

[Cite as *State v. Infante*, 2009-Ohio-2585.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91782

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSE INFANTE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-500697

BEFORE: Jones, J., Cooney, A.J., Celebrezze, J.

RELEASED: June 4, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Jose Infante, appeals the decision of the lower court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the judgment of the lower court.

{¶ 2} On September 13, 2007, Infante was indicted in Case Number CR-500697 with a two-count indictment. Count 1 charged Infante with aggravated murder (R.C. 2903.01(A)) with one- and three-year firearm specifications, notice of prior conviction, and repeat violent offender specification. Count 2 charged Infante with having a weapon under disability (R.C. 2923.13(A)(2)).

{¶ 3} The lower court granted Infante's request for an evaluation by the court psychiatric clinic on October 18, 2007. Infante underwent a second, independent psychiatric evaluation. On January 4, 2008, a hearing was held on the second evaluation, which determined that Infante was sane at the time of the act and did not suffer from mental disease or defect. Both parties stipulated to the findings, and the matter was continued for trial.

{¶ 4} Infante waived a jury as to Count 2 and the notice of prior conviction and repeat violent predator specification. The trial started on May 28, 2008. Infante's Rule 29 motion was denied by the court at the close of the State's case and at the close of all evidence. On June 2, 2008, the jury returned its verdict finding Infante guilty of Count 1, aggravated murder, along with the one- and three-year firearm specifications. On June 10, 2008, the court returned its verdict finding Infante guilty of having a weapon under disability, and also finding Infante guilty of the repeat

violent offender specification and notice of prior conviction specification charged in Count 1 of the indictment.

{¶ 5} The trial court imposed a sentence of life without parole as to Count 1 of the indictment along with the one- and three-year firearm specifications, to run concurrently with each other. Infante also received a sentence of five years on Count 2, to run concurrently with the sentence imposed in Count 1. Infante was advised that if he were to be released from prison he would be subject to a period of postrelease control. All financial obligations to the court were waived. Infante filed notice of this appeal on July 11, 2008.

{¶ 6} Jose Infante was found guilty of the aggravated murder of Angel Feliciano. At trial, the State presented 16 witnesses, and the defense called no witnesses. There was significant testimony involving a shooting at approximately 4 p.m. in the area of West 51st Street and Clark Avenue in Cleveland, Ohio. The victim, Angel Feliciano, was born in Puerto Rico and came to the United States when he was 22 years old. Angel Feliciano lived with appellant's stepdaughter, Yasmin Ginorio, from May until September 1, 2007, when he was killed.

{¶ 7} Yasmin Ginorio testified that she met the victim during the summer of 2007 at a night club and soon moved in with him. She did not tell her mother that she was living with Feliciano. She was aware that the victim had a wife and child in Puerto Rico. Yasmin was also aware that Infante had a gun and was not happy with the relationship. On September 1, 2007, Yasmin and Feliciano went to her mother's house. She arrived at her mother's house around 3 p.m. Yasmin subsequently got

into an argument with her parents about being with Feliciano. Feliciano was in the car while Yasmin was inside her parents' house. Yasmin walked out to the car, and Infante followed her, continuing to argue about her relationship with Feliciano. Infante walked up to the car and started to argue with Feliciano. Feliciano then spat in Infante's face. Infante punched the car as Feliciano and his stepdaughter drove away. Feliciano drove to Jesse Castro's house to pick him up, and then dropped Yasmin off at work. Castro and Feliciano then drove over to the First Class Barbershop. When they reached the barbershop, Castro observed Infante exit a red car.

{¶ 8} Feliciano exited his vehicle. Castro thought they were going to fight. Castro walked toward the barbershop to tell the patrons in the barbershop that there was going to be a fight. Castro heard a gunshot as he was entering the barbershop and was inside the barbershop when he heard a second shot. He then saw Feliciano enter the barbershop holding his neck. Castro then saw Infante enter the barbershop holding a gun in his hand. In Spanish, Infante said, "You are not such a big man now." Infante told the other people in the barbershop, "I'm, sorry, it's nothing with you guys," and then he left the barbershop. Yasmin was at work for 15 minutes when her friend came to tell her what happened. At the hospital, Yasmin learned that Feliciano had died.

{¶ 9} Appellant assigns two assignments of error on appeal:

{¶ 10} "[1.] The evidence was insufficient as a matter of law to support a finding beyond a reasonable doubt that the appellant was guilty of aggravated murder."

{¶ 11} “[2.] The trial court erred and denied appellant his Constitutional right to Due Process when it denied defense counsel’s request for a lesser included jury instruction.”

{¶ 12} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. With respect to sufficiency of the evidence, sufficiency is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law. In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 13} Infante was convicted of the aggravated murder of Angel Feliciano, in violation of R.C. 2903.01(A), which states that no person shall purposely, and with prior calculation and design, cause the death of another. “Prior calculation and design” is not defined by the Revised Code. In *State v. Cotton* (1978), 56 Ohio St.2d 8, 381 N.E.2d 190, paragraph three of the syllabus, the Ohio Supreme Court stated:

“Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified.”

{¶ 14} Here, Infante argues that the State failed to prove aggravated murder because the facts in this case do not support a finding that he acted with prior

calculation and design. He argues that less than an hour elapsed from the time the argument occurred at appellant's house until the time of the shooting at the barbershop. Infante claims that the short amount of time that elapsed demonstrates that he did not have a scheme designed to implement the calculated decision to kill. However, contrary to Infante's argument and given the specific facts of this case, one hour is more than enough time to satisfy the time frame needed for finding prior calculation and design.

{¶ 15} The time frame sufficient for finding prior calculation and design has been addressed in Ohio law. “Neither the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves,’ but ‘momentary deliberation’ is insufficient.” *State v. Taylor*, 78 Ohio St.3d 15, 22, 1997-Ohio-243, 676 N.E.2d 82, quoting Committee Comment to Am.Sub.H.B. No. 511; R.C. 2903.01. The Ohio Supreme Court has repeatedly recognized that some short-lived emotional situations can serve as the basis for finding the prior calculation and design element of aggravated murder. *Id.* (where defendant brought a gun to the scene and had a strained relationship with the victim, two to three minutes [from time of argument to killing] is more than instantaneous or momentary and is more than sufficient for prior calculation and design), following *State v. Claytor* (1991), 61 Ohio St.3d 234, 574 N.E.2d 472; *State v. Robbins* (1979), 58 Ohio St.2d 74, 388 N.E.2d 755; *State v. Evans*, Cuyahoga App. No. 85583, 2005-Ohio-4584.

{¶ 16} We find the record replete with evidence supporting the lower court's decision that Infante was guilty of aggravated murder. Significant evidence was

presented at the trial court level. Witness Jeannette Gomez, who had known Infante for over 20 years, testified that she was in the barbershop on September 1, 2007, when she saw him with a gun. Witness Lymarie Sanchez also identified Infante as the man who entered the shop with a gun on that same day. Moreover, Jesse Castro testified that he saw Infante confront the victim in the street in front of the barbershop. Castro further testified that he heard shots and saw Infante, with gun in hand, follow the bleeding victim into the barbershop.

{¶ 17} In addition, Yasmin Ginorio testified about the fight that Infante and the victim had at her mother's home earlier that day. Ginorio testified that the victim spit on Infante, and Infante punched the victim's car. There was also a DVD played during the trial for the jury, showing the crime as it occurred. The DVD was a recording made by a surveillance camera across the street from the barbershop. This video confirmed the sequence of events as related by Jesse Castro. Deputy Coroner Dan Galita testified that the victim died as a result of gunshot wounds to the chest.

{¶ 18} We find that the evidence demonstrates Infante acted with prior calculation and design. Here, Infante followed Feliciano from his home and tracked him to the barbershop; the incident was captured on camera; and several witnesses identified Infante as the man with the gun in the barbershop that day. Moreover, there was at least a 30-minute cooling-off period from the time of the argument until the time of the shooting. Accordingly, appellant's conviction for aggravated murder is clearly supported by sufficient evidence.

{¶ 19} Appellant's first assignment of error is overruled.

{¶ 20} Appellant argues in his second assignment of error that the lower court erred when it denied defense counsel's request for a lesser included offense jury instruction. More specifically, Infante argues that there is sufficient evidence to demonstrate that he acted under a sudden passion and/or a fit of rage.

{¶ 21} R.C. 2903.03(A) defines voluntary manslaughter as follows: "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 ***."

{¶ 22} The influence of sudden passion or a fit of rage, as described in R.C. 2903.03(A), are mitigating circumstances and not elements of the crime of voluntary manslaughter. See *State v. Tyler* (1990), 50 Ohio St.3d 24, 37, 553 N.E.2d 576; *State v. Muscatello* (1978), 55 Ohio St.2d 201, 378 N.E.2d 738.

{¶ 23} Voluntary manslaughter is an inferior degree offense of aggravated murder, not a lesser included offense. See *State v. Shane* (1992), 63 Ohio St.3d 630, 632, 590 N.E.2d 272. In *Shane*, the Ohio Supreme Court stated:

"Voluntary manslaughter is an inferior degree of murder, for "its elements are *** contained within the indicted offense, except for one or more additional mitigating elements ***." 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 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.

Thus, a defendant charged with murder is entitled to an instruction on voluntary manslaughter *when the evidence presented at trial would reasonably support both an acquittal on the charged crime of murder and a conviction for voluntary manslaughter.*"

(Emphasis added; citations omitted.) Id. at 632; see, also, *State v. Rhodes* (1992), 63 Ohio St.3d 613, 590 N.E.2d 261.

{¶ 24} The defendant bears the burden of establishing "by a preponderance of the evidence the existence of one or both of the mitigating circumstances." *Rhodes*, at 617-618. Reasonably sufficient provocation is that which is "sufficient to arouse the passions of an ordinary person beyond the power of his or her control." *Shane*, at 635. Generally, the victim's "mere words" do not constitute reasonably sufficient provocation. Id. at 637. Whether the defendant has presented evidence of reasonably sufficient provocation must be decided by the trial court as a matter of law, based on the specific case facts viewed most favorably to the defendant. Id.

{¶ 25} Here, we find that the court did not err by refusing to instruct on the inferior degree offense of voluntary manslaughter. The evidence did not reasonably permit the jury to reject the offense of aggravated murder in favor of a guilty finding on voluntary manslaughter. It is true the evidence showed Infante and Feliciano exchanged heated words and Feliciano spit on Infante. However, ample time had passed since this exchange, and there was no evidence that Infante was in fear, or acting in self-defense. Accordingly, an instruction on voluntary manslaughter was not mandated in this situation.

{¶ 26} Moreover, the jury in the case at bar returned a guilty verdict on the aggravated murder charge and *not* the lesser included straight murder charge, for which the court instructed the jury. After reviewing the evidence and considering the jury's verdict, we find no error in the lower court's denial of defense counsel's request for a lesser included jury instruction.

{¶ 27} Accordingly, appellant's second assignment of error is overruled.

It is ordered that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

LARRY A. JONES, JUDGE

COLLEEN CONWAY COONEY, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR