

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 162221

LC No. 92-006252-FC

KEVIN ROGER RYTLEWSKI,

Defendant-Appellant.

Before: Markman, P.J., and Murphy and Hoekstra, JJ.

HOEKSTRA, J. (dissenting).

I respectfully dissent from that part of the majority's decision in which they conclude that sufficient evidence was presented at trial to establish the provocation element of voluntary manslaughter. From my review of the evidence, I do not find even a modicum of evidence of provocation. To infer provocation from the facts of this case is tantamount to saying that provocation exists any time two people live together and one of them is found dead by homicide at the hand of the other without any obvious motivation.

The majority finds that the testimony established an intimate, but deteriorating relationship, and a dispute about the defendant's continued residence in the victim's house. The prosecution, indeed, attempted to prove these things, but to say they were established by the evidence is an exaggeration. The evidence showed that the victim was extremely security conscious and was very erratic about who had keys to his home and who was authorized to have access. Although the victim had taken defendant's key from him on more than one occasion, including as a result of an incident occurring several days before the homicide, defendant's uncontradicted testimony was that the situation, as on previous occasions, had been resolved and his key had been returned to him. The majority also relies on the representation that the victim and defendant had an intimate, but deteriorating relationship. First, defendant disputed these claims in his testimony. With regard to the nature of their relationship, the only evidence that suggested it was an intimate relationship was the testimony of a mutual friend who observed, on one occasion, defendant put his head on the victim's lap while the three of them were watching television. Concerning the claim of it deteriorating, any evidence that tended to support that

theory, other than problems with access to the house, was stricken by the trial court following objections.

Finally, the majority relies on the claim that the victim became angry with defendant when he stayed out late at night, as defendant admitted he did on this occasion. The only testimony in this regard was from defendant explaining to a police officer at the scene why he walked home on the night in question. Defendant explained that the victim did not like him out late and that he generally refused to come out and pick him up. In my judgment, such testimony was simply insufficient to warrant an inference of provocation.

From my review of the evidence, all that was proved was that defendant and the victim had been living together in the same residence for 1 ½ years. That, like in most living situations, from time to time they had disagreements, but that they had resolved them in the past, as most adults do, without major incidents and certainly without resorting to violence. In my opinion, nothing about their relationship prior to the incident is so remarkable that it could reasonably be related to the homicide and form the basis from which provocation could be inferred.

Given, as the majority concedes, that there was no direct evidence of provocation, and any other reliable evidence of provocation was absent, the trial court erred by granting the prosecution's request for a voluntary manslaughter instruction over defendant's objection. Other than speculation, there is no basis from which provocation can reasonably be inferred from the facts of this case.

/s/ Joel P. Hoekstra