

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HARVEY DURR, JR.,

Defendant-Appellant.

UNPUBLISHED

February 14, 2008

No. 275096

Kalamazoo Circuit Court

LC No. 06-001294-FC

Before: Talbot, P.J., and Cavanagh and Zahra JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321, and felon in possession of a firearm, MCL 750.224f. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 171 to 360 months for the manslaughter conviction and 57 to 120 months for the felon in possession conviction. He appeals as of right. We affirm.

Defendant, who was charged with murder, argues that the trial court erred in instructing the jury on voluntary manslaughter as a lesser included offense because a rational view of the evidence did not support a conviction of that offense. Defendant also argues in a Standard 4 supplemental brief that his constitutional right to due process was violated by the court's instruction on voluntary manslaughter where a rational view of the evidence did not support it.

Instructional issues that involve questions of law are reviewed de novo, “[b]ut a trial court’s determination whether a jury instruction is 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) (citation and internal quotation marks omitted). Voluntary manslaughter is a necessarily included lesser offense of murder, and an “inferior” offense within the meaning of MCL 768.32. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). Therefore, when a defendant is charged with murder, an instruction for voluntary manslaughter is appropriate if supported by a rational view of the evidence. *Id.*

“To show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions.” *Id.*, p 535. The provocation necessary to mitigate a homicide from murder to manslaughter is that which would cause a

reasonable person to lose control and act out of passion rather than reason. *People v Tierney*, 266 Mich App 687, 714-715; 703 NW2d 204 (2005).

Defendant was convicted of shooting Terrance Mackerel in the parking lot of an apartment complex where Mackerel's brother Scott Shaver was involved in a fistfight with defendant's friend Michael Wilder. There is no dispute that Mackerel obtained a baseball bat while the fight was ongoing. Some witnesses testified that Mackerel wielded the bat and indicated that he intended to hit Wilder and defendant, while others testified that he verbally stated his intention to use the bat but did not swing it. According to defendant, Mackerel said he wanted to "get one good lick on" "just want to hit him side of his head one good time." Defendant thought that if a bat were introduced into the fight, he and his friend Bruton would have to jump in to help Wilder, despite being outnumbered by the men associated with Shaver. When Shaver backed up, apparently to allow Mackerel to hit Wilder, defendant reached over and grabbed the bat. Mackerel resisted and another man assisted Mackerel in keeping the bat. Mackerel turned on defendant and "half swung" the bat. Defendant repeatedly urged him to calm down, but he said, "no, I got something for this bitch ass n-----." He approached, and defendant backed up. When he "go swing" on defendant, he moved and fell backward as he tripped on Bruton. Defendant did not fall all the way down. As he was falling, he saw a gun slide. At the time, he did not know where the gun came from. He grabbed it and came up firing. He fired because Mackerel was trying to hit him in the head with the bat. He did not see Mackerel's face as defendant shot because he was ducking with his arms up and was looking at the ground trying to get away. He acknowledged that for all he knew, Mackerel may have turned away and was not going to hit him. Defendant testified that he was not angry at Mackerel, but it was "a different type of emotion what was going on."

Q. But your tension, your passion was up?

A. Yeah, trying to-trying to talk him down, trying to back off. Maybe just try to give it a minute, you know to get off the situation a minute.

Q. Your adrenalin was pumping?

A. Yeah.

* * *

Q. You are shooting to stop him, right?

A. To stop him. I won't say to stop him, to scare him. If it was possible nothing to hit him and I didn't get hit with the bat, okay. But I didn't expect him to get hit.

Q. You didn't expect him to get hit when you were firing the gun?

A. No, that wasn't on my mind. I don't know, I just reacted to him.

Q. You would agree that that-that type of action of spinning and firing a gun, though, would create a high risk of someone getting shot?

A. No. I guess you could say that, yeah. I guess. That wasn't—That wasn't my thought process. I didn't have no time to think. I wasn't thinking that way.

Defendant concedes that the evidence arguably supported a finding that the provocation was adequate and that there was no lapse of time during which a reasonable person could control his passions, but argues that the evidence did not support a conclusion that he acted in the heat of passion or that he had a highly inflamed state of mind. However, his testimony indicated that his adrenalin was pumping, that he “just reacted,” and did not have time to think. A rational view of the evidence could lead to the conclusion that defendant acted impulsively, in the heat of passion brought on by the fight, Mackerel's words, and his display of the bat. Therefore, the trial court did not abuse its discretion in instructing the jury on voluntary manslaughter, and the instruction did not violate defendant's right to due process.

Affirmed.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra