STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 10, 2013
v	No. 309455 Kalamazoo Circuit Court
JARVUS ADRICE COLEMAN-YOUNG, Defendant-Appellant.	LC No. 2011-1498-FC

Before: HOEKSTRA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right from his convictions of second-degree murder, MCL 750.317, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was convicted following a jury trial. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case involves a shooting death at Fox Ridge Apartments in Kalamazoo, Michigan, on September 24, 2011. Defendant did not deny shooting the victim, Lyndon Berry. Numerous residents of the apartment complex testified that they heard a gunshot in the hallway, and that they saw Berry on the ground with blood coming from his mouth. Marquis Tipton testified that he saw defendant enter the hallway, and upon seeing Berry, who was in the process of shaking someone's hand, draw and fire his gun once. Following the shooting, Tipton heard defendant say "nigger shouldn't have robbed me" and also a statement to the effect that defendant "got" Berry.

The victim's girlfriend, Dashalia Walker, testified that she and Berry passed defendant in the hallway, and that defendant was drinking out of a "fifth" bottle of liquor. Walker testified that defendant saw Berry at that time. She testified that she walked ahead of Berry as Berry stopped to shake someone's hand. She didn't see the shot itself. When she turned around, she could see Berry on the ground and two men, one of whom was defendant, walking away. She heard defendant say the words "nigger" and "robbed."

Berry died of a gunshot wound to the chest. There was no evidence that he had been shot at close range, such as burn marks or stippling. No gun or other weapon was found on or near his body.

Defendant turned himself in to the Kalamazoo Department of Public Safety (KDPS) a few hours after the shooting. Defendant was interviewed by Detective Moorian of the KDPS. During the interview, defendant told Moorian that Berry had robbed him at gunpoint approximately 45 days before the shooting. He also stated that Berry had made "a gesture" before defendant shot him, and that defendant shot Berry at close range.

Defendant testified at trial that Berry had previously robbed him at gunpoint at a convenience store, and had stolen marijuana and money from him. Defendant never reported this robbery to the police, because there was a warrant out for his arrest for probation violation. Defendant testified that he went into the hallway and saw a group of people hanging out. He testified that Berry stepped out from behind another person. He testified that when Berry saw him, Berry began "mean mugging" him, which was making a mean face, and that his face was "the same face that he had when he robbed me." Defendant then testified that Berry made a "reaching" gesture, which defendant interpreted as reaching for a gun. Defendant reached for his own gun and fired one shot. He testified that he did not aim his shot and did not know who was hit afterward. He testified that he left the building because he did not know if he was still in danger. Defendant told police that he had discarded his gun; however, although police searched extensively, no gun was recovered. Defendant admitted that he never saw Berry with a gun.

Defendant admitted that he purchased his gun illegally, and that he carried it on his person almost every day since the robbery, loaded and ready to fire.

The trial court denied defendant's request to admit evidence related to a training program that police officers undergo called Use of Force Decision Making, which provides simulated scenarios involving an officer's decision to use deadly force. The trial court later denied a motion for reconsideration on this issue, as well as a motion for interlocutory appeal.

Defense counsel requested that the jury be instructed on voluntary and involuntary manslaughter as alternatives to the charge of murder. The trial court denied both instructions on the grounds that they were not supported by a rational view of the evidence.

II. ADMISSION OF EVIDENCE

Defendant first alleges that the trial court erred in refusing his repeated requests for the admission of evidence related to the Use of Force Decision Making program. We disagree. Defendant objected to the denial on the grounds that the evidence was relevant to his claim of self defense. However, on appeal defendant argues that the trial court's ruling denied him his constitutional right to present a defense. To the extent that defendant challenges the trial court's determination based on the rules of evidence, that argument is preserved. However, to the extent that defendant argues that the trial court's ruling violated his constitutional right to present a defense, that argument is unpreserved. See *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003) (holding that an objection to the admission of evidence based on the rules of evidence does not preserve the issue of whether the admission violated a constitutional right).

We review a trial court's decision to admit or exclude evidence for abuse of discretion. *Id*. "Evidentiary error will not merit reversal unless it involves a substantial right and, after an examination of the entire cause, it affirmatively appears that it is more probably than not that the

error was outcome determinative." *Id*., citing *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 609 (1999). Unpreserved alleged constitutional error is reviewed for plain error. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). "First, there must be an error; second, the error must be plain (i.e., clear or obvious); and third, the error must affect substantial rights (i.e., there must be a showing that the error was outcome determinative)." *Coy*, 258 Mich App at 12.

Generally, relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Evidence is relevant if it tends to make the existence of a material fact more or less probable than it would be without the evidence. MRE 401; *People v Watkins*, 491 Mich 450, 470; 818 NW2d 296 (2012). However, even relevant evidence may be excluded if its probative value is substantially outweighed by, among other factors, risk of confusion of the issues or misleading the jury. MRE 403; *People v Yost*, 278 Mich App 341, 407; 749 NW2d 753 (2008).

Here, defendant sought to admit evidence regarding a required training course for KDPS police officers. Specifically, defendant sought to present testimony that KDPS officers were required to participate in a simulated, scenario-based training regarding different scenarios and the use of deadly force. Defendant's objective was to present evidence showing that even a trained police officer sometimes may make a mistake in determining whether to use deadly force.

In denying the admission of the evidence, the trial court noted that the testimony arguably had some minimal relevance. However, the trial court noted the risk of confusing the issues and misleading the jurors, arising from the introduction of evidence of police officer training, notwithstanding that defendant was not a police officer and had not undergone the training.

We hold that the trial court did not abuse its discretion in denying the admission of this evidence. Any relevance to defendant's claim of self-defense was minimal; at best, this evidence would support the general notion that a person could make a mistake in the use of deadly force in a high-pressure situation. Defendant was allowed to argue this. Additionally, as records were not kept regarding officer performance in the training program, and the scenarios rarely involved unarmed individuals, even this general point would not be substantially bolstered by a mere description of the training and possible testimony that officers made mistakes in their responses.

Further, this evidence carried a substantial risk of confusing the issues and misleading the jury. Evidence related to training that police officers receive regarding decision-making in the use of deadly force could confuse the issue of whether defendant, who is not a police officer, acted in appropriate self defense in the situation in which he found himself. The issue in the case was whether *defendant* honestly and reasonably believed he was in imminent danger of death or serious bodily harm. *People v Kurr*, 253 Mich App 317, 320-321; 654 NW2d 651 (2002). The issue of whether a trained officer may have had the same belief, or whether that belief would have been influenced by a simulated training program, was not relevant to defendant's claim of self defense. The trial court was within its discretion in denying the admission of this evidence on the grounds of risk of confusing the issues and misleading the jury.

Because we find no error in the denial of the admission of this evidence, we also find no plain error affecting substantial rights. *Coy*, 258 Mich App at 12.

III. JURY INSTRUCTIONS

Next, defendant alleges that the trial court erred in denying his request for an instruction on voluntary manslaughter.[1] We disagree. We review issues of law arising from jury instructions de novo, but a trial court's determination of the applicability of an instruction to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006), cert den 550 US 920; 127 S Ct 2132; 167 L Ed 2d 868 (2007).

A trial judge's duty is to instruct the jury as to the applicable law, and fully and fairly present the case to the jury in an understandable manner. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). An instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find an additional disputed factual element and a rational view of the evidence would support the instruction. *Id*. at 606.

A lesser offense is necessarily included, absent statutory language to the contrary, when all of the elements of the lesser offense are also elements of the greater offense. *People v Wilder*, 485 Mich 35, 41; 780 NW2d 265 (2010). To be supported by a rational view of the evidence, a lesser included offense must be justified by the evidence. *People v Steele*, 429 Mich 13, 20; 412 NW2d 206 (1987), overruled in part on other grounds in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). Proof on an element differentiating the two crimes must be "sufficiently in dispute" so as to allow the jury to consistently find the defendant not guilty of the charged offense but guilty of the lesser offense. *Steele*, 429 Mich at 20; *People v Heft*, 299 Mich App 69, 77; 829 NW2d 266 (2012).

