# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 4, 2009 |
| v | No. 281386<br>Jackson Circuit Court |
| SHAWNDALE MARQUISE CLARK,<br><br>Defendant-Appellant. | LC No. 05-001213-FC |

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

SHAPIRO, J. (*dissenting*).

Defendant has now been tried twice on the charge of felony murder arising out of the death of his 14-month-old daughter. After the first trial, we remanded for a *Ginther*[1] hearing directing the trial court to determine whether trial counsel's failure to request a voluntary manslaughter instruction constituted ineffective assistance of counsel. After a hearing, the trial court found that trial counsel's failure to request that instruction constituted ineffective assistance of counsel. The case was retried by the same trial counsel and despite the prior proceedings he again failed to request a voluntary manslaughter instruction even though the prosecutor argued to the jury that defendant "lost his temper" while caring for the toddler and told the jury that a murder conviction was the jury's sole choice unless they believed the child's death was due to a purely accidental injury. I would conclude that defense counsel was again ineffective and remand for a new trial.

I agree with the majority that defendant's claims of error based upon the juror who was dismissed and the admission of the photographs do not constitute reversible error. However, I cannot agree to affirm this conviction where the very error that led to the retrial was repeated in the second trial and defendant is serving a sentence of life without parole. Although defendant's appellate attorney in the instant appeal – who is not the same appellate attorney who handled the appeal from the first trial - has not raised this issue, I believe that our principle of avoiding manifest injustice requires that we consider it. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994); People *v Metamora Water Serv, Inc*, 276 Mich App 376, 383; 741 NW2d 61, lv den

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

480 Mich 1003 (2007); *Polkton Twp v Pellegrom*, 265 Mich App 88, 95-96; 693 NW2d 170 (2005). Manifest injustice results if the defect constitutes plain error requiring a new trial or pertains to a basic and controlling issue. *Internat'l Union, UAW v Dorsey*, 268 Mich App 313, 324; 708 NW2d 717 (2005), rev'd in part on other grounds 474 Mich 1097; 711 NW2d 79 (2006). A criminal defendant may obtain relief based upon an unpreserved error if the error is plain and affected substantial rights in that it affected the outcome of the proceedings, and it either resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003).

The First Trial

Defendant was first tried in February 2006. It was uncontested that the 14-month-old decedent died due to a brain injury caused by trauma while in defendant's care. The prosecution alleged that the head trauma was inflicted by defendant. Defendant asserted that he did not assault the victim and offered expert testimony that the brain injury could have been caused by a non-intentional cause such as a slip and fall in the bathtub.

At the conclusion of proofs, the jury was instructed on three counts. Count I charged second degree murder and, on defense counsel's request, the jury received an instruction on the lesser included offense of voluntary manslaughter. Count II was felony murder (with felony child abuse as the predicate felony). As to this Count, defense counsel did not request, and the jury did not receive, an instruction on the lesser included offense of voluntary manslaughter. Count III charged first degree child abuse with lesser included offenses of second, third and fourth degree child abuse.

During closing statement in the first trial, the prosecutor argued:

> I'm not going to stand here and argue rather Mr. Clark had the intent to kill [his daughter]. We don't know because we don't know what was going through his mind at that moment. I don't believe that I could stand here and argue that he must have intended to kill her. I don't even think that, necessarily, he had the intent to do great bodily harm, in terms of having aforethought of I'm going to cause great bodily harm by doing this. We don't know. We weren't there. That's not excluded from the thought process. But *what I think the focus needs to be is, more likely, what we have is a loss of temper, a loss of control. Over what? Not quite sure. Pooping in the bathtub? Maybe*. [Emphasis added.]

As to Count I, the jury acquitted defendant of second degree murder and instead convicted him of voluntary manslaughter. Voluntary manslaughter does not negate the presence of the elements of murder. Rather, it provides a mechanism by which the crime of murder may be reduced where the defendant's intent arose out of impulse caused by emotional excitement. Thus, the jury's conclusion that defendant was guilty of voluntary manslaughter indicates findings per CJI2d 16.5 and 16.9 that:

1. Defendant caused the death of his daughter (CJI 2d 16.5);

2. Defendant either intended to kill or to do great bodily harm or knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions (CJI 2d 16.5); and

3. When defendant acted, his thinking must have been disturbed by emotional excitement to the point that a reasonable person might have acted on impulse, without thinking twice, from passion instead of judgment (CJI 2d 16.9).

4. The emotional excitement must have been the result of something that would cause a reasonable person to act rashly or on impulse (CJI 2d 16.9).

5. The killing itself must have resulted from this emotional excitement before a reasonable period of time had passed for the defendant to calm down and return to reason (CJI 2d 16.9).

The jury's finding did not reflect a conclusion that the decedent had died due to an accidental slip and fall, but rather that she died at the hands of defendant due to an impulse caused by emotional excitement. This was confirmed by the fact that as to Count III, the jury convicted defendant of first degree child abuse which requires a knowing infliction of serious harm.

As to Count II, where the jury was instructed only as to felony murder, the jury found him guilty. This reflects findings that:

1. Defendant caused the death of decedant (the same as required for second degree murder);

2. Defendant either intended to kill or to do great bodily harm or knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions (the same as required for second degree murder); and

3. When defendant did the act that caused the decedent's death, the defendant was committing the crime of child abuse.

After his conviction, the trial court sentenced defendant to 86 to 180 months for manslaughter and life without parole for felony murder. The court vacated the conviction for first degree child abuse as it had served as the predicate for the felony murder conviction.

The First Appeal

Defendant claimed an appeal as of right and moved this Court for remand to the trial court for a *Ginther* hearing. The basis of the remand request was that it was ineffective assistance of counsel for trial counsel to have failed to request a voluntary manslaughter instruction to the charge of felony murder in Count II, particularly given that as to Count I, the

jury acquitted the defendant of murder and convicted him of voluntary manslaughter. The prosecution did not oppose the motion to remand noting that the claim of ineffective assistance of counsel required further factual development. On December 18, 2006, this Court remanded the case for a *Ginther* hearing to address that question, and retained jurisdiction.

At the remand hearing on February 1, 2007, trial counsel was questioned as to why he did not request the voluntary manslaughter instruction as to felony murder and he testified that he did not believe the law permitted such an instruction on felony murder. The trial court held that this belief was incorrect and contrary to settled law that should be known to counsel. The appellate attorneys and the court referred to *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 527 (2003) which held that voluntary manslaughter is an inferior offense to murder which must be given if a rational view of the evidence would support such an instruction.

The trial court stated that he did not believe defense counsel's failure to ask for a voluntary manslaughter instruction was a strategic decision and that if it was intended to be strategic, it was not a "legitimate or reasonable strategy" in this case.

On February 5, 2007, the trial court entered an order granting defendant a new trial. The order reinstated defendant's conviction of first degree child abuse as the error on the felony murder count did not affect the finding of the jury on the child abuse conviction. The court also ordered that Count II (the felony murder count) be reduced to manslaughter and gave the prosecutor the option of accepting the manslaughter conviction or of requesting a new trial as to the murder counts. The parties then stipulated to dismissal of the defendant's appeal from his first trial and this Court entered the dismissal on March 6, 2007.

The prosecutor opted for a retrial on the murder counts.

The Second Trial

Retrial began on July 30, 2007. The same attorney who represented defendant at the first trial represented him again at the second trial.

In opening statement at the retrial the prosecutor reviewed the charges and after discussing the elements of first and second degree murder, stated:

> Now, manslaughter in this case as a lesser included of a murder charge is the same intent element. We have the same mindset. Intent to kill; intent to do great bodily harm; or, knowing the likely result of your behavior will result in death or great bodily harm. But also what we have is adequate provocation. The defendant's thinking must be disturbed by emotional excitement. And that emotional excitement must have been a result of something that would cause a reasonable person to act rashly or to act on impulse. And the action must have occurred before, again, a reasonable person would have had time to calm down.

Given this description, the prosecutor was obviously referring to voluntary manslaughter and it was plainly the prosecutor's understanding and expectation that this instruction would be given.

The proofs at the retrial were consistent, if not virtually identical with those at the first trial. The prosecution presented two forensic pathologists who testified that the injuries could only have been intentionally inflicted and could not have been due to a fall. The prosecution also called the child's doctor who testified to the lack of any pre-existing health problems, a police officer and the decedent's mother, who testified that on the night in question, defendant had telephoned her and told her that the child "pooped in the bathtub." She also testified to defendant's loving relationship with his daughter and both she and a police officer testified to his grief upon her death.

As in the first trial, the defense presented the testimony of a forensic pathologist who testified that it was possible that the head injury was caused by a slip and fall in the bathtub. The defense expert conceded, however, that he could not say with certainty that the injuries were caused in such fashion and that the cause could just as easily have been homicide.

At the conclusion of proofs, the trial court discussed jury instructions with counsel. Defense counsel stated that he did not want the jury to be instructed on CJI2d 16.9, voluntary manslaughter as a lesser included offense of murder, because it "is a heat of passion manslaughter that facts don't support here" and instead requested CJI2d 16.10, the instruction on involuntary manslaughter and CJI2d 16.18, the gross negligence instruction. The prosecutor had no objection and so the court agreed to instruct in this fashion. The verdict form asked the jury to determine guilt as to felony murder and the lesser included offenses of second degree murder and involuntary manslaughter.

