

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON LAMAR CLARK,

Defendant-Appellant.

UNPUBLISHED

April 12, 2011

No. 293581

Oakland Circuit Court

LC No. 2008-223042-FC

Before: CAVANAGH, P.J., and JANSEN and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of second-degree murder, MCL 750.317, two counts of assault with intent to murder, MCL 750.83, four counts of possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. We affirm.

This case arises from a dispute over a stolen gun. Throughout the day on June 19, 2008, Jasmine Thurman and Tequila Lewis had been feuding about a stolen gun. Finally, Jasmine went to Tequila's house, armed with a baseball bat, to confront Tequila about the gun. A large crowd gathered. Just as Jasmine swung the bat at Tequila, gun shots were fired. Jasmine was killed and two of her friends were shot. Defendant, Tequila's boyfriend, who was standing nearby, was charged with firing the shots that killed Jasmine and wounded two of her friends. He was found guilty. Tequila's brother, Demarious Lewis, admitted to firing an AK-47 out of an upstairs window with the intention of scaring the crowd of people and pleaded guilty to associated charges in separate criminal proceedings.

On appeal, defendant argues that his right to due process was violated by the prosecution's use of inconsistent theories to convict him and his codefendant, Demarious Lewis. We disagree. This issue is unpreserved therefore our review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant argues that he was denied due process "by the prosecution's decision to take inconsistent positions in the prosecutions of him and Demarious Lewis." At Lewis' plea hearing, the prosecution argued that Lewis shot a gun out of the upstairs window. However, during closing argument at defendant's trial, the prosecutor asked the jury to believe a witness' testimony that inculpated defendant but exculpated Lewis. That is, a witness who positively identified defendant as the person who fired the shots that killed and injured the victims also

testified that Lewis did not shoot a gun out of the upstairs window. Thus, defendant argues, the prosecution adopted inconsistent positions in the prosecutions of both men.

Michigan has not adopted the position that due process is violated when the prosecution offers factually contradictory theories during the prosecution of codefendants. However, in those jurisdictions which have adopted this position, it appears that due process was considered violated when mutually exclusive, or factually contradictory, theories were advanced against codefendants charged with the exact same crime. See, e.g., *Smith v Goose*, 205 F3d 1045, 1052 (CA 8, 2000); *Thompson v Calderon*, 120 F3d 1045, 1058 (CA 9, 1997), rev'd on other gds 523 US 538; 118 S Ct 1489; 140 L Ed 2d 728 (1998).

In this case, however, defendant and Lewis were not charged with the exact same crime and mutually exclusive theories were not advanced against them. The prosecution never advocated the position that defendant and Lewis were guilty of the same crimes. The prosecution always maintained that defendant, from his position standing in the doorway on the porch, shot Jasmine and her two friends. And the prosecution never claimed that Lewis shot the victims; rather, Lewis faced charges for shooting the AK-47 out of the upstairs window. Thus, even if Michigan were to adopt the position advanced by defendant, he would not prevail. Accordingly, this claim is without merit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Deborah A. Servitto