

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 24402

Appellee

v.

JESSIE T. MILLING

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 08 02 0574

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 24, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} Jesse T. Milling killed Charles Love in a fight, which he started because he thought Mr. Love had stolen his PlayStation video game system. A jury found Mr. Milling guilty of murder and felony murder, and the trial court sentenced him to fifteen years to life in prison. Mr. Milling has appealed his convictions, arguing that the trial court should have instructed the jury on voluntary and involuntary manslaughter, that it should have declared a mistrial after the prosecutor asked an improper question, and that his lawyer was ineffective for not objecting to the prosecutor's question. This Court affirms because what Mr. Love said to Mr. Milling was insufficient to constitute serious provocation, the prosecutor's question did not affect the fairness of the trial, and Mr. Milling's lawyer was not ineffective.

FACTS

{¶2} Darrin Jenkins testified that he was hanging out with Mr. Milling and Mr. Love one day in the summer of 2005 when Mr. Milling accused Mr. Love of breaking into his apartment and taking his PlayStation. Mr. Milling wanted to fight Mr. Love, but Mr. Jenkins stopped them. Mr. Milling later told police that, after that incident, Mr. Love offered to take him to the house of the person he thought had taken his things. They walked around for a little while, but Mr. Love could not find the house.

{¶3} According to Mr. Milling, a couple of weeks later, Mr. Love and he went fishing at Summit Lake. While they were fishing, they began discussing a second break-in at Mr. Milling's apartment. Mr. Milling said that what Mr. Love knew about the break-in led him to believe again that Mr. Love had been the one who had taken his things. He said he began arguing with Mr. Love, then started wrestling with him, and finally began fighting with him. Mr. Milling said that, at some point while they were fighting, Mr. Love was on top of him. To get Mr. Love off of him, Mr. Milling hit him in the head with a rock. Mr. Milling said that he struck Mr. Love in the head with the rock a total of six times, which killed him. The State presented expert testimony that Mr. Milling could only have caused the damage he did to Mr. Love's skull by striking him while Mr. Love was on the ground.

{¶4} A fisherman found Mr. Love's body at the lake about a week later. It had already decomposed significantly. When police interviewed Mr. Milling after recovering Mr. Love's body, Mr. Milling said that he had not seen Mr. Love and suggested that his death could have been over the sale of drugs. In February 2008, however, Mr. Milling went to a police station and told detectives that he had killed Mr. Love. He said that he was a Christian and wanted Mr. Love's family to have closure over his death.

{¶5} The Grand Jury indicted Mr. Milling for murder and felony murder. At trial, Mr. Milling repeated that he is a Christian and that he believes in forgiveness. During cross-examination, the prosecutor asked Mr. Milling to look at a photograph of the location where Mr. Love’s body was found and asked him if “[t]hat’s where you left him with your Christian faith to have that happen to him?” Mr. Milling’s lawyer did not object. At the conclusion of the testimony, Mr. Milling requested a jury instruction on voluntary and involuntary manslaughter. The trial court denied his request for an instruction on voluntary manslaughter because, according to the trial court, “under no reasonable view of the evidence is it possible for the trier of fact to find the defendant not guilty of the greater offense here of murder and guilty of the lesser offense.” It denied his request for an instruction on involuntary manslaughter because there was no evidence that Mr. Milling caused Mr. Love’s death while committing a felony “other than the felonious assault that’s part of the original murder charge.” The jury convicted Mr. Milling of murder and felony murder. Mr. Milling has appealed, assigning three errors.

JURY INSTRUCTIONS

{¶6} Mr. Milling’s first assignment of error is that the trial court incorrectly refused to let the jury consider a charge of voluntary or involuntary manslaughter. Regarding voluntary manslaughter, Section 2903.03(A) of the Ohio Revised Code provides that “[n]o 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” “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’” *State v. Shane*, 63 Ohio St. 3d 630, 632 (1992) (quoting *State v. Tyler*, 50 Ohio St. 3d 24, 36 (1990)).

