

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DEON L. GLENN,

Defendant-Appellant.

UNPUBLISHED

May 25, 2004

No. 246624

Wayne Circuit Court

LC No. 02-001379-01

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right a jury-trial conviction for second-degree murder, MCL 750.317, and possession of a firearm during a felony, MCL 750.227b. The trial court sentenced defendant to twenty five to fifty years in prison on the murder conviction with two additional years for the felony firearm possession conviction. We affirm.

I. FACTS

This appeal arises from the events that led to and resulted in the January 11, 2002, shooting death of Timothy Harmer. Defendant returned to his apartment complex with his girlfriend and her two children. Upon defendant's return, a group of men, including the victim, was standing in the complex parking lot. One of the men, Mr. Gamble, engaged in a verbal altercation with defendant. According to defendant and his girlfriend, Mr. Gamble was brandishing a firearm and threatened defendant. Defendant responded, "Not in front of my kids," removed the children and his girlfriend from the scene, and returned with his firearm. Witnesses testified that, by this time, Mr. Gamble had gone inside the apartment building or was moving toward it. Further, witnesses recalled hearing either one shot or two ring out and seeing defendant fire in the direction of Mr. Gamble. Defendant acknowledged firing his weapon, but testified that Gamble fired upon him first and that he was only shooting to protect himself. As a result of the shooting, Timothy Harmer was shot in the back and died.

The prosecutor charged defendant with second-degree murder. The prosecution argued that, although Mr. Harmer was not the target of defendant's shot, the intent to do grave bodily harm or kill Mr. Gamble transferred to the accidental shooting of Mr. Harmer. Therefore, both elements of second-degree murder, the actus reus, or killing act, and the mens rea, or murderous intent, were satisfied to sustain the conviction. Defendant did not challenge the application of

this doctrine, but, rather, requested that the trial judge instruct the jury to consider the lesser crime of voluntary manslaughter and the defendant's claim of defense of others. The trial judge refused both requests to instruct the jury. Ultimately, the jury returned a guilty verdict.

Defendant now challenges his conviction by arguing that the trial court's refusal to instruct the jury as to the lesser offense abrogated defendant's right to a jury trial. Alternatively, defendant now argues that the trial judge's refusal to instruct the jury on the defense of others theory abrogated defendant's right to present a full defense.

II. VOLUNTARY MANSLAUGHTER INSTRUCTION

A. Standard of Review

This Court reviews claims of instructional error de novo. *People v Hubbard*, 217 Mich App 459, 487 (1996). Particularly, this court reviews the record adduced at trial to determine whether the evidence was sufficient to convict the defendant of a lesser-included offense. *People v Cheeks*, 216 Mich App 470, 479-80 (1995), *People v Sullivan*, 231 Mich App 510, 517 (1998).

B. Analysis

MCL 768.29 requires the trial court to instruct a jury with respect to the law applicable. Therefore, if evidence warrants instruction on a lesser-included offense, the trial court must so instruct. Voluntary manslaughter is a lesser offense. It shares second-degree murder's elements and is in the same class as that offense, but differs from second-degree murder because it requires that the suspect killed in the heat of passion. *Sullivan, supra* at 517. Therefore, this Court will reverse a conviction for new trial if there was sufficient evidence at trial to show that the jury should have been instructed on voluntary manslaughter, but the trial judge refused to so instruct.

Voluntary manslaughter is defined by common law. *People v Pouncey*, 437 Mich 382, 388 (1991). The elements of voluntary manslaughter are (1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions. *Sullivan, supra* at 518. Thus, legally adequate provocation mitigates second-degree murder to manslaughter. Legally adequate provocation is that which causes the defendant to act out of passion rather than reason. *Id.* Thus, the provocation must be such that it would cause a reasonable person to lose control. *Id.*

This determination is a question of fact for the factfinder. *Id.* Yet where, as a matter of law, no reasonable jury could find that the provocation was adequate, the court may refuse to instruct on this lesser charge. The trial court, therefore, concluded that no reasonable jury could have found that defendant acted with legally adequate provocation. We agree.

Even supposing that Mr. Gamble's confrontation with defendant was sufficient to make him legally provoked and he was legally provoked, a lapse occurred between defendant's provocation and the actus reus, or killing act, evidenced by his trip to his apartment, his finding

his firearm, and his return to the scene of the encounter. Such a lapse between provocation and action invalidates any purported right to instruction on involuntary manslaughter. The trial judge's conclusion that, as a matter of law, no rational jury could find defendant of voluntary manslaughter was correct.

Therefore, the trial judge's refusal to so instruct the jury is not reversible error.

III. DEFENSE OF OTHERS INSTRUCTION

A. Standard of Review

Criminal defendants have a state and federal constitutional right to present a defense. Const 1963, art 1, § 13; US Const, Ams VI, XIV; *People v Hayes*, 421 Mich. 271, 278 (1984). Instructional errors that directly affect defendant's defense theory can infringe on defendant's right to due process. See *Barker v Yukins*, 199 F3d 875 (CA 6, 1999). This Court reviews claims of instructional error de novo. *Hubbard, supra* at 487. This Court also reviews de novo the constitutional question whether a defendant was denied the constitutional right to present a defense. See *People v Pitts*, 222 Mich App 260, 263 (1997).

B. Analysis

Again, MCL 768.29 requires the trial court to instruct a jury with respect to the law applicable. Therefore, if evidence warrants instruction on a relevant defense, the trial court must instruct the jury on the defense. A claim of defense of others, like a self-defense claim, first requires that a defendant has acted in response to an assault. *Detroit v Smith*, 235 Mich. App. 235, 238 (1999). When a defendant uses deadly force, the test for determining whether he acted in lawful defense other others has three parts: (1) defendant honestly and reasonably believed that another or others were in danger, (2) the danger feared on those other's behalf was serious bodily harm or death, and (3) the action taken by the defendant appeared at the time to be immediately necessary. *People v Heflin*, 434 Mich. 482, 502, 508 (1990).

The defendant's claim of defense of others fails because defendant's action was only remotely in response to an assault. If Mr. Gamble did in fact assault defendant, his girlfriend or children, that assault ended when the couple and children left the scene of the encounter. That that encounter motivated defendant to return to the scene and reengage confrontation does not make his violent action responsive to the initial assault; rather, his return made him the assaulter. Further, the evidence shows that Mr. Gamble let defendant take his girlfriend and her children to his apartment. Therefore, although defendant may have had an honest fear on their behalf, that fear was unreasonable because had Mr. Gamble wanted to hurt those others it is unlikely that he would not have allowed them to seek refuge in the apartment. Last, defendant's response was not immediately necessary. Rather, he had the opportunity to escort his loved one to safety, away from the scene of the earlier encounter. Therefore, because the trial judge is only required to instruct as to applicable law and the defense of others is inapplicable to this case, this Court holds that the trial judge's refusal to instruct on the defense of others claim was not erroneous.

IV. CONCLUSION

The trial court's instructions to the jury fairly presented the applicable, triable issues to the factfinder. Those instructions presented to the jury sufficiently protected defendant's due process rights. Accordingly, we affirm the decision of the trial court.

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper