STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 29, 2004
v	No. 247142 Wayne Circuit Court
ANTONIO DUANE WARE, Defendant-Appellant.	LC No. 02-008665-01

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), three counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life in prison for the premeditated murder conviction, life in prison for the felony-murder conviction, twelve to fifty years in prison for each of the assault with intent to commit murder convictions, and two years in prison for the felony-firearm conviction. We affirm but remand for entry of an amended judgment of sentence.

Victoria Seldon, who had three children with defendant, Alexis Ware was four years old, Andreyus Ware was two years old, and Amari Ware was twenty months old. All of the children resided with their mother in an apartment in Detroit.

Our record reveals that defendant and Seldon lived together on and off throughout the course of their eight-year relationship, however, they were not living together on June 27, 2002. Testimony indicated that on that date, defendant smoked some marijuana with friends at 5:00 or 5:30 p.m., he then picked the children up from the babysitter, dropped his friends off at Hart Plaza to watch the fireworks, and drove to a park with his children. After playing at the park, they were waiting in the parking lot for Seldon to finish her shift at work when defendant heard voices on the radio telling him to shoot the hottest child because heat was an indicator of the devil, a monster, or a demonic presence. Defendant felt his children's foreheads, and he noticed that they all felt hot. Because he thought the radio might be "playing games" with him, he did not shoot his children at that time. When Seldon finished her shift at 10:00 p.m., she and defendant argued about getting gas for the car while they were driving to Seldon's apartment.

Shortly after arriving at the apartment, defendant helped the children get ready for bed. Defendant was in the bedroom with Seldon, who was holding Amari. Defendant called Alexis and Andreyus into Seldon's bedroom, told them to get in the bed, and hugged and kissed them. Defendant then felt their foreheads again and noticed that his children's foreheads seemed hot when he kissed them, so he pulled a gun out of his pocket and held the gun to Andreyus' head. Seldon testified that she pushed the gun away from Andreyus' head, causing defendant to run out of the room. Defendant returned and tried to get back into the room, but Seldon was blocking the door. Defendant stuck his arm through the opening in the door and fired several gunshots into the room. A bullet grazed Andreyus' left ear, and Seldon noticed that Amari was not moving. Defendant fled, the police chased him, eventually apprehending and arresting him. Amari died as the result of a gunshot that entered her left arm and traveled into her chest.

On appeal, defendant argues that the trial court erred when it sentenced him for both his first-degree premeditated and felony-murder convictions. Given current case law, we agree. Double jeopardy issues are typically reviewed de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

Our Court has held that it is a violation of the Double Jeopardy Clause of the United States Constitution, US Const, Am V, and the Double Jeopardy Clause of the Michigan Constitution, Const 1963, art 1, § 15, to enter dual convictions of first-degree premeditated and felony murder arising from the death of a single victim. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). The proper remedy for such a violation is to modify the judgment of sentence to specify a single conviction and sentence of first-degree murder supported by both theories of premeditated murder and felony murder. *Id.* Accordingly, we remand to the trial court for modification of the judgment of sentence to reflect one conviction of first-degree murder supported by alternative theories.

Next, defendant argues that the trial court erred when it refused the jury's request to re-hear defendant's testimony. We disagree. Because this issue was not raised before the trial court, it is not preserved and may only be reviewed for a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. . . . Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. [*Carines*, *supra*, 460 Mich 763, applying *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).]

MCR 6.414(H) provides:

> If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so

> long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed. [See *People v Fetterley*, 229 Mich App 511, 519-520; 583 NW2d 199 (1998).]

When the jury requested defendant's testimony, the trial court informed that jury that they needed to "collectively recall" defendant's testimony and make their best efforts to try to "reconstruct" it. The trial court also told the members of the jury that no written transcript of defendant's testimony was available at the time of their request. Thus, the trial court left open the possibility that if the jurors were unable to collectively recall defendant's testimony, a record of the testimony may be available at a later date. By not foreclosing the possibility of reviewing the testimony at a later date, we cannot find that the trial court committed error in the manner in which it instructed the jury. We also note that MCR 6.414(H) grants the trial court discretion to order further deliberations, and the jury reached a unanimous verdict after 3 ½ hours. *Fetterley*, *supra*, 229 Mich App 519-520. Accordingly, we conclude that the trial court did not err when it denied the jury's request.

Defendant next contends that the guilty but mentally ill verdict denied him of his due process right to a fair trial because it encourages convictions. We disagree. Because defendant raises this issue for the first time on appeal, it will be reviewed for a plain error affecting defendant's substantial rights. *Carines*, *supra*, 460 Mich 762-765.

MCL 768.36 provides, in pertinent part:

> (1) If the defendant asserts a defense of insanity in compliance with section 20a of this chapter, the defendant may be found "guilty but mentally ill" if, after trial, the trier of fact finds all of the following:
>
> (a) The defendant is guilty beyond a reasonable doubt of an offense.
>
> (b) The defendant has proven by a preponderance of the evidence that he or she was mentally ill at the time of the commission of that offense.
>
> (c) The defendant has not established by a preponderance of the evidence that he or she lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law.
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> ***
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> (3) If a defendant is found guilty but mentally ill . . . the court shall impose any sentence that could be imposed by law upon a defendant who is convicted of the same offense.

While we are mindful that the Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees the right to a fair trial, *People v Ramsey*, 422 Mich 500, 510; 375 NW2d 297 (1985), our Supreme Court rejected an identical argument in *People v Boyd*, the companion case to *Ramsey*, and concluded that the legislative distinctions between mental illness and insanity did not deny the defendant his right to a fair trial. *Id.* at 514. Because our

Supreme Court precedent is binding on this Court, we conclude that defendant's argument is meritless. *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000).

Finally, defendant argues that the trial court erred when it refused to provide a jury instruction on statutory manslaughter, MCL 750.329. We disagree. We review de novo claims of instructional error and the question of law about whether an offense is inferior to a greater offense. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003); *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

MCL 768.32(1) provides:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

MCL 768.32(1) "only permits instructions on necessarily included lesser offenses, not cognate lesser offenses." *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); *People v Cornell*, 466 Mich 335, 356; 646 NW2d 127 (2002).

Defendant was charged with first-degree premeditated murder and felony murder in the shooting death of his daughter. Because common-law involuntary manslaughter is typically a necessarily included lesser offense of murder, the involuntary manslaughter instruction must be given if it is supported by a rational view of the evidence. *Mendoza*, *supra*, 468 Mich 541. *Mendoza* did not, however, specifically address whether manslaughter pursuant to MCL 750.329 is a cognate or necessarily included lesser offense of murder.

Prior to *Mendoza*, our Supreme Court specifically held that statutory involuntary manslaughter, MCL 750.329, is a cognate lesser offense of murder. *People v Heflin*, 434 Mich 482, 496-497; 456 NW2d 10 (1990). As used in MCL 768.32(1), the term "inferior" refers to the "absence of an element that distinguishes the charged offense from the lesser offense." *Cornell*, *supra*, 466 Mich 354, quoting *People v Torres (On Remand)*, 222 Mich App 411, 419-420; 564 NW2d 149 (1997). Cognate lesser offenses are only related or of the same class or category as the greater offense and "may contain some elements not found in the greater offense." *Cornell*, *supra*, 466 Mich 355.

MCL 750.316(1) provides:

> A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:
>
> (a) Murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing.
>
> (b) Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first

> degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, or kidnapping.

MCL 750.329 provides: "Any person who shall wound, maim or injure any other person by the *discharge of any firearm*, pointed or aimed, intentionally but without malice, at any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter." (Emphasis added.) Because MCL 750.329 requires the discharge of a firearm and MCL 750.316(1) does not, we conclude that statutory involuntary manslaughter under MCL 750.329 is a cognate lesser offense of murder. Because *Mendoza*, *supra*, 468 Mich 541, involved common-law manslaughter, it is distinguishable from the instant case. Because MCL 768.32(1) does not permit jury instructions on cognate lesser offenses, the trial court did not err when it refused to provide the jury with an instruction on statutory manslaughter, MCL 750.329. *Reese*, *supra*, 466 Mich 446; *Cornell*, *supra*, 466 Mich 356.

We affirm defendant's assault with intent to commit murder and felony-firearm convictions and sentences but remand for modification of the judgment of sentence to reflect one conviction and sentence of first-degree murder supported by both theories. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Michael J. Talbot
/s/ Stephen L. Borrello