

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ALBERT GILLIS,

Defendant-Appellant.

UNPUBLISHED

August 17, 2004

No. 245012

St. Clair Circuit Court

LC No. 02-000601-FC

Before: Jansen, P.J., and Meter and Cooper, JJ.

METER, J. (*concurring in part and dissenting in part*).

I concur with the majority's opinion except for two portions. I dissent from the majority's conclusions with respect to the felony murder issue and with respect to the lesser included offense issue. I would affirm defendant's convictions.

As noted by the majority, this Court stated in *People v Thew*, 201 Mich App 78, 85-86; 506 NW2d 547 (1993), quoting *People v Smith*, 55 Mich App 184, 189; 222 NW2d 172 (1974), remanded on other grounds 396 Mich 825 (1976), "[I]f a murder is committed while attempting to escape from or prevent detection of [a predicate] felony, it is felony murder, but only if it is committed as part of a continuous transaction with, or is otherwise 'immediately connected' with, the underlying felony." Applying this rule, the Court in *Thew* found a sufficient factual basis for the defendant's plea to first-degree felony murder where, although approximately fifteen to twenty minutes transpired between the underlying felony and the murder, "the trial court could have drawn the conclusion that the argument between [the] defendant and the victim was part of a continuous transaction that resulted in [the victim's] death." *Id.* at 88. The Court emphasized that "inculpatory inferences can be drawn that [the defendant] killed the victim to prevent detection of the act of sexual intercourse with her[.]" *Id.*

Applying the rule of *Thew* to the present case, the trial court correctly denied defendant's motion to quash the information charging him with felony murder. Indeed, there was sufficient evidence to establish that the traffic collision that caused the victims' deaths occurred during defendant's effort to escape from the police and was part of a continuous transaction immediately connected with the home invasion.

Steven Albright, the home invasion victim, testified at the pretrial evidentiary hearing¹ that he telephoned the police shortly after the home invasion. According to the evidentiary hearing testimony of Trooper Steven Kramer, Albright's 911 call was placed at 1:51 p.m. Kramer testified that he heard a radio advisory about the home invasion and a description of the suspect's vehicle shortly before 2:00 p.m. He spotted defendant's vehicle a few minutes later and began following it. When Kramer activated his emergency lights and tried to make a traffic stop, defendant did not stop his vehicle and eventually caused a traffic collision while traveling at a high rate of speed. Kramer testified that he reported the collision at 2:09 p.m. and that his pursuit of defendant's vehicle lasted around six or seven minutes. Therefore, Kramer began following defendant within eleven or twelve minutes of Albright's 911 call.

As with the situation in *Thew, supra* at 88, "inculpatory inferences can be drawn" that defendant engaged in the flight from police to prevent him from being apprehended in connection with the home invasion. Indeed, he engaged in the flight only minutes after committing the home invasion. The jurors could rationally conclude that defendant committed the murders "'while attempting to escape from or prevent detection of the felony . . . [and] as part of a continuous transaction with . . . the . . . felony.'" *Thew, supra* at 85-86, quoting *Smith, supra* at 189. I therefore conclude that the trial court correctly denied defendant's motion to quash the information.

I similarly conclude that the trial court did not err with respect to the lesser included offense instruction. As the majority notes, common-law involuntary manslaughter is a necessarily included lesser offense of murder. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). As such, an instruction on involuntary manslaughter must be given with regard to a murder charge "if supported by a rational view of the evidence." *Id.* A homicide committed without malice but with "a lesser mens rea of gross negligence or an intent to injure" constitutes common-law involuntary manslaughter. *People v Holtschlag*, ___ Mich ___; ___ NW2d ___ (Docket No. 123553, decided July 23, 2004), slip op at 11; see also *People v Herron*, 464 Mich 593, 605; 628 NW2d 528 (2001).

In this case, an instruction on involuntary manslaughter was not supported by a rational view of the evidence because, if the jury credited enough of the evidence to establish defendant's responsibility for the deaths at issue and was acting rationally, it would have had to conclude that defendant acted with the malice necessary to establish murder. In particular, the evidence indicated that defendant drove in the wrong direction, at high speeds and over a considerable distance, on both I-94 and a ramp between I-94 and I-69. This evidence warranted a finding of the malice required for murder because it is comparable in severity to facts held sufficient to warrant a finding of malice in *People v Goecke*, 457 Mich 442, 471-472; 579 NW2d 868 (1998). The evidence did not rationally support a conclusion that defendant drove in the wrong direction on the freeway by accident or in some other way that involved merely criminal or gross negligence falling short of the malice necessary for murder. I therefore conclude that the trial court correctly denied defendant's request for a jury instruction on involuntary manslaughter.

¹ A pretrial evidentiary hearing on the felony murder issue was held by the circuit court because no preliminary examination occurred in the district court.

Moreover, I find no merit to the additional issues defendant raises on appeal.

I would affirm.

/s/ Patrick M. Meter