

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 12, 2013

v

LEONART NAZARKO,

No. 309276
Macomb Circuit Court
LC No. 10-000648-FC

Defendant-Appellant.

Before: K. F. KELLY, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree murder, MCL 750.317. Defendant was sentenced to serve 240 months to 40 years in prison. We affirm.

Defendant's sole argument on appeal is that the trial court erred in refusing to give a requested instruction on the lesser included offense of voluntary manslaughter. We review a trial court's determination on whether a jury instruction is applicable to the facts of the case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

"Manslaughter is a necessarily included lesser offense of murder." *Gillis*, 474 Mich at 137. "[W]hen a defendant is charged with murder, an instruction 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). "The elements of voluntary manslaughter are: (1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions." *People v McMullan*, 284 Mich App 149, 156; 771 NW2d 810 (2009). "The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason." *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). The provocation is adequate if it "would cause the reasonable person to lose control." *Id.*

We conclude that a rational view of the evidence did not support an instruction on voluntary manslaughter. Defendant and his wife, the victim, had a history of arguing, and defendant's children testified regarding past acts of physical violence by defendant toward their mother. The older son testified that he had to intervene four or five times in the past and that,

several days before the final incident, defendant brought a gasoline can into the house and threatened the victim. Defendant's younger son testified that, on the day in question, his parents were arguing because his mother wanted a divorce, and his father spit on his mother and kept pushing his son away. His son testified that the arguing stopped, and defendant went into the bedroom and changed from his pajamas to his clothes. Defendant then went to the front door, put his shoes on, and went outside. Defendant's son further testified that his father walked toward the garage, that he heard the garage door open, and that he saw his father walk back into the house. Defendant then went into the kitchen, put his foot on the counter and tied his shoe, and then came out of the kitchen and stabbed the victim three times.

Defendant testified that he did not recall much from the day of the stabbing other than that he had a knife that he got from the kitchen drawer. He did not know what he was angry about. He described the day of the incident as if a fire exploded in his head. The police later discovered a sheath for the knife used in the stabbing on the front seat of defendant's van, and defendant testified that he may have left it there.

The evidence does not support a conclusion that defendant was adequately provoked or that he killed in the heat of passion. He and his wife were having a verbal argument, and the evidence was clear that there was a period of time in which defendant could have cooled off even if the requisite provocation or heat of passion were present. Defendant's younger son testified that the arguing had stopped and that defendant changed his clothes, put his shoes on, went outside, came back into the house, tied his shoe, and then stabbed his wife. Under these facts, we find no abuse of discretion in the trial court's failure to instruct the jury on voluntary manslaughter.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray
/s/ Michael J. Riordan