

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY BARNETT,

Defendant-Appellee.

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UNPUBLISHED  
September 16, 2003

No. 239517  
Wayne Circuit Court  
LC No. 00-008103-01

Before: Whitbeck, C.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant Gregory Barnett appeals as of right from a jury conviction of first-degree murder<sup>1</sup> and of felony-firearm.<sup>2</sup> The trial court sentenced Barnett to mandatory life imprisonment for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction, the terms to run consecutively. We affirm.

I. Basic Facts And Procedural History

This case arose when Barnett shot and killed twenty-one-year-old Douglas Gibson as he stood at the intersection of Floyd and Wetherby Streets in Detroit. Witnesses who testified at trial had overheard Gibson, who had a learning disability and had been hospitalized for depression, threaten Barnett and his wife in the days before the shooting. Although Gibson had been prescribed medication for his mental disorders, he had recently stopped taking it. Patricia Gibson, Gibson's mother, testified that Gibson did not act aggressively toward her, but she had seen him act aggressively toward others. After learning that Gibson had argued with Barnett a few weeks before the shooting, she and her husband told Gibson to stay away from Barnett.

Kelvin Watts, who lived in the neighborhood where the incident occurred, testified that one or two weeks before the shooting he saw Gibson standing in front of Barnett's house having a heated discussion with Barnett, and he heard Gibson tell Barnett that he was going to kill Barnett and his wife. Eddie Pauldo, a neighborhood acquaintance of Barnett, testified that he

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<sup>1</sup> MCL 750.316.

<sup>2</sup> MCL 750.227b.

saw Gibson and Barnett together four or five days before the incident, heard Gibson threaten to beat Barnett up, and noticed that the threat upset Barnett. Winston Harris, Gibson's cousin, testified that on the morning Gibson was killed, Barnett told him that if Gibson did not leave him alone he was "going to do what he had to do." Harris said he told Barnett to speak with Gibson's mother.

Patricia Gibson testified that at 5:50 p.m. on June 27, 2000, her son went by bicycle to his friend Andre Williams' house to see Williams' new puppy. Williams lived on Floyd Street, which ran perpendicular to Wetherby, where Barnett lived. Kelvin Watts' uncle Willie Watts drove to Williams' house around 6:00 p.m. and parked on Wetherby. When Willie Watts arrived, Gibson was talking to Williams. Willie Watts called to Williams, who walked over to where Watts was parked, while Gibson stayed on his bicycle next to the car in Williams' yard.

Approximately five minutes after Willie Watts and Williams began to talk, Watts heard a gunshot behind him, and then saw Barnett carry a shotgun across Wetherby and head toward Floyd Street. Willie Watts said that after Barnett walked by him, Barnett shot the shotgun again and stated, "I told you I was going to kill you if you keep messing with me." According to Willie Watts, Gibson remained on his bicycle, did not appear to have a weapon, and did not move or say anything. Willie Watts testified that Barnett fired a third time while standing in a neighboring yard on Floyd, Gibson fell, and Barnett turned and walked away.

Kelvin Watts testified that he was removing tools from his trunk when he heard a "pop" and saw a person with a rifle in his hand. Kelvin Watts said that he began walking down Floyd toward Wetherby, heard a second and third shot, and saw Barnett holding a rifle. When Kelvin Watts arrived at the corner of Floyd and Wetherby, Barnett had turned and was walking home and Gibson was lying face down on the ground.

Detroit Police Officer Lawrence Covington arrived at the scene shortly thereafter and began interviewing witnesses. Covington stated that he was approached by someone claiming to be the brother of the perpetrator and was taken by this person to Barnett's house. Barnett came out of his house and spoke with Covington. After Covington arrested Barnett and read him his rights, Barnett told Covington where the shotgun was. Detroit Police Officer Steven Baylor recovered the wadding from a shotgun shell and three shell casings at the scene and a shotgun and box of ammunition from Barnett's bedroom. Wayne County Medical Examiner Carl Schmidt, M.D., testified that the cause of death was a shotgun wound to the chest.

At trial, defense counsel informed the trial court that one of Barnett's witnesses was not present to testify, and because of a conversation counsel had with the witness the previous night, counsel did not believe the witness would be able to testify. According to defense counsel, the witness would testify that Gibson threatened to kill Barnett, rape Barnett's wife, and blow up Barnett's house. The trial court ruled that there was no reason to delay the trial.

Before the defense rested, defense counsel requested an instruction on voluntary manslaughter, a cognate offense. However, the trial court explained that before an instruction on a cognate offense is given there must be sufficient evidence for the jury to find that the offense did in fact occur. Voluntary manslaughter occurs when the killing was committed in the heat of passion, was caused by adequate provocation, and occurred without a lapse of time during which a reasonable person could have controlled his passion. The trial court refused to give the

manslaughter instruction on the basis that there was no evidence on the record to support it. The trial court did instruct the jury regarding self-defense, as requested, and instructed on both first-degree murder and second-degree murder.

During deliberations, the jury requested further instructions regarding the meaning of “justification.” The trial court informed the jury that “justified” meant that the killing was either excused, self-defense, or an accident. Defense counsel objected, arguing that the prosecutor must prove a defendant did not use self-defense. The trial court refused to give any further instruction. As noted, the jury found Barnett guilty of first-degree murder and felony-firearm, and the court sentenced Barnett to life imprisonment. This appeal followed.