> The elements of second-degree murder are (1) that a death occurred, (2) that it was caused by the defendant, (3) that the killing was done with malice, and (4) without justification or excuse. Malice is the intention to kill, the intention to do great bodily harm, or the intention to create a high risk of death or great bodily harm with knowledge that such is the probable result. [*People v Porter*, 169 Mich App 190, 192; 425 NW2d 514 (1988); see also *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002).]

"Manslaughter is murder without malice." *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). To prove voluntary manslaughter, "one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Id*. at 535. Provocation is not an element of manslaughter, but rather a circumstance that negates the presence of malice. *Id*. at 536.

[1] As noted above, defendant also requested, and was denied, an instruction on involuntary manslaughter; however defendant does not challenge this denial on appeal.

Manslaughter is thus a necessarily-included lesser offense of murder, because the elements of manslaughter are included in the offense of murder, with murder having the additional element of malice. *Id*. Therefore the trial judge was required to give the requisite instruction if the element of malice was sufficiently in dispute and a rational view of the evidence supported it. *McGhee*, 268 Mich App at 606.

However, we conclude that the evidence did not support such a view. Defendant argues that the trial court erred by focusing on the period between the alleged robbery and the shooting and concluding that defendant had a sufficient "cooling off" period. The trial court indeed made statements to this effect. Defendant maintains that the trial court instead should have considered whether defendant was adequately provoked by the sight of Berry, his facial expression, and Berry's gesture. However, the trial court also stated:

> The other theory I think the defense could argue was that there was some sort of provocation that night that caused him to act out of passion or anger. But, there was no evidence to that affect [sic], so I don't think that a rational view of the evidence supports giving this instruction.

We agree with the trial court. The evidence shows that defendant acted intentionally in removing the gun from his pocket, pointing it at the victim, and firing it. Further, the evidence shows that none of the numerous residents and eyewitnesses saw the victim make any sort of aggressive movement or say anything to defendant. No weapon was found on the victim. Defendant's own self-serving testimony only indicates that the victim may have made a "mean face" and made a reaching motion that defendant interpreted as reaching for a gun. Defendant admitted that he never saw the victim's hands or saw a gun. Under no stretch of the imagination could even defendant's description of the victim's conduct be considered "adequate" provocation for fatally shooting a person. Thus, a rational view of the evidence would not allow a jury to consistently find the defendant guilty of voluntary manslaughter but not guilty of murder. *Heft*, 299 Mich App at 77.

Further, defendant's own theory of the case was that he acted in self-defense. Self-defense relates to the justification for a homicide, not lack of intent to kill. See *People v Heflin*, 434 Mich 482, 503; 456 NW2d 10 (1990) ("A finding that a defendant acted in justifiable self-defense necessarily requires a finding that the defendant acted intentionally, but that the circumstances justified his actions."). Instruction on a necessarily-included lesser offense is required if "proof of the element or elements *differentiating the two crimes*" is "*sufficiently in dispute* so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense." *Heft*, 299 Mich App at 77 (quotation marks and footnote omitted) (emphases added). Here, defendant's theory centered on disputing the element of justification, not malice.

Because the element of malice was not sufficiently in dispute, and because a rational view of the evidence did not support a voluntary manslaughter instruction, the trial court did not abuse its discretion in finding such an instruction inapplicable to the facts of the case.

Affirmed.[2]

/s/ Joel P. Hoekstra
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra

[2] On appeal, defendant also argued that his judgment of sentence erroneously listed his felony-firearm conviction and CCW convictions as being consecutive to each other. This indeed was error. See *People v McCrady*, 213 Mich App 474, 486; 540 NW2d 718 (1995). However, it appears from the record provided to this court that the judgment of sentence was amended to have the sentences run concurrently with each other (see amended judgment of sentence, 6/13/2012). That action renders defendant's third assignment of error moot. See *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010).