STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MILTON A. HARRIS,

Defendant-Appellant.

UNPUBLISHED
June 28, 2002

No. 231398
Wayne Circuit Court
LC No. 99-010817

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

METER, J. (*concurring in part and dissenting in part*).

I agree with all aspects of the majority's opinion except for the analysis of the voluntary manslaughter issue. I would remand this case for further findings of fact and conclusions of law with regard to the elements of second-degree murder and voluntary manslaughter.

Defendant contends that the trial court's factual findings supported a conviction for voluntary manslaughter but not for second-degree murder, because the court essentially found that defendant acted as a result of adequate provocation. In making its findings, the court stated:

> So it seems to me that he was so angry he was shooting at the house and, when the guy came out, he shot at him too.
>
> So I just don't believe that I can find here that his actual intent was to kill. It seems to me his intent was to do great harm and *he was so angry that he really almost didn't know what he was doing*. He had been drinking which would feed into that anger and . . . he was going to shoot, as [the prosecutor] pointed out, whoever came out on that porch. He was going to keep shooting at the porch [and] at the house.
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> * * *
>
> So this certainly is not a case where the killing was justified or excused but, *on the other hand, I think it's really, as [defense counsel] said, one of the words we used to hear is hot blood and I think this was a shooting which came from hot blood.*

> The defendant didn't calculate this. *He just was so angry*, he went home, got his shotgun, went back and started shooting and, when the guy came out, he shot him and I think that's all part of, goes to the inability to have – let me put it in the correct way.
>
> I think all of that goes to show that there is nothing here that says that he specifically intended to kill Mr. Wright.
>
> So, therefore, I am finding the defendant guilty of murder in the second degree . . . . [Emphasis added.]

To be convicted of second-degree murder, a defendant must have acted with malice. See *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). "Malice requires an intent to kill, an intent to do great bodily harm, or an intent to create a high risk of death or great bodily harm with knowledge that such is the probable result." *Id.* Moreover, malice must be shown from circumstances "that do not mitigate the degree of the offense to manslaughter. . . ." *Id.* Voluntary manslaughter occurs "when a killing which would otherwise be murder takes place when the defendant is under the influence of passion." *People v Delaughter*, 124 Mich App 356, 360; 335 NW2d 37 (1983). As noted in *People v Fortson*, 202 Mich App 13, 19; 507 NW2d 763 (1993):

> Voluntary manslaughter is an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to cool and reason to resume its habitual control.

In the instant case, the trial court found that defendant acted with an "intent to do great harm," a state of mind supporting the "malice" element of second-degree murder. See *Neal, supra* at 654. However, as noted, malice must be shown *from circumstances that do not mitigate the crime to manslaughter*. *Id.* The court here found that defendant "was so angry that he really almost didn't know what he was doing" and that defendant acted as a result of "hot blood." In light of the definition of voluntary manslaughter found in *Fortson*, *supra* at 19, and *Delaughter*, *supra* at 360, and in light of the testimony that shortly before the killing, Wright pointed a handgun at defendant and stated "I'm going to kill me a bitch ass n----- tonight," it is possible that the trial court's factual findings in this case supported a conviction for voluntary manslaughter and not for second-degree murder. However, it is unclear from the record whether the trial court considered the offense of voluntary manslaughter. Therefore, based on the existing record, a miscarriage of justice might have occurred in this case. Indeed, if the trial court concluded, as a factual matter, that defendant acted as a result of adequate provocation[1] yet convicted him of second-degree murder, then defendant was essentially convicted of a crime he did not commit.

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[1] While we, as appellate judges, might surmise from the cold record that the provocation in this case was inadequate to support a voluntary manslaughter conviction, it is not our role to make such factual findings; that role, as long as the evidence in support of provocation was sufficient, is the sole province of the trier of fact.

In light of the trial court's conflicting findings, i.e., its conclusion that defendant committed second-degree murder even though he was under the influence of "hot blood" and "was so angry that he really almost didn't know what he was doing," I believe that the appropriate action at this point would be to remand this case for further factual findings and conclusions of law. Indeed, based on the existing record it is not possible to discern whether the trial court correctly applied the law to the facts of the case. See *People v Legg*, 197 Mich App 131, 134; 494 NW2d 797 (1992). While it is likely that the trial court merely worded its findings inartfully and fully concluded that all the necessary elements of second-degree murder were established, I, unlike the majority, cannot be certain of this conclusion based on the existing record. I would direct the court on remand to indicate whether it unintentionally failed to consider a conviction for voluntary manslaughter or whether it considered such a conviction and rejected it. If the court failed to consider a conviction for voluntary manslaughter, I would direct it to do so on remand and make the appropriate findings.[2]

I would remand this case for further findings and retain our jurisdiction.

/s/ Patrick M. Meter

[2] I acknowledge that defendant did not request an instruction for manslaughter and did not argue manslaughter at trial. I do not find this fact dispositive, however. Indeed, this was a bench trial. A trial judge is presumed to know the law, see *People v Garfield*, 166 Mich App 66, 79; 420 NW2d 124 (1988), and by indicating, *inter alia*, that defendant acted with "hot blood," the court was arguably making a finding in support of manslaughter. I believe that a remand for additional findings is necessary despite defendant's failure to argue manslaughter at trial.