

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN EVANS BROWN,

Defendant-Appellant.

UNPUBLISHED

November 16, 2004

No. 249896

Wayne Circuit Court

LC No. 03-001966-01

Before: Zahra, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of twenty-five to fifty years, and 3 ½ to 7 ½ years, and to a consecutive two-year term for felony-firearm. Defendant appeals as of right. We affirm.

Defendant and decedent were both drinking when they got into an argument. Decedent allegedly hit defendant in the head with a bottle. Defendant fell and said he was four or five feet away from decedent. Defendant testified that decedent was no longer swinging the bottle at him. Defendant pulled out a gun, walked across the room, and shot decedent in the head. Defendant said he shot decedent because he was scared, and that decedent had a reputation for violence. Decedent fell, face down, and lay motionless. Defendant shot decedent several more times while he lay on the ground. Defendant walked away and then returned, stepped over decedent's body, and shot decedent again. Defendant testified that decedent never made any attempt to get up. Decedent died as a result of six gunshot wounds, two of them to his head. Defendant testified that he shot decedent in self defense, but that he never meant to kill decedent when he pointed the gun at him and fired.

Defendant sole claim on appeal is that the trial court erred in denying the requested voluntary manslaughter instruction because voluntary manslaughter is a necessarily included lesser offense of murder and a rational view of the evidence supported giving the instruction. We disagree.

This Court reviews questions regarding the applicability of jury instructions de novo. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003); *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). It is the trial court's duty to instruct on the law applicable to the

case. *People v Pouncey*, 437 Mich 382, 386; 471 NW2d 346 (1991). Jury instructions are reviewed in their entirety to determine whether they fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Green*, 260 Mich App 392, 414; 677 NW2d 363 (2004).

A jury instruction on a lesser offense is appropriate only if all the elements of the lesser offense are included in the greater offense, and a rational view of the evidence supports the instruction. *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004). The elements of manslaughter are included in the offense of murder, and when a defendant is charged with murder, instructions for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003).

To prove voluntary manslaughter, the prosecution must establish that the defendant killed in the heat of passion caused by adequate provocation, with no lapse of time during which a reasonable person could regain self-control. *Id.*, 535. "Key to any finding of voluntary manslaughter is evidence of adequate provocation that a reasonable factfinder could conclude that the defendant, overcome by emotion, could not choose to refrain from the crime." *Pouncey, supra*, 392-393. The evidence here, that defendant was not in danger when he fired the first shot and that he paused before continuing to shoot the motionless decedent, did not clearly support an instruction on voluntary manslaughter. *People v Cornell*, 466 Mich 335, 365; 646 NW2d 127 (2002). Although he said he was "scared," there was no evidence that defendant lost all control and was unable to act deliberately. *Pouncey, supra*, 390. On the contrary, defendant testified that he deliberately shot White in "self-defense" after their altercation ended.

Further, to warrant reversal, a defendant must show that it is more probable than not that the trial court's failure to give the requested lesser included offense instruction undermined the reliability of the verdict, and thus, was outcome determinative. *Cornell, supra*, 365; *People v Lowery*, 258 Mich App 167, 172-173; 673 NW2d 107 (2003). The jury rejected defendant's self-defense theory, convicting defendant of second-degree murder, and implicitly rejected defendant's claim that he was adequately provoked. Thus, any conceivable error in the court's failure to instruct on voluntary manslaughter was harmless.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot

I concur in result only.

/s/ Helene N. White