

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 2, 2014

v

MARCUS TRINAL ROBINSON,

Defendant-Appellant.

No. 314906
Kalamazoo Circuit Court
LC No. 2012-000990-FC

Before: MURPHY, C.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of second-degree murder, MCL 750.317, assault with intent to do great bodily harm less than murder, MCL 750.84, three counts of possession of a firearm during the commission of a felony, MCL 750.227b, felon in possession of a firearm, MCL 750.224f, and carrying a concealed weapon, MCL 750.227. We affirm.

I. FACTUAL BACKGROUND

Defendant and his friend, Cortez Howard, met the victims, Jared Boothe and Brian Tolson, in an apartment complex parking lot to talk about a situation involving Howard, Boothe's younger brother, and a female friend. Prior to the meeting, Howard told defendant that he was friends with the victims and that he did not expect any violence at the meeting. Howard also told defendant that neither of them needed to bring a gun to the parking lot meeting.

Nevertheless, defendant had heard that Boothe and Tolson were looking for him and that one of them might have had a gun. Defendant and Howard arrived with two other friends, who stayed in a nearby car. Defendant and Howard approached Boothe and Tolson, and defendant pulled out his gun and flashed it at Boothe during the encounter.

Boothe began to walk away from the parking lot, and defendant followed him. Tolson then told defendant not to "creep up" on his brother. Tolson then asked defendant, "what are you going to do, shoot me[?]" Defendant responded, "I will, but don't make me have to." Tolson thereafter jumped and grabbed defendant. During the altercation, defendant shot Tolson in the chest, causing his death. Defendant claimed that prior to his discharge of the gun, Tolson picked him up and slammed him into the ground.

Boothe then punched the defendant in the head several times and attempted to pick him up and slam him on the ground. The defendant ended up landing on top of Boothe. The gun fired again, hitting Boothe in the chest, but not killing him. After the shootings, defendant got back in the car and drove away while flashing his gun at the victims.

II. JURY INSTRUCTIONS

A. STANDARD OF REVIEW

Defendant first argues that the trial court erred in refusing to instruct the jury on involuntary manslaughter. “[I]f a criminal defendant is charged with murder, the trial court should instruct the jury on involuntary manslaughter if the instruction is supported by a rational view of the evidence.” *People v McMullan*, 488 Mich 922, 922; 789 NW2d 857 (2010). “An appellate court must therefore review *all* of the evidence irrespective of who produced it to determine whether it provides a rational view to support an instruction on the lesser charge.” *Id.* (emphasis in original).

B. ANALYSIS

Here, the “facts inescapably show that defendant acted with malice because, at a *minimum*, he inten[ded] to do an act in wanton and wilful disregard of the likelihood that the natural tendency of [his] behavior [was] to cause death or great bodily harm, and did *not* act with an intent merely to injure or with non-malicious gross negligence—the two recognized types of involuntary manslaughter.” *Id.* (emphasis in original) (quotation marks omitted). Defendant knew that Howard was friends with Boothe and Tolson and that a gun was not necessary for the meeting. Even with the knowledge that the meeting was meant to be peaceful, defendant brought a gun with him to the parking lot. He brought the gun out during the meeting, flashing it at Boothe.

Moreover, the evidence showed that the barrel of the gun was pushed up against Tolson’s body when the gun was fired. Therefore, “[b]ased on this chain of events,” a rational view of the evidence shows that “defendant’s actions constitute a malicious series of intentional acts[.]” *McMullan*, 488 Mich at 922. If a homicide is committed with malice, it is murder; however, if it is “committed with a lesser mens rea of gross negligence or an intent to injure, and not malice, it is not murder, but only involuntary manslaughter.” *People v Holtschlag*, 471 Mich 1, 21-22; 684 NW2d 730 (2004). Defendant argues that there was evidence supporting a conclusion that he acted in a grossly negligent manner in brandishing and wielding a gun in a volatile situation which led to the unintentional killing of the victim, thereby necessitating an instruction on involuntary manslaughter. In *People v Albers*, 258 Mich App 578, 582; 672 NW2d 336 (2003), this Court examined the meaning of gross negligence for purposes of involuntary manslaughter:

To prove gross negligence amounting to involuntary manslaughter, the prosecution must establish: (1) defendant's knowledge of a situation requiring the use of ordinary care and diligence to avert injury to another, (2) [his] ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand, and (3) [his] failure to use care and diligence to avert the threatened danger

when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. [Citations omitted; see also M Crim JIs 16.10 and 16.18.]

A person who acts recklessly or with wanton indifference to the results is grossly negligent. *People v Lanzo Constr Co*, 272 Mich App 470, 477; 726 NW2d 746 (2006).

Defendant testified that he did not pull out his gun until one of the individuals at the scene walked away and stated that he was going to retrieve his gun, although there was other evidence indicating that defendant brandished his own gun earlier. There was further evidence that the murder victim then spoke some words to defendant before the victim jumped on defendant and slammed defendant to the ground. Defendant testified that his gun discharged during the ensuing struggle, ultimately resulting in the victim's death. Defendant insisted that he did not intentionally shoot the victim. In the context of the situation, we cannot conclude that defendant's conduct in simply bringing his gun to the scene and displaying it amounted to gross negligence. Perhaps had defendant, with gun in hand, instigated the tussle with the victim, we might be prepared to rule that defendant acted in a reckless or wantonly indifferent manner, i.e., in a grossly negligent manner, by deciding to physically wrestle with the victim with a gun in defendant's hand. But none of the evidence suggested that defendant decided to engage in a struggle with the victim. At most, the evidence merely reflected that defendant was holding a gun and the victim jumped on him, leading to the unintentional discharge of the firearm. In those circumstances, the trial court's determination that an instruction on involuntary manslaughter was not supported by the facts in evidence did not constitute an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). No rational view of the evidence could support a finding of gross negligence, and "the trial court did not err in denying defendant's request for the jury to be instructed on involuntary manslaughter." *McMullan*, 488 Mich at 922.

Defendant next argues that the trial court erred in failing to *sua sponte* instruct the jury on accident. However, he waived review of this issue. Waiver is the "intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citation omitted). In *Carter*, the Court found waiver where trial counsel "clearly expressed satisfaction" with the jury instructions. *Id.* at 219. Here, defense counsel objected to the jury instructions, arguing that the self-defense instruction was not clear. After further instructing the jury on self-defense, the trial court stated, "everyone agreed to the jury instructions then as read based on the Court's prior rulings. Is that correct?" Defense counsel responded, "Yes." Thus, defendant waived review of the issue of including an accident instruction, extinguishing any error.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Defendant next argues that defense counsel was ineffective for failing to request a jury instruction on accident. Defendant has not properly preserved this claim because he failed to move for a new trial or for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d

922 (1973). *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). This Court's review is therefore "limited to mistakes apparent on the record." *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

B. ANALYSIS

In establishing ineffective assistance of counsel, a defendant bears a "heavy burden" to justify reversal. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). First, the defendant "must show that counsel's performance was deficient." *Id.* (quotation marks and citation omitted). Second, "the defendant must show that the deficient performance prejudiced the defense." *Id.* (quotation marks and citation omitted).

The evidence clearly established that defendant acted with malice. An accident theory was thus not applicable, and defense counsel was not unreasonable for failing to take a position that one should be given. See *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011) (quotation marks and citation omitted) ("[t]rial counsel cannot be faulted for failing to raise an objection or motion that would have been futile."). The defense counsel argued that the gunshot was accidental, and he requested a self-defense instruction, which was the main defense theory at trial. "A defendant who argues self-defense implies his actions were intentional but that the circumstances justified his actions." *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992).

Thus, a self-defense argument is inconsistent with an accident argument where a defendant argues that a gunshot was unintentional and accidental. Although "a defendant in a criminal matter may advance inconsistent claims and defenses[.]" *People v Cross*, 187 Mich App 204, 205-206; 466 NW2d 368 (1991), failing to request an instruction when it is inconsistent with a defense theory is a matter of trial strategy, *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003). "[W]e will not second-guess strategic decisions with the benefit of hindsight." *People v Dunigan*, 299 Mich App 579, 590; 831 NW2d 243 (2013). In addition, further instruction on accident may have confused the jury because it would have been inconsistent with defendant's self-defense argument. *Gonzalez*, 468 Mich at 645.

Defendant also has not established prejudice. *Carbin*, 463 Mich at 600. The jury had to find that defendant possessed some form of intent to establish the malice required for second-degree murder. Thus, the jury inherently rejected the notion that defendant's act in shooting the gun was unintentional or accidental.

IV. CONCLUSION

Defendant has failed to establish that the trial court erred in refusing to instruct the jury on involuntary manslaughter. He also has failed to establish that the trial court erred in failing to *sua sponte* instruct the jury on accident. Nor has defendant demonstrated any instances of ineffective assistance of counsel. We affirm.

/s/ William B. Murphy

/s/ Michael J. Riordan