

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHON SAMUEL MITCHELL,

Defendant-Appellant.

UNPUBLISHED

November 14, 2006

No. 265141

Wayne Circuit Court

LC No. 05-004400-01

Before: Fort Hood, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant was convicted of second-degree murder, MCL 750.317,¹ felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to two years' imprisonment for the felony-firearm conviction, 25 to 45 years' imprisonment for the second-degree murder conviction, and one to five years' imprisonment for the felon in possession of a firearm conviction. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues on appeal that he was denied a fair trial by the trial court's failure to instruct the jury on the lesser offense of voluntary manslaughter. We disagree. This Court reviews challenges to jury instructions de novo, but a trial court's determination whether an instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A necessarily included lesser offense instruction is appropriate only if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser offense, and a rational view of the evidence supports giving the instruction. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Manslaughter is a necessarily included lesser offense of murder. *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003). The element that must

¹ Defendant was charged with first-degree murder, MCL 750.316, but convicted of second-degree murder.

exist to find murder over manslaughter is malice.² *Id.* at 534-535. A showing that a defendant acted under provocation and sudden heat of passion may negate the presence of malice, thus mitigating a murder charge to manslaughter. *Id.* at 536-537.

Common-law voluntary manslaughter requires a showing that the defendant killed in the heat of passion, the passion was caused by an adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). “The provocation must be adequate, namely, that which would cause the reasonable person to lose control.” *Id.* at 389.

Defendant argues that he acted out of passion rather than reason because the killing took place while a large group of angry people engaged in a series of verbal arguments and confrontations. To determine the existence of heat of passion and lack of reason, courts look to the victim’s provocation of the defendant, not vice versa. *Id.*; *People v Tierney*, 266 Mich App 687, 715-716; 703 NW2d 204 (2005). Here, defendant was the provoker of the arguments and confrontations, so any lack of reasoned thought on behalf of defendant was self-induced.

The second element of voluntary manslaughter is adequate provocation. Defendant’s first encounter with the victim, Donnell Ford, involved defendant holding a gun to Ford’s head, with no provocation whatsoever on behalf of Ford. Defendant’s second and last encounter with Ford was when Ford tried to get defendant and defendant’s friends off of Nadine Harper’s property. Defendant cursed at Ford in response. Ford, unarmed, stepped off Harper’s porch and walked toward defendant, but was then distracted by defendant’s friend, Frank Whetstone.³ That was the extent of Ford’s interactions with defendant prior to defendant shooting him three times in the back as he fought with Whetstone. A reasonable person would not be prompted to lose control under these circumstances, and therefore, such actions do not rise to the level of adequate provocation.

Furthermore, voluntary manslaughter requires that there not be a lapse of time during which a reasonable person could control his passions. *Pouncey*, *supra* at 388. If in fact defendant’s passions were out of control when Ford was walking toward him, he had time to control his passions when Whetstone sidetracked Ford with a fistfight. Defendant was not engaged with Ford at the time of the shooting. Ford’s back was to defendant. Ford was not paying attention to defendant. Ford was far enough away from defendant when defendant shot him that the shooting was not considered close range. Thus, none of the elements of voluntary manslaughter were established. The trial court did not abuse its discretion by refusing to give a voluntary manslaughter instruction since a rational view of the evidence did not support it.

² *Cornell* requires that the factual element that separates the greater offense from the lesser offense, in this case malice, be in dispute. *Cornell*, *supra* at 357 n 11. Here, defendant never made the claim or presented evidence at trial that he was acting under the heat of passion or was provoked. The fact in dispute in this case was who did the killing, not whether defendant acted with malice. However, defendant disputes the existence of malice on appeal.

³ Frank Whetstone is also known as “Buddha.”

Affirmed.

/s/ Karen M. Fort Hood

/s/ Christopher M. Murray

/s/ Pat M. Donofrio