

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES DUANE CRAWFORD,

Defendant-Appellant.

UNPUBLISHED

January 26, 2010

No. 284853

Wayne Circuit Court

LC No. 07-015269-FC

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm with intent to commit a felony, second offense, MCL 750.227b. We affirm.

I. Basic Facts

According to the testimony of Shalonda Askew and Elisha Jones, the two drove to a gas station at approximately 2:00 a.m. to look for defendant. Jones, who apparently was intoxicated, was angry with defendant because she had given him her food stamp card to buy snacks for her children and he had not returned soon enough. When the two arrived, Jones saw defendant and started arguing with him, while he was trying to give her some bags. Jones started hitting defendant with her hands and defendant hit Jones back repeatedly and tried to push her back into the car. Askew managed to get Jones into the car, but Jones got out of the car again and continued arguing with defendant. Askew testified that defendant calmed down and tried to get Askew to take Jones and leave, but Jones continued fighting with defendant and hitting him. Askew stated that Jones spat on defendant, and that he ensued hitting her again. Defendant then pulled out a gun and said, "I ain't no joke." Jones returned to her car.

At around the same time, Jeffrey Coles and his uncle Edmond Green arrived at the gas station and went into the store. Green testified that they saw defendant and Jones fighting as they entered the store. When Coles left the store, he approached defendant and stated, "Chill out, dog." Defendant started "tripping" and stated, "Who . . . you talking to? What do you want to do?" Askew, who had also returned to the car, began to drive away. However, she saw Coles start to walk away from defendant, and state, "My bad. Chill. My bad. Chill." Green, who had left the store, saw Coles backing away from defendant with his hands up and defendant was

moving with Coles. According to Green, defendant fired into the ground, then raised the gun and fired at Coles, striking him in the chest.

II. Analysis

Defendant's sole argument on appeal is that trial counsel provided ineffective assistance when he failed to request a manslaughter jury instruction. Defendant contends that the evidence showed that he was in a highly emotional state at the time of the shooting due to his fight with Jones and that this caused him to act on impulse when he was confronted by Coles. We disagree. "Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.* Because no *Ginther*¹ hearing was held, our review of defendant's claim is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

When a defendant is charged with murder, the trial court must instruct the jury on voluntary and involuntary manslaughter at defendant's request, so long as those instructions are supported by a rational view of the evidence. *People v Mendoza*, 468 Mich 527, 533, 541; 664 NW2d 685 (2003). "[T]o show voluntary manslaughter, one must show that the defendant 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. The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes a defendant to act out of passion rather than reason. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). The provocation must be that which would cause a reasonable person to lose control. *Id.*

In this case, a rational view of the evidence does not support a voluntary manslaughter instruction. Here, nothing Coles said to defendant could rationally be found to be adequate provocation for shooting him. Coles did not insult defendant, and his request that defendant calm down could not be interpreted as any type of threat. In addition, Coles was retreating from defendant and continued his attempts to calm defendant as defendant pursued and fired at him. "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). Because the evidence does not support a manslaughter instruction, trial counsel was not ineffective for failing to request it. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant, nonetheless, maintains that the facts do support a manslaughter instruction because the earlier provocation caused by Jones can be used to mitigate defendant's killing of Coles to manslaughter. However, trial counsel cannot be deemed ineffective for failing to make a novel legal argument. *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996). Moreover, even were we to extend the manslaughter mitigation to such a situation generally, defendant's claim is without merit here. According to the witnesses, Jones had retreated to her car and was in the process of leaving when Coles approached defendant. Coles also began to move away immediately after defendant threatened him. While Jones' verbal and physical assault may have caused minor injuries to defendant and may have damaged his pride, it did not constitute such an overwhelming provocation so shortly before the shooting that a reasonable person could not "cool off," especially given the fact that Jones had retreated and Coles was actively attempting to placate defendant at the time defendant killed him. Accordingly, defendant has not shown that he is entitled to relief.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck