

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRIN COATS,

Defendant-Appellant.

UNPUBLISHED

June 23, 2000

No. 213418

Wayne Circuit Court-

Criminal Division

LC No. 97-008523

Before: Hoekstra, P.J., and Holbrook, Jr. and Zahra, JJ.

MEMORANDUM.

Defendant appeals as of right his convictions for first-degree murder, MCL 750.316; MSA 28.548 and felony-firearm, MCL 750.227b; MSA 28.424(2), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The charges against defendant arose out of the shooting death of James Harrison, Jr. Rebecca Chappelle testified that on July 18, 1997, she saw defendant and the victim arguing at Second and Peterboro. She heard defendant say that he would kill the victim. A pregnant, black female approached defendant, and defendant took a gun out of her bag and shot the victim. Chappelle did not know the female.

Robert Blount testified that on the afternoon of July 18th, he saw the victim running at defendant. Defendant had a stick and the victim had a brick. Defendant told a woman named Becky to go and get this woman and get his gap, or gun. A few minutes later, a woman arrived and defendant took a long handgun out of her purse. Defendant started firing at the victim, and he fell in the street. The victim was unarmed.

Defendant testified that he knew Rebecca Chappelle, but he did not know the victim or Robert Blount. On July 18th, he was at Children's Hospital with his two year old son, who had asthma. They arrived at two in the morning and stayed until three the next day. His girlfriend was pregnant at the time. Defendant admitted to selling drugs in the area of Second and Peterboro. The jury convicted defendant as charged.

Defendant argues that the trial court erred in failing to give a requested jury instruction on manslaughter. Manslaughter is a cognate lesser included offense of murder. *People v Heflin*, 434 Mich 482, 497; 456 NW2d 10 (1990). An instruction on a cognate lesser included offense will be required only if there is a dispute in evidence that would support a conviction on the lesser charge. *People v Lemons*, 454 Mich 234; 562 NW2d 447 (1997). A defendant may not seek reversal of a conviction on the basis of a trial court's refusal to instruct on an offense inconsistent with the evidence and defendant's theory of the case. *Heflin, supra*, 499.

Here, the trial court properly found that the cognate lesser included offense instruction was not supported by the evidence. Defendant's theory of the case was alibi. He testified that he did not know the victim, and was not in the vicinity at the time of the shooting. The theory of the case and the evidence presented were totally inconsistent with a manslaughter conviction.

Moreover, defendant's theory of the case was totally inconsistent with the possibility that he was provoked into shooting the victim. While the eyewitnesses to the shooting testified that there was a fight between defendant and the victim, they also testified that the fight was over, and defendant asked for his gun. Five or ten minutes passed before a woman arrived with the gun and defendant shot the victim. There is no basis for finding provocation or that the shooting was committed in the heat of passion. *People v Townes*, 391 Mich 578, 218 NW2d 136 (1974).

Defendant has also failed to show that the trial court abused its discretion in denying his motion to reopen proofs. *People v Keeth*, 193 Mich App 555, 560; 484 NW2d 761 (1992). The proffered evidence was cumulative to what had already been presented in the trial. The evidence was available to defendant before he rested his case, and there is no showing that it would have affected the outcome of the trial.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Donald E. Holbrook, Jr.

/s/ Brian K. Zahra