STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 25, 2009
v	No. 285387 Macomb Circuit Court
ALBERTO BARAJAS-ENRIQUEZ, Defendant-Appellant.	LC No. 2007-004323-FC

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Defendant was charged in the alternative with second-degree murder, MCL 750.317, and manslaughter, MCL 750.321, as well as first-degree home invasion, MCL 750.110a(2). Following a jury trial, he was convicted of voluntary manslaughter and first-degree home invasion. He was sentenced to concurrent prison terms of 57 months to 15 years for the manslaughter conviction and 95 months to 20 years for the home invasion conviction. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court erred in failing to give a limiting instruction on the proper consideration of other acts under MRE 404(b). See *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Here, the prosecutor only referred to the challenged evidence in an attempt to impeach a defense witness who, apparently in support of a theory that defendant acted out of passion induced by adequate cause, testified that he had never seen defendant that angry or violent before. Thus, the evidence was not offered as part of the prosecutor's case-in-chief, but rather for purposes of impeachment and was proper under MRE 405(a).

While the defense objected to the testimony at the time it was offered, the defense did not request a limiting instruction, either at that time, or when instructions were submitted. While a court should, upon request, provide a limiting instruction regarding the proper consideration of other acts evidence when such evidence is offered for a relevant, limited purpose, in the absence of a request for such an instruction, we review the issue under the plain error standard. *People v Chism*, 390 Mich 104, 120-121; 211 NW2d 193 (1973); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Under this standard, the question is whether the absence of the instruction affected a substantial right such that the defendant "was actually innocent or that the

error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence." *Knox*, *supra* at 508. That standard is not met in this case. First, defendant did not dispute that he struck the victim with a golf club. Second, the jury acquitted defendant of second degree murder and instead convicted him of voluntary manslaughter, thus indicating that it accepted the argument that defendant acted under the impulse of provocation. We are not persuaded under the facts of this case that the lack of a limiting instruction affected defendant's substantial rights.

Although defendant next argues that the trial court erred in refusing to instruct the jury on his theory of the case, it appears from the context of his argument that he is actually challenging the trial court's denial of his request for an instruction on the offense of felonious assault, MCL 750.82. We review de novo claims of instructional error, but review for an abuse of discretion the trial court's determination that a jury instruction is applicable to the facts of the case. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007).

The trial court must "instruct the jury concerning the law applicable to the case and fully and fairly present the case to the jury in an understandable manner." *People v Mills*, 450 Mich 61, 80; 537 NW2d 909, mod 450 Mich 1212 (1995). Where an offense consists of different degrees, the jury may acquit the defendant of the charged offense and find him guilty "of a degree of that offense inferior to that charged . . . ." MCL 768.32(1). Thus, a court is required to instruct the jury on a necessarily included lesser offense or attempt if such an instruction is requested and is supported by a rational view of the evidence. *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002); *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). A necessarily included lesser offense is "an offense which contains some of the elements of the greater offense, but no additional elements," such that the "greater offense cannot be committed without committing the lesser offense." *People v Norman*, 184 Mich App 255, 259-260; 457 NW2d 136 (1990).

"The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). The crime of murder is reduced to voluntary manslaughter if the defendant lacked malice because he acted in the heat of passion without time for reflection. *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003). "The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The elements of felonious assault are not completely subsumed by those of second-degree murder because it is possible to commit a murder without the use of any weapon, *People v Smith*, 478 Mich 64, 71; 731 NW2d 411 (2007), whereas a felonious assault cannot be committed without the use of a dangerous weapon. Because felonious assault includes an element not found in second-degree murder, it is a cognate lesser offense, see *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001), and "MCL 768.32(1) does not permit consideration of cognate lesser offenses." *Smith*, *supra* at 73.

Therefore, the trial court properly rejected defendant's request for an instruction on felonious assault.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Douglas B. Shapiro