

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FERNANDO HINOJOSA,

Defendant-Appellant.

UNPUBLISHED

July 29, 1997

No. 189607

Wayne Circuit Court

LC No. 94-007159 FH

Before: Jansen, P.J., and Wahls and P.R. Joslyn*, JJ.

MEMORANDUM.

Defendant appeals by right his jury conviction of voluntary manslaughter and felony firearm arising from the death of Billy Landau.

Defendant claims that the trial court erred in failing to instruct the jury, as it did with respect to similar charges as to which defendant was acquitted in the death of Esteban Garcia, on the defense of accident. Accident is a defense to voluntary manslaughter. *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995). However, the record is barren of evidence in support of a defense of accident. Defendant's own testimony was that during the general melee which preceded the shooting, he was struck in the head with a thrown object, and his vision was thereby partially obscured or blurred. Defendant saw Landau on the floor and thought Landau was reaching for a weapon; defendant pulled his own pistol, which was of a different caliber than the bullets which fatally wounded Landau, and fired twice in Landau's direction.

On defendant's own theory of the case, the homicide was either justifiable as in self-defense, or defendant was not guilty because he used a .22 caliber pistol and Landau died as a result of .38 caliber gunshot wounds, or if defendant was the person who shot Landau, he succeeded in doing so only fortuitously. That defendant's vision was obscured or blurred may have made the striking of Landau with bullets fired by defendant fortuitous, but it did not render such shooting accidental. Defendant clearly intended to shoot Landau and fired twice in his direction for that purpose. For purposes of the law of homicide, an "accident" must be one in which the actor is not criminally negligent. *People v*

* Circuit judge, sitting on the Court of Appeals by assignment.

Morrin, 31 Mich App 301, 310; 187 NW2d 434 (1971), quoted in *Hess, supra*. By defendant's own lights, he was at least criminally negligent in twice firing a gun in Landau's direction, even if he did not intend to strike him with a bullet; given that defendant did so intend, that he succeeded was likewise not accidental.

As there was no factual basis for instruction on the defense of accident with respect to the death of Landau, the trial court could not have erred by failing to *sua sponte* give such instruction, and defendant's failure to preserve the issue by timely request for instruction or objection need not be addressed.

Affirmed.

/s/ Kathleen Jansen

/s/ Myron H. Wahls

/s/ Patrick R. Joslyn