STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 23, 2000
v	No. 211333 Wayne Circuit Court
MICHAEL GOODMAN, a/k/a MICHAEL BROWN, Defendant-Appellant.	Criminal Division LC No. 97-004519

Before: Cavanagh, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316; MSA 28.548, three counts of assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, three counts of felonious assault, MCL 750.82; MSA 28.277, and felony-firearm. He was sentenced to concurrent prison terms of twenty to forty years for the murder conviction and one and one-half to four years each for the assault convictions to be served consecutive to a two-year term for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

The evidence showed that defendant argued with Michael Davis at a barbecue. Both men left the scene separately, but returned shortly thereafter. The prosecution witnesses testified that defendant exited his car armed with an assault rifle and began shooting at Davis, who attempted to drive away. Davis was killed and three bystanders were injured. Defendant testified that he returned to the scene to talk to Davis. As he stepped out of his car, Davis drove toward him as if to run him down. Defendant claimed that he retrieved the rifle from his car and fired at Davis' car in self-defense.

I.

Defendant first argues that the trial court erred in excluding expert testimony that he suffered from post traumatic stress disorder and that his conduct was consistent therewith. We disagree. We review a trial court's decision to admit or exclude expert testimony for a clear abuse of discretion.

People v Beckley, 434 Mich 691, 713; 456 NW2d 391 (1990); *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992). MRE 702 provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The threshold determinations are whether expert testimony will be helpful to the jury and relevant to the case. *People v Christel*, 449 Mich 578, 592; 537 NW2d 194 (1995).

Defendant contends the expert testimony regarding defendant's past traumatic experiences would have assisted the jury in determining that defendant honestly and reasonably believed he needed to act in self-defense at the time of the shootings. To be lawful self-defense, the evidence must show that the defendant honestly and reasonable believed his life was in imminent danger or that there was a threat of serious bodily harm and that the action taken by the defendant appeared at the time to be immediately necessary. *Wilson, supra*; *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985).

Defendant testified he left the barbecue after arguing with Davis and that Davis followed him to his house and threatened him with a crowbar. Defendant ran inside his house and retrieved the assault rifle. According to defendant, Davis threatened to return to defendant's home with a gun. Davis then returned to the barbecue. Defendant claimed that he returned to the barbecue simply to talk to Davis. He testified that he put the rifle in his car because it happened to be in his hand when he left his house. Defendant did not claim to have taken the rifle back to the barbecue because he felt it necessary for his protection. It was only when Davis allegedly drove toward him that defendant retrieved the rifle. Given defendant's version of the events, expert testimony regarding whether defendant felt it necessary to arm himself would not have been helpful in analyzing defendant's self-defense theory or relevant to determining any fact at issue. *Christel, supra*. Defendant's self-defense theory was based on his perceived fear when Davis drove toward him and testimony that defendant's prior experience caused him to feel the need to possess and use the rifle would have been contrary to defendant's testimony that he brought the rifle back to the barbecue because it happened to be in his hand when he got into his car. The jury could determine from defendant's own testimony whether Davis' alleged conduct of driving toward defendant caused defendant to have an honest and reasonable belief that his life was in danger. The proposed testimony regarding defendant's prior experiences would have only confused the jury as to the matters at issue in the present case. See MRE 403; *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, modified 450 Mich 1212 (1995). Moreover, to the extent the expert would have been asked to testify that defendant's conduct resulted from post traumatic stress disorder, his testimony would have been inadmissible. *Christel, supra* at 591; *Wilson, supra* at 605.

II.

Defendant next argues that the trial court erred in ruling he could not testify regarding various incidents in his past, which he claimed were relevant to show that he had an honest and reasonable

belief that his life was in danger or that he was threatened with serious injury when he shot at Davis. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Howard*, 226 Mich App 528, 551; 575 NW2d 16 (1997). Again, evidence of defendant's prior traumatic experiences was not relevant to defendant's self-defense theory given defendant did not claim to have brought the rifle to the barbecue for protection and he only felt it necessary to retrieve the rifle from his car when Davis drove toward him. Consequently, the trial court did not abuse its discretion in excluding such evidence.

III.

Defendant also argues that the trial court erred in denying his request to instruct the jury on imperfect self-defense, voluntary manslaughter, and involuntary manslaughter. We review claims of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Even if somewhat imperfect, jury instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

Imperfect self-defense can mitigate second-degree murder to voluntary manslaughter in circumstances where a defendant would have had a right to act in self-defense, but for his actions as the initial aggressor. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992), citing *People v Amos*, 163 Mich App 50, 57; 414 NW2d 147 (1987). Here, the evidence established defendant and Davis argued at the barbecue. Defendant claimed he then went home where he was threatened by Davis at his home, and later returned to the barbecue to talk with Davis. According to defendant, immediately after he arrived at the barbecue, Davis drove toward him as if to strike him. Under defendant version of the events, Davis was the initial aggressor of the conflict that led directly to the shooting. See *Amos, supra*. Consequently, imperfect self-defense is inapplicable and the trial court properly denied defendant's request for such an instruction. A trial court is not required to give instructions that the facts do not warrant. *Piper, supra*.

Voluntary and involuntary manslaughter are cognate lesser included offenses of murder. *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996). The trial court is required to instruct on cognate offenses if the instruction is requested, the instruction is consistent with the evidence and the defendant's theory of the case, and the evidence would support a conviction of that charge. *People v Sullivan*, 231 Mich App 510, 517-518; 586 NW2d 578 (1998), aff'd 461 Mich 986 (2000); *Cheeks, supra* at 479-480. The elements of voluntary manslaughter are: (1) the defendant kills in the heat of passion; (2) the passion is caused by an adequate provocation; and (3) without a lapse of time during which a reasonable person could control his passions. *Sullivan, supra* at 518. The provocation must be "that which would cause a *reasonable person* to lose control." *Id*. (Emphasis in original). In the present case, there was no evidence that defendant became so enraged by Davis' conduct that he lost his ability to reason and shot him without thinking. Voluntary manslaughter was inconsistent with defendant's theory that he returned to the barbecue to talk to Davis and shot at Davis only when he drove toward him. Therefore, the trial court properly denied defendant's request for an instruction on that offense. *Piper, supra*.

Involuntary manslaughter includes all manslaughter not characterized as voluntary. *People v Datema*, 448 Mich 585, 594; 533 NW2d 272 (1995). Involuntary manslaughter is defined as:

> the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty. [*People v Booker (After Remand)*, 208 Mich App 163, 170; 527 NW2d 42 (1994), quoting *People v Scott*, 29 Mich App 549, 551; 185 NW2d 576 (1971), quoting *People v Ryczek*, 224 Mich 106, 110; 194 NW 609 (1923).]

Here, defendant contends the jury should have been instructed regarding involuntary manslaughter because his testimony that he did not aim the rifle at Davis' car suggests he did not intend to kill Davis. Defendant, however, acknowledged that he fired the rifle in the direction of Davis' car in order to stop Davis. By intentionally firing in the direction of Davis and the bystanders, defendant engaged in unlawful conduct amounting to a felony that naturally tends to cause death or great bodily harm. Therefore, defendant's conduct does not fall within the definition of involuntary manslaughter, *Booker*, *supra*, and the trial court properly denied defendant's request to instruct on the offense, *Piper*, *supra*.

IV.

Defendant last argues that the prosecution failed to prove defendant had the intent to assault the three bystanders that were injured because the doctrine of transferred intent, upon which the jury was instructed, is inapplicable where a defendant is convicted of a more serious offense based on the same intent. We disagree. See *People v Lawton*, 196 Mich App 341, 350-351; 492 NW2d 810 (1992); *People v Lovett*, 90 Mich App 169, 174-175; 283 NW2d 357 (1979).

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Brian K. Zahra