

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ANDREW THOMPSON,

Defendant-Appellant.

UNPUBLISHED

June 2, 2005

No. 251588

Roscommon Circuit Court

LC No. 02-004332-FC

Before: Murray, P.J., and O’Connell and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.316(c), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 22½ to 50 years’ imprisonment for the second-degree murder conviction and a consecutive two years’ imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred by failing to grant his request for an involuntary manslaughter jury instruction. We disagree. This Court reviews defendant’s claim of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Involuntary manslaughter is a necessarily included lesser offense of murder because the elements of manslaughter are included in the offense of murder. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). Therefore, “when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence.” *Id.* at 541.

“Involuntary manslaughter is the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty.” *Id.* at 536. Defendant argues that that the court erred in failing to give the requested instruction because his conduct amounted to the commission of a negligently performed lawful act.

“The negligence required to establish involuntary manslaughter is different in kind from ordinary negligence. Such negligence is variously referred to as ‘criminal negligence’ or ‘gross negligence’” *People v Townes*, 391 Mich 578, 590-591 n 4; 218 NW2d 136 (1974). To find gross negligence, the following three elements must be established: (1) the defendant

“knew of the danger to another, that is, he knew there was a situation that required him to take ordinary care to avoid injuring another;” (2) “the defendant could have avoided injuring another by using ordinary care;” and (3) “the defendant failed to use ordinary care to prevent injuring another when, to a reasonable person, it must have been apparent that the result was likely to be serious injury.” *People v Clark*, 453 Mich 572, 578-579; 556 NW2d 820 (1996).

The evidence in this case did not support an instruction for involuntary manslaughter. Defendant testified that while he and the victim were in a field checking on the victim’s deer blind, defendant confronted the victim with allegations that the victim had molested defendant’s minor son. Defendant contended the two men argued and that, while defendant was attempting to leave, the victim pointed the rifle he was carrying at defendant. After struggling over the weapon, defendant claimed that the gun discharged while he was pulling on it. In other words, defendant’s story was that the rifle accidentally discharged while he was defending himself. This evidence does not support a finding that defendant acted negligently, let alone in a grossly negligent manner.

Much of the case law addressing involuntary manslaughter is careful to point out that the criminal negligence at issue is different from ordinary negligence. See, e.g., *Townes, supra* at 590 n 4. However, a defendant who finds himself in a situation like the one described by defendant cannot be said to have failed to use ordinary care if the weapon accidentally fires and injures or kills the aggressor. Additionally, where a defendant is struggling to prevent himself from being shot, it is reasonable to assume that while he is acting with some “awareness of the risk of safety” involved, he is not acting “in wilful disregard of the safety of others.” *People v Datema*, 448 Mich 585, 606; 533 NW2d 272 (1995). There is nothing in the record before to warrant rejecting this assumption. Therefore, we see no error in the court’s denial of defendant’s requested instruction.

Defendant next argues that the trial court erred when it instructed the jury regarding the intent element of second-degree murder. However, after instructing the jury, the trial court asked if the instructions given were as agreed, to which defense counsel replied that he was satisfied with the instructions. By “expressly approving the instructions, defendant has waived this issue on appeal.” *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Defendant’s argument that the trial court erred by not granting his request for a self-defense instruction is also without merit. A “defendant is entitled to have a properly instructed jury consider the evidence against him.” *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). If a defendant requests a self-defense instruction and it is supported by the evidence at trial, the trial court must give the instruction to the jury. *Id.*

“[T]he killing of another person in self-defense is justifiable homicide only if the defendant honestly and reasonably believes his life is in imminent danger or that there is threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself.” *Id.* at 127. In this case, there was no testimony or evidence adduced at trial that showed the shooting was the result of an intentional exercise of deadly force. While under defendant’s version of the shooting the amount of force he used to protect himself may have been justified, defendant did not testify that he intentionally used deadly force in self-defense. Rather, he testified that the gun discharged accidentally. This does not support a theory of self-

defense. Therefore, the trial court did not abuse its discretion by refusing to give the requested instruction. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

Finally, defendant asserts that he was denied due process of law by the alleged instructional errors he identifies. Having found either that no error occurred or that any alleged error has been waived, we necessarily conclude that defendant fails to show a denial of due process.

Affirmed.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Pat M. Donofrio