STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 2, 2001
v	No. 218923 Wayne Circuit Court
SAMUEL JONES, Defendant-Appellant.	LC No. 98-000831

Before: Neff, P.J., and Holbrook, Jr., and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and sentenced to a term of eighteen to thirty-five years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant first argues that because the jury acquitted him of the principal charge of first-degree murder before rendering its verdict of guilt on the lesser-included offense of second-degree murder, he was denied the protections afforded him under the double jeopardy provisions of our state and federal constitutions. See US Const, Am V; Const 1963, art 1, § 15. We do not agree.

Although defendant is correct that retrial following acquittal is barred under the constitutional provisions cited above, the jury's verdict in the instant matter does not constitute successive prosecution for the same offense for purposes of double jeopardy. Despite the manner in which the verdict was rendered, defendant was tried only once before a single tribunal which, before being discharged, rendered but one verdict with respect to the charged conduct. Cf. *People v Rushin*, 37 Mich App 391, 398; 194 NW2d 718 (1971)(holding that to recall a discharged jury back into court to alter, amend, or impeach its verdict is a violation of double jeopardy). Moreover, inasmuch as conviction of a lesser-included offense constitutes an implicit acquittal of the greater offense, the fact that the jurors first announced their verdict on the greater is of no consequence on the issue of double jeopardy. See *People v Garcia (On Remand)*, 203 Mich App 420, 424; 513 NW2d 425 (1995).

II

Defendant next argues that the trial court erred in instructing the jury regarding the elements of first- and second-degree murder. Specifically, defendant asserts that although the court properly informed the jury that it was the prosecutor's burden to prove that "the killing was not justified, excused or done under circumstances that reduce it to a lesser crime," the court's failure to elaborate on the circumstances which would support such a finding denied him the fair trial contemplated by due process. Again, we disagree.

Even assuming that in some circumstances due process would require the additional instruction now suggested by defendant, we find no error requiring reversal under the facts of the instant case. Because defendant failed to preserve this issue by objecting to the challenged instructions, he must demonstrate plain error that was prejudicial, i.e., that could have affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). At trial defendant did not argue that the victim's death was the result of a killing which was justified or otherwise excused by some mitigating circumstance. Rather, defendant advanced the notion that the victim had suffered the consequences of a drug overdose or had otherwise died as a result of a physical defect not detected during the autopsy.

Given defendant's chosen theory of the case, i.e., that the decedent had not been the victim of a homicide, we do not believe that the alleged error could have affected the outcome of the trial. Therefore, we reject defendant's contention that he was denied a fair trial as the result of the court's failure to elaborate on the circumstances that would justify, excuse, or otherwise reduce a homicide to something less than murder.

III

Defendant next argues that the trial court erred in failing to grant his request that the jury be instructed on the lesser cognate offense of voluntary manslaughter. We disagree.

A homicide may be reduced to voluntary manslaughter if the circumstances surrounding the killing demonstrate that malice was negated by adequate and reasonable provocation, that the killing was done in the heat of passion, and that there was not a lapse of time during which a reasonable person could control his passions. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). This Court reviews the record adduced at trial de novo to determine whether the evidence was sufficient to convict the defendant of the cognate lesser included offense. See, e.g., *People v Cheeks*, 216 Mich App 470, 479-480; 549 NW2d 584 (1996).

In challenging the trial court's decision not to instruct on this offense, defendant argues that the court erred in determining that before such instruction could be given it must be "convinced that there is more than just . . . a possibility" of the provocation and hot blood necessary to negate malice. Defendant asserts that the proper standard requires instruction on the offense if there is "any evidence" consistent with the lesser offense. We find this assertion to be without merit.

As noted by our Supreme Court in *People v Bailey*, 451 Mich 657, 668; 549 NW2d 325 (1996):

> If no reasonable jury could find a cognate offense because of the absence of evidence, "then the [trial] judge should not give the requested instruction." [Quoting *Pouncey*, *supra* at 387.]

Therefore, because voluntary manslaughter is a cognate lesser included offense of murder, a trial court must instruct on manslaughter only where a reasonable view of the evidence would support the jury in finding the defendant guilty of the lesser offense. Here, however, the evidence introduced at trial was insufficient to reasonably support such a finding.

