STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 21, 2013
v	No. 309383 Wayne Circuit Court
JAMES EDWARD HAILE, Defendant-Appellant.	LC No. 11-006399-FC

Before: BECKERING, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Defendant, James Edward Haile, appeals as of right his jury-trial convictions of second-degree murder, MCL 750.317,[1] and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant's convictions arise out of a December 8, 2010, incident where defendant shot and killed 17-year-old Devaunta Brown during a card game. The trial court sentenced defendant to 18 to 40 years' imprisonment for second-degree murder and two years' imprisonment for felony-firearm. We affirm.

I

Defendant first argues that the trial court erred by submitting his felony-murder charge to the jury because it was not supported by sufficient evidence. Although the jury acquitted him of the felony-murder charge and convicted him of the lesser included offense of second-degree murder, defendant contends that submitting the charge to the jury violated his due-process rights due to the possibility of a "compromise verdict" and a substantial decrease in his chances of acquittal.[2] We disagree.

In order to preserve an issue regarding the submission of a charge to the jury, the defendant must move for a directed verdict at trial regarding the subject charge. *People v Lugo*, 214 Mich App 699, 710-711; 542 NW2d 921 (1995). Defendant did not move for a directed

[1] The jury acquitted defendant of the charge of felony murder.

[2] Second-degree murder is a lesser included offense of first-degree felony murder. *People v Goodchild*, 68 Mich App 226, 236; 242 NW2d 465 (1976).

verdict with respect to his felony-murder charge. Therefore, this issue has not been preserved for appellate review. See *id*. "This Court reviews the effect of an unpreserved constitutional error under the plain-error standard." *People v Shafier*, 483 Mich 205, 211; 768 NW2d 305 (2009).

"The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated . . . ." *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999) (citation omitted). Under MCL 750.316(b), larceny from a person is a predicate felony to felony murder. "The elements of larceny from a person are (1) the taking of someone else's property without consent, (2) movement of the property, (3) with the intent to steal or permanently deprive the owner of the property, and (4) the property was taken from the person or from the person's immediate area of control or immediate presence." *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004). Defendant contends that there is no evidence that the shooting occurred in the perpetration or attempted perpetration of a larceny.

The incident in question occurred at a home where several people were playing blackjack for money, including defendant and his cousin Sequiea Winston. Winston testified that she left the game temporarily to pick up her friend Brown. After she returned with Brown, defendant and another person left for about five minutes and returned with three other people. Defendant and Brown exchanged aggressive words and drew guns. Winston told Brown to put his gun away, and Brown pointed his gun to the floor. Defendant placed his gun in his sweatshirt pocket. As Winston was attempting to locate car keys in order to take Brown away from the situation, she heard a gunshot to her left where defendant was standing.[3] Brown's eyes widened, and Winston realized that he had been shot. Brown fell backwards onto the floor. Winston dropped to her knees and began trying to comfort him. As Brown lie shaking on the floor, defendant reached into Brown's pocket and removed money and marijuana. One of the people who had arrived with defendant took Brown's gun, and defendant and his companions left the home. This evidence supported the submission of the felony-murder charge to the jury because a rational jury could have concluded that defendant shot Brown in order to take his belongings while intending to permanently deprive him of the items.[4] See *Lugo*, 214 Mich at 710.

Accordingly, the trial court did not plainly err by submitting the felony-murder charge to the jury.

[3] Winston testified that defendant and Brown were the only two people she saw with guns.

[4] Because a rational jury could have concluded that defendant shot Brown in order to take his belongings, we need not address whether taking Brown's belongings as an afterthought of the shooting supports a felony-murder charge.

II

Defendant next argues that he was deprived of his due-process rights because the trial court denied the prosecution's request for a jury instruction on voluntary manslaughter. We disagree.

To preserve an instructional error for appellate review, a defendant must request adequate jury instructions or object to the instructions given in the trial court before the jury deliberates. *Carines*, 460 Mich at 761; *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). The prosecution initially requested a voluntary-manslaughter instruction but then withdrew its request. Defendant did not request a voluntary-manslaughter instruction. Therefore, we review this unpreserved issue for plain error affecting defendant's substantial rights. See *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

Voluntary manslaughter is a necessarily lesser included offense of murder. See *People v Mendoza*, 468 Mich 527, 544; 664 NW2d 685 (2003). "[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." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002); see also *People v Reese*, 466 Mich 440, 446-448; 647 NW2d 498 (2002). Instruction on a necessarily included lesser offense requires some evidence that would support a conviction on the lesser offense, and "proof on the element or elements differentiating the two crimes must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense." *Cornell*, 466 Mich at 352 (quotation marks and citations omitted).

A voluntary manslaughter instruction is only warranted when a rational view of the evidence would support it. *Mendoza*, 468 Mich at 548. "[T]o show 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. "Manslaughter is murder without malice." *Id*. at 534. "The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason." *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991).

There was no evidence presented at trial that defendant shot Brown out of passion. According to defendant, he and Brown exchanged words. Brown then indicated to defendant that he had a weapon and reached for his gun. As a result, defendant reached for and grabbed Brown's gun and simultaneously reached for his own gun. A shot then went off. Defendant asserted that he was defending his life during this incident. At the time, defendant did not know which gun fired the shot. A rational view of the evidence does not support a conclusion that defendant killed Brown out of passion; rather, it supports a possible conclusion that defendant

acted out of self-defense or reason.[5] Furthermore, this is true even though the jury ultimately rejected defendant's self-defense claim. Therefore, defendant has failed to show that the trial court erred by not instructing the jury on voluntary manslaughter. *Mendoza*, 468 Mich at 548; *Cornell*, 466 Mich at 352-357.

III

Lastly, defendant contends that the trial court violated his right to a fair and impartial jury by improperly dismissing Juror 14 for cause. We disagree.

We will reverse a trial court's decision to remove a juror only when there has been a clear abuse of discretion. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). A trial court abuses its discretion when it reaches a decision falling outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

MCL 768.18(1) provides, "Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed . . . ."

During deliberations in this case, Juror 13 advised the trial court that she wanted to bring a concern to its attention involving a bias of someone on the jury. Both the prosecution and the defense agreed that the trial court should inquire into the problem. The trial court brought Juror 13 into the courtroom, and she appraised the court of comments Juror 14 allegedly made. According to Juror 13, Juror 14 stated, "I'm not going to put away another one of my boys," and "I would never convict on just hearing—on the basis of one person's testimony." The trial court noted that both Juror 14 and defendant were African American. The trial court indicated that it had no problem with Juror 14's second alleged statement but that the first statement was an indication of racial bias. The trial court brought Juror 14 into the courtroom and asked him if he made the first statement attributed to him. Juror 14 denied making the statement. However, he recalled saying, "Here we are with another young man" and noted that he may even have said "young black man who's in trouble."[6] He stated that he was "explaining the complete dynamics of everything" and that, as a teacher, he intended to "make sure our men know exactly how to focus on details." Referencing certain words used by the witnesses at trial, Juror 14 stated that "so many black men do not have a command of the English language" and indicated that "words in our young brother's minds" can be synonymous with different meanings. The trial court excused Juror 14 from the jury given his constant reference to race, which led the court to believe Juror 13's assertions.

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[5] Winston's version of the events also did not support a voluntary-manslaughter instruction. Winston testified that Brown had his gun pointed to the ground when she heard the shot fired that struck and killed Brown. Such evidence fails to establish that defendant acted in the heat of passion due to adequate provocation rather than reason.

[6] He later repeated that he said, "Here we are with another young black man that may – that's in trouble."

MCR 2.511(D), which addresses impaneling a fair and impartial jury, indicates that "[i]t is grounds for a challenge for cause that" a person is "biased for or against a party or attorney" or "shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be." MCR 2.511(D)(2) and (3). Given Juror 13's assertions and Juror 14's remarks, the trial court did not abuse its discretion by concluding that Juror 14 was allowing race to interfere with his impartiality. Therefore, defendant has failed to show that the trial court abused its discretion by removing Juror 14.

Affirmed.

/s/ Jane M. Beckering
/s/ Kathleen Jansen
/s/ Michael J. Kelly