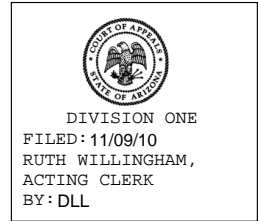


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) CA-CR 09-0329
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
SAMUEL LOVE,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court of Maricopa County

Cause No. CR2008-105585-001 DT

The Honorable Paul J. McMurdie, Judge

AFFIRMED

James J. Haas, Maricopa County Public Defender Phoenix
By Cory Engle, Deputy Public Defender
Attorneys for Appellant

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
And Joseph T. Maziarz
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

T H O M P S O N, Judge

¶1 Samuel Love (defendant) appeals his conviction of second degree murder, arguing the trial court erred in refusing to instruct the jury on sudden quarrel or heat of passion manslaughter as a lesser-included offense. For the following reasons, we affirm.

I. FACTS AND PROCEDURAL HISTORY

¶12 In February 2008, the state indicted defendant with one count of second degree murder, a class one dangerous felony. The following evidence was presented at trial.

¶13 Defendant and his friend, Hawkins, were in line for lunch at the St. Vincent de Paul cafeteria in Phoenix when they stopped to talk to someone at a table and "the line moved past" them. When Hawkins noticed, she walked back and "regained her place in line." A few minutes later, defendant saw the victim "coming toward [defendant] and he was quite agitated." Defendant and the victim began "trad[ing] insults back and forth."

¶14 Defendant testified the argument was verbal until the victim allegedly called defendant a "nigger," at which point defendant initiated a physical confrontation. Defendant testified that he stepped toward the victim, and that the victim "stepped back with his right foot and made a motion to go to his hip pocket." Defendant testified he "recognized that as the motion of somebody going to draw a weapon," so defendant pulled out his knife and held it "up in the air." Defendant testified the victim then withdrew his hand from his pocket and was unarmed, and that the victim's "eyes got kind of big" when he saw defendant brandishing the knife. Defendant testified he lowered the knife and that the victim reached up, grabbed his shoulder, and "hit [defendant] in the ear [and] at the same time he grabbed [defendant]."

¶15 Defendant further testified that during the ensuing struggle, he believed the sheath was still on the knife and that he was using the "flat of the blade" to "get [the victim] off" of him. He testified he had "no intention of hurting him." One eyewitness, however, testified that she saw defendant pull the knife out of the sheath. Another eyewitness testified that defendant used a "thrusting motion" to strike the victim, and the witness had the impression defendant was "wielding a knife" that was covered up by defendant's clothing. The victim died from multiple sharp force injuries, suffering eight stab wounds on his neck, chest, abdomen, and arms. The state's medical examiner, Dr. Hu, described one stab wound to the victim's neck as a fatal injury received from a "significant slicing movement." Additionally, Dr. Hu testified that two other wounds to the victim's chest and liver were fatal.

¶16 During the discussion of jury instructions, defendant requested a "sudden heat of passion instruction" under A.R.S. § 13-1103(A)(2)(2010). The trial court noted that "words alone are not enough" to constitute adequate provocation. Defendant's counsel stated that defendant had testified the victim "hit his ear" before defendant stabbed him, but the prosecutor pointed out that defendant testified he had "already brandished a knife" before the victim hit defendant. The trial court concluded, "I don't see the evidence there for sudden quarrel or heat of passion."

¶17 The trial court instructed the jurors on intentional,

knowing, and reckless second-degree murder, as well as the lesser-included offense of reckless manslaughter and negligent homicide. The jurors were also instructed on justification. During deliberations, the foreperson of the jury submitted the following question to the trial court:

Can you provide additional clarification or definitions to the explanation of: 2nd degree murder v. manslaughter or a material definition that may cater to the layman?

¶18 The trial court noted, "it's very hard for a lot of the jurors to distinguish between second-degree murder and manslaughter as it relates to the recklessness." The court and the parties then agreed on the following response:

Second Degree Murder and Manslaughter may both result from recklessness. The difference is that the culpable recklessness in Manslaughter is less than the culpable recklessness involved in Second Degree Murder.

If you would like more argument on this point, let us know.

¶19 The jurors convicted defendant of second degree murder and found the offense to be a dangerous offense. Pursuant to Rule 24.1 of the Arizona Rules of Criminal Procedure, the trial court ordered the parties to brief whether it erred in refusing to give a jury instruction on sudden quarrel or heat of passion. Defendant filed a motion for new trial arguing the court erred in refusing to give the requested instruction, which was denied.

¶10 The trial court sentenced defendant to a mitigated term

of 14 years imprisonment and credited defendant with 446 days of presentence incarceration. Defendant timely appealed his conviction and sentence. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1) (2003), 13-4031, and - 4033(A)(1) (2010).

II. DISCUSSION

¶11 Defendant argues he was deprived of a fair trial and due process when the trial court refused to give an instruction on sudden quarrel or heat of passion manslaughter. We apply an abuse of discretion standard in reviewing a trial court's denial of a requested jury instruction. *State v. Wall*, 212 Ariz. 1, 3, ¶ 12, 126 P.3d 148, 150 (2006). We defer to the trial court's assessment of the evidence. *Id.* at 5, ¶ 23, 126 P.3d at 154.

¶12 Sudden quarrel or heat of passion manslaughter upon adequate provocation requires proof of "a different circumstance" than second degree murder. *Peak v. Acuna*, 203 Ariz. 83, 84, ¶ 6, 50 P.3d 833, 834 (2002). To be entitled to an instruction on manslaughter under A.R.S. § 13-1103(A)(2), the evidence must be such that the jurors could reasonably find that defendant committed the offense "upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim." Section 13-1101(4)(2010) defines "adequate provocation" as "conduct or circumstances sufficient to deprive a reasonable person of self-control." It is

well-established that “[w]ords alone are not adequate provocation to justify a manslaughter instruction.” *State v. Runningeagle*, 176 Ariz. 59, 68, 859 P.2d 169, 178 (1993) (citing *State v. Doss*, 116 Ariz. 156, 162, 568 P.2d 1054, 1060 (1977)).

¶13 Defendant contends that because the victim’s fatal injury “was inflicted in the midst of a sudden physical quarrel sparked by the verbal argument between the victim and the defendant,” adequate provocation exists to support the manslaughter instruction. However, defendant’s theory of the case must be “reasonably supported by the evidence” to be entitled to the requested instruction. *See State v. Kinkade*, 147 Ariz. 250, 253-54, 709 P.2d 884, 887-88 (1985) (instruction on lesser-included offense not warranted because evidence overwhelmingly supported state’s theory and contradicted defendant’s version of the facts).

¶14 Defendant testified that once he pulled out his knife, the victim withdrew his hand from his pocket and was unarmed, and that the victim’s “eyes got kind of big” once he realized defendant had a weapon. According to defendant, the victim used a racial slur, grabbed defendant’s shoulder, and hit defendant in the ear. Defendant then stabbed the victim numerous times and slit his throat. In light of the victim’s significant injuries and the testimonies of eyewitnesses and the state’s medical examiner, no reasonable juror would conclude that defendant killed the victim “upon a sudden quarrel or heat of passion resulting from adequate

provocation by the victim." A.R.S. § 13-1103(A)(2) (emphasis added).

¶15 The evidence here does not reasonably support defendant's theory that his actions were engendered by the victim's provocation. See *State v. Edgin*, 110 Ariz. 416, 418, 520 P.2d 288, 290 (1974) (defendant's requested manslaughter instruction was properly denied because "nothing in the evidence" would establish that defendant's passion was aroused by adequate provocation; "deliberate use of a deadly weapon in such a way that it is likely to and does produce death" evinces "deliberate formed design" to kill, supporting murder charge). We conclude that the trial court did not abuse its discretion when it determined the sudden quarrel or heat of passion manslaughter instruction was not supported by the evidence. Accordingly, the refusal to give defendant's requested instruction was not error.

III. CONCLUSION

¶16 We affirm defendant's conviction and sentence.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

DONN KESSLER, Presiding Judge

/s/

DANIEL A. BARKER, Judge