

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 15, 2011

v

ORONDE KENYATTE THOMPSON,
Defendant-Appellant.

No. 298888
Wayne Circuit Court
LC No. 05-009189-FC

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

Defendant, Oronde Kenyatte Thompson was convicted by jury of involuntary manslaughter, MCL 750.321.¹ Defendant was sentenced to 5 to 15 years' imprisonment for the involuntary manslaughter conviction. Defendant appeals as of right. We affirm.

In his sole appellate issue, defendant argues that the trial court erred in refusing to instruct the jury on the offense of reckless discharge of a firearm. We disagree.

We review claims of instructional error de novo. *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). Moreover, whether an offense is a necessarily included lesser

¹ At his first trial, defendant was convicted of possession of a short-barreled shotgun or rifle, MCL 750.224b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The jury was unable to reach a verdict on the first-degree murder charge. In a second trial, defendant was retried on the murder charge and the jury found him guilty of first-degree murder. Also at the second trial, defendant pleaded *nolo contendere* to the charge of felon in possession of a firearm. This Court affirmed defendant's conviction and sentences in an unpublished, per curiam opinion. See *People v Thompson*, unpublished opinion per curiam of the Court of Appeals, issued April 17, 2008 (Docket No. 273777). Application for leave to appeal to the Michigan Supreme Court was filed and then dismissed by stipulation of the parties. Thereafter, the trial court granted defendant a new trial based upon the newly discovered evidence contained in a report by the Michigan State Police Crime Lab. The report contradicted expert firearms testimony at the second trial. The present case is an appeal from defendant's conviction in his third trial stemming from these same crimes.

offense of another offense is a question of law, which we review de novo. See *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010).

In general, “the trial court is required to instruct the jury concerning the law applicable to the case and fully and fairly present the case to the jury in an understandable manner.” *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995), citing MCL 768.29. However, “[i]nstructions on cognate lesser offenses are not permitted, while instructions on necessarily included offenses are proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.” *Lowery*, 258 Mich App at 173, citing *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002).

“A lesser offense is necessarily included in the greater offense when the elements necessary for the commission of the lesser offense are subsumed within the elements necessary for commission of the greater offense.” *Wilder*, 485 Mich at 41, citing *Cornell*, 466 Mich at 357. A cognate lesser offense is related to or of the same class as the greater offense and may contain elements not found in the greater offense. *Cornell*, 466 Mich at 355.

Defendant was charged with first-degree murder. The trial court instructed the jury on the lesser offenses of second-degree murder and involuntary manslaughter, but refused to instruct the jury on reckless discharge of a firearm. In order to determine whether the trial court erred in refusing to instruct the jury on the offense of reckless discharge of a firearm, we must determine whether reckless discharge of a firearm is a necessarily included lesser offense or a cognate lesser offense of first-degree murder by examining the statutes to determine whether the elements of reckless discharge of a firearm are subsumed within the elements of first-degree murder. See *Lowery*, 258 Mich App at 173; See also *Wilder*, 485 Mich at 41.

The elements of reckless discharge of a firearm, MCL 752.861, are that a firearm was carelessly, recklessly, or negligently discharged causing death or injury. *Lowery*, 258 Mich App at 174. The elements of first-degree murder, MCL 750.316, are “that the defendant killed the victim and that the killing was either ‘willful, deliberate, and premeditated,’ or committed in the course of an enumerated felony.” *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002) (citations omitted). The discharge of a firearm is not an element of first-degree murder. Therefore, the elements of reckless discharge of a firearm are not subsumed within the elements of first-degree murder and reckless discharge of a firearm is not a necessarily included lesser offense of first-degree murder. See *Wilder*, 485 Mich at 41. Accordingly, the trial court properly declined to instruct the jury on the offense of reckless discharge of a firearm and defendant’s claim of error is without merit.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Donald S. Owens