STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 1999
V	No. 211542 Clare Circuit Court
KERRY WAYNE KOCSIS, Defendant-Appellant.	LC No. 97-001109 FC

Before: Talbot, P.J., Gribbs and Meter, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; MSA 28.549,[1] and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced him to twenty-five to fifty years' imprisonment for the second-degree murder conviction consecutive to a two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court abused its discretion in refusing to strike other acts evidence, which the prosecutor presented without advance notice. Specifically, defendant contends that testimony elicited from his prior landlord, that she evicted him after she found him in the woods, "shooting off his gun or calling someone that was sneaking upon on him" while he was "under the influence of alcohol,"[2] was irrelevant and prejudicial. We find that any error in the trial court's refusal to strike the contested evidence was harmless.

"A preserved nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), quoting MCL 769.26; MSA 28.1096. Thus, reversal is only required if the error is prejudicial, and the appropriate inquiry "focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence." *Id.*, citing *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). The object of the inquiry is to determine if it affirmatively appears that the error asserted

"undermine[s] the reliability of the verdict." *Id.*, citing *Mateo*, *supra* at 211. In other words, "the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Id.*

In this case, defendant admitted that he shot and killed the victim with a .22 caliber rifle, and the pivotal question was whether defendant acted in lawful self-defense. Self-defense requires both an honest and reasonable belief that the defendant's life was in imminent danger or that there was a threat of serious bodily harm. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). Defendant maintains that the alleged error was not harmless because it portrayed him as a drunk who would use deadly force in response to any threat, whether real or imaginary and, therefore, made it less likely that the jury would believe that he acted in self-defense. We do not agree.

At trial, both the victim's friend and defendant testified that defendant fired the rifle in the victim's general direction from a distance of about twenty to forty feet only after the victim had attempted to break into defendant's trailer, after the victim had already left defendant's trailer, and after defendant called out to the victim. In addition, another witness testified that five days before the incident, defendant told her that he "was gonna do what [he] had to do" to get the ten dollars that the victim owed him even if it meant "killing him" and that "killing [the victim] would be like huntin' squirrels." A fellow inmate also testified that defendant told him that he slashed the victim's tires on the day in question in an attempt to get the victim to go to defendant's trailer so he could shoot him. Given the strength of this evidence, we find that the admission of the contested evidence is not grounds for reversal because it does not appear that it was more probable than not that the allegedly tainted evidence affected the verdict or the jury's decision to reject defendant's self-defense theory.

II

Defendant next argues that his convictions must be reversed because the trial court denied his request to instruct on two lesser included offenses of second-degree murder. We disagree.

Defendant first contends that the trial court erred in refusing to instruct the jury on careless, reckless, or negligence discharge of a firearm causing death. A trial court must instruct on a lesser included misdemeanor when, *inter alia*, the instruction is supported by a rational view of the evidence adduced at trial. *People v Stephens*, 416 Mich 252, 262-263; 330 NW2d 675 (1982); *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996). This requires, at the very least, that there be some evidence which would justify a conviction on the lesser offense. *Stephens*, *supra* at 262. A conviction for the offense at issue requires proof that the firearm was discharged as a result of the defendant's carelessness, recklessness, or negligence. MCL 752.861; MSA 28.436(21); CJI2d 11.20(6).

Contrary to defendant's contention, no evidence was presented to suggest that defendant's discharge of the firearm was careless, reckless or negligent. To the contrary, defendant's testimony established that he intentionally aimed the rifle in the victim's general direction and pulled the trigger in order to provide a "warning shot." In particular, defendant stated that he held his gun "at port" while he looked for the victim, that as the victim came toward him, "I lowered my gun and pulled the trigger,"

that he pointed the gun in the victim's "general direction and fired," and that "I figured once he seen that I would shoot my gun, that he would change his mind to come down there and try and do me any bodily harm." Because defendant's own testimony established that the firing of the weapon was intentional, his conduct did not fall within the scope of the conduct prohibited by the statute. *People v Cummings*, 458 Mich 877; 585 NW2d 299 (1998). Therefore, the trial court did not err in refusing to give the requested instruction.

We similarly conclude that the trial court did not err in refusing to instruct the jury on involuntary manslaughter under a gross negligence theory. Involuntary manslaughter is a cognate lesser included felony of first- and second-degree murder. *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996), citing *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991), and *Heflin*, *supra* at 497. A trial court must give a requested instruction for a cognate lesser included offense if: (1) the principal and lesser offense are of the same class or category, and (2) the evidence adduced at trial would support a conviction of the lesser offense. *People v Flowers*, 222 Mich App 732, 734; 565 NW2d 12 (1997). Because murder and manslaughter are of the same class or category, see *id* at 434-734, we need only evaluate the evidence adduced at trial. In this regard, "[t]here must be more than a modicum of evidence; there must be sufficient evidence that the defendant could be convicted of the lesser offense." C*heeks*, *supra* at 479, citing *Pouncy*, *supra* at 387.

