[Cite as *State v. Moman*, 2017-Ohio-453.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

STATE OF OHIO,	:	Case No. 16CA1022
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
ARTHUR D. MOMAN,	:	**RELEASED: 1/24/17**
Defendant-Appellant.	:	

APPEARANCES:

Valerie Kunze, Assistant State Public Defender, Columbus, Ohio, for appellant.

David Kelley, Adams County Prosecuting Attorney, and Lingyu Jia, Special Prosecuting Attorney, West Union, Ohio, for appellee.

Harsha, J.

{¶1} Claiming there was sufficient evidence of "serious provocation" to warrant an instruction, Moman, who was convicted of murder, argues that the trial court erred by failing to instruct the jury on the inferior-degree offense of voluntary manslaughter. However, the record contains no evidence to support a finding that the victim provoked Moman into using deadly force.

{¶2} The state presented uncontroverted evidence that Moman stabbed the victim repeatedly in the face, neck, shoulders and back with a 12- inch knife, puncturing several vital organs with deep, aggressive knife wounds. Moman admitted he stabbed the victim and that the victim did not have a weapon and did not fight back. Nonetheless, Moman contends that he fatally stabbed the victim because he was provoked because his girlfriend was sitting on the victim's lap.

{¶3} Moman is not entitled to a jury instruction on voluntary manslaughter because the evidence cannot reasonably support a conviction on that offense. There is

no evidence in the record that the purported provocation was objectively sufficient to bring on sudden passion or a sudden fit of rage. In the absence of evidence of such a provocation, no reasonable jury could have decided that he was not guilty of the murder, but guilty of voluntary manslaughter. Because Moman was not entitled to a jury instruction on the inferior-degree offense of voluntary manslaughter, we overrule his sole assignment of error and affirm his conviction.

I. FACTS

{¶3} The Adams County Grand Jury returned an indictment charging Moman with one count of murder in violation of R.C. 2903.02(A). Moman entered a not-guilty plea to the charge, and the matter proceeded to a jury trial, which provided the following evidence.

{¶4} Moman's friend, Billy Joe Riggs, testified that Riggs, Ricky Francis, Jammi McKenzie, and Jeff McNeiland were sitting in the living room of Riggs's trailer home. Jammi McKenzie, Moman's girlfriend, was sitting on Ricky Francis's lap. Moman entered the trailer, saw McKenzie on Francis's lap and told McKenzie he was going to have his sister "whip her butt" and told Francis "sometime he will die that day." Riggs testified that after Moman threatened McKenzie and Francis, Moman left but returned a few hours later.

{¶5} Riggs testified that when Moman returned the second time, McKenzie ran out the door as soon as she saw Moman. Riggs described how Moman entered the trailer, pulled out a knife approximately 12 inches long, and immediately began stabbing Francis multiple times. Riggs testified that after Moman threatened to kill Riggs and McNeiland if they told anyone, Moman left. Riggs continued, saying that Francis had no

weapons and made no comments or threats to Moman and that McKenzie was not sitting on Francis's lap when Moman returned the second time.

{¶6} Jeff McNeiland testified consistently with Riggs's version of events. McNeiland indicated McKenzie was sitting on Francis's lap initially, but after Moman threatened to kill Francis during Moman's first visit, Francis moved to the couch and McKenzie stayed in the chair. McNeiland testified that he had been in the hallway when Moman returned the second time. McNeiland noted that he witnessed Moman stab Francis repeatedly and heard Moman threaten to kill anybody if they said anything.

{¶7} Jammi McKenzie testified that she, Riggs, McNeiland, and Francis were sitting in Riggs's trailer when Moman came to the trailer. McKenzie admitted that she had been drinking that evening and only remembered Moman's second visit. McKenzie testified that she was either sitting on the couch next to Francis or standing next to the couch when Moman arrived. McKenzie indicated that when Moman arrived, she left immediately, went to a girlfriend's house, and did not actually witness Moman stabbing Francis.

{¶8} Moman testified in his own defense, claiming that he walked into Riggs's trailer and saw his girlfriend, McKenzie, stilling on Francis's lap and it "tripped me out" and "shocked me.". Moman asked McKenzie, "if she is sure this is what you want" and then he left. Moman went to his nephew's house and slept for a few hours but decided to go to McKenzie's trailer to check on her. Moman found that McKenzie was not there so he packed up his personal belongings. Moman indicated he was going to stop by Riggs's trailer to make sure that is what McKenzie wanted and then he was leaving. Moman stated that he went to Riggs's trailer and saw McKenzie still sitting on Francis's

lap. Moman testified that in response, "I went to set my books down in the chair and I see a knife to the side. And when I did that she jumped and ran out. * * * I think the knife set me off and her running past me. She ran past me as soon as I set my books down and I seen a knife laying there." Moman professed that he started cutting Francis with the knife because he was angry about Francis being with McKenzie. Moman admitted that Francis had no weapons and did not attempt to fight back with him at any time.

{¶9} Moman requested a jury instruction on voluntary manslaughter, which the trial court denied because there was no evidence of serious provocation by the victim.

{¶10} The jury returned a verdict finding Moman guilty of murder in violation of R.C. 2903.02(A). The trial court sentenced him to prison for an indefinite term of 15 years to life and fined him. Moman appealed.

II. ASSIGNMENT OF ERROR

{¶11} Moman assigns the following error for our review:

> I. THE TRIAL COURT VIOLATED ARTHUR MOMAN'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT FAILED TO GIVE THE JURY AN INSTRUCTION AS TO THE INFERIOR-DEGREE OFFENSE OF VOLUNTARY MANSLAUGHTER. FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION; CRIM. R. 52(B); T.PP. 668-694.

III. LAW AND ANALYSIS

Jury Instruction on Inferior-Degree Offense

1. Standard of Review

{¶12} Moman argues that the trial court erred in denying his request for the inferior-degree offense of voluntary manslaughter under R.C. 2903.03(A). In general "[a]n appellate court reviews a trial court's refusal to give a requested jury instruction for

abuse of discretion." *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 240, citing *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989). But "de novo review applies to whether jury instructions correctly state the law." *See* Wolff, Brogan, and McSherry, *Anderson's Appellate Practice and Procedure in Ohio*, Section 6.02[8][b], fn.47 (2015 Ed.), citing *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 21. Thus, we use the abuse of discretion standard to decide whether the trial court erred in determining that there was insufficient evidence presented to reasonably support both an acquittal on the charged crime of murder and a conviction for voluntary manslaughter. *State v. Shane*, 63 Ohio St.3d 630, 632, 590 N.E.2d 272 (1994) ("Even though voluntary manslaughter is not a lesser included offense of murder, the test for whether a judge should give a jury an instruction on voluntary manslaughter [an inferior-degree offense] when a defendant is charged with murder is the same test to be applied as when an instruction on a lesser included offense is sought."). An abuse of discretion implies that the court's attitude is arbitrary, unreasonable, or unconscionable. *Sivit v. Village Green of Beachwood, L.P.*, 143 Ohio St.3d 168, 2015–Ohio–1193, 35 N.E.3d 508, ¶ 9, citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

2. Law and Analysis

{¶13} Moman asked the trial court to give a jury instruction on voluntary manslaughter under R.C. 2903.03(A). "Requested jury instructions should ordinarily be given if they are correct statements of law, if they are applicable to the facts in the case, and if reasonable minds might reach the conclusion sought by the requested

instruction." *State v. Adams,* at ¶ 240, citing *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591, 575 N.E.2d 828 (1991).

{¶14} Voluntary manslaughter is an inferior-degree offense to murder because its elements are contained within the indicted offense, except for one or more additional mitigating elements. *Shane* at 631. The voluntary manslaughter statute, R.C. 2903.03, provides:

> (A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another or the unlawful termination of another's pregnancy.
> * * *
> (C) Whoever violates this section is guilty of voluntary manslaughter, a felony of the first degree.

{¶15} To mitigate the accused's conduct, the sudden passion or sudden fit of rage must be "brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force." R.C. 2903.03(A). We use two components to determine whether "reasonably sufficient" provocation exists, one is objective and the other is subjective:

> In determining whether the provocation is reasonably sufficient to bring on sudden passion or a sudden fit of rage, an objective standard must be applied. Then, if that standard is met, the inquiry shifts to the subjective component of whether this actor, in this particular case, actually was under the influence of sudden passion or in a sudden fit of rage. It is only at that point that the " * * * emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time * * * " must be considered. If insufficient evidence of provocation is presented, so that no reasonable jury would decide that an actor was reasonably provoked by the victim, the trial judge must, as a matter of law, refuse to give a voluntary manslaughter instruction. In that event, the objective portion of the consideration is not met, and no subsequent inquiry into the subjective portion, when the defendant's own situation would be at issue, should be conducted.

Shane at 634. The provocation must be sufficient "to arouse the passions of an ordinary person beyond the power of his or her control." *Id.* at 635.

{¶16} Moman argues that he was entitled to an instruction for voluntary manslaughter because he "faced infidelity of the woman he believed to be his life partner" and was "tripped out" and "shocked." However the only evidence in the record of provocation was that the victim allowed Moman's girlfriend to sit on his lap. There is no evidence that the victim had engaged in sexual relations with Moman's girlfriend, they were not unclothed, not holding hands, and not kissing. The record indicates that the victim did not do or say anything to Moman. This case does not involve any of the "classic voluntary manslaughter situations" such as "assault and battery, mutual combat, illegal arrest and discovering a spouse in the act of adultery." *Shane* at 635. Applying the objective standard we conclude as a matter of law that the evidence, when viewed in a light most favorable to Moman, did not raise a possibility of serious provocation. No reasonable jury could have found Moman not guilty of murder, but decided that Moman was sufficiently provoked by the victim and convicted him on the inferior-degree offense of voluntary manslaughter. In other words the fact that Moman discovered his girlfriend merely sitting on another man's lap could not mitigate his culpability for the use of deadly force.

{¶17} Because the objective standard is not met, we do not inquire into the subjective component of whether Moman, in this particular case, actually was under the influence of sudden passion or in a sudden fit of rage. *Shane* at 634.

{¶18} We overrule Moman's sole assignment of error.

IV. CONCLUSION

{¶19} The trial court did not abuse its discretion in rejecting a jury instruction on voluntary manslaughter when the defendant failed as a matter of law to present sufficient evidence of provocation. The provocation that allegedly caused Moman to act under the influence of sudden passion or in a sudden fit of rage – his girlfriend sitting on the victim's lap – was not reasonably sufficient to incite him to use deadly force. No reasonable jury could have found Moman not guilty of murder, but guilty of voluntary manslaughter. Having overruled Moman's sole assignment of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.