

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
April 28, 2011

v

DARIUS TYRONE HUNTINGTON,  
  
Defendant-Appellant.

No. 295474  
Muskegon Circuit Court  
LC No. 09-058168-FC

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Before: SHAPIRO, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Defendant, Darius Tyrone Huntington, appeals as of right his first-degree felony murder, MCL 750.316(1)(b); felon in possession of a firearm, MCL 750.750.224f; and felony firearm, MCL 750.227b, convictions. Defendant was sentenced as a habitual offender, second offense, pursuant to MCL 769.10, to life imprisonment without eligibility for parole for his first-degree murder conviction; to 2 years to 7 years and 6 months' imprisonment for his felon in possession of a firearm conviction; and to two years' imprisonment for his felony firearm conviction. Defendant was credited with 141 days of jail credit for both his felon in possession of a firearm and felony firearm convictions. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

The evidence showed that on June 19, 2009, the victim, Willie Rice, was cooking dinner for his brother and three friends. The victim was standing up in the kitchen, and the rest of the men were sitting. Defendant and another man walked into the home. Defendant was wearing a bandana-type mask covering his face from the nose down, and dark clothing. Defendant immediately indicated that "this is a stickup," and as the victim turned around to face defendant, defendant shot the victim in the torso. The other men ran into a bedroom. Defendant and his accomplice followed the men and demanded money. The men emptied their pockets and defendant and co-defendant then left. Emergency personnel were immediately contacted but the victim died later that night from the gunshot wound.

Officers arrested defendant based in part on interviews with defendant's ex-girlfriend, Cynoda Sparkling, and Sparkling's friend, Jasmine Flowers. Sparkling initially lied to police and provided an alibi for defendant, but later went back to the police and provided a different version of events. She told officers that she was not with defendant the day or night of the murder. Sparkling testified that late at night on the day after the murder she picked defendant up

and he confessed to the robbery and shooting. Flowers testified that she was in the car when Sparkling picked defendant up, and that defendant said he was wrestling with the victim and the gun accidentally fired. During cross examination, Sparkling admitted defendant told her that he accidentally shot the victim. However, all four eyewitnesses testified that there was no struggle over the gun, and that defendant shot the victim almost immediately upon entry into the home.

Before trial, the prosecution moved the trial court to modify the jury instruction defining malice, and the trial court granted the motion over defendant's objection. Defendant requested instructions on second-degree murder and involuntary manslaughter. The trial court denied defendant's request. Defendant now appeals the trial court's ruling regarding the malice instruction and the requested lesser offense jury instructions. Additionally, defendant, in his Standard 4 brief, also argues that he was denied effective assistance of counsel.

"Questions of law, including questions of the applicability of jury instructions and claims of instructional error, are reviewed de novo." *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003); *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). However, a trial court's determination regarding whether the facts of a case support a requested jury instruction is reviewed for an abuse of discretion. *McKinney*, 258 Mich App at 163. Reversal is not required if the jury instructions fairly present the issues and sufficiently protect the defendant's rights. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002).

Defendant first argues that the trial court committed error requiring reversal when it refused his request to instruct on the offenses of second-degree murder and involuntary manslaughter. Whether an offense is a necessarily included lesser offense depends on whether all the elements of the lesser offense are present in the greater offense. *People v Cornell*, 466 Mich 335, 361; 646 NW2d 127 (2002), overruled in part on other grounds *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003). An instruction on a necessarily included lesser offense "is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Id.* at 357.

The elements of first-degree felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or with malice, (3) while committing, attempting to commit, or assisting in the commission of an enumerated felony. *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007). In this case the felony was robbery, which is enumerated in MCL 750.316(1)(b). Defendant argues second-degree murder and involuntary manslaughter are necessarily included lesser offenses of first-degree felony murder. The elements of second-degree murder are: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). The elements of involuntary manslaughter are defined by common law, *People v Herron*, 464 Mich 593, 604; 628 NW2d 528 (2001). The offense is a "catch-all concept including all manslaughter not characterized as voluntary." *People v Holtschlag*, 471 Mich 1, 10; 684 NW2d 730 (2004). Thus, an involuntary murder has occurred if an unintentional killing of another is committed with "a lesser mens rea of gross negligence or an intent to injure, and not malice." *Id.* at 21-22. Both second-degree murder and involuntary manslaughter are necessarily included lesser offenses of first-degree felony murder. *Cornell*, 466 Mich at 357; *Mendoza*, 468 Mich at 541.