Unlike voluntary manslaughter, which requires that the defendant intended to kill, involuntary manslaughter under a gross negligence theory is established if the defendant acts in a grossly negligent manner in causing the death of another. *People v Datema*, 448 Mich 585, 595-596, 606; 533 NW2d 272 (1995); *People v Harris*, 159 Mich App 401, 406; 406 NW2d 307 (1987). Gross negligence requires (1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another, (2) the ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand, and (3) the omission to use such 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. *People v McCoy*, 223 Mich App 500, 503; 566 NW2d 667 (1997), citing *People v Orr*, 243 Mich 300, 307; 220 NW 777 (1928). Gross negligence has also been defined within the confines of intent and negligence as follows:

> [C]riminal intention anchors one end of the spectrum and negligence anchors the other. Intention . . . "emphasiz[es.] that the actor seeks the proscribed harm not in the sense that he desires it, but in the sense that he has chosen it, he has decided to bring it into being." Negligence, lying at the opposite end of the spectrum, "implies inadvertence, i.e., that the defendant was completely unaware of the dangerousness of his behavior although actually it was unreasonably increasing the risk of occurrence of an injury."
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> Criminal negligence, also referred to as gross negligence, lies between the extremes of intention and negligence. As with intention, the actor realizes the risk of his behavior and consciously decides to create that risk. As with negligence, however, the actor does not seek to cause harm, but is simply "recklessly or wantonly indifferent to the results." [*Datema*, *supra* at 604 (citations omitted).]

Here, defendant stated at trial and in his statements to the police that he did not intend to kill or hurt the victim, that he did not aim the rifle at the victim, and that the victim must have "staggered into the [shot] at the same time I pulled the trigger." However, as discussed above, defendant's testimony also established that, after the victim left defendant's trailer, defendant retrieved his gun, went outside and called for the victim as he stood with his gun "at port" and, when the victim approached, he intentionally aimed the gun in the victim's direction and pulled the trigger. Based on this evidence, we cannot conclude that the trial court erred in determining that there was insufficient evidence of gross negligence to support a conviction for involuntary manslaughter. Rather, we agree with the trial court that the instruction on the lesser offense of statutory involuntary manslaughter or "firearm intentionally aimed," which does not require proof of gross negligence, see *People v Maghzal*, 170 Mich App 340, 345; 427 NW2d 555 (1992), was the more appropriate instruction under the circumstances of this case.

III

Finally, defendant argues that the trial court erred in refusing to give an instruction on the use of deadly force in the defense of others in accordance with his theory of the case. Again, we disagree.

Jury instructions must not exclude material defenses and theories that are supported by the evidence. *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998). An instruction on the use of deadly force in defense of others is warranted if the evidence shows that the defendant: (1) honestly and reasonably believed that the protectee was in danger of being killed or seriously injured or forcibly sexually penetrated at the time he acted (2) was afraid that the protectee would be killed or seriously injured or forcibly sexually penetrated at the time he acted, and (3) honestly and reasonably believed that what he did was immediately necessary at the time he acted. CJI2d 7.21; see also *Heflin, supra* at 502-503

After a thorough review, we find that the trial court correctly concluded that the instruction was not supported by the evidence. Defendant's own testimony negates the suggestion that he held an honest and reasonable belief that his wife was in danger of being killed or seriously injured. Defendant testified that the altercation began when the victim unsuccessfully tried to gain access to his trailer and culminated in the shooting outside his trailer. During the entire episode, defendant's wife, who suffered from a debilitating disease, was in her bedroom in the back of the trailer. There is no evidence that defendant's wife was ever in the victim's immediate presence or that the victim threatened or intended to harm her. Therefore, the trial court did not err in refusing to give the instruction, and the general instruction on the theory of self-defense adequately presented defendant's theory to the jury and sufficiently protected his rights. *People v Bartlett*, 231 Mich App 139, 142; 585 NW2d 341 (1998).

Affirmed.

/s/ Michael J. Talbot
/s/ Roman S. Gribbs
/s/ Patrick M. Meter

[1] Defendant was charged with open murder. MCL 750.316; MSA 28.548.

[2] While defendant also cites to testimony that he was "drunk all the time," this evidence was elicited by defense counsel during cross-examination before he advanced his motion to strike. As the trial court noted, defense counsel invited this testimony by asking the witness open-ended questions. It is well settled that this Court will not to address allegations concerning invited error on appeal. See *People v Amison*, 70 Mich App 70, 75; 245 NW2d 405 (1976); see also *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).