

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MITCHELL LEE HULON,

Defendant-Appellant.

UNPUBLISHED

March 10, 2005

No. 247489

Midland Circuit Court

LC No. 02-001266-FC

ON REMAND

Before: Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

On April 22, 2004, we issued an opinion affirming defendant's convictions of first-degree felony murder, MCL 750.316(b), with first-degree child abuse, MCL 750.136b(2), as the predicate offense. We held, in relevant part, that the trial court properly denied defendant's request for an instruction on involuntary manslaughter because "defendant's conduct, at the very least, amounted to the felony of second-degree child abuse." On December 27, 2004, the Michigan Supreme Court, in lieu of granting leave to appeal, remanded this case for reconsideration in light of *People v Holtschlag*, 471 Mich 1; 684 NW2d 730 (2004). We affirm.

People v Holtschlag, unpublished opinion per curiam of the Court of Appeals, decided March 27, 2003 (Docket Nos. 226715, 227941, 227942, and 241661), involved the death of a fourteen-year-old girl who had been intentionally given a date rape drug without the intention to cause her death. *Holtschlag* quoted the language in *People v Ryczek*, 224 Mich 106, 110; 194 NW 609 (1923), to define the crime of manslaughter as:

The killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some lawful act in itself, or by the negligent omission to perform a legal duty. [*Holtschlag, supra* at slip op p 6.]

Applying this definition of manslaughter, and noting that the jury convicted the defendants under the gross negligence theory of involuntary manslaughter, the *Holtschlag* Court stated:

[T]he death in this case resulted from defendants' unlawful placement, or aiding and abetting in placement, of a poison/harmful substance in a drink that they knew was likely to be ingested. Mingling a poison/harmful substance in a person's drink is clearly an unlawful act in itself and is in fact labeled a *felony*

under MCL 750.436(1). Because mingling a harmful substance is an unlawful act, defendants could not be convicted of gross negligence.

Moreover, because defendants . . . were convicted of felonies, it would be impossible, as a matter of law, to find them guilty under the misdemeanor-manslaughter rule. While the prosecution argues that it is not required to prove negative elements of a crime, it fails to admit that it provided affirmative evidence that a felony was committed. [*Id.* at slip op p 7.]

The Court therefore concluded that defendants could not be convicted of involuntary manslaughter under a gross negligence theory.

The Supreme Court reversed. The Court determined that language used in *Rycek*, and quoted in *Holtschlag*, to define involuntary manslaughter was descriptive, not definitional, and that the “not amounting to a felony” language was intended to distinguish involuntary manslaughter from felony murder.¹ *Holtschlag, supra*, at 9. The Court concluded that the relevant question in determining whether a homicide is murder or involuntary manslaughter is whether it occurred with malice, not whether the death occurred during the commission of a felonious or non-felonious act. *Holtschlag*, 471 Mich at 10. The Court quoted Black’s Law Dictionary (7th ed) in defining malice:

“Malice” is defined as: “1. The intent, without justification or excuse, to commit a wrongful act. 2. Reckless disregard of the law or of a person's legal rights. 3. Ill will; wickedness of heart.” . . . “Malice aforethought,” which is the type of malice specifically related to the crime of murder, is defined as “encompassing any one of the following: (1) the intent to kill, (2) the intent to inflict grievous bodily harm, (3) extremely reckless indifference to the value of human life (the so-called ‘abandoned and malignant heart’), or (4) the intent to commit a felony (which leads to culpability under the felony-murder rule).” [*Id.* at 6, n 3.]

The Court further stated that:

[I]t must be kept in mind that “the sole element distinguishing manslaughter and murder is malice,” . . . and that “[i]nvoluntary manslaughter is a catch-all concept including all manslaughter not characterized as voluntary: ‘Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse.’” . . . If a homicide is not voluntary manslaughter or excused or justified, it is, generally, either murder or involuntary manslaughter. If the homicide was

¹ At that time, felony murder was defined as a homicide committed during a felony. This concept of felony murder was rejected in *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980), which held that felony murder is “a homicide that occurred during the commission of any crime, including a felony, . . . if the prosecutor specifically proves the existence of malice.” *Id.* at 727-728.

committed with malice, it is murder. 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. [*Id.* at 21-22.]