An instruction on second-degree murder was not warranted in this case, however, because the element differentiating first-degree felony murder and second-degree murder was not disputed at trial, and so a rational view of the evidence would not support a conviction of second-degree murder rather than first-degree felony murder. The element that differentiates the two offenses is the commission of an enumerated felony, in this case robbery. Defendant's theory of the case was that he had no involvement with the crime and was never present at the victim's home. Defense counsel largely ignored the issue of the robbery and did not address it in closing argument, focusing instead on the lack of evidence tying defendant to the scene of the crime. Further, the evidence does not rationally support a murder absent a robbery. All four eyewitnesses testified that defendant threatened them with the gun and took their money, and Sparkling testified that defendant told her he robbed and shot the victim. Thus, the trial court properly denied defendant's request for an instruction on second-degree murder.

However, review of the evidence clearly indicates that the trial court should have granted defendant's request for an instruction on involuntary manslaughter. Involuntary manslaughter is a necessarily included lesser offense of first-degree murder. *Mendoza*, 468 Mich at 541 ("the elements of involuntary manslaughter are included in the offense of murder because involuntary manslaughter's mens rea is included in murder's greater mens rea"). However, an instruction on a necessarily included lesser offense was required only if the element differentiating the offenses was disputed and a rational view of the evidence supported an instruction on the lesser offense. *Cornell*, 466 Mich at 357.

Malice is the disputed element that differentiates murder from manslaughter. *Mendoza*, 468 Mich at 541. Defendant argues that because there was evidence admitted at trial that he accidentally shot the victim, the element that differentiates the lesser offense from the greater offense was disputed during trial. During closing argument, defense counsel argued the only evidence against defendant was the testimony of Sparkling and Flowers, which described defendant's alleged confession of robbery and murder. Defense counsel argued that based on the testimony of the two women, there was no evidence of malice because their testimony suggested defendant was at the victim's home and there was a struggle over the gun, which went off accidentally. Defendant makes this same argument on appeal. Based on our review of the evidence and defendant's arguments during trial and on appeal, we find that malice, the element differentiating the two offenses, was disputed at trial.

Having found that the element differentiating the offenses was disputed at trial we next turn to the issue of whether an instruction on involuntary manslaughter was required. Such an instruction was required only if a rational view of the evidence would support a conviction of involuntary manslaughter. *Mendoza*, 468 Mich at 545. "An inferior-offense instruction is appropriate only when a rational view of the evidence supports a conviction for the lesser offense." *Id.* The testimony defendant focuses on is the testimony of Sparkling, during cross-examination, when she admitted that what defendant said to her was that he "didn't mean to shoot [the decedent] Old School," and that defendant and the victim were wrestling over the gun. Defendant also points to the testimony by Flowers, who testified that defendant said "I didn't mean to hurt that man," and that defendant said the victim grabbed the gun and the gun accidentally fired. Thus, if the jury believed the testimony of Flowers, and believed that what Sparkling admitted on cross-examination was the truth, then the jury might not have found that defendant killed the victim with malice. *Cornell* held that "a requested instruction on a

necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.” *Cornell*, 466 Mich at 357. Accordingly, the trial court erred when it failed to instruct the jury on involuntary manslaughter.

Having found that the testimony and proofs required the instruction on involuntary manslaughter, we next turn to the issue of whether the trial court’s failure to give the instruction constituted reversible or harmless error. In order to require reversal, the error must have undermined the reliability of the verdict. *Id.* at 364. The reliability of the verdict is undermined when there is substantial evidence to support the lesser offense, but the requested instruction on the lesser offense was not given. *People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000). Even where it was error not to give the requested instruction, the entire cause must be surveyed and “more than an evidentiary dispute regarding the element that differentiates the lesser from the greater offense is required” to justify reversal. *Cornell*, 466 Mich at 365-366. To demonstrate that the error was not harmless, defendant must demonstrate that it is more probable than not that the failure to give the requested instruction undermined the reliability of the verdict. *Id.* at 364.

