STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL CHRISTOPHER VINSON,

Defendant-Appellant.

UNPUBLISHED
December 12, 1997

No. 194867
Berrien Circuit Court
LC No. 95-001305-FC

Before: Neff, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(b); MSA 28.548(b) (murder committed in the perpetration of larceny and/or robbery), and armed robbery, MCL 750.529; MSA 28.797. The trial court sentenced defendant, a second habitual offender, to life imprisonment on each count. We affirm.

Defendant first argues that the trial court erred in the manner in which it instructed the jury at the close of trial respecting the homicide offenses. Defendant did not object to the trial court's jury instructions at trial. Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052; *People v Turner*, 213 Mich App 558, 573; 540 NW2d 728 (1995); *People v Haywood*, 209 Mich App 217, 230; 530 NW 2d 497 (1995).

At the close of trial, the trial court instructed the jury on each of the homicide offenses for which it could return a conviction; namely, first-degree felony murder, second-degree murder, and voluntary manslaughter. The trial court tendered its instructions respecting first-degree felony murder pursuant to CJI2d 16.4. Noticeably, however, the trial court neglected to instruct the jury that it must find "that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime." CJI2d 16.4(5). The commentary to CJI2d 16.4 provides that this instruction should be read if the jury is being instructed on manslaughter or any offense less than manslaughter. Because the trial court in this case instructed the jury on voluntary manslaughter, it should have instructed the jury as contemplated by CJI2d 16.4(5).

Following instructions on second-degree murder and voluntary manslaughter, the trial court concluded its instructions regarding the homicide offenses by instructing the jury on the order in which it must consider those offenses. The trial court instructed the jurors that they must consider the crime of first-degree felony murder first. If they found defendant not guilty of felony murder or could not agree about that crime, then they must consider the less serious offense of second-degree murder; and if they could not agree about the crime of second-degree murder, then they must consider the crime of voluntary manslaughter.

This ordering instruction is found verbatim in CJI2d 3.11(5), which embodies our Supreme Court's holding in *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982).[1] Although the ordering instruction comports with prior case law, when read in conjunction with the trial court's instruction on first-degree felony murder, the instructions allowed the jury to convict defendant of felony murder without considering whether defendant committed the homicide under circumstances that would reduce it to voluntary manslaughter.

In order to convict a defendant of felony murder, the prosecutor must establish the following: (1) that the defendant killed a human being; (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result; (3) while committing, attempting to commit, or assisting in the commission of any of the felonies enumerated in MCL 750.316(b); MSA 28.548(b). *Turner*, *supra* at 566. To establish second degree murder, the prosecutor must prove beyond a reasonable doubt that (1) there was a death, (2) caused by defendant, (3) absent circumstances of justification, excuse or mitigation, and (4) done with the intent to kill, the intent to inflict great bodily harm or the intent to create a very high risk of death with knowledge that the act probably will cause death or great bodily harm. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). First-degree felony murder, therefore, is second-degree murder committed during the perpetration of one of the felonies enumerated in MCL 750.316(b); MSA 28.548(b).

Voluntary manslaughter, on the other hand, is murder that is reduced because "the defendant acted out of passion or anger brought about by adequate cause and before the defendant has had a reasonable time to calm down." CJI2d 16.9(1). Provocation is not an element of voluntary manslaughter; rather, provocation "negates malice and reduces a killing that would otherwise be murder to manslaughter." *People v King*, 98 Mich App 146, 150; 296 NW2d 211 (1980). Stated differently, adequate and reasonable provocation that "causes the defendant to act out of passion rather than reason" "mitigate[s] a homicide from murder to manslaughter." *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). Thus, voluntary manslaughter requires a finding of murder (second-degree) which the jury may then reduce because "the law . . . looking at the frailty of human nature . . . considers great provocations sufficient to excite the passions beyond the control of reason." *People v Scott*, 6 Mich 287, 294-295 (1859).

We find that by not instructing the jury that it could reduce first-degree felony murder to manslaughter, the trial court deprived defendant of the opportunity of having the jury consider his theory that he committed the lesser offense of voluntary manslaughter because the jury could have found that defendant committed first-degree felony murder but also decided that he was guilty of the lesser offense

of voluntary manslaughter due to mitigating circumstances. The trial court's ordering instruction, however, permitted the jury to ignore the instructions on voluntary manslaughter once it found that the elements of first-degree felony murder were satisfied.

While jury instructions are to be read as a whole rather than extracted piecemeal to establish error, *People v Bell*, 209 Mich App 273, 276; 530 NW 2d 167 (1995), it is precisely such a reading in this case that leads to the conclusion the trial court erroneously instructed the jury, i.e., the instructions did not fairly present the issues to be tried or insufficiently protected defendant's rights. While the omission of the manslaughter reference from the felony-murder instruction alone permits us to find error, we conclude that error is present when the omission in the felony-murder instruction is considered in conjunction with the trial court's ordering instruction.

As stated above, however, defendant failed to object to the complained-of jury instructions, and thus, our review is limited to whether relief is necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052; *Haywood, supra* at 230. In order to protect defendant's rights, the instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is evidence in support. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). We find that the evidence in this case did not support a voluntary manslaughter instruction. Therefore, manifest injustice will not result if we deny defendant relief.

Before a court instructs on a cognate lesser offense such as voluntary manslaughter, it must examine the evidence to determine whether it would support a conviction of the lesser offense. *Pouncey, supra* at 387. The evidence in this case did not support a conviction of voluntary manslaughter.

As indicated above, defendant theorized that he lacked the intent necessary to commit murder because he was under the influence of crack cocaine and that his addiction to crack cocaine affected his mental capacity to the extent that he lacked the intent necessary to commit murder. Although it is unclear whether defendant argued these two explanations for his behavior as alternative or coexisting reasons for mitigating the murder to manslaughter, neither supports the trial court's decision to tender the voluntary manslaughter instruction.

Our Supreme Court addressed the applicability of the voluntary intoxication defense in *People v Langworthy*, 416 Mich 630; 331 NW2d 171 (1982). First-degree murder is a specific intent crime, while second-degree murder requires only a showing of general intent. *Id*. at 650-651. Michigan joins the majority of jurisdictions in holding that as between first- and second-degree murder, the defendant's voluntary drunkenness may be a legitimate subject of inquiry, but voluntary intoxication can never be a material or a pertinent consideration when the debate involves whether the defendant is guilty of second-degree murder or manslaughter. *Id*. at 652. Indeed, voluntary intoxication may negate the specific intent necessary for a conviction of first-degree murder, but it does not negate the general intent required for a second-degree murder conviction. *Id*. at 651. Thus, while a showing of adequate provocation might reduce a murder to manslaughter, voluntary intoxication is not adequate provocation that can reduce to manslaughter what would otherwise be murder. *Id*. at 652. Therefore, defendant's theory that the crack cocaine he used affected his mental state at the time of the homicide may be a valid

defense as between first- and second-degree murder but not as between second-degree murder and voluntary manslaughter. The trial court erred, therefore, to the extent that it instructed the jury regarding voluntary manslaughter on the basis of evidence showing that defendant was under the influence of crack cocaine at the time of the killing.

Defendant also theorized that his crack cocaine craving, in general, negated the intent necessary to commit murder. This theory is akin to a diminished capacity defense. Like the defense of voluntary intoxication, however, "[e]vidence of diminished capacity is only relevant to the question of a defendant's ability to form the specific intent necessary to commit a particular crime." *People v Jones*, 151 Mich App 1, 5; 390 NW2d 189 (1986). Because second-degree is a general intent crime, *Langworthy*, *supra*, 416 Mich 652, the defense of diminished capacity is not available to reduce second-degree murder to voluntary manslaughter. Accordingly, the trial court erred to the extent that it instructed the jury that it could convict defendant of voluntary manslaughter on the basis of evidence showing that defendant was suffering from the effects of crack cocaine addiction at the time of the killing.

Thus, the trial court erred in instructing the jury that it could convict defendant of voluntary manslaughter. Accordingly, because the evidence did not justify the giving of the manslaughter instruction, there can be no manifest injustice in the trial court's failure to give the instruction in a proper manner.

Defendant next argues that defense counsel was ineffective for failing to provide the jury any evidentiary support for the defense theory that defendant's use and addiction to crack cocaine so severely affected his state of mind as to render his behavior consistent with voluntary manslaughter. As we have just discussed, however, evidence of drug use or addiction is insufficient to reduce a crime of murder to manslaughter. Therefore, defense counsel could not have been ineffective for failing to provide evidence in support of these meritless theories because counsel's actions did not deprive defendant of a substantial defense. See *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990); *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

Defendant also argues that he is entitled to a new trial because three witnesses testified respecting their opinion of defendant's state of mind at the time of the killing. Defendant did not object to these alleged instances of improper testimony. We will not review an unpreserved claim of improper admission of evidence unless we find error that could have affected the outcome of the trial or where prejudice is presumed or reversal is automatic. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). Our review of the record reveals that no error occurred in the admission of the now-challenged testimony, and thus, we decline to review defendant's claims.

Affirmed.

/s/ Janet T. Neff
/s/ Kathleen Jansen
/s/ Jane E. Markey

[1] This Court decided *People v Handley (On Remand)*, 135 Mich App 343; 352 NW2d 343 (1984), which our Supreme Court reversed in part at 422 Mich 859; 365 NW2d 752 (1985).