STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 2, 2014
v	No. 314906 Kalamazoo Circuit Court
MARCUS TRINAL ROBINSON, Defendant-Appellant.	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

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SHAPIRO, J. (*dissenting*).

Defendant argues that the jury should have been instructed on involuntary manslaughter as a lesser included offense and also that it should have been given an accident instruction. The majority mistakenly rejects each of these arguments and in doing so reaches completely inconsistent legal conclusions. I would reverse and remand and so respectfully dissent.

I. FACTS

Defendant went with a group of men to confront a second group about a dispute. One member of this second group was Jared Boothe. Boothe testified at trial. According to Boothe's testimony, when the two groups met, the process was peaceful until defendant brandished a gun and pointed it at Boothe. When that occurred, Boothe's companion Brian Tolson (the eventual victim) started a physical altercation with defendant. During the struggle between Tolson and defendant, the gun went off. Tolson was struck by the bullet and died.

Defendant testified that he did not intend to shoot Tolson but that the gun went off accidentally during the physical struggle initiated by Tolson. Defendant also testified that before he brandished his gun, Tolson stated that he was going to get his own gun.

The trial court rejected defendant's request for an involuntary manslaughter instruction and defense counsel did not request an accident instruction. On appeal, defendant contends that the trial court erred by failing to give the involuntary manslaughter instruction and/or the accident instruction and that his counsel was ineffective for failing to request the latter.

The prosecution's theory at trial was that defendant was guilty of first-degree murder if he intentionally fired the gun because there had been time for premeditation. Alternatively, the prosecution argued that the jury could find that even if defendant did not intend to kill Tolson,

his actions in displaying and/or firing the gun demonstrated that defendant "intended to do an act in wanton and wilful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm,"[1] a state of mind sufficient to convict of second-degree murder.

The jury acquitted defendant of first-degree murder but convicted him of second-degree murder, along with firearm charges arising from the incident, without having the opportunity to consider the lesser included charge of involuntary manslaughter or the accident defense.

II. ANALYSIS

Involuntary manslaughter is a necessarily included offense of murder. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). "Consequently, when a defendant is charged with murder, an instruction for . . . involuntary manslaughter must be given if supported by a rational view of the evidence." *Id*. The majority recognizes that '[i]f the homicide was committed with malice, it is murder . . . [but] if it was 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) (footnote omitted).

Thus, whether or not an involuntary manslaughter instruction should have been given depends on whether the evidence could allow a jury to find that defendant did not intend to shoot Tolson, but that his display of a gun and pointing it at one of the opposing group members was an act of gross negligence that led to the Tolson's death. *Id*. The majority concludes that no reasonable jury could have found defendant's brandishing of a handgun to be grossly negligent, stating, seemingly as a matter of law, that "simply bringing [a] gun to the scene and displaying it" *cannot* amount to gross negligence.[2] Indeed, to reach its conclusion, the majority had to pick and choose from the evidence, relying on defendant's testimony that he did not draw his gun until after Tolson said he was going to get a gun, while ignoring the fact that Boothe, a prosecution witness, testified that this was false and that defendant brandished the gun without any such statement being made.[3]

It is beyond question that a jury, based on a rational review of all the evidence, could conclude that it was grossly negligent for defendant to brandish a gun during a potentially

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[1] *People v McMullan*, 488 Mich 922, 922; 789 NW2d 857 (2010) (quotation marks, citation, and formatting omitted).

[2] This new rule of law will likely come as a surprise to prosecutors seeking to charge involuntary manslaughter in cases where a defendant brandished a gun that accidentally fired, causing a death.

[3] Despite its selection of only the testimony that supports its conclusion, the majority recites the rule that "[a]n 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 a lesser charge." *McMullen*, 488 Mich at 922.

volatile situation. And, the jury could certainly conclude that doing so resulted in the death of the victim even if defendant never intended to fire the weapon. Accordingly, the trial court erred by denying defendant's request for an involuntary manslaughter jury instruction.

The majority then reverses course in its rejection of defendant's argument that his attorney's failure to request an accident instruction constituted ineffective assistance of counsel because he was not entitled to such an instruction under the evidence presented. The majority asserts that the defendant cannot establish prejudice resulting from the lack of an accident instruction because in order to convict defendant of murder "the jury had to find that defendant possessed some form of intent to establish the malice for second degree murder." The majority concludes that this intent was demonstrated because "defendant brought a gun with him to the parking lot [and] brought the gun out during the meeting, flashing it at Boothe."

Thus, where defendant complains that he was entitled to an involuntary manslaughter instruction, the majority concludes that "simply bringing [a] gun to the scene and displaying it" *cannot* amount to gross negligence and that the evidence could not support such an instruction. Indeed, in its discussion of involuntary manslaughter, the majority states that, "[a]t 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."

However, where defendant complains that he was entitled to an accident instruction, the majority reaches precisely the opposite conclusion, stating that because "defendant brought a gun with him to the parking lot [and] brought the gun out during the meeting," he demonstrated intent to murder.

Unfortunately, the majority does not go on to explain how displaying a gun without intent to fire it is sufficient to show intent to murder while it is not sufficient to demonstrate gross negligence. In the absence of such an explanation, the majority opinion is its own worst enemy and I decline to join it.

Lastly, I reject the majority's willingness to expand the doctrine of waiver so as to swallow the right to a properly instructed jury. Rather than concluding that defense counsel simply failed to preserve the error by not requesting the accident instruction and thus requiring defendant to demonstrate "plain error" on appeal, the majority asserts that defendant waived the instructional error completely and so is not entitled to any review. See, e.g., *People v Carines*, 460 Mich 750, 767; 597 NW2d 130 (1999) (unpreserved claims of error are reviewed for plain error affecting substantial rights). The majority reaches its conclusion by citing *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000), a very different case than that at hand. In *Carter*, the attorneys and the court had a discussion regarding what the court should instruct in response to a jury question. *Id*. at 210-213. At the conclusion of the discussion, the defense counsel stated his specific agreement with the text of the proposed answer. *Id*. at 212. This statement was essentially a stipulation. Nothing like that happened here. There was no discussion of an accident instruction nor any explicit agreement that such an instruction need not be given. Rather, after the instructions were read, the trial court asked if it had read the instructions properly based on its prior rulings, to which defense counsel responded, "Yes." If such an action is sufficient to waive all instructional error, then every failure to object is converted into a full waiver simply by the trial court asking if it read the instructions as anticipated. The availability

of review for plain error is wholly extinguished, an outcome unsupported by caselaw and contrary to fundamental principles of due process and appellate review. Accordingly, I dissent and would remand for new trial on the charges of which defendant was convicted.

/s/ Douglas B. Shapiro