STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALDO ZAVALETA,

Defendant-Appellant.

UNPUBLISHED
April 23, 2009

No. 282195
Wayne Circuit Court
LC No. 07-011076-FC

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 20 to 60 years in prison for the second-degree murder conviction and two years in prison for the felony-firearm conviction. We affirm.

Defendant argues on appeal that he was denied a fair trial because the trial judge refused to instruct the jury on voluntary manslaughter when there was evidence to support it. We disagree. "Jury instructions that involve questions of law are reviewed de novo. But a trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006) (citations and internal punctuation omitted).

"Where a trial court erroneously refuses to give a requested instruction on a necessarily included lesser offense, a harmless-error analysis applies . . . ." *People v Hall (On remand)*, 256 Mich App 674, 677; 671 NW2d 545 (2003). Under such an analysis, "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000), citing *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The defendant has the burden of proving that the error was outcome determinative, that is, the error "undermined the reliability of the verdict." *Rodriguez*, *supra* at 474. With a lesser included offense instruction, "[T]he reliability of the verdict is undermined when the evidence 'clearly' supports the lesser included instruction, but the instruction is not given. In other words, it is only when there is substantial evidence to support the requested instruction that an appellate court should reverse the conviction." *People v Cornell*, 466 Mich 335, 365; 646 NW2d 127 (2002).

A trial judge must "instruct the jury regarding the law applicable to the case, MCL 768.29; . . . and fully and fairly present the case to the jury in an understandable manner." *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). "The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). "[A] requested instruction on a necessarily included lesser offense is proper 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." *Cornell*, *supra* at 357. "[A]ll the elements of a necessarily considered lesser offense are contained within those of the greater offense. Thus, 'it is impossible to commit the greater without first having committed the lesser.'" *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001) (citations omitted).

"[M]anslaughter is a necessarily included lesser offense of murder because the elements of manslaughter are included in the offense of murder." *People v Mendoza*, 468 Mich 527, 536; 664 NW2d 685 (2003). Malice is the only element distinguishing murder from manslaughter. *Id.* at 540. Thus, "when a defendant is charged with murder, an instruction for voluntary . . . manslaughter must be given if supported by a rational view of the evidence." *Id.* at 541.

A defendant charged with murder who seeks an instruction on the lesser offense of voluntary manslaughter must show that he "killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Mendoza*, *supra* at 535. "[P]rovocation is not an element of voluntary manslaughter . . . it is the circumstance that negates the presence of malice." *Id.* at 536. "The provocation must be adequate, namely, that which would cause the reasonable person to lose control." *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). So "[n]ot every hot-tempered individual who flies into a rage at the slightest insult can claim manslaughter." *Id.* Although what is reasonable provocation is generally a question of fact for the factfinder, the trial judge may rule the evidence insufficient to support an instruction on voluntary manslaughter if no reasonable jury could find that the provocation was adequate to cause the reasonable person to lose control. *Id.* at 389, 391-392.

In this case, defendant argues that there was evidence of adequate provocation. Defendant claims that both parties were angry, and there were heated and profane exchanges between defendant and Christopher Glumm, the victim, before the shooting. Defendant also testified that Glumm used an ethnic slur, was armed, and threatened to kill him. We conclude that a rational view of the evidence does not support a finding of adequate provocation.

According to defendant's own testimony, he voluntarily interjected himself into the initial verbal confrontation between Glumm, his friend, James Lee Rich, and defendant's girlfriend, Brenda Neal Dunn. After defendant himself spoke profanely, he went back inside the house. Though on the one hand defendant claims that the men threatened to return and said "something about they might come back and kill us or hurt us," defendant also testified that he thought the situation was over by the time he went back inside the house and that the men were just trying to scare him. Even if defendant were angry after this first confrontation, in the ten minutes or so that Glumm was absent, certainly enough time passed for a reasonable person to gain control of his passions.

Nonetheless, when Glumm did return, defendant, who was armed, purposefully walked out of the house toward Glumm to confront him. At that point, the only "provocation" was Glumm's walking down the street. Moreover, although defendant claims that Glumm was headed toward the house, Glumm was still far enough away that, at first, defendant could not hear what he was saying. It was *defendant* who began to walk toward Glumm, and when defendant got close enough to hear him, Glumm started swearing, uttered an ethnic slur, and threatened to kill defendant. Although there is "no per se rule" that insulting words can never constitute adequate provocation, in this case, all parties involved were spewing obscenities. *Pouncey*, *supra* at 391. While an ethnic slur and a death threat are more serious than obscenities, Dunn, the only eyewitness who testified, said that Glumm had only started to say, "I'm back mother . . . ," when defendant shot him.

Moreover, as defendant approached Glumm, both Dunn and defendant's son were asking him to stop and not to shoot, which again suggests that a reasonable person would not have reacted as defendant did at the mere sight of Glumm walking down the street swearing and uttering profanities. In fact, Glumm was still in the street when defendant shot him. Thus, a rational view of the evidence does not support a voluntary manslaughter instruction.

Even if it were error for the trial court to refuse the instruction, however, the jury still considered whether defendant acted in self-defense based on defendant's testimony that Glumm had a gun and was threatening him. If the jury found this testimony credible, it could have excused the killing all together, yet it chose not to. Therefore, under the harmless error analysis, failure to give the requested instruction did not affect the reliability of the verdict or outcome of the trial. That is, it is unlikely that the jury would conclude that defendant did not act in self-defense, but then conclude that he was provoked into shooting the victim.

We affirm.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher