

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFERY J. WIGGINS,

Defendant-Appellant.

UNPUBLISHED

December 7, 1999

No. 209523

Recorder's Court

LC No. 97-003456

Before: White, P.J., and Hood and Jansen, JJ.

WHITE, J. (dissenting).

The trial court's intention in giving the lengthy instruction¹ regarding the elements of murder and manslaughter was benign. The court wanted to make clear to the jury that the prosecutor did not have the burden of proving provocation or hot blood. Nevertheless, I agree with the majority that the court went too far in its comment that defendant could have been charged with first-degree murder and the court had never seen a manslaughter charge in a case such as this, and in making similar related comments. I dissent because I am unable to conclude on this record that the heavy burden of establishing harmful error under *People v Lukity*, 460 Mich 484, 496; __ NW2d __ (1999), has been satisfied. Given the totality of the evidence and the court's instructions, I cannot conclude that it is more probable than not that the court's improper statements were outcome determinative; i.e., I am unable to say that it is more probable than not that had the court not made the comments, the jury would have found defendant not guilty of manslaughter. I would affirm.

/s/ Helene N. White

¹ The trial court said:

To properly explain to you the Voluntary Manslaughter, it is first necessary to explain to you what Murder in the Second Degree is, even though it's not charged in this case. Okay? So, bear with me a little bit.

The elements of Murder in the Second Degree are . . . Number 1, that the defendant Jeffrey Wiggins have [sic] caused the death of the complainant Nathaniel Jones. That is, that Mr. Jones has died as a result of the discharge of a firearm by the defendant. That's one.

Two, that the defendant had one of these three states of mind at the time that he caused the act. That is, that he intended to kill Mr. Jones, or he intended to do great bodily harm to Mr. Jones, or that he knowingly created a very high risk of death or great bodily harm knowing that death or great bodily harm is the likely result of his conduct.

Now, the crime of murder may be reduced to voluntary manslaughter, if the defendant acts out of passion or anger, brought about by an adequate cause and before the defendant would have had a reasonable time to calm down. For manslaughter, the following two things must be present.

First, when the defendant acted, his thinking must have been disturbed by emotional excitement, to the point that an ordinary person might have acted on impulse, without thinking twice, and from passion instead of from judgment.

This emotional excitement must have been the result of something that would cause an ordinary person to act rashly, or on impulse. The law doesn't say what things are enough to do this, that is for you to decide.

Second, the killing itself must result from that emotional excitement. The defendant must have acted before a reasonable time had passed to calm down and return to reason. The law doesn't say how much time is needed, that again is for you to decide.

Now, what's the complication here? The complication here is that the Prosecutor charged Manslaughter in the first instance. He didn't charge Murder in the Second Degree; he charged Manslaughter in the first instance.

The defendant denies that he committed manslaughter, and claims that the gun discharged accidentally upon the impact with the floor.

If you find, as a fact, that the gun discharged accidentally, then you must find the defendant not guilty.

If you have a reasonable doubt whether the defendant intentionally shot the complainant, and a reasonable doubt whether the defendant knowingly and intentionally created a very high risk of death or great bodily harm where such result was likely, then you must find defendant not guilty.

JUROR BANDROWSKI: Can I ask a question?

You said if the jury decides that the gun discharged accidentally, then the defendant is not guilty?

THE COURT: That's correct.

JUROR BANDROWSKI: Couldn't the jury decide that even if it did discharge accidentally, that the defendant created an environment that was – I can't remember how you put it.

THE COURT: Go ahead. A very high risk of death or great bodily harm or some result is likely.

JUROR BANDROWSKI: And, therefore it's guilty?

THE COURT: If you find that the defendant knowingly and intentionally created a very high risk of death or great bodily harm where death or great bodily harm was clearly likely, by his having the gun and the use of the gun, then you could find the defendant was guilty.

Your question, I'm glad you asked it, and we had a debate out here before you were called out where Ms. Nessel and Mr. Van Tiem were asking me to give you an additional instruction along the lines of what you've just asked about. And, I declined at that time. But, now I've given it, now that you've asked. Okay? All right.

Let me say it yet another way. I've told you what voluntary manslaughter is. Yet, it is not part of the Prosecution's burden to prove that the defendant was emotionally excited, or acting in what we call hot blood, you know, as I have described it.

So long as the Prosecutor proves, beyond a reasonable doubt, that the killing was intentional within the meaning of the elements for murder in the second degree that I just defined for you. Okay. You got that?

Now, that you didn't get; right? Well, let me say it again. It goes back to your question. If the mind state of the defendant is either an intent to kill, or an intent to do great bodily harm, or the intention and knowing creation of a very high risk of death or great bodily harm where such result is plainly likely, okay, that's the mind state for a murder in the second degree.

So, what I'm telling you is, you'd ordinarily get a case like this. This is the first case I've ever seen like this in 31 years of experience in the Detroit Criminal Justice System. Where the Prosecutor charged Voluntary Manslaughter from the get go. Now, maybe their office has done it before. But, I was part of that office for 17 and a half years, and I never knew them to do that.

They might well have charged Murder in the First Degree in this case. Listen to the arguments you heard from the Prosecutors, both in the opening statements and some of the final argument.

There is bad blood between the decedent and the defendant. There was some altercation in the past. It may be that the defendant – this is their theory now, not what I'm telling you as a fact, but their theory – that the defendant suspects his wife is having an affair with this guy.

And that basically he then finds a way of going over the where he thinks she is. And, then he more or less confirms his suspicions by what she is [sic]. And, then he does this u-turn and comes back. And, then he goes in, armed with a weapon, and he shoots this guy.

I've seen cases with less evidence that are charged murder in the first degree on such a case. Why? Everything I told you that a murder two is, all you add is premeditation and deliberation. If somebody thinks about it, plans, and then acts, that's a first degree murder.

A second degree murder is ordinarily – every first degree murder has within it a second degree murder. Why? Because a first degree murder is a second degree murder, plus premeditation and deliberation. You got that? Okay?

Every second degree murder has within it a manslaughter. Okay? Why? Because voluntary manslaughter is a second degree murder, but you subtract something out of it.

And, the society recognizes that when people act under certain circumstances that even ordinary people would go nuts and get into hot blood, and be unable to control their impulses, then that's a reason to reduce it from a murder two to a manslaughter.

Now, does that help at all, in what I'm saying to you? But here they charged the Voluntary Manslaughter to begin with. And, I'm sure, acting off the best instincts in the world, that's what they charged.

But, now I have a problem explaining it to you because I don't want you thinking that it's the Prosecutor's burden to prove that he acted out of this emotional excitement.

In other words, if they prove from the evidence in the case that it's a murder two, okay, that he shot the guy and when he did he either intended to kill him, or intended to do great bodily harm, or at minimum he knowingly and intentionally created a very high risk of death or great bodily harm where that is likely, that would be a murder two.

And, if they proved the murder two, you would still find the defendant guilty of a voluntary manslaughter. Do you understand that?

Or, if they go ahead and prove all of those things for the murder two, but in addition to that you find as a fact that he acted out of this emotional excitement, in other words you find manslaughter, as I've defined it, then you would still find the defendant guilty of manslaughter.

I just don't want you into that jury room having an argument among yourselves where some juror says, "Well, I think he created a very high risk of death or great bodily harm where such result was plainly likely.

But, I don't believe that the defendant acted out of emotional excitement. I think the defendant intentionally shot this guy. And, so therefore it's not what the Prosecutor says it is, acting out of excitement."

Well, that's nonsense. Are you following what I'm saying? If they proved the higher charge, you would still find the defendant guilty of the voluntary manslaughter. If they proved the voluntary manslaughter, you find the defendant guilty of the voluntary manslaughter. Is that clear to you?

But, what I want to be, again, perfectly clear to you as well, if you find as a fact in this case that – in other words, here's what I'm telling you.

If you credit the defendant and what the defendant's testimony was in the case, that he goes there, even though he kind of knows he's armed, he nevertheless has forgotten about that fact. He never intended to do this person. Never intended to kill him, or to do him any kind of harm in going there.

And, then all of a sudden something happens and the gun falls to the floor and accidentally discharges, then I'm telling you, you should find the defendant not guilty.

And, that's the important thing to remember here. All I'm trying to take great pains to tell you is, they don't have to prove he acted out of emotional excitement, so long as they prove that he – within the murder two as I've defined it – that those elements are made out.

It gets attorneys on both sides angry with me, cause sometimes I even give hypotheticals. You know, hypothetical set of facts that explain the law to you. As long as they're unrelated to the facts in this case.

If I start picking some of the facts in this case to give you a hypothetical, then both lawyers will get mad at me. Cause, that's their job. They don't want me influencing your verdict.

And, I'm telling you right now, whether you choose to believe it or not, I have no opinion in this case, about the facts in this case. You guys have the tough job of deciding whether that person's guilty or not guilty of this offense. And, I'm counting on you to do your job.

But, what I want to do is at least, as accurately and clearly, give you the law, the elements of the offense particularly, but all the law that you have to use to decide that fundamental question.