

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL GREG CARTER,

Defendant-Appellant.

UNPUBLISHED

December 22, 2005

No. 257035

Calhoun Circuit Court

LC No. 2004-000264-FC

Before: Fitzgerald, P.J., and O’Connell and Kelly, JJ.

PER CURIAM.

A jury convicted defendant of involuntary manslaughter, MCL 750.321, and the court sentenced him to a prison term of 48 months to 15 years. Defendant appeals as of right. We affirm.

Defendant’s conviction arises from the death of Mary Lynn Wichman. Defendant was cooking steaks in his kitchen, a steak knife in his hand, when Wichman engaged him in horseplay by poking him with a fork. Defendant began poking her back with the steak knife. The horseplay continued until defendant stuck Wichman in the stomach with the steak knife, creating a four and a half inch deep cut that went through Wichman’s stomach and pierced her aorta. Wichman collapsed and died within minutes.

Defendant failed to request jury instructions on the defense of accident¹ and the definitions of slight negligence and ordinary negligence.² He argues on appeal that the trial court erred by failing to sua sponte give these instructions to the jury. We review this issue for plain error affecting defendant’s substantial rights. *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003).

Defendant first argues that the jury should have been instructed on the defense of accident because his act was involuntary “in that he did not mean to poke [Wichman] or touch her at all, only that he had meant to dissuade her from horsing around.” We disagree.

¹ CJI2d 7.1: Murder: Defense of Accident (Involuntary Act).

² CJI2d 16.17(2) and (3), respectively.

“[A]ccident is not a defense to involuntary manslaughter, because . . . accident is subsumed within that offense. Thus, a defendant is only excused from involuntary manslaughter if he did not act with criminal negligence.” *People v Hawthorne*, 265 Mich App 47, 51-52; 692 NW2d 879 (2005). Because defendant was found guilty of involuntary manslaughter, and accident is not a defense to involuntary manslaughter, the court did not commit reversible error by failing to instruct the jury as to CJI2d 7.1.

Defendant also argues that the trial court should have instructed the jury on the definitions of slight negligence and ordinary negligence, in addition to the definition of gross negligence, to enable the jury to determine if defendant acted with one of these lesser degrees of negligence. We disagree.

The court properly noted in the jury instruction for involuntary manslaughter that defendant could only be found guilty of this crime if he acted in a grossly negligent manner. The court further defined gross negligence as “more than carelessness,” noting that gross negligence constituted “willfully disregarding” the likelihood of injury to another as a result of one’s actions. This definition, in and of itself, distinguishes gross negligence from the reasonable care standard of ordinary negligence described in defendant’s proposed instruction. Merely failing to compare the clearly defined standard of gross negligence with a definition of ordinary negligence does not amount to plain error by the trial court requiring reversal. “Even if somewhat imperfect, jury instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant’s rights.” *People v McDaniel*, 256 Mich App 165, 170; 662 NW2d 101 (2003).

Defendant also contends the magistrate erred in binding him over on a charge of open murder because no evidence of premeditation or malice was presented. We disagree. First, the prosecutor is not required to present evidence of premeditation and deliberation during the preliminary examination to support a bindover on a charge of open murder. *People v Baugh*, 243 Mich App 1, 7; 620 NW2d 653 (2000). Second, malice may be inferred from the use of a deadly weapon. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999); *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004). Finally, even assuming that the magistrate erred in binding defendant over when evidence of malice was lacking, the issue is moot because defendant was acquitted of second-degree murder and convicted of an offense for which malice is not an element. *People v Coddington*, 188 Mich App 584, 594 n 5; 470 NW2d 478 (1991).³

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O’Connell
/s/ Kirsten Frank Kelly

³ “Involuntary manslaughter is the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty.” *People v Mendoza*, 468 Mich 527, 536; 664 NW2d 685 (2003).