STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee-Cross Appellant,

v

MENAYETTA MICHELL YEAGER,

Defendant-Appellant-Cross Appellee.

UNPUBLISHED
December 21, 2021

No. 346074
Wayne Circuit Court
LC No. 17-008290-01-FC

Before: O'BRIEN, P.J., and BECKERING and CAMERON, JJ.

BECKERING, J. (*concurring*).

In this case, which has recently been returned to this Court following a *Ginther*[1] hearing, I agree with the trial court's and the majority's conclusion that defendant Menayetta Yeager was deprived of effective assistance when her trial counsel chose not to ask for a voluntary manslaughter jury instruction, among other very poor advocacy strategies. If ever there were a heat of passion case, this is it. Defendant shot and killed her boyfriend in the throes of an episode where he beat her up, yanked her out of her car by the hair, carjacked her, drove over people's lawns in an attempt mow her down, and taunted and threatened to kill her when she tried to get her car back.[2] Defendant's counsel decided to argue only self-defense. But as the trial court correctly concluded, it was substandard not to also ask for a voluntary manslaughter instruction in light of the presenting record evidence and defendant deserves a new trial. To deprive her of that opportunity would be a serious deprivation of justice. But in its cross appeal after remand, the prosecution cited for the very first time *People v Raper*, 222 Mich App 475; 563 NW2d 709 (1997), proclaiming correctly that we are bound by it on the issue of prejudice. I agree with defendant's appellate counsel that *Raper* was wrongly decided, and I would convene a conflict panel under MCR 7.215(J) because I believe defendant was prejudiced by her counsel's unacceptably bad representation. Before she spends the rest of her life in prison, she deserves a new trial.

[1] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

[2] Defendant testified that it was her mother's car.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant's convictions arose out of the shooting death of Jonte Brooks. According to defendant's trial testimony, she was driving her mother's van with Brooks as a passenger. She told Brooks that she no longer wanted to be in a relationship and he became angry. He punched defendant. Defendant stopped the van and Brooks pulled her out of the van by her hair. He then beat defendant on the side of the road. Brooks got back into the van and attempted to run over defendant. Defendant called the police while evading Brooks. Witness Labarren Borom stopped his truck beside defendant and told her to get in before Brooks returned. She got into the truck. During these events, defendant was speaking to Brooks on the phone in an attempt to get him to stay in the area so that he could be apprehended by the police. Brooks told defendant he would leave the van at a nearby gas station. However, when Borom and defendant arrived at that gas station, Brooks was not there. Brooks evidently saw defendant in the truck with Borom. He threatened to kill them both. Borom pulled out of the gas station and continued driving down the road while defendant and Brooks argued over the phone. Brooks screamed at Borom to pull into a nearby gas station. Borom complied. Brooks also pulled into the gas station. Defendant claimed that she exited Borom's car in order to run away, but Borom handed her a gun, and she shot at Brooks because she was scared. Video surveillance at the gas station captured the incident and showed defendant shooting at the van as Brooks drove away in it. Brooks later lost control of the van and crashed into a brick wall. He was pronounced dead upon arrival at the hospital. An autopsy showed that he was killed by a bullet that entered through the back of his shoulder and pierced his lung. Toxicology testing showed that Brooks's blood alcohol concentration was .135, which is slightly less than twice the legal intoxication limit. There was also marijuana in his system.

Defendant claimed she shot at Brooks two or three times, while the on-duty gas station clerk testified that he heard 10 shots. Evidence technicians discovered 17 shell casings in the gas station's parking lot.

During closing arguments, the prosecution emphasized defendant's frustration and anger illustrated by her 911 call and statements to Borom. According to Borom, defendant expressed her frustration with Brooks and indicated that she was tired of him playing games with her. After Brooks pulled the van into the gas station, he taunted defendant. She then exited the truck and shot at the van. Moreover, Borom stated that after defendant shot at Brooks, she got back into his truck and demanded that he "follow that bitch."

Defense counsel decided to pursue only a claim of self-defense and chose not to ask for a voluntary manslaughter jury instruction based on his understanding that self-defense is mutually exclusive of voluntary manslaughter. The prosecution asked the trial court to add a lesser included instruction for second-degree murder. The jury deliberated for multiple hours over the course of two days, requesting multiple exhibits including video footage of the shooting and 911 calls, before eventually finding defendant guilty of first-degree murder and possession of a firearm during the commission of a felony.

The trial court sentenced defendant to the mandatory sentence of life imprisonment without the possibility of parole. Defendant appealed her convictions and sentence to this Court. After

oral argument, this Court remanded the case to the trial court to conduct a *Ginther* hearing to address whether defendant was denied the effective assistance of counsel as the result of defense counsel's failure to request a voluntary manslaughter jury instruction. After hearing testimony and considering the parties' arguments, the trial court granted defendant's motion for a new trial, finding that defense counsel provided ineffective assistance on this basis. The prosecution filed a cross-appeal, arguing that the trial court erred by granting defendant's request for a new trial because this Court's holding in *Raper* requires us to conclude that trial counsel's ineffectiveness was harmless.

II. ANALYSIS

Defendant asserted, and the trial court agreed, that she was denied the effective assistance of counsel at trial. I agree. I believe that this Court's holding in *Raper* inappropriately precludes relief to defendants for the failure to provide a voluntary manslaughter instruction in cases in which the jury chooses first-degree murder instead of second-degree murder.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, Mich 575, 579; 640 NW2d 246 (2002). "The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007).

To prevail on a claim of ineffective assistance of counsel, a defendant must establish that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

"Manslaughter is an inferior offense of murder because manslaughter is a necessarily included lesser offense of murder." *People v Mendoza*, 468 Mich 527, 533; 662 NW2d 685 (2003). "[A]n inferior-offense instruction is appropriate only if the lesser offense is necessarily included in the greater offense, meaning, all the elements of the lesser offense are included in the greater offense, and a rational view of the evidence would support such an instruction." *Id*. (footnote omitted). "To prove voluntary manslaughter, the prosecution must prove that: (1) the defendant killed in the heat of passion; (2) the passion was caused by adequate provocation; and (3) there was no lapse of time during which a reasonable person could have controlled his passions." *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005). However, "provocation is not an element of voluntary manslaughter . . . [r]ather, provocation is the circumstance that negates the presence of malice." *Mendoza*, 468 Mich at 536 (citation omitted). In a case in which "a defendant is charged with murder, instructions for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Tierney*, 266 Mich App at 714. "The degree of provocation required to mitigate a killing from murder to manslaughter is that which causes the defendant to act out of passion rather than reason." *Id*. at 714-715 (quotation marks and citation omitted). "The determination of what is reasonable provocation is a question of fact for the fact-finder." *Id*. at 715 (quotation marks and citation omitted).

In this case, a rational view of the evidence supports an instruction on voluntary manslaughter. Testimony at trial showed that Brooks physically assaulted defendant by punching, kicking, and pulling her hair. He forcibly removed defendant from the driver's seat of her mother's van and attempted to hit her with the van several times. He then taunted and threatened defendant over the phone as she attempted to retrieve the van. According to testimony elicited by the prosecution, defendant was angry and frustrated with Brooks. She indicated that she was tired of him. After Brooks pulled into the gas station, he continued to taunt defendant. She then exited the truck and shot at the van 17 times as Brooks drove away. When she returned to the truck, she told Borom to follow Brooks. A reasonable jury could accept the evidence that indicated that defendant was stoked into a heat of passion and shot defendant before there was a lapse of time during which a reasonable person could control her passions and apply reason to the situation. Although defendant's taunts over the phone could not serve as adequate provocation, Brooks also physically assaulted defendant and attempted to run her over multiple times, including driving over people's lawns in an attempt to hit her, followed by carjacking and threats to kill her which kept her passions inflamed. See *People v Mitchell*, 301 Mich App 282, 288; 835 NW2d 615 (2013) (concluding that the trial court erred by failing to provide voluntary manslaughter instruction because the defendant killed the victim after the victim struck the defendant with a baseball bat and hit him several times in the face). Therefore, defendant was entitled to a voluntary manslaughter instruction, and defense counsel was deficient for failing to request such an instruction.[3] See *Tierney*, 266 Mich App at 714. See also *People v Dupree*, 486 Mich 693, 712; 788 NW2d 399 (2010) ("A criminal defendant is entitled to have a properly instructed jury consider the evidence against him.") (Quotation marks and citation omitted).

However, defendant must also show that she was prejudiced by defense counsel's error. In other words, she is required to establish that if defense counsel had asked for a voluntary manslaughter jury instruction, there exists a reasonable probability of a different outcome. See *Sabin (On Second Remand)*, 242 Mich App at 659. In *Raper*, 222 Mich App at 483, the defendant, who was charged with first-degree murder, argued that he was denied the effective assistance of counsel because his attorney failed to request that the jury be instructed on the lesser included offenses of voluntary and involuntary manslaughter. This Court disagreed, observing that the jury was instructed in regard to first-degree murder and second-degree murder, and the jury found the defendant guilty of first-degree murder. *Id*. This Court concluded that "[t]he jury's rejection of second-degree murder in favor of first-degree murder reflected an unwillingness to convict on a lesser included offense such as manslaughter." *Id*. Thus, any error was ultimately harmless, and

[3] As explained in the majority opinion, defense counsel made an error of law because self-defense and voluntary manslaughter are not mutually exclusive mitigating circumstances, and self-defense also requires that the defendant act with deliberation. Similarly, although not raised by defendant in this appeal, defense counsel may have also provided ineffective assistance during the plea negotiation phase of the proceedings. During his *Ginther* hearing testimony, defense counsel explained that if he requested a voluntary manslaughter instruction, defendant might as well have taken the plea deal offered by the prosecution because defendant would then have to admit that she exited the truck with the intent to shoot and kill Brooks.

therefore, the defendant could not establish that he was prejudiced by defense counsel's failure to request an instruction on manslaughter. *Id*. at 483-484.

The opinion in *Raper*, 222 Mich App at 483, cites this Court's earlier opinion in *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990), for the proposition that failure to instruct the jury on manslaughter constitutes harmless error if the jury was instructed on both first- and second-degree murder, and finds the defendant guilty of first-degree murder. In the *Zak* case, two codefendants went to trial for murder; defendant John Zak was convicted of second-degree murder and defendant Harry Anderson was convicted of first-degree murder. *Zak*, 184 Mich App at 1. On appeal, Anderson argued that the trial court erred by refusing to instruct the jury in regard to manslaughter. *Id*. However, this Court concluded that

> Where the trial court instructs on a lesser included offense which is intermediate between the greater offense and a second lesser included offense, for which instructions were requested by the defendant and refused by the trial court, and the jury convicts on the greater offense, the failure to instruct on that requested lesser included offense is harmless if the jury's verdict reflects an unwillingness to have convicted on the offense for which instructions were not given. [*Id*., citing *People v Beach*, 429 Mich 450, 491; 418 NW2d 861 (1988), superseded by statute as stated in *People v Smith-Anthony*, 494 Mich 669, 687 n 53;837 NW2d 415 (2013)[4].]

Because "the jury was instructed on both first- and second-degree murder and convicted defendant Anderson of first-degree murder[,]" this Court determined "that their rejection of second-degree murder reflects an unwillingness by the jury to convict on manslaughter and, therefore, the failure to so instruct constitutes harmless error." *Zak*, 184 Mich App at 16.

In *Beach*, 429 Mich at 490, a Michigan Supreme Court case that preceded *Raper* and *Zak*, our Supreme Court held that the failure to instruct the jury in regard to conspiracy to commit larceny in a building constituted error; however, because the jury rejected the lesser included offense of conspiracy to commit unarmed robbery and convicted the defendant of the greater offense of conspiracy to commit armed robbery, the error was ultimately harmless. In regard to the harmless error analysis, the Court explained that "[t]he existence of an intermediate charge that was rejected by the jury does not, of course, automatically result in an application of the [harmless error] analysis." *Id*. at 491. Rather, "the intermediate charge rejected by the jury would necessarily have to indicate a lack of likelihood that the jury would have adopted the lesser requested charge." *Id*. The Court further explained that implicit in the jury's verdict in that case was a finding concerning the use of a weapon. *Id*. at 492. The Court observed that "if [the jury] concluded that the defendant was not planning to use force, it could have and undoubtedly would have, found her guilty of the instructed lesser included offense of conspiracy to commit unarmed robbery." *Id*. at 490. As a result, the Court believed that the jury's verdict showed that the failure to provide an

[4] The Court notes that after Michigan's robbery statute was amended in 2004, larceny from a person was no longer a necessarily included lesser offense of robbery. *Smith-Anthony*, 494 Mich 687 n 53.

instruction concerning the conspiracy to commit larceny in a building was not prejudicial to the defendant because the jury had no reasonable doubt concerning the intended use of force. *Id*.

I conclude that *Raper* impermissibly limits relief in cases involving instructional error, especially considering the reasoning and analysis employed by the Supreme Court in *Beach*. I believe that this case exemplifies the situation described in *Beach*, 429 Mich 491, in which an instructional error is not harmless because the jury's rejection of second-degree murder does not necessarily "indicate a lack of likelihood that the jury would have adopted" a verdict of voluntary manslaughter.

In this case, defendant was charged with first-degree murder. "The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation." *People v Bass*, 317 Mich App 241, 256-266; 893 NW2d 140 (2016) (quotation marks and citation omitted). The jury was also instructed in regard to second-degree murder. 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 Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (quotation marks and citation omitted). "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 wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id*. (quotation marks and citation omitted). "Murder and manslaughter are both homicides and share the element of being intentional killings. However, the element of provocation which characterizes the offense of manslaughter separates it from murder." *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). As noted earlier in this opinion, the provocation required for a manslaughter charge "is that which causes the defendant to act out of passion rather than reason." *Tierney*, 266 Mich App at 714.

As a result, considering the elements of the aforementioned offenses, I do not believe that the jury's decision to convict defendant of first-degree murder instead of second-degree murder automatically proves that the jury would not have been inclined to convict defendant of voluntary manslaughter if given the opportunity. A reasonable jury could have accepted the prosecution's theory of the case that defendant deliberately shot and killed Brooks, but concluded that she did so out of uncontrollable anger as a result of the events that occurred in the moments before the shooting. There is a reasonable probability that even though the jury would not find self-defense, if given the option it would have found defendant guilty of voluntary manslaughter rather than first-degree murder. See *Sabin (On Second Remand)*, 242 Mich App at 659. See also *People v Ackley*, 497 Mich 381, 389; 870 NW2d 858 (2015) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

Moreover, claims of ineffective assistance of counsel are reviewed on the basis of the facts in each individual case. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004) ("The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." On the other hand, this Court's holding in *Raper* acts as an absolute bar to relief in circumstances such as those present in this case. I believe such a strict, bright line rule contradicts the proper analysis necessary to address a claim that a criminal defendant was denied the effective assistance of counsel. As such, if it were not for this Court's binding opinion in *Raper*, I would affirm the trial court's order granting

defendant a new trial on the basis that defense counsel's performance fell below an objective standard of reasonableness and defendant was prejudiced by it. In light of *Raper*, I would declare a conflicts panel under MCR 7.215(J) so this Court can revisit the ruling in that case. Barring that, I hope the Michigan Supreme Court takes this case and examines the legal integrity of the bright line rule in *Raper*.

/s/ Jane M. Beckering