{¶7} “[T]he 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.” *Id.* “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.” *Id.* “When the evidence presented at trial . . . meets this test, the trial judge must instruct the jury on the lesser (or inferior-degree) offense.” *Id.* “In making this determination, the court must view the evidence in the light most favorable to the defendant.” *State v. Smith*, 89 Ohio St. 3d 323, 331 (2000).

{¶8} The State has argued that the trial court correctly refused to give an instruction on voluntary manslaughter because there was insufficient evidence of “serious provocation occasioned by the victim.” R.C. 2903.03(A). The Ohio Supreme Court has held that, “[b]efore giving a jury instruction on voluntary manslaughter in a murder case, the trial judge must determine whether evidence of reasonably sufficient provocation occasioned by the victim has been presented to warrant such an instruction.” *Shane*, 63 Ohio St. 3d 630, at paragraph one of the syllabus. “In determining whether . . . provocation is reasonably sufficient to bring on sudden passion or a sudden fit of rage, an objective standard [applies].” *Id.* at 634. “For provocation to be reasonably sufficient, it must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control.” *Id.* at 635.

{¶9} Mr. Milling testified that he did not go to Summit Lake with the intent to kill Mr. Love. He said that, “[w]hile discussing the issue of the robbery of my house, . . . [Mr. Love] led me to believe it was not him . . . so I attempted to leave it alone.” When they began discussing “the second robbery of [Mr. Milling’s] house,” however, Mr. Milling said that Mr. Love’s

statements “led me back to believe that he once again may have robbed me . . . and it had led to an argument, and then to a wrestling match, and then into a fight.”

{¶10} Mr. Milling said that, although he and Mr. Love were arguing with each other, he “took the first step . . . to begin the wrestling match.” He admitted that he had a knife in one of his hands when he began wrestling with Mr. Love and that the knife cut Mr. Love while they were wrestling. He said the wrestling escalated into a fight while he was “attempting to get loose from wrestling.” He said that both he and Mr. Love threw punches in the fight.

{¶11} Even viewing the evidence in a light most favorable to Mr. Milling, the only evidence suggesting that Mr. Love provoked Mr. Milling was Mr. Milling’s testimony that Mr. Love said things to him leading him to believe that Mr. Love stole items from his home. The Ohio Supreme Court has held that “[w]ords alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations.” *Shane*, 63 Ohio St. 3d 630, at paragraph two of the syllabus. Mr. Love’s statements suggesting that he may have taken things from Mr. Milling’s apartment were not “sufficient to arouse the passions of an ordinary person beyond the power of his or her control” and, therefore, were not reasonably sufficient to constitute “serious provocation occasioned by the victim.” See *id.* at 634, 635.

{¶12} Mr. Milling has noted that “[c]ertain situations have been regarded as cases in which voluntary manslaughter instructions are appropriate: assault and battery, mutual combat, illegal arrest, and discovering a spouse in the act of adultery.” *State v. Cheers*, 9th Dist. No. 04CA008465, 2004-Ohio-6533, at ¶18 (citing *Shane*, 63 Ohio St. 3d at 635). He has argued that, because this case involved mutual combat, the trial court should have given a voluntary manslaughter instruction.

{¶13} The evidence does not support Mr. Milling’s contention that his fight with Mr. Love was mutual combat. “[M]utual combat” is “[a] consensual fight on equal terms – arising from a moment of passion but not in self-defense – between two persons armed with deadly weapons.” Black’s Law Dictionary 1045 (8th ed. 2004). There was no evidence that Mr. Love agreed to fight Mr. Milling at the lake or that he possessed a deadly weapon. Mr. Milling’s testimony was that he initiated contact with Mr. Love and that he was the only one with a knife. Although Mr. Love may also have thrown punches, “[w]hile one who first makes a malicious assault upon another, continues in the conflict which ensues, he can not justify taking the life of his adversary, however necessary it may be to save his own, or to whatever extremity he may be reduced.” *Stoffer v. State*, 15 Ohio St. 47, paragraph one of the syllabus (1864) (overruled on other grounds by *Mead v. McGraw*, 19 Ohio St. 55 (1869)). Accordingly, the trial court correctly refused to instruct the jury on voluntary manslaughter.

{¶14} Regarding Mr. Milling’s argument that the trial court should have given an instruction on involuntary manslaughter, this Court has determined that, “[e]ven though involuntary manslaughter is a lesser included offense of murder, a criminal defendant is only entitled to such an instruction when the evidence warrants it.” *State v. Brown*, 9th Dist. No. 20662, 2002 WL 58000 at *4 (Jan. 16, 2002). “[A] charge on such lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense.” *State v. Thomas*, 40 Ohio St. 3d 213, paragraph two of the syllabus (1988).

{¶15} “A person commits involuntary manslaughter when he causes the death of another as a proximate result of the commission of a felony, a misdemeanor of the first, second, third, or fourth degree, or a minor misdemeanor.” *State v. Platt*, 9th Dist. No. 18835, 1998 WL 887220 at

*3 (Dec. 16, 1998) (citing R.C. 2903.04(A), (B)). “In a murder case, when the evidence fails to demonstrate that a separate felony, misdemeanor, or minor misdemeanor was being committed at the time the victim was [killed], an instruction on involuntary manslaughter is not required.” *Id.* (citing *State v. Carter*, 115 Ohio App. 3d 770, 775 (1996)). Mr. Milling has not suggested what separate felony, misdemeanor, or minor misdemeanor he was committing when he killed Mr. Love. Accordingly, he has failed to demonstrate that he was entitled to an instruction on involuntary manslaughter. Mr. Milling’s first assignment of error is overruled.

FAITH QUESTION

{¶16} Mr. Milling’s second assignment of error is that the trial court incorrectly failed to declare a mistrial when the prosecutor asked him a faith-based question. Mr. Milling has argued that the prosecutor’s question: “That’s where you left him with your Christian faith to have that happen to him?” was prejudicial and inflammatory and, therefore, grounds for a mistrial. Mr. Milling’s third assignment of error is that his lawyer was ineffective because he did not object to the prosecutor’s question.

{¶17} “The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected the accused’s substantial rights.” *State v. Diar*, 120 Ohio St. 3d 460, 2008-Ohio-6266, at ¶140. “The touchstone of the analysis ‘is the fairness of the trial, not the culpability of the prosecutor.’” *Id.* (quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982)).

{¶18} Mr. Milling has argued that the prosecutor’s question violated Rule 610 of the Ohio Rules of Evidence. That rule provides that “[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness’ credibility is impaired or enhanced.” While “[t]he use of one’s

congregational affiliation to show bias is acceptable under [Rule] 610[,] [t]he use of one's religious beliefs or affiliation to attack credibility is not.” *Redman v. Watch Tower Bible & Tract Soc. of Pennsylvania*, 69 Ohio St. 3d 98, 99 (1994).

{¶19} The prosecutor's question to Mr. Milling did not violate Rule 610. The question, at most, implied that Mr. Milling's killing of Mr. Love was inconsistent with his faith. It did not suggest that he was more or less credible because of his faith. While the prosecutor's question was improper because it was argumentative, it did not deprive Mr. Milling of a fair trial. In addition, Mr. Milling has not demonstrated that his lawyer was ineffective. A lawyer's "performance will not be deemed ineffective unless and until [his] performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from [his] performance." *State v. Bradley*, 42 Ohio St. 3d 136, paragraph two of the syllabus. Mr. Milling has not shown that it is reasonably probable that the result of the trial would have been different if his lawyer had objected to the prosecutor's question. Accordingly, he has not established ineffective assistance. See *id.* at paragraph three of the syllabus ("To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."). Mr. Milling's second and third assignments of error are overruled.

CONCLUSION

{¶20} The trial court correctly refused to instruct the jury on voluntary or involuntary manslaughter, the prosecutor's question on faith did not deprive Mr. Milling of a fair trial, and Mr. Milling's lawyer was not ineffective. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
CARR, J.
CONCUR

APPEARANCES:

JILL R. FLAGG, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellee.