STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 18, 2001
v DERRICK A. JACKSON, Defendant-Appellant.	No. 202140 Recorder's Court LC No. 96-002797

Before: Markey, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was subsequently sentenced to consecutive sentences of the mandatory terms of life imprisonment without parole for the conviction of felony murder and two years' imprisonment for felony-firearm. The trial court vacated the conviction of second-degree murder since the case involved the death of a single victim. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court improperly allowed the prosecution to introduce evidence of a nontestifying codefendant's out-of-court statement during the trial. We review the trial court's decision to admit evidence for an abuse of discretion. *People v Lukity,* 460 Mich 484, 488; 596 NW2d 607 (1999). When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, then the issue is one of law and is reviewed de novo. *Id.* Similarly, because this issue implicates the Confrontation Clause of the state and federal constitutions, the issue is constitutional and is reviewed de novo. *People v Beasley,* 239 Mich App 548, 557; 609 NW2d 581 (2000).

During trial, Raymond Robinson, an acquaintance of both defendant and codefendant Lashawn Holston, testified that Holston told him that defendant and Holston were involved in the robbery and killing of the victim in this case. Specifically, Holston told Robinson that he (Holston) and defendant robbed someone on Margaret Street. Holston indicated that the victim was sleeping in his vehicle when they went to the vehicle and used a club to break the passenger

window. The victim woke up and started to struggle with defendant, and defendant hit the victim in his jaw with a gun. Holston then urged defendant to shoot the victim. According to Holston, defendant shot the victim three times. The trial court permitted Robinson to testify in this manner, over defendant's objection at trial.

Codefendant Holston did not testify at defendant's trial; consequently, he was an unavailable witness. MRE 804(a)(1); *People v Poole,* 444 Mich 151, 163; 506 NW2d 505 (1993). Because Holston's alleged statement was an unsworn, out-of-court statement admitted at trial through the testimony of Robinson, it is clearly hearsay. MRE 801(c). The trial court admitted the statement under MRE 804(b)(3), which provides:

> *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The trial court found, and we agree, that the statement was admissible as a statement against interest pursuant to *Poole*. Here, the codefendant's statement was voluntarily given, made to a friend, uttered spontaneously at the initiation of the declarant without prompting or inquiry by the listener, was made in the context of a narrative of events, was made three days after the killing, and was clearly against the codefendant's penal interest. *Id.* at 161. Further, the fact that the codefendant's statement identified defendant as the shooter does not compel exclusion of the statement. As noted by the trial court, the codefendant's statement implicated himself as an aider and abettor during the commission of the crime. This is not a situation where the codefendant's statement shifted all blame to the defendant. *Id*.

To the extent that defendant argues that our Supreme Court's decision in *Poole* was overruled by *Williamson v United States,* 512 US 594; 114 S Ct 2431; 129 L Ed 2d 476 (1994), we note that this same argument was rejected by this Court in *Beasley*. As noted in *Beasley, supra* at 556, our Supreme Court in *Poole* was interpreting MRE 804(b)(3), while the United States Supreme Court in *Williamson* was ruling on the federal rule of evidence. Consequently, we are bound by our Supreme Court's decision in *Poole*. Under these circumstances, the trial court did not abuse its discretion is admitting the codefendant's statement under MRE 804(b)(3).

The next question is whether admission of the codefendant's statement violated defendant's right of confrontation. See *People v Meredith,* 459 Mich 62, 67; 586 NW2d 538 (1998). The Confrontation Clause[1] requires a showing that the witness is unavailable and that the statement bears adequate indicia of reliability. *Id.* at 68, quoting *Ohio v Roberts,* 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980). We again agree with the trial court, for the reasons it

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[1] US Const, Am VI; Const 1963, art I, § 20.

stated, that the codefendant's statement bears adequate indicia of reliability. As stated, the statement was voluntarily given to a friend, made spontaneously at the codefendant's initiation and without prompting or inquiry by Robinson, and was made three days after the killing. *Poole, supra* at 165. Consequently, we conclude that the totality of the circumstances indicate that the codefendant's statement is sufficiently reliable to be allowed as substantive evidence even though defendant was not able to cross-examine the codefendant. Accordingly, the trial court did not abuse its discretion in admitting codefendant's Holston's unsworn, out-of-court statement against defendant at trial.

II

Defendant next argues that the prosecutor engaged in deliberate misconduct when she elicited from Raymond Robinson testimony that defendant was the shooter, immediately after Robinson testified that Holston told him that Philip Harris was the shooter. Specifically, the following colloquy occurred during the trial between the prosecutor and Robinson:

> *Q.* And then what did Mr. Holston say?
>
> *A.* That they bust out the window. The guy awoke and started to fight back and they hit him. One of them hit him in the jaw. Dee [defendant] hit him and the guy kept fighting back and he told Derrick to shoot him, but Derrick act like he didn't want to shoot the guy and kept telling him to shoot him and Phil shot him.
>
> *Q.* Did Mr. Holston say how many times Mr. Jackson shot the person?
>
> *A.* Three times.

First, we note that defense counsel did not object to this line of questioning, therefore, the issue was not preserved. Moreover, we do not agree with defendant's characterization that the prosecutor engaged in deliberate misconduct. As the prosecution states in its appellate brief, it is just as possible that the prosecutor at trial either misheard Robinson's testimony (which went uncorrected by Robinson) or that there is an error in the transcription of the testimony.[2] Therefore, we find no error requiring reversal with respect to this issue.

III

Defendant next raises several issues regarding a claim of ineffective assistance of counsel. Based on the record before us, we conclude that defendant was not denied his right to the effective assistance of counsel because defendant has failed to show that counsel's conduct was objectively unreasonable or prejudicial. *People v Toma,* 462 Mich 281, 302-303; 613 NW2d 694 (2000).

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[2] The prosecution's claim in this regard that there is probably an error in the transcription of the testimony seems the more likely. Having reviewed the transcripts, we note that they are fraught with errors.

First, defendant contends that counsel was ineffective for failing to file a pretrial motion in limine regarding codefendant Holston's statement to Robinson or Bruce Butler. However, Butler did not testify. Additionally, regardless of whether counsel filed a pretrial motion, the admissibility of codefendant Holston's statement through Robinson was addressed before Robinson testified and the trial court allowed the testimony. Because the trial court did not err in its ruling (see Issue I), defendant was not prejudiced in any way merely because the issue was not addressed before trial.

Second, defendant suffered no prejudice from counsel's failure to argue that codefendant Holston's statement violated the Confrontation Clause. As has been held in Issue I, the admission of the statement did not violate defendant's right of confrontation.

Third, counsel was not ineffective for failing to object to the prosecutor's question asking Robinson how many times defendant shot the victim (see Issue II) because, as has been stated, it is most likely that this was an error in the transcription of the testimony. In fact, this seems to be the most reasonable explanation given that counsel did not respond in any way.

Further, to the extent that defendant claims that he wanted to testify but did not do so because of counsel's advice based on defendant's prior conviction of carrying a concealed weapon, we conclude that this was reasonable trial strategy employed by counsel that we will not second guess. *Id.* at 304.

IV

Finally, we address the issue of the missing jury instruction transcript. Defendant argues that the trial court erred on remand by finding that the jury instructions in regard to codefendant Holston were identical to those given with respect to defendant. Defendant claims that error requires reversal of his convictions. We disagree that reversal is warranted.

This issue initially arose when defendant requested that the trial transcripts be filed for his appeal. When the transcripts were filed, it was discovered that the transcript of the *Walker* hearing and defendant's jury instructions were not included. Defendant and codefendant Holston were tried together before separate juries in November and December 1996. Defendant filed his appellate brief on September 14, 1999. In an affidavit dated November 2, 1999 and filed with this Court on November 9, 1999, court reporter Betty Sanders averred that she transcribed the notes for court reporter Dolores Wilder and that the stenographer notes for December 10, 1996 were missing the entire third pack, which contained the jury instructions regarding defendant's case.

As a result, defendant moved to hold the appeal in abeyance pending the resolution of the missing transcripts and moved for a remand. This Court, in an unpublished order entered on January 18, 2000, granted the order to hold the appeal in abeyance until the *Walker* hearing transcript of August 30, 1996, and the jury instruction transcript of December 10, 1996 were filed or the record was settled. This Court specifically ordered that the matter be remanded to the trial court so that defendant could file a motion for an evidentiary hearing to determine whether the transcript of the jury instructions was available or, if not, to proceed to settle the record pursuant

to MCR 7.210(B)(2). The transcript of the *Walker* hearing was filed with this Court on February 1, 2000.

With respect to the jury instruction transcript, the trial court, in an order entered on March 1, 2000, granted defendant's motion for an evidentiary hearing regarding the availability of the transcript. On March 13, 2000, it was determined that the December 10, 1996, jury instruction transcript was unavailable and that the parties would proceed to settle the record. An evidentiary hearing to settle the record was then held on May 24, 2000, June 7, 2000, and June 12, 2000. The trial court,[3] in an order entered on July 31, 2000, ruled:

> It is the finding of this Court that the content of the instructions given the jury deliberating in the case against defendant Derrick Jackson were identical to the instructions given to the jury deliberating in the case against the co-defendant Lashawn Holston.
>
> Therefore, it is the order of this Court the transcribed jury instructions for co-defendant Lashawn Holston shall serve as the settled record of jury instructions applicable to defendant Derrick Jackson.

We conclude that the trial court's ruling in this regard was clearly erroneous because the jury instructions could not have been identical. Defendant was charged with first-degree felony murder, first-degree premeditated murder, and felony-firearm. Codefendant Holston was charged with first-degree felony murder, first-degree premeditated murder, and armed robbery. Defendant did not testify, while codefendant Holston testified in his own behalf before his jury. During trial, the trial court instructed codefendant Holston's jury on: (1) first-degree felony murder with larceny as the underlying felony and second-degree murder as a lesser offense; (2) first-degree premeditated murder with second-degree murder as a lesser offense; and (3) armed robbery with unarmed robbery and larceny from a person as lesser offenses. The obvious differences, even without a transcript, are that defendant was not charged with armed robbery, but was charged with felony-firearm, and did not testify at trial. Consequently, we cannot accept the trial court's conclusion that the instructions given to codefendant Holston's jury were identical to those given to defendant's jury.

The dissent concludes that Judge Kenny's error in settling the record has made it impossible for defendant or this Court to review the regularity of the jury instructions and, thus, reversal is required. Significantly, there is no Michigan authority establishing that the failure to provide a transcript of the charging of the jury mandates that a defendant be granted a new trial. Rather, Michigan case law provides that when there exists an inability to provide a complete trial transcript, a reviewing court must look to the balance of the transcript to determine whether there is a sufficient record to review defendant's claim on appeal. *People v Federico*, 146 Mich App 776, 799; 381 NW2d 819 (1985). We conclude that Jude Kenny's erroneous ruling in regard to the settlement of the record does not compel reversal of defendant's convictions.

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[3] The hearing was held before Judge Timothy M. Kenny because the original trial court, Judge Kym L. Worthy, testified at the evidentiary hearing.

After thorough review of the trial record and the record of the evidentiary hearing, we are convinced that there is only one reasonable conclusion regarding the settlement of the record of the jury instructions. Prior to closing arguments at trial, Judge Worthy cited the exact instructions she intended to read in regard to each defendant. She stated:

> [F]or the record I am going to give Criminal Jury Instruction, this goes for you, Mr. Price [codefendant's counsel], too, so please pay attention, Criminal Jury Instruction 3.1, Duties of Judge and Jury; 3.2, Presumption of Innocence, Burden of Proof and Reasonable Doubt. For the Jackson jury only I will give 3.3 Defendant Not Testifying. 4.3, Circumstantial Evidence; 3.5, Evidence; 3.6, Witnesses Credibility; 4.1, Defendant Statement as Evidence Against the Defendant. I will give the modified version that I spoke of at this point just before Mr. Jackson's jury since we haven't discussed the issues before Mr. Price that's for Mr. Holston.
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> 4.5, Impeachment by Prior Inconsistent Statement; 4.7, Stipulation; 4.9, Motive; 5.2, Weighing Conflicting Evidence, Number of Witnesses, 5.3, Witnesses Being Interviewed by a Lawyer; 5.10, pathology and the doctor - - I'm sorry, Sergeant Dale Johnston Firearms Identification.
>
> 5.11, Police Witness; 16.1, First Degree Premeditated Murder; Specific Intent, 3.9; 16.5, Murder in the Second Degree; 3.8, Less Serious Crime which obviously I will give before Murder in the Second Degree; 16.4, First Degree Felony Murder; Larceny. 23.1 that's the underlying charge in the Information. And also with that of course Specific Intent.
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> Felony-Firearm, 11.34; 16.21 Inferring State of Mind; 16.24 Degrees of Murder; 16.25 Unanimity of Verdict. Well [Sic] committing a felony murder; 16.26, Felony Murder Co-Defendants; 8.1, Aiding and Abetting; 8.3, Separate Crime Within the Scope of Common Unlawful Enterprise; 8.4, Inducement.
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> 8.5, Mere Presence is Sufficient; 3.20, Single Defendant More Than One - - Multiple Counts More Than One Unlawful Act; 3.11, Deliberations and Verdict; 3.13, Penalty; 3.14, Communications with the Court; 3.15 Exhibits. And lastly 3.23 Verdict Form.

At the evidentiary hearing, the prosecutor who had been assigned to Judge Worthy's courtroom for two years and was actually present during the instructions testified that it is Judge Worthy's practice to always give the instructions she cites on the record. That prosecutor described Judge Worthy as "meticulous about having a discussion before the jury is brought in so both attorneys would know exactly what they would be able to argue based on the jury instructions," and testified: "if she said she was going to give an instruction, you could take that to the bank." No witness at the evidentiary hearing challenged those statements regarding Judge Worthy's common practice or suggested that the instructions included anything other than those cited by Judge Worthy. Under these circumstances, we hold as a matter of law that Judge Worthy charged the jury as she indicated she would in the trial record. No evidence contradicts or places doubt on this conclusion.

Accepting the above cited instructions as those given to defendant's jury, there exists only two possible preserved areas of contention regarding defendant's jury instructions: (1) defendant's counsel objected to the trial court's failure to give an instruction on voluntary manslaughter; and (2) defendant's counsel objected to a proposed instruction requested by the prosecutor regarding evidence that defendant made a false exculpatory statement. Both of these areas of contention were preserved in the trial court record. Significantly, however, defendant has not set forth any substantive argument in regard to these issues on appeal. It is well settled that a party may not simply announce his position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and search for authority to sustain or reject his position. *Wilson v Taylor,* 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 38 (1959). On this appeal, defendant merely challenges the trial court's settlement of the record on remand, arguing Judge Kenny's error leaves defendant and this Court without a record of the jury instructions to review for error thus requiring reversal. Despite the fact that the trial record and the record of the evidentiary hearing lead to only one conclusion regarding the instructions actually given, defendant has not raised any specific challenge to the instructions given. As stated prior, we reject defendant's claim that Judge Kenny's erroneous settlement of the record requires reversal and we need not address the areas of instructional contention that defendant has not presented for our review. *Id.*[4]

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[4] Even had defendant presented argument on appeal specifically challenging the trial court's failure to instruct regarding voluntary manslaughter or the trial court's instruction on false exculpatory statements, we would not find error requiring reversal. Whether the requested voluntary manslaughter instruction should have been given depends upon whether the evidence supported such an instruction. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Judge Worthy made an extensive record regarding her conclusion that the evidence did not support a voluntary manslaughter instruction and nothing in the record suggests that conclusion was erroneous.

The prosecutor proposed a special instruction regarding defendant's alleged false exculpatory statement. Prior to charging the jury, defendant's counsel objected to this proposed special instruction. The record of the pre-instruction discussions and the parties' recollections at the evidentiary hearing establish that Judge Worthy agreed to read a modified version of the proposed instruction. The record of the discussion prior to closing arguments includes:

> As far as false exculpatory statement, the law in this [state] is very clear. Some of these have been cited in the supporting memorandum of law of the people. Just two cases I am going to refer to [sic]. The main one I am going to be citing is People versus [Dandron], 70 Michigan [Sic] 439, 1976 case. And also People versus Wackerle, . . . 156 Michigan Appellate 717, a 1986 case. That defines exactly what false exculpatory statement is. But basically what those cases say is the evidence must be looked at in totality to determine if the defendant's statement was or could be looked at as false in nature based on totality of the evidence we have had in this case.

(continued…)

Affirmed.

/s/ Jane E. Markey
/s/ Brian K. Zahra

(…continued)

> And certainly there is ample testimony in this case for [sic] other people as to what occurred out there in front of 150 East Margaret that a fact finder could look at this and determine that in fact this defendant's statement was falsely exculpatory in nature.
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> I do agree, however, with Mr. Blake that this statement is very redundant, especially in light of Criminal Jury Instruction section 4.1 and I will modify it somewhat. But I am going to give, in essence, the first paragraph of this proposed instruction in defining what a false exculpatory statement is. And may have - it may have occurred in this case and how they can consider or may consider that circumstantial evidence of his guilt. So, Mr. Blake, your objection's noted for the record.
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> Mr. Blake: Thank you.
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> The Court: But it's not going to be in this exact form.
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> Mr. Blake: All right.

Unfortunately, neither the false exculpatory statement instruction proposed by the prosecutor nor the memorandum of law relied on by the trial judge is in the record. Nonetheless, the cases cited by Judge Worthy support the proposition that such an instruction would be appropriate. We do not know the exact instruction given by Judge Worthy. However, even were we to assume error in regard to the substance of the false exculpatory statement instruction, such error would have been harmless given the substantial evidence of defendant's guilt. A trial court's instructional error can be harmless error. *People v Rodriguez*, 463 Mich 466, 472-474; 620 NW2d 13 (2000); *People v Mosko*, 441 Mich 496, 502-503; 495 NW2d 534 (1992). The validity of a verdict is presumed, and the defendant bears the burden of showing that the instructional error resulted in a miscarriage of justice, in that, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Rodriguez, supra* at 474, quoting *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000), citing *Lukity, supra* at 495-496. An error is outcome determinative if it undermined the reliability of the verdict, considering the nature of the error in light of the weight and strength of the untainted evidence. *Id.* Here, substantial evidence aside from defendant's alleged false exculpatory statement supported defendant's convictions. Therefore, even had defendant advanced an argument on appeal regarding the false exculpatory instruction, such an argument would fail.

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 18, 2001
v DERRICK A. JACKSON, Defendant-Appellant.	No. 202140 Recorder's Court LC No. 96-002797

Before: Markey, P.J., and Jansen and Zahra, JJ.

JANSEN, J. (*dissenting*).

I must respectfully dissent from part IV of the majority's opinion. I conclude that the missing jury instruction transcript constitutes an issue that compels reversal for a new trial.

As noted by the majority, the entire jury instruction transcript is missing and obviously can no longer be reproduced since the court reporter transcribing the stenographer's notes averred that the entire third pack containing the jury instructions in defendant's case were missing. Moreover, the parties have not been able to settle the record. As also noted by the majority, Judge Kenny's ruling that codefendant Holston's jury instructions shall serve as the settled record of defendant Jackson's jury instruction is clearly erroneous for the obvious reasons that defendant and codefendant Holston were not charged with identical offenses, and that defendant did not testify at trial while codefendant Holston testified in his own behalf before his jury.

I cannot, however, accept the majority's conclusion that "there is only one reasonable conclusion regarding the settlement of the record of the jury instructions." The majority's analysis is based on assumptions and inferences upon inferences. I note the following testimony taken from the evidentiary hearing held in May and June 2000. Nancy Westveld, the trial prosecutor, acknowledged that defense counsel objected to the false exculpatory statement as evidence instruction requested by the prosecutor. However, Westveld also indicated that she was *not* present during trial when the trial court gave the jury instructions. Lawrence Shulman, the trial prosecutor who stood in for Westveld for the jury instructions, indicated that he had no independent recollection of the jury instructions. Wright Blake, trial counsel for defendant, stated that he had no independent recollection of the jury instructions. Blake, however, did recall that he requested an instruction on voluntary manslaughter as a lesser included offense that was not given and that he objected to the false exculpatory statement instruction as requested by the prosecutor. Finally, Judge Kym Worthy, the trial judge, testified that she had no independent

recollection of the jury instructions. Judge Worthy, however, did recall that defense counsel requested a voluntary manslaughter instruction (that was not given) and that defense counsel objected to the false exculpatory statement instruction. It should perhaps be emphasized that the hearing was held 3 ½ years after the trial; therefore, it is hardly surprising that there was really no independent recollection of the jury instructions by any of the parties involved.

The rules surrounding a missing trial transcript were most recently summarized in *People v Federico,* 146 Mich App 776, 799-800; NW2d (1985):

> The inability to obtain the transcripts of a criminal proceeding may impede a defendant's right to appeal to an extent that a new trial must be ordered. . . . Where only a portion of the trial transcript is missing, the surviving record must be reviewed in terms of whether it is sufficient to allow evaluation of defendant's claim of appeal. The sufficiency of the record depends on the questions that must be asked of it.

There need not be a rule mandating a new trial when a jury instruction transcript cannot be provided to justify reversal in this case. Here, it is clear that the record was not successfully settled on remand because defendant's jury instructions could not have been identical to codefendant Holston's jury instructions. Moreover, there is no transcript available, nor is there any transcript whatsoever for this Court to review relative to the jury instructions. The instructions that Judge Worthy *intended* to give is, with all due respect, irrelevant since it is the task of a reviewing court to review the actual record for error. I do not see how this Court can hold as a matter of law, with no record to review, that Judge Worthy gave the instructions that she indicated at the hearing she would have given. Thus, the surviving record is simply insufficient for any type of meaningful review. See, *United States v Malady,* 960 F2d 57, 59 (CA 8, 1992) (To obtain reversal, a defendant must show that the missing part of the transcript specifically prejudices the appeal and prejudice exists when the appellate court cannot determine whether the trial court committed reversible error).

Consequently, I find that it is impossible for either defendant or this Court to review the regularity of the jury instructions. This is not a situation where the record can be reconstructed, where the surviving record is sufficient to evaluate a claim of instructional error, or where it is clear that there were no objections posed below to the trial court's instructions. Therefore, to insure defendant's constitutional right to a trial by jury and his right to appeal in a criminal case, Const 1963, art 1, § 20, I would reverse defendant's convictions and remand for a new trial. See *People v Horton (After Remand),* 105 Mich App 329, 331; 306 NW2d 500 (1981).

/s/ Kathleen Jansen