STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS DON PONCE,

Defendant-Appellant.

UNPUBLISHED
April 4, 2000

No. 200612
Recorder's Court
LC No. 95-000940

Before: Cavanagh, P.J. and White and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to fifteen to thirty years' imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in refusing his request to instruct the jury on involuntary manslaughter and careless, reckless, or negligent discharge of a firearm causing death (negligent discharge) as lesser included offenses of second-degree murder. We disagree. This Court reviews claims of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 522 NW2d 493 (1996).

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 *People v Heflin*, 434 Mich 482, 497; 456 NW2d 10 (1990). 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; *Cheeks*, *supra* at 479, 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." *Id.*, citing *Pouncey*, *supra* at 387.

Involuntary manslaughter is the unintentional killing of another without malice and unintentionally, but (1) in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or (2) in negligently doing some act lawful in itself, or (3) by the negligent omission to perform a legal duty. *People v Datema*, 448 Mich 585, 595-596; 533 NW2d 272 (1995), quoting *People v Ryczek*, 224 Mich 106, 110; 194 NW 609 (1923). The negligence required to establish involuntary manslaughter is gross negligence. *People v Clark*, 453 Mich 572, 578 (Mallett, J.); 556 NW2d 820 (1996); *People v Townes*, 391 Mich 578, 590-591, n 4; 218 NW2d 136 (1974). 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).

With regard to negligent discharge, 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 negligent discharge requires proof that (1) the victim's death was caused by the discharge of a gun, (2) the defendant either discharged the gun or allowed the gun to be discharged while it was under his immediate control, (3) the discharge was the result of the defendant's carelessness, recklessness, or negligence, (4) the shooting was not the result of the defendant's willfulness or wantonness. MCL 752.861; MSA 28.436(21); CJI2d 11.20; *People v Cummings*, 229 Mich App 151, 158; 580 NW2d 480 (1998), rev'd on other grounds 458 Mich 877. Our Supreme Court explained the distinction between criminal intent, negligence, and gross 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).]

Defendant claims that both instructions were supported by his testimony, which established that the gun discharged accidentally as he was attempting to recover his gun from the victim. According to defendant, the victim took defendant's gun out of defendant's jacket pocket and pointed it toward him, which inspired defendant to protect himself by struggling for possession of the weapon. As defendant

tried to turn the barrel away from him, the victim's vehicle rolled back, struck the vehicle behind it and the gun accidentally discharged. Defendant testified inconsistently that he shot the victim but that he never had control of the gun, that he was not touching the trigger when the gun discharged, and that the victim could have shot the gun. In our view, defendant's version of the events does not establish gross negligence, carelessness, recklessness, or negligence. To the contrary, were the jury to believe defendant's testimony, defendant would have established that he acted reasonably under the circumstances. Accordingly, the instructions were not proper.

We disagree with defendant's contention that this case is factually analogous to *People v Richardson*, 409 Mich 126; 293 NW2d 332 (1980), where our Supreme Court held that instructions on the offenses at issue were warranted. In *Richardson*, the defendant produced a gun butt end first, and the victim grabbed the barrel. *Id*. at 133. As the defendant and the victim struggled for possession, the jostling caused the defendant to pull the trigger. *Id*. Clearly, the fact that the defendant in *Richardson* was the one who produced the gun, pointed it toward the victim, and unquestionably pulled the trigger distinguishes that case from the present. Accordingly, unlike *Richardson*, we conclude that the requested instructions were not supported by the evidence and the trial court therefore did not err in refusing to give them.

We further hold that defendant's claim that the trial court erred in failing to explain to the jury when a killing is justified or excused is without merit because the court instructed the jury on accident as a defense to murder, a legal excuse for homicide. *People v Morrin*, 31 Mich App 301, 310; 187 NW2d 434 (1971). While the trial court did err in failing to instruct that accident is a defense to voluntary manslaughter in addition to murder, *People v Hess*, 214 Mich App 33, 37-38; 543 NW2d 332 (1995), the error was harmless in light of the fact that the jury rejected defendant's theory of accident by returning a verdict of guilty on the charge of second-degree murder. *People v Morris*, 139 Mich App 550, 559-560; 362 NW2d 830 (1984).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot