter.

A defendant is entitled to a fair trial and a properly instructed jury. *People v Mills*, 450 Mich 61, 80-81; 537 909 NW2d (1995), modified 450 Mich 1212 (1995) (a criminal defendant has the right to have a properly instructed jury consider the evidence against the defendant). Here, the jury was not properly instructed and the trial court's comments concerning first- and second-degree murder were so pervasive that the error was not harmless because it is more probable than not that the trial court's comments had the effect of directing the jury to convict defendant by convincing the jury that the prosecutor had already granted defendant leniency in the charge.

Reversed and remanded for a new trial.

/s/ Harold Hood
/s/ Kathleen Jansen

[1] This standard jury instruction does not include provocation as an element of voluntary manslaughter and the commentary following the instruction acknowledges that provocation is a mitigating factor that negates malice and reduces murder to manslaughter, but need not be proven by the prosecutor as an element of manslaughter. The standard jury instruction on voluntary manslaughter would have adequately conveyed the elements of voluntary manslaughter to the jury without injecting the issue of provocation.