We do not find that this standard was met in the instant case. The theory that the shooting was accidental was not defendant’s primary defense which was, instead, that he was not present and did not participate in the crime. Moreover, the only evidence of an accidental shooting came through the testimony of defendant’s girlfriend and her friend reciting statements allegedly made by defendant in which he confessed to the shooting and stated that it had been accidental. The defense asserted at trial that these witnesses were not truthful and had invented the statements purportedly made by defendant. Thus, the defense claims that there was reversible error for failing to instruct the jury on a theory for which the only evidentiary support was testimony that the defense itself asserted was not true. Finally, we do not believe that these disputed out-of court statements were of sufficient weight to have undermined the reliability of a verdict supported by the testimony of four eyewitnesses, none of whom testified that there was a struggle over the gun or that the shooting was in any way accidental.

Defendant also challenges the trial court’s decision to give an amended jury instruction in lieu of the standard jury instruction regarding the definition of malice. The trial court instructed the jury that it must find defendant “had one of these three states of mind: He intended to kill, or he intended to do great bodily harm to [the victim], or he acted in wanton and willful disregard of the likelihood that the natural tendency of such behavior was to cause death or great bodily harm.” Defendant argues the standard criminal jury instruction should have been given instead. The standard criminal jury instruction defining malice states in relevant part: “that defendant . . . intended to kill, or he intended to do great bodily harm to [name deceased], or he knowingly created a high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions.” CJI2d 16.5(3). The use of the Michigan Criminal Jury Instructions by a trial court is not mandatory. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). The trial court has discretion to decide whether to use a standard jury instruction. *Heikkinen*, 250 Mich App at 327. “There is no error requiring reversal if, on balance, the instructions fairly present the issues to be tried and sufficiently protect the defendant’s rights.” *Id.* The definition of malice given by the trial court comports with the definition of malice set forth in *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980). Thus, we conclude that where the trial court

instructed the jury on the definition of malice as set forth in an opinion of our Supreme Court that has not been overruled, the trial court did not abuse its discretion when it declined to use the standard jury instruction.

Lastly, defendant argues in his Standard 4 brief that he was denied effective assistance of counsel. Defendant failed to properly preserve his claim of ineffective assistance of counsel; therefore, our review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In order to prevail, defendant must demonstrate that trial counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 311-312; 521 NW2d 797 (1994). To demonstrate trial counsel was deficient, defendant must overcome the strong presumption that the alleged deficiency was trial strategy. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). Defendant argues counsel did not adequately impeach or cross-examine Sparkling. Defendant generally alleges that counsel did not try to ascertain the truth from Sparkling even though defendant informed counsel that Sparkling was lying, and he specifically alleges that counsel should have impeached Sparkling with her prior inconsistent statements. In *People v Odom*, 276 Mich App 407, 416; 740 NW2d 557 (2007), we explained: "[O]ne cannot object simply because one *thinks* a witness is lying. The veracity of a witness is a matter for the trier of fact to discern." Defense counsel was not ineffective for failing to object to the testimony. Further, defendant's argument that counsel failed to impeach Sparkling is without merit because the trial record clearly demonstrates that defense counsel questioned Sparkling regarding her prior inconsistent statements about defendant's confession. Further, trial counsel's decision regarding how to question the witness is presumed to be a matter of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

Defendant also claims counsel was ineffective for failing to move for a directed verdict. However, based on the evidence admitted at trial there was no likelihood that a directed verdict would have been granted by the trial court. Counsel does not have an obligation to bring a frivolous or meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Finally, defendant makes other statements as to how counsel was deficient, specifically that counsel failed to object to improper and inflammatory remarks. Defendant fails to cite the record to support this claim or to otherwise explain it. He has thus failed to establish a factual predicate for the claim and has abandoned it. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999); *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). Following our examination of all of defendant's claims of ineffective assistance of counsel, we find that defendant has failed to convince this Court that trial counsel's performance fell below an objective standard of reasonableness.

Affirmed.

/s/ Douglas B. Shapiro  
/s/ E. Thomas Fitzgerald  
/s/ Stephen L. Borrello