## II. Continuances

### A. Standard Of Review

Barnett claims that he should have been granted a continuance so that an unavailable witness could testify. We review a trial court’s denial of a continuance for an abuse of discretion.<sup>3</sup> The factors we consider when determining whether a trial court abused its discretion in denying a continuance are: (a) whether the defendant asserted a constitutional right, (b) whether a legitimate reason existed for asserting the right, (c) whether the need for the continuance was caused by the defendant’s negligence, (d) whether the defendant had previously requested adjournments, and (e) whether defendant can demonstrate prejudice resulting from the denial.<sup>4</sup>

### B. Applying The Legal Standards

While a defendant has the “right to call witnesses in his defense, and a constitutional right to compulsory process to obtain witnesses in his favor,”<sup>5</sup> we conclude that here Barnett’s claim of self-defense was not legally viable. Killing another in self-defense is justified only if there is an honest and reasonable belief that one’s life is in imminent danger or that one is threatened with serious bodily harm.<sup>6</sup> Here, there was no evidence that Gibson had previously physically harmed Barnett. There also was no evidence that Barnett reasonably believed he was in imminent danger where Gibson was across the street, sitting on a bicycle, and was unarmed. Further, Barnett had already presented testimony from three separate witnesses that Gibson had threatened him and that the unavailable witness was not at the scene when the incident occurred. Because an unbiased person could conclude that there was justification for the trial court’s ruling, we conclude that the trial court did not abuse its discretion.<sup>7</sup>

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<sup>3</sup> *People v McCrady*, 213 Mich App 474, 481; 540 NW2d 718 (1995).

<sup>4</sup> *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

<sup>5</sup> *People v Pullins*, 145 Mich App 414, 417; 378 NW2d 502 (1985), citing Const 1963, art 1, § 20.

<sup>6</sup> *People v Kurr*, 253 Mich App 317, 320-321; 654 NW2d 651 (2002).

<sup>7</sup> *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

### III. Manslaughter Instruction

#### A. Standard Of Review

Barnett claims that the court erred by not instructing the jury on voluntary manslaughter. “This Court reviews de novo claims of instructional error.”<sup>8</sup> An instruction on a lesser included offense is required where the lesser offense is necessarily included in commission of the greater offense, the element distinguishing the two offenses is in dispute, and a rational view of the evidence supports the instruction.<sup>9</sup> Because the trial court anticipated the Supreme Court’s decision in *Cornell*, the issue was sufficiently preserved to apply *Cornell* on appeal.<sup>10</sup>

#### B. The Offense Of Manslaughter

The Michigan Supreme Court recently determined that voluntary manslaughter is a necessarily included lesser offense of first-degree murder, with malice being the only element distinguishing the two offenses.<sup>11</sup> Malice is negated by “provocation and heat of passion.”<sup>12</sup> “The provocation necessary to mitigate homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason.”<sup>13</sup> Whether provocation is sufficient is determined by an objective, reasonable-person standard.<sup>14</sup>

#### C. Applying The Legal Standards

Here, there was no evidence that Gibson had physically harmed Barnett. While Gibson had previously made numerous threats, there was no indication that he intended to carry them out. Words alone are generally not adequate provocation.<sup>15</sup> Witnesses testified that Barnett fired two shots as he walked across the street to where Gibson was standing, then shot him. Clearly, the distance Barnett walked gave him time to reflect on his actions and tended to negate an act of passion.

We further note that one witness testified that he overheard Barnett tell Gibson, “I told you I was going to kill you if you keep messing with me.” This indicates a deliberate and

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<sup>8</sup> *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

<sup>9</sup> *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

<sup>10</sup> “Our decision in this case is to be given limited retroactive effect, applying to those cases pending on appeal in which the issue has been raised and preserved.” *Cornell*, *supra* at 367. An appeal had been filed in this case when *Cornell* was decided.

<sup>11</sup> *People v Mendoza*, 468 Mich 527, 540-541; 664 NW2d 685 (2003).

<sup>12</sup> *Id.* at 540.

<sup>13</sup> *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 391.

reasoned act, which negates Barnett's claim of provocation.<sup>16</sup> In addition, another witness testified that Barnett told him that if Gibson did not leave him alone he "was going to do what he had to do." Because the evidence did not support a finding of reasonable provocation, we conclude that the trial court was not required to give a voluntary manslaughter instruction.

#### IV. Insufficient Evidence

##### A. Standard Of Review

Barnett argues that the prosecutor presented insufficient evidence to negate his claims of sufficient provocation and self-defense. We review de novo claims of insufficient evidence.<sup>17</sup> In so doing, we "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt."<sup>18</sup>

##### B. Applying MCL 750.316

MCL 750.316 provides in relevant part that any willful, deliberate, or premeditated killing is first-degree murder. Because we have already determined that the evidence did not support a claim of sufficient provocation or self-defense, we find that the prosecutor presented sufficient evidence for a rational factfinder to find Barnett guilty of first-degree murder.<sup>19</sup>

Affirmed.

/s/ William C. Whitbeck  
/s/ Hilda R. Gage  
/s/ Brian K. Zahra

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<sup>16</sup> *Id.* at 390.

<sup>17</sup> *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

<sup>18</sup> *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), citing *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979).

<sup>19</sup> *Johnson*, *supra* at 723.