

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ORANDE KENYATTE THOMPSON,

Defendant-Appellant.

UNPUBLISHED

April 17, 2008

No. 273777

Wayne Circuit Court

LC No. 05-009189-01

Before: Whitbeck, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant Orande Thompson appeals as of right his jury convictions of first-degree premeditated murder,¹ possession of a short-barreled rifle,² and possession of a firearm during the commission of a felony.³ Thompson pleaded no contest to felon in possession of a firearm.⁴ The trial court sentenced Thompson to two years' imprisonment for the felony-firearm conviction, followed by concurrent sentences of life imprisonment for the first-degree murder conviction, one to five years' imprisonment for the possession of a short-barreled rifle conviction, one to five years' imprisonment for the felon in possession of a firearm conviction. We affirm.

I. Basic Facts And Procedural History

A. The First Trial

Commer Davis, Thompson's ex-stepfather, testified that on August 27, 2005, Thompson knocked on his door. When Davis opened the door, he found Thompson holding his three-month-old son and his four-year old daughter standing next to him. Thompson stepped inside Davis's residence, handed the boy to Davis, and stated, "Kiara was shot." Thompson fainted

¹ MCL 750.316.

² MCL 750.224b.

³ MCL 750.227b.

⁴ MCL 750.224f.

inside Davis's doorway and hit his head, but then he got up, left Davis's residence, and ran home.

Sergeant Michael Thomas testified that, on August 27, 2005, a dispatch directed him to Thompson's residence. When Sergeant Thomas arrived, he observed Thompson and his two children walking away from the house. Sergeant Thomas entered through the open back door of the house. He found Kiara Barton, Thompson's live-in girlfriend, conscious but unable to speak, in the attic. She had a bullet wound to her face. Sergeant Thomas called EMS. As Sergeant Thomas was on his way outside to wait for EMS, Thompson came back to the house. Thompson told Sergeant Thomas that the shooting was an accident.

Investigator Donald Olsen interviewed Thompson while they were sitting in Investigator Olsen's car. Investigator Olsen advised Thompson of his *Miranda*⁵ rights. Thompson's statement was read to the jury. Thompson told Investigator Olsen that he and Barton had been together for six years. They had two children together. The children were home during the shooting. Thompson described his relationship with Barton as "not real good. We argue a lot. It's like arguing with your kids. I fuss a lot. Mostly, it's my fault. [Barton] is slow." Thompson described himself as a whiner and complainer.

Thompson told Investigator Olsen that Barton, on the day in question, was upstairs hanging laundry. He went upstairs to ask her when they were going to the grocery store and to help her hang clothes. He found a handgun, walked up to Barton, and pointed it at her. She told Thompson to "stop playing" with her. Thompson pulled the trigger, and the handgun went off. He dropped the handgun and Barton fell. Thompson "was shocked that the gun went off." He asked Barton if she was okay, but she just looked away. He called 911 and then went downstairs, and got the kids, and took them out of the house. He was not mad at Barton. When he pointed the handgun at her, he was "[j]ust joking, playing around."

Thompson told Investigator Olsen that he did not know who originally owned the handgun. He found it in the house when they first moved into the house two years before. It was a .32-caliber revolver. He knew what kind of handgun it was because he had guns before. He loaded the handgun a year before the shooting. There was a box in the attic that had a short-barreled rifle in it. He put the handgun inside the box along with the rifle and locked it. The box was not locked on August 27, 2005, but "it took a little bit to get it to open." He had fired a handgun twice before. He owned other weapons in the past, including an AK-47 rifle and a .32-caliber pistol. When he had put the bullets in the handgun the year before, he tried to fire it but it did not go off.

Officer Velma Tutt, an evidence technician, responded to the scene of the shooting on August 27, 2005. She recovered the .32-caliber handgun from the floor of the attic. The handgun contained a spent casing at the hammer and two live rounds. Every alternate chamber was empty. On a shelf near the chimney was an open rifle case containing an unloaded .22-caliber rifle. On the main level, in one of the bedrooms, Officer Tutt recovered a bulletproof

⁵ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

vest, and in the office, she recovered boxes of ammunition, none of which contained .22-caliber cartridges. Officer David Pauch, assigned to the crime lab, firearms, and tool mark identification unit, testified that the handgun was rusty and dirty, but was functional.

Michael Ratzloff works at the Rite-Aid at Five Mile and Newburgh in Livonia where Thompson worked from February 2005 until August 2005. According to Ratzloff, Thompson sometimes talked about Barton and, on more than one occasion, said he wanted to kill her. Thompson found Barton to be ignorant. The last time Ratzloff heard Thompson say he wanted to kill Barton was within two weeks of when she was killed. Thompson admitted to telling Ratzloff that he wanted to kill Barton, but stated that he was just joking when he said it. Thompson testified that he made the statement to Ratzloff right after he hung up the phone with Barton, after arguing with her. Ratzloff did not take Thompson seriously when he said he wanted to kill Barton. Ratzloff stated that in the past he has said that he was going to kill someone and indicated that he believes it is a generally used figure of speech.

Thompson chose to testify, but defense counsel asked no questions on direct examination. On cross-examination, Thompson testified that he found the .32-caliber handgun in the attic after he moved into the house. There was no ammunition with it. He put the handgun in a box on the top shelf in the closet of his office. Thompson had ammunition for the handgun before he moved into the house. He was unsure how many cartridges he had but he knew that he had less than six. Thompson admitted that this was the third .32-caliber handgun that he owned. He admitted to owning one in 1994 and another in 1997. Thompson was familiar with how to operate .32-caliber handguns.

Thompson put the ammunition in the handgun around the time that the Pistons won the championship. At that time, he went out onto the porch with Barton and tried to fire the handgun numerous times but it would not fire. He put the handgun in the box in the attic along with the rifle. He kept it even though it did not work because he did not know how to get rid of it. He said he loaded every other chamber because he did not have enough cartridges to fill all six chambers.

When Thompson went up to the attic to talk to Barton, he saw a hat in a box on top of the rifle box. The rifle box was on a metal shelf. He went to grab the hat to put it on Barton, but the box fell on the floor amidst a lot of clutter. Then he opened the rifle box by pressing two gold buttons. The box has a combination lock on it but Thompson does not know the combination. He picked the loaded handgun up instead of the unloaded rifle because the handgun was on top of the rifle. Holding the handgun, he walked about 15 feet over to where Barton was standing and pointed it at her face. The handgun was approximately three feet from Barton. Barton said, "Stop playing." Thompson said, "You know this don't work," and he pulled the trigger. Thompson pointed the handgun at Barton and pulled the trigger because he thought that Barton would think it was funny. Thompson testified that he did not intend a bullet to come out of the handgun. He was shocked that the handgun fired. When asked if he believed the shooting was an accident, or a mistake, or stupid, Thompson replied, "Stupid."

Thompson tried to call 911 from his cell phone but thought that emergency services would not be able to find him based on his cell phone location. He ran to Davis's house and told Davis what happened and assumed Davis would call 911 from a landline. Then he ran back home, got the two children, and took them to Davis's house.

The trial court instructed the jury on first-degree premeditated murder, the lesser offenses of second-degree murder and common law involuntary manslaughter, and the defense of accident to the first-degree and second-degree murder offenses. The jury convicted Thompson of possession of a short-barreled rifle and felony-firearm, but was unable to reach a verdict on the murder charge.

B. The Second Trial

Thompson was tried again on the single count of first-degree premeditated murder. Thompson's testimony from his first trial was read to the jury. Testimony given by Ratzloff, Olsen, Tutt, Davis, and Thomas at the second trial was similar to the testimony that they gave at the first trial. Thompson's recorded 911 call was played for the jury.

Officer Pauch testified that he test-fired the weapon 40 times and that it fired each time as the manufacturer designed.

Thompson testified again. The prosecutor had Thompson demonstrate how the rifle and handgun were placed in the rifle box. Thompson placed them next to each other in the box. Thompson admitted that he testified in his first trial that he picked up the handgun instead of the rifle because it was on top of the rifle. He agreed that there was nothing preventing him from picking up the unloaded rifle rather than the loaded handgun based on the way that he placed them in the rifle box in the demonstration. Defense counsel had difficulty getting the box open when he attempted to open it for a demonstration.

The trial court instructed the jury on first-degree premeditated murder and second-degree murder. The jury found Thompson guilty of first-degree premeditated murder. The trial court sentenced him to life imprisonment for the first-degree murder conviction, one to five years' imprisonment for the possession of a short-barreled rifle conviction, one to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction.

Thompson now appeals.

II. Jury Instructions

A. Standard Of Review

Thompson argues that the trial court made the following two instructional errors at the second trial: (1) failure to instruct the jury on the defense of accident, and (2) failure to instruct the jury on common law involuntary manslaughter. We review unpreserved claims for plain error that affected the defendant's substantial rights.⁶

⁶ *People v Hawthorne*, 474 Mich 174, 176 n 1; 713 NW2d 724 (2006); *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003).

B. Relevant Facts

(1) The First Trial

At a November 2005 motion hearing before the first trial, the prosecution argued for admission of MRE 404(b) similar act evidence to show the absence of mistake or accident. Thompson told police that he was “shocked” that the .32-caliber handgun fired when he pulled the trigger, killing Barton. Therefore, the prosecution sought to admit evidence that Thompson was charged with first-degree murder as a juvenile in 1994 but was acquitted under a self-defense theory, where he used a .32-caliber handgun to kill the victim, and that he was arrested for possessing a .32 caliber handgun in 1997. In the 1997 arrest, Thompson also had an AK-47 with a drum magazine with 74 live rounds in it. Consequently, to rebut Thompson’s contention that he was shocked that the handgun fired, the prosecutor argued that the requested evidence was admissible to show that Thompson was familiar with .32 caliber handguns.

Defense counsel argued that the evidence should be excluded because Thompson would not be claiming innocence based on accident or mistake, but rather would be claiming that the act was intentional. Defense counsel conceded that Thompson pointed the handgun at Barton and intentionally pulled the trigger. Therefore, the issue would be whether Thompson was guilty of murder or statutory manslaughter.

The trial court opined that the issue was the level of Thompson’s intent and not whether the shooting was accidental and that the prejudicial effect of revealing to the jury that Thompson was previously charged with murder outweighed its probative value. However, implicit in determining Thompson’s level of intent was his familiarity with and access to a weapon. Therefore, the trial court ruled that the prosecution could introduce evidence that Thompson had “previous criminal contact with the criminal justice system in which a .32-caliber weapon was used” and that Thompson “was convicted of an offense in which a .32-caliber weapon was used.”⁷ The trial court further ruled that if Thompson made any mention of accident or mistake, then all of the evidence regarding the prior charges and convictions would be allowed in.

During trial, but outside of the jury’s presence, the trial court and counsel again discussed the issue of admitting Thompson’s previous possession of a .32-caliber weapon as MRE 404(b) evidence. Although at the earlier MRE 404(b) hearing, the trial court told Thompson that he could not argue mistake or accident, the trial court reversed itself and stated that Thompson could argue mistake or accident.

Thompson argued for an instruction on accident, not because Thompson was claiming accident, but because police officers testified that Thompson stated that the shooting was an accident. Thompson argued that accident is a defense to murder and manslaughter. The trial court ruled that it would instruct the jury on first- and second-degree murder and accident as a defense to murder, and on common law involuntary manslaughter. Thompson argued that a

⁷ At the motion hearing, the prosecutor stated only that Thompson was arrested for possession of a .32-caliber weapon, and made no mention of a conviction.

second-degree murder instruction was not warranted because, if the jury found that Thompson had the intent to kill, no matter when he formed that intent, then there was time to deliberate before pulling the trigger. The trial court replied that whether Thompson's intent was premeditated is a question of fact.

Thompson also objected to an instruction on common law involuntary manslaughter. Rather, Thompson asked for an instruction on statutory involuntary manslaughter,⁸ intentional discharge of firearm pointed or aimed at another resulting in death, and stated that the offense was a lesser-included offense of murder. The prosecution observed that statutory involuntary manslaughter is only a cognate lesser-included offense of murder because it requires that there be a firearm, and therefore, an instruction on it could not be given to the jury. Thompson further argued for an instruction on careless, reckless, or negligent discharge of a firearm. The prosecution again observed that the offense requires use of a weapon, and therefore, was only a cognate lesser offense. Thompson argued that a rational view of the evidence could support the instruction.

The trial court instructed the jury on first-degree premeditated murder, the lesser offenses of second-degree murder and common law involuntary manslaughter, and the defense of accident to the first-degree and second-degree murder offenses.

(2) The Second Trial

After the prosecution rested in the second trial, the trial court and counsel discussed instructions. Defense counsel argued for a first-degree premeditated murder instruction only. The trial court stated that it would instruct on first- and second-degree murder. The prosecution opined that the trial court should also instruct on common law involuntary manslaughter. The trial court did not believe that the evidence supported such an instruction. The prosecution argued that if the jury believed that Thompson did not have a premeditated intent to kill Barton, then it needed to decide whether Thompson's conduct was willful and wanton disregard, as required for second-degree murder, or grossly negligent, as required for involuntary manslaughter. Defense counsel again argued that the trial court should give only a first-degree murder instruction and, if the trial court was determined to also give a second-degree murder instruction, then the trial court should also instruct on statutory involuntary manslaughter. Defense counsel stated that the evidence did not support an instruction on common law involuntary manslaughter. Neither party requested an accident instruction.

C. Accident Defense Instruction

A trial court is required to instruct the jury on "the applicable law, the issues presented by the case, and, if a party requests, . . . that party's theory of the case."⁹ The trial court must instruct the jury on the "central issue" of the case.¹⁰ The central issue of a case may be

⁸ MCL 752.329.

⁹ MCR 2.516(B)(3); *People v Anstey*, 476 Mich 436, 451-452; 719 NW2d 579 (2006).

¹⁰ *Hawthorne*, *supra* at 176.

distinguished from a defendant's theory of the case.¹¹ Unlike a trial court's requirement to sua sponte instruct on the central issue, a trial court is not required to give an instruction on the defendant's theory of the case unless the defendant requests the instruction and evidence supports the instruction.¹²

We hold that, while accident may have been one theory of the case, it was not the central issue. While Thompson stated to police that he was shocked that the handgun fired when he pulled the trigger and Sergeant Michael Thomas testified that Thompson told him that the shooting was an accident, Thompson did not testify that the shooting was accidental. Rather, he testified that he believed the handgun was not operational and that he was "stupid" for firing it at Barton. At the second trial, Officer David Pauch testified that he test-fired the handgun over 40 times and that it fired as designed. Thompson was familiar with the operation of .32-caliber handguns. Ammunition and a bulletproof vest were found in his residence. Thompson testified at the first trial that he picked up the loaded handgun rather than the unloaded rifle because the handgun was on top of the rifle, but then when asked at the second trial to demonstrate how the weapons were placed in the rifle box, Thompson placed them next to each other. Defense counsel argued that Thompson used poor judgment, was unsafe, irresponsible, stupid, and knowingly created a very high risk of death or great bodily harm. Thus, the central issue of the case was the level of Thompson's intent, and consequently, the trial court was not required to give an accident instruction absent Thompson's request.

Even had the trial court erred by not instructing the jury on the defense of accident, Thompson cannot show that his substantial rights were affected. Thompson contends that he was prejudiced because at the first trial, where the trial court instructed the jury on accident, the jury could not reach a unanimous verdict on the first-degree murder charge. However, there was evidence presented at the second trial that was not presented at the first trial. At the second trial, the prosecution presented evidence that the handgun fired properly a minimum of 40 times. Defense counsel had difficulty opening the rifle case. Thompson demonstrated how the handgun and rifle were placed in the box by laying them side-by-side, but he testified earlier that he picked up the handgun because it was lying on top of the rifle.

Furthermore, the jury was instructed on first-degree and second-degree murder and convicted Thompson of first-degree murder. The jury was instructed that the prosecution had to prove all of the elements of the crime beyond a reasonable doubt. If the jury had any doubts regarding whether Thompson possessed premeditated intent, it could have convicted Thompson of second-degree murder. Thus, the trial court's failure to instruct the jury on the defense of accident did not result in prejudice to Thompson as the outcome of the case would have been the same given an accident instruction.

¹¹ See *People v Robinson*, 79 Mich App 145, 162; 261 NW2d 544 (1977), abrogated on other grounds *People v Heflin*, 434 Mich 482 (1990).

¹² *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995), citing *People v Wilson*, 122 Mich App 1, 3; 329 NW2d 513 (1982).

D. Involuntary Manslaughter Instruction

The failure to make a timely assertion of a right constitutes a forfeiture of the issue, but an “intentional relinquishment or abandonment of a known right” waives the issue and extinguishes the error,¹³ thereby foreclosing appellate review.¹⁴ Here, when discussing what instructions to give the jury, defense counsel erroneously¹⁵ stated to the trial court, “The evidence does not support voluntary manslaughter and therefore you don’t have to give [the instruction]. *The evidence does not support involuntary manslaughter for gross negligence either.*” (Emphasis added.) Additionally, when the trial court finished instructing the jury, it asked both counsel whether it had complied with the reading of the jury instructions, and both counsel answered, “Yes, your Honor.” By arguing against the trial court giving the common law involuntary manslaughter instruction and then expressing agreement with the trial court’s reading of the instructions, Thompson waived the issue and any alleged error is extinguished.

III. Ineffective Assistance Of Counsel

A. Standard Of Review

Thompson next argues that he was denied the effective assistance of counsel where his counsel failed to request instructions on the defense of accident and common law involuntary manslaughter. When reviewing an unpreserved claim of ineffective assistance of counsel, our review is limited to mistakes apparent on the record.¹⁶ The trial court’s factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo.¹⁷

B. Legal Standards

To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms, and that this performance was so prejudicial that it denied the defendant a fair trial.¹⁸ A

¹³ *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000), quoting *People v Carines*, 460 Mich 750, 762-763 n 7; 597 NW2d 130 (1999).

¹⁴ *Id.*; *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003).

¹⁵ See *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003) (Common law involuntary manslaughter is a necessarily included lesser offense of murder, and therefore, a defendant has the right to an instruction on the offense if the evidence would support a jury verdict on the lesser charge). See also *id.* at 536 (“Involuntary manslaughter is the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty.”).

¹⁶ *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

¹⁷ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

¹⁸ *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Washington v Strickland*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

defendant must overcome the strong presumption that his counsel was effective and engaged in sound trial strategy.¹⁹ Defense counsel is not required to advocate a meritless position.²⁰

C. Applying The Standards

Thompson argues that no reasonable strategy could account for his counsel not requesting an accident instruction at the second trial. According to Thompson, defense counsel knew the importance of the defense to the first-degree and second-degree murder charges, as evidenced by his request for the instruction at the first trial. Regardless whether defense counsel's performance fell below an objective standard of reasonableness, Thompson cannot show that he was prejudiced such that he was denied a fair trial. The jury was instructed on first-degree and second-degree murder and convicted Thompson of first-degree murder. The jury was instructed that the prosecution had to prove all of the elements of the crime beyond a reasonable doubt. If the jury had any doubts regarding whether Thompson possessed premeditated intent, it could have convicted Thompson of second-degree murder.²¹ Thus, Thompson cannot show that, had his counsel requested an accident instruction, the outcome of the trial would have been different.

Thompson also argues that his counsel was ineffective for not requesting an instruction on common law involuntary manslaughter. However, the prosecution argued for the instruction and the trial court denied it. Consequently, defense counsel's request for the instruction would have been futile, and counsel is not required to advocate a meritless position. Again, regardless of defense counsel's performance, Thompson cannot show that he was prejudiced. The jury convicted him of first-degree premeditated murder even though it had the option of convicting him of second-degree murder. Therefore, we find it highly improbable that the jury would have convicted Thompson of involuntary manslaughter had it been given such an instruction.

Affirmed.

/s/ William C. Whitbeck

/s/ Donald S. Owens

/s/ Bill Schuette

¹⁹ *Id.*; *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

²⁰ *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

²¹ See *Hawthorne*, *supra* at 185 (stating that a trial court's failure to instruct on the defense of accident did not require reversal where "the jury instructions explaining the intent element of murder made it clear that a finding of accident would be inconsistent with a finding that Thompson possessed the intent required for murder.").