

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GARY W. HAFKO,	§	
	§	No. 583, 2003
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware
STATE OF DELAWARE,	§	in and for Sussex County
	§	Cr. I.D. No. 0211007241
Plaintiff Below,	§	
Appellee.	§	

Submitted: August 4, 2004  
Decided: October 15, 2004

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

ORDER

This 15<sup>th</sup> day of October, 2004, on consideration of the briefs of the parties, it appears to the Court that:

1) Gary W. Hafko appeals from his convictions, following a jury trial, of second degree murder and possession of a firearm during the commission of a felony. He argues that the trial court erred in refusing to instruct the jury on the lesser included offense of manslaughter.

2) On November 14, 2002, shortly before midnight, Hafko shot and killed his son, Gary Hafko, Jr. (“Junior”). Hafko, Junior, and Hafko’s brother, Brian, had been sitting in Hafko’s living room, drinking, playing the guitar, and talking about their

plans to go hunting the following day. Hafko left the living room for a few minutes, and returned with the loaded shotgun that he kept in his bedroom. He stood behind Junior, who was sitting on a love seat, and told him to leave the house. Junior turned toward his head toward his father, said nothing, and smiled. Hafko then shot his son once in the chest.

3) Brian was sitting across from Junior at the time. After Junior fell to the floor, Brian took off his shirt and used it to try to stop the bleeding. He also called 911. Hafko sat down and smoked a cigarette, saying that there was no reason to help Junior because Junior was already dead. By the time the paramedics arrived, Hafko's statement was accurate.

4) Hafko and Brian both gave statements to the police. Brian said that the three men had been having a good time and that nothing had happened that would explain Hafko's behavior. Brian commented that Hafko, who had had bypass surgery and trouble breathing, thought he was dying. Brian thought that Hafko's medical condition may have had something to do with the killing. Hafko told the police that he could not believe he did it; he did not aim the gun; and he was just trying to scare Junior. He described what happened as a "blur," saying he did not remember pulling the hammer back on the gun. Hafko also acknowledged that he was wrong, and that he had been drinking heavily, but that the drinking was no excuse for what he did.

5) Hafko was charged with first degree murder, but he asked the trial court to instruct the jury on the lesser included offenses of second degree murder and manslaughter. The court agreed to instruct on second degree murder, but not on manslaughter. The difference between the two, for present purposes, is that second degree murder requires a finding that Hafko “recklessly cause[d] the death of another person under circumstances which manifest a cruel, wicked and depraved indifference to human life...”<sup>1</sup> whereas manslaughter only requires a finding of recklessness.<sup>2</sup>

6) The difference between second degree murder and manslaughter is one of degree only, and, generally, “is a determination for the jury to make.”<sup>3</sup> Thus, if there was a rational basis in the record for the jury to decide that Hafko was reckless, but did not exhibit a cruel, wicked or depraved indifference to human life, then the jury should have been instructed on manslaughter.<sup>4</sup> Here, although Hafko’s behavior easily could be considered cruel, wicked or depraved, a rational jury could conclude that Hafko was operating in a “blur” and did not mean to hurt his son. Accordingly,

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<sup>1</sup>11 *Del.C.* §635(1).

<sup>2</sup>11 *Del.C.* §632(1).

<sup>3</sup> *Viridin v. State*, 780 A.2d 1024, 1034 (Del. 2001).

<sup>4</sup>*Capano v. State*, 781 A.2d 556, 628 (Del. 2001).

we conclude that the jury should have been instructed on the lesser included offense of manslaughter, and that Hafko is entitled to a new trial.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is REVERSED. This matter is remanded to the Superior Court. Jurisdiction is not retained.

BY THE COURT:

/s/ Carolyn Berger  
Justice