In closing argument, the prosecutor cited the defense expert's admissions and implicitly referencing the lack of an option to convict of voluntary manslaughter stated:

> In terms of the instructions that you will receive, therein lies the difference. Because *if you believe this case is a homicide, then your choices are either the felony murder or the second degree murder*. If you believe that this case is an accident, then the choice that you are left with would be the involuntary manslaughter, the gross negligence. Because that does not indicate an intentional forceful act towards a child, but rather indicates some sort of accidental force that could have been prevented. [Emphasis added.]

In his closing argument, defense counsel argued that the injuries were accidental. In rebuttal, the prosecutor asserted that the proofs made clear that the injuries could not have resulted from a fall in the bathtub and argued that "Mr. Clark lost it. He lost his temper. I don't know why, but he is the cause of those injuries . . . they're inflicted injuries. They are not accidental injuries."

The jury began deliberations shortly before 11:00 a.m. and returned their verdict shortly after 4:00 p.m. the following day. The jury found defendant guilty of felony murder. Defendant was sentenced to the mandatory term of life without parole and his child abuse conviction from the first trial was vacated as it served as the predicate offense for the felony murder conviction. This appeal followed.

## Analysis

In my view, the defense attorney's failure to request a voluntary manslaughter instruction at the second trial constituted ineffective assistance of counsel. Indeed, it was a level of ineffectiveness that exceeded the error at the first trial. At the second trial defense counsel possessed the additional information provided by the verdict in the first trial as well as the trial court's earlier ruling that failing to request a voluntary manslaughter instruction on felony murder had constituted ineffective assistance of counsel. Defense counsel went into the second trial knowing that a jury, which had heard virtually identical proofs, had concluded (a) that the death of the child was a homicide perpetrated by defendant and was not an accident; and (b) that defendant committed the homicide due to a sudden loss of control due to excitement or anger. Nevertheless, counsel opted to pursue a strategy that sought to convince the second jury of the exact opposite of both these findings i.e., that the death was not caused by homicide and that defendant was not subject to any excitement or loss of control.

There is no possible strategy that could have justified this approach. First, to the degree that defense counsel was seeking was an outright acquittal rather than a manslaughter conviction, such a result would have been of no practical value since manslaughter is a 15 year felony, no greater a maximum than the 15 year maximum for first degree child abuse for which defendant had already been convicted and sentenced in the first trial; and which could not be overturned. Second, even if defense counsel felt that an involuntary manslaughter instruction was more consistent with his theory of the case than a voluntary manslaughter instruction asking for both instructions would have been without prejudice to his client.[2] Finally, whether defense counsel believed that a voluntary manslaughter instruction was consistent with the facts of the case he tried to put on, a previous jury had told him that they – the triers of fact who controlled his client's fate – believed it was consistent with the facts of the case and the trial judge's grant of a new trial indicated his concurrence with that view.

Defendant's initial conviction of first degree felony murder was vacated for ineffective assistance of counsel for failing to request a voluntary manslaughter instruction on that charge. The case was then retried with the same defense attorney who, once again, failed to request the same instruction despite the same proofs being offered at trial and despite the prosecution's arguments that (1) if the jury believed the death was a homicide that they had no alternative but to convict of murder – an argument that was only made possible by counsel's failure to request the voluntary manslaughter instruction and (2) given the evidence of the defendant's good relationship with his daughter and his grief upon her death that the homicide must have occurred when the defendant "lost it . . . lost his temper."

This case has been tried twice and yet no jury has found that the defendant did not act rashly or on impulse caused by emotional excitement. The first jury found that he did so and the

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[2] *Mendoza, supra at 541*, stated: "we hold the elements of voluntary and involuntary manslaughter are included in the elements of murder…. consequently, when a defendant is charged with murder, an instruction for voluntary *and* involuntary manslaughter must be given if supported by a rational view of the evidence, (emphasis added)."

second jury was never asked to make that determination. With a properly instructed jury, defendant may again be found guilty of murder. However, I do not believe we can simply assume so and affirm a sentence of life in prison without parole where no properly instructed jury has reached that conclusion.

For these reasons, I would vacate the felony murder conviction, reinstate the child abuse conviction and would remand for a new trial on felony murder and second degree murder in which the jury would be instructed on both voluntary and involuntary manslaughter as lesser included offenses.

/s/ Douglas B. Shapiro