Although there was testimony at trial indicating that there had been a physical confrontation between defendant and the victim earlier in the night, defendant informed police that following this fight he left the house for a period of time. According to defendant, upon his return he fell asleep without further speaking with the victim and awoke the next morning to find her dead. This evidence was consistent with the testimony of defendant's mother and son, who both testified that all was quiet after the initial confrontation between the two. Given that no evidence contradicting defendant's statement was presented at trial, and considering that this evidence is wholly at odds with a finding that the victim's death was precipitated by provocation sufficient to mitigate a homicide from murder to manslaughter, we find no error in the trial court's refusal to give the requested instruction.

IV

Defendant next argues that the trial court erred in failing to instruct the jury, as it did when addressing the principal charge of first-degree murder, that his voluntary intoxication could also constitute a defense to the lesser-included offense of second-degree murder. Given that our Supreme Court has previously held that second-degree murder is a general intent crime to which voluntary intoxication is not an available defense, we find no error in the court's failure to instruct to the contrary. See *People v Langworthy*, 416 Mich 630, 651; 331 NW2d 171 (1982).

V

Defendant next argues that the trial court, in sending the jury into deliberations with a partial recording of the final instructions, deprived him of a fair trial. Although defendant failed to preserve this issue by objecting at trial to the court's decision to do so, defendant now contends that inasmuch as the record is not clear as to the content of these instructions, reversal of his conviction is required. Because defendant failed to preserve this issue by objection at trial, he again must demonstrate plain error affecting his substantial rights in order to avoid forfeiture of appellate review. *Carines*, *supra*. We find no such error on the record before us.

Contrary to defendant's characterization of the subject recording as "some sort of 'extra-record' tape of undisclosed instructions," the record indicates that the recorded instructions provided to the jury were a duplicate of those given on the record in open court:

> When you go to the jury room *you will be given an electronically recorded copy of some of the instructions you've just heard.* As you discuss the case, you should think about all my instructions, both those I gave orally and those you also have with you, as the law you are to follow. [Emphasis added.]

Moreover, pursuant to MCR 6.414(G) it was permissible for the trial court to provide the jury with a partial set of recorded instructions upon agreement of the parties. Here, although counsel for defendant did not specifically acquiesce to the court's providing the jury with these instructions, he did not object and in fact expressed an overall satisfaction with the instructions as given by the court. Considering defendant's failure to object to providing the recorded instructions, as well as the fact that the court specifically emphasized that its oral instructions

were to be equally considered by the jury, we do not believe that defendant has met his burden of demonstrating error affecting the outcome of his trial.

VI

Defendant next argues that in making the following statement during final instructions, the trial court improperly infringed on his constitutional right not to testify:

> The defendant says that he could not have specifically intended to commit First Degree Murder, because he was intoxicated with alcohol or other drugs. There's been testimony on the record that he could have been, if you believe, high on alcohol or drugs. *He didn't say it, but that's the evidence*. You must decide whether the defendant's mind was so overcome by alcohol or drugs . . . that he could not have formed that intent. [Emphasis added.]

Defendant asserts that the language emphasized above, in the absence of an instruction that every criminal defendant has the right not to testify, had the "practical effect" of calling to the jurors' attention the fact that defendant had exercised his right against compelled testimony under the United States and Michigan Constitutions, see US Const, Am V; Const 1963, art 1, § 17, thereby denying him a fair trial.

Defendant has again failed to preserve this issue by objection at trial, and must therefore demonstrate plain error affecting his substantial rights in order to avoid forfeiture of our review. *Carines*, *supra*.

Initially, we note that contrary to defendant's assertion the trial court did inform the jury of defendant's "absolute right not to testify," and in doing so specifically cautioned that his exercise of that right in the instant matter was not to be considered as a factor in their deliberations. Moreover, notwithstanding defendant's claim that the challenged comment highlighted the fact that he did testify on his own behalf, it is clear after a contextual review of the statement that such was not the intent of the court. Rather, it appears that the court was merely trying to convey to the jury that although the evidence relating to defendant's alleged intoxication had been presented by someone other than defendant, it was nonetheless evidence to be considered in his defense.

Nonetheless, even assuming that the "practical effect" of the statement was an emphasis of defendant's failure to testify, given the court's clear instruction that this was defendant's right and that such failure was not to be considered against him in reaching a verdict in this matter, we do not believe that the claimed error, if any, affected the outcome of defendant's trial.

Affirmed.

/s/ Janet T. Neff
/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen