STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2005
v CESAR R. VALLADOLID, Defendant-Appellant.	No. 256738 Kent Circuit Court LC No. 04-000427-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ELMER GARCIA-MEDINA, Defendant-Appellant.	No. 257546 Kent Circuit Court LC No. 04-000426-FC

Before: Bandstra, P.J., and Neff and Markey, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal by right from their convictions of felony murder, MCL 750.316(1)(b), first degree home invasion, MCL 750.110A2, and possession of a firearm during the commission of a felony, MCL 750.227b, arising out of the shooting death of Stanley Robinson. Defendant Garcia-Medina's conviction for home invasion was subsequently vacated. We affirm the convictions for felony murder and felony-firearm and vacate defendant Valladolid's conviction for home invasion.

Defendant Valladolid argues that the trial court erred when it refused to instruct the jury on the provocation theory of voluntary manslaughter and when it told the jury he could be convicted of manslaughter only if they believed his claim of imperfect self defense because voluntary manslaughter is a lesser-included offense of murder and the evidence warranted the instruction. We disagree.

Properly preserved claims of instructional error are reviewed de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). Jury instructions must include all elements of

the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is evidence in support. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). A requested instruction on a necessarily included lesser offense is appropriate "if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). In *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003), our Supreme Court determined that manslaughter is a lesser included offense of murder and that the disputed element is malice. Malice can be negated, and thus a manslaughter instruction is warranted if imperfect self-defense or adequate provocation is established. The issue in the present case is whether the evidence warranted the provocation defense.

A defendant is entitled to an instruction of voluntary manslaughter under a provocation theory where there is evidence that defendant was provoked and the provocation would cause a reasonable person to act out of passion, not reason. *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). In the present case, there was no evidence that Valladolid acted in the heat of passion when they killed the victim. Valladolid testified that he went to the victim's cousin's house, carrying a weapon, with knowledge that their friend had just been robbed by the victim's cousin[1] with a weapon. Additionally, Valladolid testified that he kicked in the front door to the victim's cousin's house, and the victim was on the other side of the door aiming a gun at him. He testified that he drew his gun and shot the victim out of self-defense; therefore, a claim that he acted after being provoked is inconsistent. Thus, failing to instruct the jury regarding the provocation theory of manslaughter did not result in error.

Next, Valladolid claims that his constitutional right against double jeopardy was violated when he was convicted of felony murder and the underlying felony of home invasion. Plaintiff concedes the point, and we agree. *People v Williams*, 265 Mich App 68; 692 NW2d 722 (2005).

Finally, defendant Garcia-Medina claims that his counsel was ineffective because he failed to request a manslaughter instruction based on the theory of the imperfect self-defense. We disagree.

Counsel was not ineffective for failing to advance a theory of imperfect self-defense because there was no evidence to support that claim as it relates to Garcia-Medina. Panels of this Court have applied the doctrine of imperfect self-defense when a defendant would have had the right to assert self-defense but for his actions as the initial aggressor. *People v Kemp*, 202 Mich App 318, 324; 508 NW2d 184 (1993), and *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). For a valid claim of self-defense, a defendant's actions must have appeared at the time to be immediately necessary, i.e., the defendant could only utilize the amount of force necessary to defend himself. CJI2d 7.15; *People v Heflin*, 434 Mich 482, 502, 508; 456 NW2d 10 (1990); *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985). "The necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he

[1] The witnesses thought that the robber is the victim's sister; however, the robber testified that she is his cousin.

can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat." *People v Riddle,* 467 Mich 116, 119; 649 NW2d 30 (2002).

In the present case, one witness testified that the victim was on the ground with his head covered with his arm when Garcia-Medina shot him. A letter from Garcia-Medina was read into evidence in which he states he took the victim's gun and then shot him. There was no evidence that the victim had a weapon or was a threat to anyone when he was shot in the head. Additionally, there was nothing preventing Garcia-Medina from leaving the victim's home once he had taken the victim's weapon. Therefore, a claim of imperfect self-defense would have been meritless, and counsel is not ineffective for failing to advance a meritless position. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Garcia-Medina alluded to the fact that he did not testify in support of his assertion that counsel was ineffective for failing to advance a theory of imperfect self-defense. However, the record provides no evidence that Garcia-Medina wanted to testify and was not allowed or if he testified, that he would have provided evidence sufficient to support a claim of imperfect self-defense. Therefore, his assertion is without merit.

We vacate defendant Valladolid's conviction and sentence for home invasion but affirm his other convictions and those of defendant Garcia-Medina.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Jane E. Markey