

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP SAMPLE,

Defendant-Appellant.

UNPUBLISHED

October 4, 1996

No. 185232

LC No. 94-008327

Before: Cavanagh, P.J., and Murphy and C.W. Simon, Jr.,* JJ.

PER CURIAM.

Defendant, Phillip Sample, was charged with murder in the first degree, MCL 750.316; MSA 28.548, three counts of assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and appeals as of right from his jury trial convictions of three counts of assault with intent to murder and one count of and felony-firearm. Defendant was sentenced to three concurrent terms of twelve years and eight months to twenty years in prison on the assault with intent to murder convictions and a consecutive term of two years in prison on the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred in refusing to give the jury an instruction on voluntary manslaughter. We disagree. Jury instructions are reviewed in their entirety to determine whether error requiring reversal occurred. Imperfect instructions are acceptable so long as they fairly present the issues to be tried and sufficiently protect the rights of the defendant. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

It is the duty of the court to instruct the jury regarding the law applicable to the case. MCL 768.29; MSA 28.1052. Voluntary manslaughter is a cognate lesser included offense of murder. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). To determine whether a jury should

* Circuit judge, sitting on the Court of Appeals by assignment.

be instructed on a cognate lesser included offense, the trial court must review the record to determine whether the evidence presented at trial supports such a conviction for the cognate lesser included offense. If evidence supports the offense, if requested, the trial court must instruct the jury on it. *Pouncey, supra*, 437 Mich 387. In the present case, the evidence presented at trial did not show that defendant killed in the heat of passion. Therefore, the trial court did not err in refusing to instruct the jury regarding the crime of voluntary manslaughter.

Defendant next argues that the trial court erred in instructing the jury that it could convict defendant of assault with intent to commit murder if it found that defendant had the specific intent to kill *or* place his victims in fear of being killed. We disagree. Assault with intent to murder requires that the prosecutor prove beyond a reasonable doubt: (1) an assault; (2) committed with the specific intent to murder, (3) which, if successful, would make the killing a murder. *People v Beard*, 171 Mich App 538, 541; 431 NW2d 232 (1988). Assault is an attempted battery or any unlawful act which places another in reasonable apprehension of an imminent battery. *People v Johnson*, 407 Mich 196, 223; 284 NW2d 718 (1979). Reviewing the jury instructions in their entirety, it is clear that the trial court's instruction merely sets forth the definition of assault as one element of the crime of assault with intent to commit murder and then continues to explain the specific intent necessary to convict defendant of the crime charged, the intent to kill. The instructions, viewed as a whole, fairly present the issues to be tried and sufficiently protect the defendant's rights.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Charles W. Simon, Jr.