STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 1, 2011
v	No. 299233 Ingham Circuit Court
DESHAWN RAY MILTON, Defendant-Appellant.	LC No. 09-001464-FC

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, carrying a concealed weapon, MCL 750.227, and felony-firearm, MCL 750.227b. Defendant appeals and, for the reasons set forth below, we affirm.

On October 25, 2009, defendant approached Demarkis Rembert and a group of his friends on a street in Lansing. Defendant was upset about an earlier incident in which Demarkis threw a rock at a car owned by defendant's girlfriend. As he walked up to Demarkis and the other young men, defendant asked who threw the rock at the car. Demarkis said he threw the rock and witnesses testified that defendant responded by saying he would "beat" Demarkis. Witnesses also testified that defendant referred to someone "tak[ing] a bullet." Defendant pulled out a .44 magnum handgun and hit Demarkis in the head. Defendant also fired a bullet from the gun and Demarkis later died from the gunshot wound.

Defendant argues that the trial court erred when it denied his request for a jury instruction on statutory involuntary manslaughter. The trial court gave instructions on first-degree and second-degree murder as well as voluntary manslaughter, but declined to give the statutory involuntary manslaughter instruction because it was not supported by the evidence.[1]

We hold that the trial court correctly denied defendant's request for an instruction on statutory involuntary manslaughter. MCL 768.32(1) provides:

[1] We review de novo a trial court's ruling on a necessarily included lesser offense instruction. *People v Walls*, 265 Mich App 642, 644; 697 NW2d 535 (2005).

> 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.

An "inferior" offense "does not refer to inferiority in the penalty associated with the offense, but . . . to the absence of an element that distinguishes the charged offense from the lesser offense." *People v Cornell*, 466 Mich 335, 354; 646 NW2d 127 (2002), quoting *People v Torres (On Remand)*, 222 Mich App 411, 419–420; 564 NW2d 149 (1997). In *Cornell*, our Supreme Court ruled that, for purposes of MCL 768.32(1), an inferior offense is limited to necessarily included lesser offenses. *Cornell*, 466 Mich at 353-354. As the *Cornell* Court explained, "a requested instruction on a necessarily included lesser offense is 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." *Id*. at 357. Thus, contrary to defendant's argument, the test is not merely whether some evidence could support the instruction, but whether the requested instruction is on a necessarily included lesser offense. "As *Cornell* makes clear, when deciding whether a lesser offense is necessarily included in the greater offense, the determination whether all the elements of the lesser offense are included in the greater offense requires an abstract analysis of the elements of the offenses, *not* the facts of the particular case." *People v Smith*, 478 Mich 64, 73; 731 NW2d 411 (2007) (emphasis in original).

Our Supreme Court specifically ruled in *Smith* that statutory involuntary manslaughter is not a necessarily included lesser offense of second-degree murder. *Id*. at 71. The Court opined:

> It is plain that the elements of statutory involuntary manslaughter are not completely subsumed in the elements of second-degree murder. Statutory involuntary manslaughter contains two elements that are not required to prove second-degree murder: (1) that the death resulted from the discharge of a firearm and (2) that the defendant intentionally pointed a firearm at the victim. Second-degree murder, on the other hand, may be committed without a firearm or even without a weapon of any kind. Because it is possible to commit second-degree murder without first committing statutory involuntary manslaughter, statutory involuntary manslaughter cannot be a necessarily included lesser offense of second-degree murder. [*Id*.]

Moreover, in *Smith*, our Supreme Court reiterated its prior holding that statutory involuntary manslaughter is not a necessarily included lesser offense of murder, but is a cognate lesser included offense of murder. *Id*. at 73, citing *People v Heflin*, 434 Mich 482, 497; 456 NW2d 10

(1990). Because "MCL 768.32(1) does not permit consideration of cognate lesser offenses," the trial court correctly declined to give defendant's requested instruction.[2]

Affirmed.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Jane M. Beckering

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[2] Defendant's reliance on *People v Hawthorne*, 265 Mich App 47; 692 NW2d 879 (2005), rev'd 474 Mich 174 (2006), is misplaced. The legal question in *Hawthorne* was whether the trial court should have given the jury an instruction on accident, not statutory involuntary manslaughter. Thus, unlike in this case, *Hawthorne* did not involve a request for an instruction on a cognate lesser offense, which is clearly prohibited by MCL 768.32(1). Further, the rule reiterated in *Hawthorne*—that a requested instruction must be given if supported by the evidence—does not bear on this case where the evidence simply did not support the statutory involuntary manslaughter instruction. Statutory involuntary manslaughter applies if "[a] person . . . wounds, maims, or injures another person by discharging a firearm that is pointed or aimed intentionally but without malice . . . if the wounds, maiming, or injuries result in death." MCL 750.329. The broadest reading of the evidence and defendant's argument at trial was that the gun may have gone off as defendant pistol-whipped Demarkis in the head with the gun. This factual scenario simply does not fit within the definition of statutory involuntary manslaughter because defendant did not intentionally aim or point the gun at Demarkis without malice and injure him in the process. Rather, the facts appear to better lend themselves to an accident instruction, but defendant has not appealed the trial court's failure to give an accident instruction. Moreover, were we to find error, defendant has not met the standard to support reversal outlined by the Supreme Court in *Hawthorne*:

> Under *Lukity*, the defendant has the burden to demonstrate that a preserved, nonconstitutional error resulted in a miscarriage of justice. MCL 769.26 sets forth a presumption that such an error does not warrant reversal "unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." [*People v Lukity*, 460 Mich 484, 496 596 NW2d 607 (1999)] (quoting MCL 769.26). " 'An error is deemed to have been "outcome determinative" if it undermined the reliability of the verdict.' " [*People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000)], quoting *People v Elston*, 462 Mich 751, 756; 614 NW2d 595 (2000), quoting *People v Snyder*, 462 Mich 38, 45; 609 NW2d 831 (2000). [*People v Hawthorne*, 474 Mich 174, 181-182; 713 NW2d 724 (2006).]

By convicting defendant of second-degree murder, the jury found that defendant acted with malice. *Smith*, 478 Mich at 70. Further, ample evidence supported defendant's conviction and nothing in the record suggests that the failure to give the statutory involuntary manslaughter undermined the reliability of the verdict.