The Court concluded in *Holtschlag* that:

Defendants in this case purposely committed a malum in se² unlawful act when they poured GHB into Samantha Reid's drink and, in doing so, caused her death. Her death was not voluntary manslaughter or excused or justified. Whether or not defendants acted with malice, the jury found, in either case, that they acted with a diminished mens rea of gross negligence sufficient to sustain a conviction of manslaughter. In short, defendants, by their purposeful, willful, reckless, and unlawful behavior, unintentionally killed another person, and this is exactly the type of homicide that fits within the parameters of involuntary manslaughter.

Voluntary and involuntary manslaughter are necessarily included lesser offenses of murder. *People v Mendoza*, 468 Mich 527, 529; 664 NW2d 685 (2003). Thus, if a defendant is charged with murder, the jury, upon the defendant's request, must also be instructed on manslaughter if a rational view of the evidence supports such an instruction. *Id.* at 548. Manslaughter is an unintended homicide with a diminished mens rea. *Id.* at 541. With regard to involuntary manslaughter, the *Mendoza* Court referred to *People v Datema*, 448 Mich 585, 606-607; 533 NW2d 272 (1995), wherein the Court stated:

Unlike murder, involuntary manslaughter contemplates an unintended result and thus requires something less than an intent to do great bodily harm, an intent to kill, or the wanton and willful disregard of its natural consequences. An intent to injure or gross negligence strikes the appropriate balance in this crime, which by definition criminalizes an unintended result, i.e., death.

Where an actor knows of the danger to others and has acted with the intent to injure another, his conduct is advertent and he is guilty of subjective fault. . . . This standard is akin to the subjective state of mind that will permit a finding of the malice required for murder, the intent to do great bodily harm or the intent to kill. CJI2d 16.4(3). Intent is not implied in law from commission of a mere assault and battery. As in *Aaron*, intent to injure must be found by the jury beyond a reasonable doubt.

Where an actor knows of the danger to others that might follow from his act or failure to act, and wilfully disregards the consequences by failing to use the care that a reasonable person would have used in the circumstances, his negligence is also advertent and wilful, but the mens rea is objective. This standard is akin to the state of mind that will permit a finding of the malice

² Inherently immoral, as opposed to malum prohibitum (a crime only because prohibited by statute).

required for murder from the wilful and wanton disregard of a likelihood of death or great bodily harm. [*Id.*]

Here, if defendant's testimony is to be believed, the injury occurred when defendant "snapped" and tackled the eighteen-month-old victim, causing the victim's head to hit the floor. Defendant's testimony suggests that he reacted, not that he acted with any specific intent or malice. While a case could be made that defendant's conduct amounted to reckless disregard or extremely reckless indifference constituting malice, such that the involuntary manslaughter instruction would not be warranted, reckless disregard and reckless indifference suggest that there was some regard in the first instance; these states of mind would not cover a situation where someone "snapped." At the very least, a rational view of the evidence, if defendant were believed, would allow for the conclusion that he acted without malice, making involuntary manslaughter plausible. Consequently, the trial court abused its discretion by refusing to instruct the jury on the lesser included offense of involuntary manslaughter.

We find, however, that the failure to instruct on involuntary manslaughter was harmless. Harmless error analysis is applicable to jury instruction errors involving necessarily included lesser offenses. *People v Cornell*, 466 Mich. 355; 646 NW2d 127 (2002). In *People v Zak*, 184 Mich App 1, 16; 547 NW2d 59 (1990), this Court stated:

Where the trial court instructs on a lesser included offense, which is intermediate between the greater offense and a second lesser included offense, for which instructions were requested by the defendant and refused by the trial court, and the jury convicts on the greater offense, the failure to instruct on that requested lesser included offense is harmless if the jury's verdict reflects an unwillingness to have convicted on the offense for which instructions were not given.

Here, the jury was instructed with regard to first-degree felony murder and second-degree murder and found defendant guilty of first-degree felony murder. The jury's rejection of second-degree murder in favor of first-degree murder reflected an unwillingness to convict of a lesser included offense such as manslaughter. *People v Sullivan*, 231 Mich App 510, 520; 586 NW2d 578 (1998); *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709 (1997).

Affirmed.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald