STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2001
v ALLEN SCHAFFER, a/k/a RAYSHAWN GRADY, Defendant-Appellant.	No. 221293 Wayne Circuit Court Criminal Division LC No. 98-009951

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

PER CURIAM.

Defendant was charged with second-degree murder, MCL 750.317; MSA 28.549, assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a jury trial, he was convicted of voluntary manslaughter, MCL 750.321; MSA 28.553, assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, and felony-firearm. He was sentenced to concurrent prison terms of eight to fifteen years for the manslaughter conviction and four to ten years for the assault conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first claims that there was insufficient evidence to support his voluntary manslaughter conviction. We disagree.

In a challenge to the sufficiency of the evidence, the reviewing court must view the evidence in a light most favorable to the prosecution and determine whether a reasonable jury could find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Nowack, supra* at 400.

Voluntary manslaughter is an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to cool. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). An essential element of the crime of voluntary manslaughter is the intent to kill or commit serious bodily harm. *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995). Murder and voluntary

manslaughter are both homicides and share the element of being intentional killings. However, the element of provocation separates voluntary manslaughter from murder. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991); *Hess, supra* at 38. In this case, defendant did not dispute that he shot and killed the victim. He claimed, however, that he acted in self-defense.

In *People v Fortson*, 202 Mich App 13, 19-20; 507 NW2d 763 (1993), this Court held:

> "[T]he killing of another in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt.

A defendant who argues self-defense implies his actions were intentional, but that the circumstances justified his actions. *Heflin, supra*; *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992).

Here, the evidence indicated that McGarrah was bigger than defendant and pushed him down during an argument. However, the evidence did not indicate that defendant's life was in imminent danger from McGarrah or that there was a threat of serious bodily harm to defendant at the time defendant shot McGarrah. The evidence, viewed in a light most favorable to the prosecution, indicated that McGarrah was unarmed during the incident, and that, after being pushed to the ground by McGarrah, defendant got up and shot McGarrah five times, three times in the back.

Defendant's claim that his life was in imminent danger and that there was a threat of serious bodily harm at the time he shot McGarrah is not supported by the evidence. Defendant and McGarrah were merely in a scuffle over a woman. No evidence was presented to indicate that McGarrah had threatened defendant's life prior to the incident, that McGarrah was beating defendant or trying to seriously harm him during the incident, or that McGarrah was armed during the incident. In sum, the evidence was sufficient for a rational factfinder to find beyond a reasonable doubt that the prosecution disproved defendant's self-defense claim.

We also reject defendant's claim that the trial court erred in refusing to instruct the jury on involuntary manslaughter.[1] Involuntary manslaughter is the unintentional killing of another without malice in (1) the commission of an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the commission of a lawful act, negligently performed, or (3) the negligent omission to perform some legal duty. *People v Beach*, 429 Mich 450, 477; 418 NW2d 861 (1988). Both voluntary and involuntary manslaughter are cognate lesser included offenses of murder. *Pouncey, supra* at 388; *Heflin, supra* at 497; *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996). The trial court

[1] Defendant does not argue the merits of his claim that the trial court erred in refusing to instruct the jury on the lesser included offense of careless, reckless, or negligent use of a firearm resulting in death. Therefore, this issue is considered abandoned on appeal. *People v Canter*, 197 Mich App 550, 565; 496 NW2d 336 (1992).

is required to give an instruction for a cognate lesser included offense if: (1) the principal offense and the lesser offense are of the same class or category, and (2) the evidence adduced at trial would support a conviction of the lesser offense. *People v Bailey*, 451 Mich 657, 667-668; 549 NW2d 325 (1996); *People v Hendricks*, 446 Mich 435, 444; 521 NW2d 546 (1994); *Cheeks*, *supra* at 479. There must be more than a modicum of evidence; there must be evidence sufficient to sustain a conviction on the lesser offense. *Pouncey*, *supra* at 387; *Cheeks*, *supra* at 479-480.

Here, the evidence indicated that defendant, during a scuffle with McGarrah, pulled his gun, pointed it at McGarrah and shot him five times; three times in the back. Defendant never argued, and no evidence was presented to indicate that he accidentally killed McGarrah, that his conduct was unintentional, or that the killing was the result of negligence, gross negligence, or recklessness. The evidence indicated that defendant's conduct was purposeful and intentional. Accordingly, the trial court did not err in refusing to give the requested instructions.

Next, defendant claims that the trial court abused its discretion in determining that the prosecutor exercised due diligence in attempting to produce eyewitness Jesse Sanders. Defendant argues Sanders' preliminary examination testimony should not have been presented to the jury. We disagree.

Under MRE 804(b)(1), the prosecution may present at trial the transcribed testimony of a witness at the preliminary examination if the witness is unavailable pursuant to MRE 804(a)(5). MRE 804(a)(5) provides:

> "Unavailability as a witness" includes situations in which the declarant—
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> * * *
>
> is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown.

The prosecution must make a diligent good-faith effort to locate a witness for trial. Whether due diligence is demonstrated depends on the facts and circumstances of each case. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

The trial court did not abuse its discretion by concluding that the prosecution made a diligent good-faith effort to produce Sanders for trial. Detroit Police Sgt. Gregory Jones made several visits to Sanders' former neighborhood to attempt to locate him. He spoke with Sanders' neighbors and tried to contact Sanders by telephone. He also tried to locate Sanders' sister by visiting her last known residence, talking with her neighbors, and attempting to contact her by telephone. Sgt. Jones contacted utility companies, the Postal Service, jails, and hospitals in an attempt to locate Sanders. Sgt. Jones investigated without success possible alternate addresses for Sanders. Days before the trial, the court issued a witness detainer to allow Sanders to be held if he was located. However, Sanders was never located. Under these circumstances, the prosecutor exercised due diligence in attempting to locate Sanders. *Bean*, *supra* at 684. Thus,

the trial court did not abuse its discretion in admitting Sanders' preliminary examination testimony.

Lastly, defendant claims that the trial court erred in admitting a photograph of the victim into evidence at trial. We find no abuse of discretion. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, modified 450 Mich 1212 (1995); *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998). Defendant does not dispute that the identification of the victim was a relevant consideration. Therefore, the photograph was properly admitted for the purpose of identifying the deceased. MRE 401 and MRE 402. There is nothing in the photograph that could be construed as prejudicial to defendant. The photograph is not gruesome. It does not depict the victim after death, nor does it depict the crime scene. The photograph merely shows the victim, while still alive, looking into the camera with a pleasant expression on his face. Under these circumstances, defendant's claim that the admission of the photograph requires reversal is without merit.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Brian K. Zahra