

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICOLE L. YOUNG,

Defendant-Appellant.

UNPUBLISHED
September 4, 2003

No. 239997
Wayne Circuit Court
LC No. 01-013978

Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. She was sentenced to a prison term of fifteen to twenty-five years for the second-degree murder conviction and to a two-year mandatory consecutive prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred in failing to instruct the jury on voluntary manslaughter. Claims of instructional error are reviewed de novo on appeal. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002).

Defendant was charged with first-degree premeditated murder for shooting her boyfriend, Sean Reynolds. The jury convicted her of the lesser offense of second-degree murder. Reynolds died of a single gunshot wound to the left lower back. There was no evidence of close-range firing. Defendant's statement, taken the day of the shooting, was read into the record at trial:

Q. Tell me about what happened at 15238 Prevost tonight.

A. I got home about 3:30 a.m., from work. I came into my bedroom and sat on my bed. I called a girl named Tanya or Kim, . . . This is the girl that Sean was fucking around with. I was talking to her on the phone. She told me that she was two . . . months pregnant. She then told me that she was going to get some dick from my man. At about this time Sean was knocking on my bed – my window, bedroom. (I was still on the phone with this girl.) I walked to the front door to let Sean in. I hung up the phone and opened the door. I walked back to my bedroom and sat on my bed. Sean came into the bedroom and stood at the door. I asked him about this girl named Kim or Tanya. We

started talking about this girl. He called me a Bitch. He said 'Bitch, I'm not about to go through this shit. I am about to go over there.' I then grabbed the gun from my mattress. It was on my side of the bed by the night stand. I pointed it at him and he said, 'Bitch, how are you going to pull a gun on me. . . . Bitch, your ass ain't going to shoot me.' He then turned and tried to walk away. I then fired one shot at him. Sean then walked to the living room and he fell. I ran to the living room and grabbed him. Before I ran out of the bedroom I tossed the gun under the bed. I tried to give him mouth to mouth. I screamed for Tory to call the police.

* * *

Q. Why did you shoot Sean?

A. I do not know. I was not thinking. I did not mean to shoot him. I was trying to scare him. I was upset about the girl being pregnant.

Q. What about [sic] what happened to the gun?

A. Before the . . . police got there my mother, Sheila Whitehead, got there. When the police came, when the police came they would not let her come into the house. They let me go out to her car. I hugged her and gave her the gun, gave the gun to her.

Christine Henderson testified that she worked with Reynolds for about a month at AAA on the same shift. She paged Reynolds once each day for three days during the month of November. She paged Reynolds on November 22, 2000, and someone else returned the page. The next day, Reynolds told her that his girlfriend had returned the page. On November 25, 2000, Henderson received numerous phone calls starting at about 4:00 a.m. The voice on the phone was the same voice as the person who called her on November 22, 23, and 24, 2000, and who Reynolds had identified as his girlfriend. Henderson told the caller that she was sleeping with Reynolds and was pregnant with his child. Henderson testified that this statement was not true but that she said it because the caller was harassing her. Henderson stated that there came a time when she told the caller that she did not know Reynolds and was not pregnant by him but the calls did not stop.

Defendant took the stand and testified that Reynolds was her boyfriend and they had been going together for four years. When she got home from work on November 25, 2000, between 3:30 and 4:00 a.m., she checked her caller ID and saw the same number that was on Reynolds' pager and she called it back. The person who answered the call told defendant that her name was "Kim" and that she had had a relationship with Reynolds for the last six months and was pregnant with Reynolds' child. Defendant found out later that the woman's name was Christine Henderson. Defendant was very hurt and was crying. Reynolds came home and defendant asked Reynolds about "Kim." Reynolds replied, "Bitch, I'm not about to go through this with you. I'm tired of this shit." Defendant stated she stood in front of Reynolds with the gun in her hand but she did not point it. Reynolds said something like, "Bitch, you're going to pull a gun on me. You ain't going to shoot me." Reynolds then pushed defendant down onto the bed and the gun went off. Defendant stated she did not know how it was that Reynolds was shot in the

back. She said she fired the gun but she does not know how she did it, she did not intend to shoot Reynolds, and she did not intend to kill him.

On cross-examination, defendant stated she talked to “Kim” twice on the morning of November 25, 2000. There was a time lapse of an hour between her first conversation with “Kim” and the time that Reynolds arrived at her house. She knew the gun was loaded, and was familiar with the gun and how to handle it.

The trial court denied the request for a voluntary manslaughter instruction, relying on *People v Pouncey*, 437 Mich 382; 471 NW2d 346 (1991), and *People v Eagen*, 136 Mich App 524; 357 NW2d 710 (1984). The court concluded that words alone could not provide the necessary provocation for manslaughter, and that pushing another person as well does not provide the necessary provocation. The court also concluded that adultery only provides adequate provocation in the context of a marital relationship.

Voluntary and involuntary manslaughter are both necessarily included lesser offenses of murder. *People v Mendoza*, 468 Mich 527, 540-542; ___ NW2d ___ (2003). Thus, both forms of manslaughter are “inferior offenses” of murder. *Id.* at 533. An inferior offense instruction is appropriate only where a rational view of the evidence supports a conviction for the lesser offense. *Id.*; *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

A rational view of the evidence here does not support an instruction on voluntary manslaughter based on an adequate provocation. Voluntary manslaughter under such a theory consists of an intentional killing committed under the influence of passion produced by adequate provocation before a reasonable time has passed for blood to cool. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991).

Here, the evidence showed that defendant was upset with Reynolds because he was having an affair with Henderson. After telephoning Henderson and being told that Henderson was sleeping with Reynolds and was pregnant, defendant confronted Reynolds when he arrived at defendant’s house. Reynolds responded, “Bitch, I’m not going to go through this shit,” and stated that he was “about to go over there.” As Reynolds turned to walk away, defendant grabbed the gun from her nightstand and pointed it at him. Reynolds made statements such as, “Bitch, your ass ain’t going to shoot me.” Reynolds then turned and tried to walk away. Defendant then fired a shot at Reynolds, striking him in the back.

Although adequate provocation can arise from informational words, see *Pouncey, supra* at 391, the evidence in this case reveals that defendant at least suspected that defendant was having an affair two or three days before the present offense. Defendant telephoned Henderson on numerous occasions during the three days before the shooting. Defendant telephoned Henderson the day of the shooting and was informed that Henderson was pregnant with Reynold’s child. An hour passed before defendant again telephoned Henderson, and it was during this second conversation that Reynolds arrived at defendant’s house. Reynolds did not make any informational statements to provoke defendant. Rather, when defendant confronted Reynolds, the victim indicated that he was not going to “take this shit” and that he was “going to go there.” It was at this point that Reynolds turned to leave and defendant shot him. Because no reasonable jury could find that the provocation was adequate, the trial court properly refused to instruct the jury on voluntary manslaughter.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald