STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 11, 2013
v	No. 307749 Wayne Circuit Court
VONZEL SIMMONS, Defendant-Appellant.	LC No. 11-006499-FC

Before: STEPHENS, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 570.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 37-1/2 to 60 years for the second-degree murder conviction, three to five years for the felon in possession of a firearm conviction, and two years for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court abused its discretion because the trial court, at the request of defendant, failed to instruct the jury on voluntary manslaughter, a lesser included offense of murder. Specifically, defendant argues that he did not kill Raphael Washington with malice, as required for murder, but instead, acted out of heat of passion. We disagree.

This Court reviews a claim of instructional error involving a question of law de novo, but reviews the trial court's determination that a jury instruction applies to the facts of the case for an abuse of discretion. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes. *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006). This Court considers the instruction as a whole to determine whether any error occurred. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). The defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice. *Dupree*, 486 Mich at 702.

Voluntary manslaughter is a necessarily included offense of murder. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). When a defendant is charged with murder, a requested instruction for voluntary manslaughter must be given if supported by a rational view of the evidence. *Id*. The instruction for voluntary manslaughter as a necessarily included offense of murder, CJI2d 16.9, provides:

> (1) The crime of murder may be reduced to voluntary manslaughter if the defendant acted out of passion or anger brought about by adequate cause and before the defendant had a reasonable time to calm down. For manslaughter, the following two things must be present:
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> (2) First, when the defendant acted, [his/her] thinking must be disturbed by emotional excitement to the point that a reasonable person might have acted on impulse, without thinking twice, from passion instead of judgment. The emotional excitement must have been the result of something that would cause a reasonable person to act rashly or on impulse. The law does not say what things are enough to do this. That is for you to decide.
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> (3) Second, the killing itself must result from this emotional excitement. The defendant must have acted before a reasonable time had passed to calm down and return to reason. That is for you to decide. The test is whether a reasonable time passed under the circumstances of this case.

Voluntary manslaughter is murder without malice. *Mendoza*, 468 Mich at 540. 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). The provocation necessary to mitigate murder to voluntary manslaughter is that which causes the defendant to act out of passion rather than reason. *People v Roper*, 286 Mich App 77, 87; 777 NW2d 483 (2009).

The trial court did not abuse its discretion in deciding that the evidence did not support an instruction on voluntary manslaughter. There is no dispute that defendant was involved in the fight at the C Note Lounge, which, according to defendant, started because a guy was "dancing with someone else's girl[.]" However, there was conflicting testimony regarding Washington's involvement in the fight. Regardless of the extent of Washington's involvement in the fight, Leonard Kiner testified that he and Washington left the C Note Lounge and walked towards the parking lot. The C Note Lounge employees made everyone leave, thus, the fight was over. Kiner was approximately three feet apart from Washington when he observed someone who waived and then fired a gun at Washington.

Deandre Moorman testified that he was standing in the street outside the C Note Lounge and saw defendant, who was standing approximately ten feet away. Moorman saw Washington exit the bar. Defendant pulled out a gun at the same time Washington exited the C Note Lounge and walked towards the parking lot. Defendant, with a gun in his hand, and another individual were pacing back and forth "like they were debating." Moorman yelled to Washington that someone had a gun. Washington stopped walking in the parking lot. Defendant then "came from behind the wall[,]" waived, raised, and pointed the gun, and shot Washington in his back. Thus, defendant was acting out of reason, not passion, because he waited outside after the fight had concluded, hid behind a wall, and then fired a shot at Washington, hitting him in the back.

Defendant testified that he fired the gun in self-defense, which further validates that he was acting out of reason, rather than passion. According to defendant, he was in a fight that

involved about 50 people, in which defendant "got the worst of it." Defendant was then chased outside by a crowd of 20 people. Defendant stopped on the corner of the parking lot and saw Redrick Character with a gun in his hand. Defendant took cover on the side of a building and attempted to catch his breath. After Character failed in firing the gun, defendant grabbed the gun and fired a shot at the crowd. Defendant fired the gun because he was scared for his life and tried to prevent himself from further attacks. It is fair to infer that defendant acted out of reason because defendant not only stopped and attempted to catch his breath, he also decided to grab the gun from Character and fire a shot at the crowd in self-defense. Therefore, the trial court did not abuse its discretion in denying defendant's request to instruct the jury of voluntary manslaughter because the instruction was not supported by a rational view of the evidence.

Even if an instruction for voluntary manslaughter was supported by a rational view of the evidence, the trial court's failure to give the instruction was harmless error. To warrant reversal of convictions based on failure to instruct the jury on a lesser included offense, the defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice, in that, it is more probable than not that the failure to give the requested instruction undermined the reliability of the verdict. *Dupree*, 486 Mich at 702; *People v Lowery*, 258 Mich App 167, 172-173; 673 NW2d 107 (2003). The reliability of the verdict is undermined if the evidence at trial clearly supported the instruction that was not given. *People v Heft*, 299 Mich App 69, 73; ___ NW2d ___ (2012). "Clearly supported" means that there is substantial evidence to support the requested instruction that an appellate court should reverse the conviction. *People v Cornell*, 466 Mich 335, 365; 646 NW2d 127 (2002). If the instruction was not clearly supported by substantial evidence, then the failure to give the lesser included offense instruction was harmless. *Id*.

For many of the same reasons as discussed above, defendant has not met his burden of establishing that it is more probable than not that the failure to give the voluntary manslaughter instruction undermined the reliability of the verdict. After the fight concluded and patrons left the C Note Lounge, Moorman observed defendant pull out a gun at the same time as Washington exited the C Note Lounge. Defendant then paced back and forth with the gun in his hand. Moorman attempted to warn Washington that defendant had a gun, but defendant, who was hiding behind a wall, pointed the gun and shot Washington. Moreover, Kiner's testimony corroborated Moorman's testimony, in that the shooter waived and fired the gun at Washington shortly after he exited the C Note Lounge. Defendant testified that he was acting in self-defense. However, defendant shot Washington in the back, which negates defendant's self-defense and voluntary manslaughter claims. Defendant admitted that he told Detective Lance Sullivan that he was never at the C Note Lounge on January 1, 2011, and that he was involved in a fight inside the establishment. The surveillance videos from the C Note Lounge showed that defendant was there in the early morning of the shooting. Therefore, because defendant failed to establish that the instruction was clearly supported by substantial evidence, an error in the trial court's failure to give the voluntary manslaughter instruction was harmless.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Patrick M. Meter