

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-220307
	:	TRIAL NOS. B-2001107
Plaintiff-Appellee,	:	B-2201279
vs.	:	<i>OPINION.</i>
DONTE THOMPKINS,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: July 28, 2023

*Melissa A. Powers*, Hamilton County Prosecuting Attorney, and *Philip R. Cummings*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

*The Law Office of John D. Hill, Jr.*, for Defendant-Appellant.

**KINSLEY, Judge.**

{¶1} Defendant-appellant Donte Thompkins appeals from the trial court's judgment convicting him, following a jury trial, of murder in violation of R.C. 2903.02(B) and felonious assault in violation of R.C. 2903.11(A).

{¶2} In two assignments of error, Thompkins asserts the trial court erred in declining to instruct the jury on the inferior offense of aggravated assault and the lesser-included offense of involuntary manslaughter. Following our review of the record, we hold the trial court did not abuse its discretion in denying Thompkins' request to instruct the jury on these lesser offenses. Accordingly, the judgment of the trial court is affirmed.

***Factual and Procedural Background***

{¶3} On the afternoon of September 8, 2019, a group of juveniles, including Thompkins, entered the courtyard of an apartment complex located in Avondale known as The Crescent. At trial, the state played video footage from that afternoon obtained from a surveillance camera in the courtyard.

{¶4} The video footage shows that the first group of juveniles to enter the courtyard was dressed mostly in white. Thompkins was among this group. A few minutes later, another group of juveniles dressed mostly in red approached the first group. Another juvenile named K.B. was among this group. The two groups lined up across from each other, and eventually one person from each group started fighting with each other. Neither Thompkins nor K.B. was directly involved in this fight.

{¶5} In the video footage, Thompkins, dressed in white, stood to the side and observed the fight, while constantly fidgeting with something in his pocket. K.B., dressed in red, also observed the fight, but stood in the opposite corner of the

courtyard as Thompkins. As the fighting intensified, Thompkins reached for something in his pocket. But Thompkins was interrupted by Tommy Pickett-Glover, an adult resident of The Crescent, who was not a part of either group of juveniles. Pickett-Glover approached Thompkins and punched him to the ground. The force of the punch threw Thompkins to the ground, but he quickly got back on his feet.

{¶6} As K.B., Pickett-Glover, and everyone else at the scene moved closer to the individuals engaged in the fight, Thompkins took a few steps forward, pulled out a gun, and pointed it towards the fight. K.B. was shot and immediately fell to the ground. Pickett-Glover ran away from the scene injured.

{¶7} K.B. died instantly from his injuries. Pickett-Glover sustained two gunshot wounds to his leg and hip. Shell casings recovered from the scene were confirmed to have come from a handgun used by Thompkins.

{¶8} The state subsequently charged Thompkins with murder in violation of R.C. 2903.02(B) for the killing of K.B. and felonious assault in violation of R.C. 2903.11(A) for the serious physical harm inflicted on Pickett-Glover.

{¶9} Though the state offered Thompkins the opportunity to plead guilty to one count of voluntary manslaughter and one count of felonious assault in exchange for a reduced sentence, he declined and proceeded to trial. Prior to trial, the state filed a motion in limine requesting that the trial court issue a pretrial order excluding any mention by Thompkins's counsel of self-defense, involuntary manslaughter, or aggravated assault during trial. After hearing oral argument, the trial court denied the state's motion.

{¶10} At trial, K.B.'s sister, Donye Banks, testified. She testified that she and K.B. lived in The Crescent with the rest of their family. She further testified that K.B.

did odd jobs around The Crescent to make money. She testified that on the day of his death K.B. was being paid to take out trash by another resident at The Crescent.

{¶11} Detective Eric Karaguleff testified that K.B. had no police contact prior to his death. Karaguleff further testified that Thompkins did not reside at The Crescent. Karaguleff also testified that Pickett-Glover was bigger in size than Thompkins.

{¶12} Toward the close of evidence, Thompkins requested jury instructions on the inferior offense of aggravated assault as to Pickett-Glover and the lesser-included offense of involuntary manslaughter as to K.B. The trial court denied this request, finding there was insufficient provocation.

{¶13} The jury found Thompkins guilty of murder and felonious assault. He was sentenced to an aggregate sentence of 27-30 years to life imprisonment.

{¶14} He now appeals.

***Inferior Degree and Lesser-Included Offenses***

{¶15} “We review a trial court’s decision granting or denying a defendant’s proposed jury instruction under an abuse-of-discretion standard.” *State v. Houston*, 1st Dist. Hamilton No. C-190598, 2020-Ohio-5421, ¶ 34. “A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary.” *State v. Pittman*, 1st Dist. Hamilton No. C-220460, 2023-Ohio-1990, ¶ 10, citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶16} An offense is an inferior degree of the indicted offense where its elements are identical to or contained within the indicted offense, except for one or more additional mitigating elements. *State v. Tyler*, 50 Ohio St.3d 24, 36, 553

N.E.2d 576 (1990). Conversely, an offense may be a lesser-included offense of another only if:

- (1) the offense carries a lesser penalty than the other;
- (2) the offense of the greater degree cannot, as statutorily defined, ever be committed without the offense of the lesser degree also being committed; and
- (3) some element of the greater offense is required to prove the commission of the lesser offense.

*State v. Marshall*, 175 Ohio App.3d 488, 2008-Ohio-955, 887 N.E.2d 1227, ¶ 78 (1st Dist.).

{¶17} “The test for giving an instruction on an inferior-degree offense is similar to the test applied when an instruction on a lesser-included offense is sought.” *State v. Black*, 1st Dist. Hamilton No. C-160321, 2017-Ohio-5611, ¶ 26. “[A] jury instruction must be given on a lesser included (or inferior-degree) offense when sufficient evidence is presented which would allow a jury to reasonably reject the greater offense and find the defendant guilty on a lesser included (or inferior-degree) offense.” *State v. Rhymer*, 1st Dist. Hamilton No. C-200164, 2021-Ohio-2908, ¶ 25. In determining whether to give jury instructions as to a lesser included or inferior degree offense, “the trial court must view the evidence in the light most favorable to the defendant.” *Id.*

### ***Aggravated Assault***

{¶18} In his first assignment of error, Thompkins asserts the trial court erred in declining to instruct the jury on the inferior offense of aggravated assault as to Pickett-Glover.

{¶19} “The elements of aggravated assault are identical to the elements defining felonious assault, except for the additional mitigating element of serious provocation.” *State v. Smith*, 168 Ohio App.3d 141, 2006-Ohio-3720, 858 N.E.2d 1222, ¶ 44. “The serious-provocation inquiry is a factual inquiry that contains both objective and subjective components.” (Internal quotation marks omitted.) *Id.* at ¶ 46. To qualify as a serious provocation, the event must be intense enough to cause an ordinary person to lose control of their emotions, acting out of passion rather than reason. *Id.* The objective standard for measuring the adequacy of the provocation does not consider the defendant’s individual characteristics, such as short-temperedness. *Id.*

{¶20} If the provocation was objectively reasonable, then the focus of the inquiry shifts to whether the defendant was in a sudden fit of rage or under a sudden passion when committing the crime. *Id.* at ¶ 47. This subjective inquiry requires the factfinder to consider evidence of the defendant’s emotional and mental state, as well as the conditions and circumstances surrounding the incident. *Id.*

{¶21} In *Smith*, this court found sufficient provocation where the defendant saw the victim urinating in his yard, showed the victim his gun on his waistband to scare off the victim, and the victim instead grabbed the gun from the defendant. *Id.* at ¶ 54-55. The court reasoned the defendant did not have the opportunity to cool off, because the victim was shot in the struggle that immediately ensued over the firearm. *Id.* at ¶ 55. As a result, the court held the facts met the objective standard for sudden provocation. *Id.* Further, the court held the record contained evidence that the defendant was actually provoked into a sudden passion or rage, because the victim testified that the defendant looked angry and upset. *Id.* at ¶ 56.

{¶22} And in *Rhymer*, this court found sufficient provocation where the victim, who had previously threatened the defendant and his son with violence, showed up uninvited, extremely agitated, and under the influence of drugs to a custody exchange of the defendant's son with the mother. *Rhymer*, 1st Dist. Hamilton No. C-200164, 2021-Ohio-2908, at ¶ 32. Moreover, the defendant testified that the victim pushed him and tried to grab a firearm from him. *Id.*

{¶23} But here, there is insufficient evidence of provocation. Thompkins argues that Pickett-Glover provoked him by punching him and that he then inadvertently shot K.B. The video footage, however, depicts a different course of events. In the video footage, Thompkins is seen fidgeting with the gun in his pocket well before Pickett-Glover approached him. When Pickett-Glover moved towards Thompkins to punch him, Thompkins reached into his pocket to pull out his gun. This suggests Pickett-Glover was perhaps attempting to stop Thompkins from shooting. But, regardless of Pickett-Glover's motivation, Thompkins made an effort to reach for his gun prior to being punched by Pickett-Glover and therefore could not have been provoked by this encounter.

{¶24} Further, as the state correctly points out, Thompkins recovered from the punch and got back up in mere seconds. And in response, he pointed the gun towards the fight, not towards Pickett-Glover. Consequently, while K.B. died on the spot after being shot in the temple, Pickett-Glover was injured but still able to run away from the scene. Thus, Thompkins did not respond as if he were provoked by Pickett-Glover, because he shot in the direction of the fight, not in the direction of the alleged provocation.

{¶25} Therefore, even viewing the evidence in the light most favorable to Thompkins, we hold the trial court did not abuse its discretion in denying Thompkins’s request to instruct the jury on the inferior offense of aggravated assault as to Pickett-Glover. The evidence shows that Thompkins had considered pulling out his gun well before Pickett-Glover arrived on the scene. Thus, we cannot conclude that it was Pickett-Glover’s actions which provoked Thompkins. Accordingly, Thompkins’ first assignment of error is overruled.

***Involuntary Manslaughter***

{¶26} In his second assignment of error, Thompkins asserts that the trial court erred in declining to instruct the jury as to the lesser-included offense of involuntary manslaughter as to K.B.

{¶27} In *State v. Deanda*, the Ohio Supreme Court explained when the trial court is required to instruct the jury as to a lesser-included offense:

The question of whether a particular offense should be submitted to the finder of fact as a lesser included offense involves a two-tiered analysis. The first tier, also called the statutory-elements step, is a purely legal question, wherein we determine whether one offense is generally a lesser included offense of the charged offense. The second tier looks to the evidence in a particular case and determines whether a jury could reasonably find the defendant not guilty of the charged offense, but could convict the defendant of the lesser included offense.

(Internal quotation marks and citations omitted.) *State v. Deanda*, 136 Ohio St.3d 18, 2013-Ohio-1722, 989 N.E.2d 986, ¶ 6.



{¶28} And in *Marshall*, this court explained why involuntary manslaughter is a lesser-included offense of murder:

The evidence presented in a particular case is irrelevant to the determination of whether an offense, as statutorily defined, is necessarily included in a greater offense. Under this test, involuntary manslaughter is always and necessarily a lesser included offense of murder because murder cannot ever be committed without also committing or attempting to commit a felony or misdemeanor.

(Internal quotation marks and footnotes omitted.) *Marshall*, 175 Ohio App.3d 488, 2008-Ohio-955, 887 N.E.2d 1227, at ¶ 79.

{¶29} “The involuntary-manslaughter statute does not contain a mens rea component.” *State v. Hill*, 2018-Ohio-1401, 110 N.E.3d 823, ¶ 10 (1st Dist.). But “[k]nowingly causing the death of another is the definition of murder.” *Id.* Thus, “[t]he difference in culpability distinguishes the two crimes – murder criminalizes the conduct while involuntary manslaughter criminalizes the result.” *Id.* “R.C. 2901.22(B) provides that [a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.” (Internal quotation marks omitted.) *State v. Smith*, 4th Dist. Scioto No. 09CA3321, 2010-Ohio-5953, ¶ 27.

{¶30} Because involuntary manslaughter is indeed a lesser-included offense of murder, we shift the focus of our inquiry to whether the jury could have reasonably found Thompkins not guilty of murder but could have convicted him of involuntary manslaughter. Thompkins argues that because he only began shooting

when he was provoked by Pickett-Glover, he did not intend to shoot K.B. Rather, Thompkins asserts he shot at K.B. inadvertently, because K.B. was standing right next to Pickett-Glover.

{¶31} But Thompkins reached for his gun *before* Pickett-Glover punched him. As discussed above, we do not find that Thompkins was provoked by Pickett-Glover. Further, Thompkins’s emphasis on provocation is misplaced here. Involuntary manslaughter is distinguished from murder by the defendant’s mental state. We must therefore consider whether Thompkins was aware of what could result from him shooting at the fight. For example, in *Smith*, the court held that it could not conclude that the jury could have reasonably found that the defendant did not act knowingly when he kicked his victim in the head while wearing steel toed boots. *Smith* at ¶ 31.

{¶32} As seen in the video footage, Thompkins got back up after being punched by Pickett-Glover, took a few steps towards the fight, and shot directly at the fight. Based on these facts alone, we hold that the jury could have concluded that Thompkins was aware that his conduct would likely cause injury or death to those standing in the line of his fire, including K.B. Thus, we hold the trial court did not abuse its discretion by failing to instruct the jury on the lesser-included offense of involuntary manslaughter. Thompkins’s second assignment of error is accordingly overruled.

***Conclusion***

{¶33} Finding no error in the trial court’s jury instructions, we overrule Thompkins’s assignments of error and affirm the judgment of the trial court.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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Judgment affirmed.

**CROUSE, P.J.**, and **ZAYAS, J.**, concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.