

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FELICIA ANNETTE HALE,

Defendant-Appellant.

UNPUBLISHED

January 15, 2009

No. 280680

Wayne Circuit Court

LC No. 07-007113-01

Before: Beckering, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and sentenced to 22 to 60 years' imprisonment. She appeals as of right. We affirm.

Defendant's conviction arises from the shooting death of Jimmy Lee Merritt, the father of her three children. The prosecution's theory at trial was that Merritt was shot by Brandon Edwards, and that defendant aided or abetted the offense.

Defendant first argues that resentencing is required because defense counsel was not afforded an opportunity to allocute on her behalf at sentencing, as required by MCR 6.425(E)(1)(c). We disagree.

MCR 6.425(E)(1)(c) provides that a defendant and her attorney be afforded an opportunity to speak in mitigation of the sentence. *People v Petty*, 469 Mich 108, 119; 665 NW2d 443 (2003). The rule requires the court to provide defense counsel with an opportunity to address the court before sentence is imposed, but the court is not required to specifically ask counsel if he has anything to say before sentencing. See *People v Petit*, 466 Mich 624, 627-628; 648 NW2d 193 (2002).

In this case, defense counsel submitted a written sentencing memorandum that the trial court reviewed before sentencing. At sentencing, after providing defendant with an opportunity to address the court, the court proceeded to impose sentence. Thereafter, defense counsel stated that he had not been provided with an opportunity for allocution. The trial court commented that it had reviewed counsel's sentencing memorandum and that counsel could have addressed the court further after defendant spoke. Nonetheless, the court agreed to allow counsel to state anything that he had not already stated in the sentencing memorandum. Counsel declined to make any further statements.

In *People v Wells*, 238 Mich App 383, 392-393; 605 NW2d 374 (1999), the trial court acknowledged that it failed to provide the defendant his right of allocution before imposing sentence, but corrected this oversight before the sentencing hearing was concluded. After hearing the defendant's statement, the court did not change its sentencing decision. *Id.* at 392. In this case, before the sentencing hearing was concluded, defense counsel informed the court that he had not been permitted to address the court. The court then provided counsel with an opportunity to allocute, but counsel declined. On this record, counsel was afforded his right of allocution and resentencing is not required.

Defendant next argues that the trial court's restrictions on defense counsel's examination of defendant regarding Merritt's domestic violence, and the court's refusal to instruct the jury on involuntary manslaughter, infringed on her constitutional right to present a defense. We disagree.

We review constitutional issues de novo. *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008); *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

A defendant has a due process right to present a defense. *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006); *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005); *Kurr*, *supra* at 327. However, an accused's right to present evidence in her defense is not absolute. *Unger*, *supra* at 247. "A defendant's interest in presenting evidence may thus bow to accommodate other legitimate interests in the criminal trial process," such as the implementation of evidentiary rules. *Id.* at 250 (internal quotations and citation omitted). Evidentiary rules "do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve." *Id.* (internal quotations and citation omitted).

Contrary to defendant's argument on appeal, the trial court did not preclude her from offering evidence of Merritt's history of domestic violence. The court permitted defendant to testify regarding prior incidents of both physical and sexual abuse by Merritt, and also permitted defense counsel to cross-examine defendant's sisters about Merritt's history of domestic violence. In the instances where the court limited defense counsel's examination of defendant, the court was enforcing evidentiary rules against leading questions, MRE 611(c)(1), and the presentation of irrelevant testimony, MRE 402, by preventing excessive inquiry into the details of the underlying assaults. A criminal defendant's right to present a defense is not infringed by the exclusion of irrelevant evidence. *Unger*, *supra* at 250. Defendant has not established that the evidentiary rules enforced by the trial court were arbitrary or disproportionate to the purposes they were designed to serve, and the court's enforcement of those rules did not violate defendant's constitutional right to present a defense.

Further, defendant's right to present a defense was not implicated by the trial court's decision not to instruct the jury on involuntary manslaughter. The court was required to instruct on the lesser offense of involuntary manslaughter only if such an instruction was supported by a rational view of the evidence. *People v Gillis*, 474 Mich 105, 137; 712 NW2d 419 (2006); *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003).

"Involuntary manslaughter is the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause

great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty.” *Mendoza, supra* at 536. “Involuntary manslaughter is established if the defendant acts in a grossly negligent, wanton, or reckless manner, causing the death of another.” *People v Moseler*, 202 Mich App 296, 298; 508 NW2d 192 (1993).

In this case, defendant never theorized that she acted in a grossly negligent manner. Instead, the defense theory was that defendant acted reasonably by bringing several people to her home because she feared going there alone. Defendant did not engage in any inherently grossly negligent acts that were the legal cause of the victim’s death. See *People v Zak*, 184 Mich App 1, 8-9; 457 NW2d 59 (1990). Thus, an instruction on involuntary manslaughter was not supported by a rational view of the evidence, and the trial court’s refusal to instruct on that offense did not hinder defendant’s defense. Furthermore, any error in failing to instruct on involuntary manslaughter was harmless because the trial court instructed the jury on the intermediate offense of voluntary manslaughter, but the jury convicted defendant of second-degree murder instead. *Gillis, supra* at 140 n 18; *People v Wilson*, 265 Mich App 386, 396; 695 NW2d 351 (2005).

Finally, defendant argues that the evidence was insufficient to support her conviction. We disagree.

“In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

“The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004) (internal quotations and citation omitted). Defendant argues that there was insufficient evidence of malice in this case.

Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. Malice for second-degree murder can be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. [*Id.* (internal quotations and citations omitted).]

The prosecution’s theory at trial was that defendant was guilty of second-degree murder under an aiding or abetting theory. “To establish that a defendant aided or abetted a crime, the prosecutor must prove that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the principal in committing the crime, and (3) the defendant intended the commission of the crime or knew the principal intended its commission at the time [she] gave aid or encouragement.” *People v Norris*, 236 Mich App 411, 419; 600 NW2d 658 (1999).

In this case, the prosecution presented evidence that Merritt had abused defendant in the past, that defendant was romantically involved with someone else, and that she was in the

process of moving her belongings out of the home that she shared with Merritt. Further, defendant and Merritt were involved in an argument shortly before Merritt was killed. This evidence supported an inference that defendant had a motive to either kill Merritt or cause him great bodily harm.

Shortly before Merritt was shot, defendant went to Edwards' home. Afterward, Edwards, Sir Gawain Floyd, and several others accompanied defendant to the home she shared with Merritt. Defendant admitted that she was aware that Floyd had a gun. She told the police that she was aware that Floyd was "coming packed," meaning that he intended to either "bring his boys" or a gun. Shortly after defendant entered the house, Floyd kicked in the door. Floyd, Edwards, and others rushed inside the house, chased Merritt to a back bedroom, and then forced their way into the bedroom. They assaulted Merritt and then Edwards shot him. During the incident, defendant hindered an attempt by Merritt's father to call 911, thereby supporting an inference that defendant intended for Merritt to be killed. Also, after the offense, defendant returned to Edward's home, thereby supporting an inference of concert of action. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find the necessary element of malice beyond a reasonable doubt. Thus, the evidence was sufficient to support defendant's conviction of second-degree murder.

Affirmed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly