STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 25, 2009
v	No. 283669 Isabella Circuit Court
GORDON DEVERE SCHULTZ, Defendant-Appellant.	LC No. 07-000830-FC

Before: Zahra, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

A jury convicted of first-degree murder, MCL 750.316, and aggravated stalking, MCL 750.411i. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to life in prison for the murder conviction, and 6 to 15 years' imprisonment for the aggravated stalking conviction. He appeals as of right. We affirm.

Defendant argues on appeal that the trial court erred in not giving a voluntary manslaughter instruction because there was evidence of adequate provocation. 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).

A trial judge must "instruct the jury regarding the law applicable to the case, . . . 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), citing MCL 768.29. "[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." *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007).

Voluntary manslaughter "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). "[B]oth murder and voluntary manslaughter require a death, caused by defendant, with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. However, the element distinguishing murder from manslaughter – malice – is negated by the presence of provocation and heat of passion. Thus . . .

murder possess[es] the single additional element of malice." *Id.* at 540. "Consequently, 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.

"To prove voluntary manslaughter, the prosecution must prove that: (1) the defendant killed in the heat of passion; (2) the passion was caused by adequate provocation; and (3) there was no lapse of time during which a reasonable person could have controlled his passions. The degree of provocation required to mitigate a killing from murder to manslaughter 'is that which causes the defendant to act out of passion rather than reason.' Adequate provocation must be 'that which would cause a reasonable person to lose control.'" *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005), quoting *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). "Not every hot-tempered individual who flies into a rage at the slightest insult can claim manslaughter." *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991).

Here, defendant cites as evidence of adequate provocation testimony indicating that Macdonald had provoked defendant on other occasions and they had a violent relationship. Defendant specifically points to evidence showing that he was upset that Macdonald burned his clothing and glasses and removed other items from his home. These arguments are without merit.

The evidence showed defendant and his former girlfriend and victim Becky Sue Macdonald, had a violent and abusive relationship. Evidence also showed Macdonald received a great deal of the abuse, often exhibiting bruises on her face and arms and red marks on her neck where defendant tried to choke her. Based on the information given by Macdonald to the various witnesses (friends, family, and police officers), defendant would sometimes beat her if she (1) left the house, (2) talked on the phone, and (3) argued.

We agree that there was testimony presented that days before the murder defendant was angry because the victim allegedly burned his clothes and a pair of glasses he needed for work, and she removed items from his home. However, we cannot conclude these actions would cause a reasonable person to lose control. Further, testimony from defendant's friend, Lee Blalock, indicated that she removed the clothes from the home on October 17, 2005, the day after defendant's arrest, when he was released on bond. This was several weeks before Macdonald's reported disappearance on November 11, 2005. Indeed, Macdonald was also asked about burning defendant's clothing at the preliminary examination on October 27, 2005, and thus, this "provocation," too, happened well before her death. Accordingly, even should such actions on the part of Macdonald qualify as adequate provocations, they did not occur at the time of the killing, and therefore, there was sufficient time for a reasonable person's passions to cool. *Tierney, supra*.

Finally, regardless of any provocation, adequate or otherwise, there was abundant evidence that defendant acted in a premeditated and deliberate manner, and not in the heat of passion. "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). Premeditation and deliberation "may be established by evidence of (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *Id.* at 657 (internal citations omitted).

Here, Macdonald told several witnesses that she feared defendant and that he had threatened to kill her. Further, defendant also told three witnesses that essentially he wanted to kill Macdonald to prevent her from testifying in his domestic violence trial. Defendant told one witness that he had dug a hole for Macdonald's grave. He also told two witnesses that he was driving a rental car because "you can't fit somebody in the back of a hatchback." Defendant's prior relationship with Macdonald and his statement before the killing overwhelmingly suggest premeditation.

The circumstances of the actual killing suggest that defendant stalked Macdonald before the killing and did not fly into an uncontrolled rage. In addition, defendant told his cellmate that he had called Macdonald prior to the murder and she had agreed to walk out of the house to meet him. Although medical experts could not state conclusively how Macdonald died, they agreed it was asphyxiation, and defendant himself seemed to indicate that he choked her to death.[1] Dr. Joyce DeJong, a forensic pathologist, explained that, with manual strangulation, while the victim will pass out after 30 seconds of constant pressure, it takes minutes for death to occur, though it can be longer if the victim struggles. Therefore, defendant would have had time to take a second look at what he was doing. Finally, regarding defendant's conduct after the murder, not only did he burn the body to hide DNA evidence and bury the body in a remote location, he also hired a person he thought was a hit man to kill Macdonald's daughter in an attempt to thwart the ongoing investigation into Macdonald's disappearance and he asked the hit man to go to the burial site and do whatever was necessary to ensure that Macdonald's body could never be found.

Thus, while there was overwhelming evidence of premeditation, the evidence of adequate provocation was negligible, at best. As noted, "only when there is substantial evidence to support the requested instruction" should an appellate court reverse the conviction. *People v Cornell*, 466 Mich 335, 365; 646 NW2d 127 (2002), overruled in part on other grounds, *Mendoza, supra*. Moreover, the trial court instructed the jury on both first- and second-degree murder, and the jury convicted defendant of the greater offense. "[W]here a defendant is convicted of first-degree murder, and the jury rejects other lesser included offenses, the failure to instruct on voluntary manslaughter is harmless." *Sullivan, supra* at 520. Therefore, the trial court did not abuse its discretion by refusing to give the voluntary manslaughter instruction and defendant is not entitled to a new trial.

Affirmed.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Michael J. Kelly

[1] In fact, prior to the murder, there were numerous occasions when defendant choked Macdonald, and at least once he did it to the point where she passed out.