

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO DION CHILDRESS,

Defendant-Appellant.

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UNPUBLISHED

November 25, 2003

No. 240847

Wayne Circuit Court

LC No. 01-008232-01

Before: Judge Fort Hood, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant was convicted in a jury trial of assault with intent to do great bodily harm less than murder, MCL 750.84,<sup>1</sup> and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to three to ten years' imprisonment on the assault conviction, and two years' imprisonment on the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's first issue on appeal is that he was denied the effective assistance of counsel when his trial counsel failed to present a voluntary intoxication defense. We disagree.

Defendant failed to preserve this issue, therefore, we are limited to a review of the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). Effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed by this Court for clear error. *Id.* Issues of constitutional law are given de novo review. *Id.* To establish a claim of ineffective assistance of counsel, a defendant must show that counsel did not meet the standards of counsel guaranteed by the Sixth Amendment and that this "deficient performance" prejudiced the defendant's case. *Id.* at 578. There is a presumption that actions of counsel are reasonable and constitute "sound trial strategy." *Id.*

Defense counsel has a duty to "prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). A defendant must show that he

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<sup>1</sup> Defendant was charged with assault with intent to murder, MCL 750.83, but the jury found him guilty of the lesser offense.

made a good faith effort to avail himself of that defense and that the defense was in fact substantial, meaning that it might have made a difference in the outcome of the trial. *Id.* Voluntary intoxication is only a defense to a specific intent crime. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). Assault with intent to murder is a specific intent crime because it requires an intent to cause a specific result above and beyond the act of the assault. See *People v Disimone*, 251 Mich App 605, 611; 650 NW2d 436 (2002). But, a defendant is only entitled to an instruction on the defense of voluntary intoxication if the facts of the case would allow a jury to conclude that the defendant's intoxication made it impossible for him to form the requisite intent for the charged offense. *People v Gomez*, 229 Mich App 329, 332; 581 NW2d 289 (1998).<sup>2</sup>

Defendant was the only witness who testified regarding his intoxication on July 5, 2001, and he failed to testify regarding when he was drinking and in what quantity. He testified that due to his fear, not his intoxication, he thought that Lawrence Snider was approaching his car with a shotgun, which led him to shoot his own pistol. He testified that later, when giving his statement to the police, his head was cloudy, and he was scared and intoxicated. No police officer testified regarding defendant's behavior at the station. However, defendant remembered the details leading up to the shooting clearly. In fact, defendant testified that he had made a mistake and shot the wrong person, not that he did not intend to shoot a person at all. Before defendant shot Maurice Jones, his mind was clear enough to attempt to protect himself by trying to call the police and removing Jones from his home for the night. After the shooting, defendant thought to leave the scene and change his shirt to avoid detection. The facts of this case do not indicate that defendant was so intoxicated that he could not form the intent to kill. We find that, as the jury could not find a lack of intent due to intoxication on these facts, this defense was not substantial. Defendant's trial counsel did not have a duty to present an intoxication defense and was not ineffective for failing to do so.

Defendant's last issue on appeal is that the trial court erred when it denied defendant's request for an instruction on the lesser offense of careless, reckless or negligent discharge of a firearm causing injury, MCL 752.861. We disagree.

A claim of instructional error is reviewed de novo. *People v Lowery*, 258 Mich App 167, 173; \_\_\_ NW2d \_\_\_ (2003). Jury instructions are reviewed as a whole in determining if the trial court made an error requiring reversal. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Jury instructions do not have to be perfect, but they must fairly present the issues for trial and sufficiently protect the defendant's rights. *Id.*

An instruction is only warranted for necessarily included lesser offenses; instructions on cognate lesser offenses are not permitted per MCL 768.32(1). *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002); *Lowery, supra*, slip op, p 4. A necessarily included lesser offense is one where it is impossible to commit the greater offense without first having committed the lesser offense. *Cornell, supra* at 345. A cognate lesser offense, however, shares several

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<sup>2</sup> We note that the defense of intoxication, for the most part, is now precluded by MCL 768.37; however, that statute became effective after the events in the case at bar.

elements with the greater offense and is of the same nature, but has some elements that are not part of the greater offense as well. *People v Mendoza*, 468 Mich 527, 532 n 4; 664 NW2d 685 (2003).

In *Lowery*, *supra*, slip op, p 4, this Court held that reckless discharge of a firearm is a cognate lesser offense of assault with intent to murder. Defendant has correctly characterized this offense on appeal. The elements of MCL 752.861 are (1) a firearm is recklessly, negligently, or carelessly discharged (2) causing death or injury. *Id.* The elements of assault with intent to murder are (1) an assault; (2) with an actual intent to kill; and (3) which, if successful, would make the killing murder. *People v Abraham*, 234 Mich App 640, 657-658; 599 NW2d 736 (1999). As reckless discharge of a firearm has an element not found in assault with intent to murder, the discharge of a firearm, it is a cognate lesser offense. We therefore find that the trial court was not permitted to give this instruction.

Affirmed.

/s/ Karen M. Fort Hood

/s/ William B. Murphy

/s/ Janet T. Neff