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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1984**

State of Minnesota,
Respondent,

vs.

Andre Francis Hall,
Appellant.

**Filed March 10, 2009
Affirmed
Collins, Judge***

Hennepin County District Court
File No. 27-CR-04-70061

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

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Considered and decided by Larkin, Presiding Judge; Hudson, Judge; and Collins, Judge.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

COLLINS, Judge

Appellant Andre Hall challenges his conviction of second-degree intentional murder for the shooting death of Denis Winfield, arguing that the district court erred by refusing to instruct the jury on the lesser-included offense of first-degree (heat of passion) manslaughter. Because the district court did not abuse its discretion by refusing to give the instruction, we affirm.

DECISION

A district court must grant a defendant's request for a lesser-included-offense instruction if (1) the lesser offense is included in the charged offense, and (2) the evidence provides a rational basis for acquitting the defendant of the charged offense while convicting him of the lesser-included offense. *State v. Dahlin*, 695 N.W.2d 588, 595 (Minn. 2005). In making this determination, the district court must view the evidence in the light most favorable to the party requesting the instruction and must not weigh the evidence or make credibility determinations. *State v. Penkaty*, 708 N.W.2d 185, 205 (Minn. 2006).

We review the denial of a request for an instruction on a lesser-included offense for an abuse of discretion. *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008); *Dahlin*, 695 N.W.2d at 597. In determining whether the district court abused its discretion by deciding that the instruction was not warranted, we view the evidence in the light most favorable to the party requesting the instruction. *Dahlin*, 695 N.W.2d at 598. Even if a district court abused its discretion by failing to give the requested instruction, we will

reverse the verdict “only if the defendant [was] prejudiced” by the district court’s failure to give the instruction. *Id.*

The threshold question under *Dahlin* is whether the lesser offense is included in the charged offense. A lesser degree of the crime charged is an “included offense.” Minn. Stat. § 609.04, subd. 1 (2008). Every lesser degree of murder is intended by section 609.04 to be characterized as an “included offense.” *State v. Leinweber*, 303 Minn. 414, 421, 228 N.W.2d 120, 125 (1975). First-degree heat-of-passion manslaughter is a lesser-included offense of second-degree intentional murder—the crime charged here. *See State v. Hannon*, 703 N.W.2d 498, 509 (Minn. 2005).

The more difficult inquiry is whether the evidence provides a rational basis for acquitting Hall of the charged offense while convicting him of the lesser-included offense. *See State v. Griffin*, 518 N.W.2d 1, 3 (Minn. 1994) (holding that district court is required to submit instruction only if there was rational basis to convict on lesser crime and acquit on greater crime). Such a rational basis exists only if sufficient evidence was presented to find that (1) Hall shot and killed Winfield in the heat of passion, and (2) Hall’s passion was provoked by words or acts that would provoke a person of ordinary self-control under similar circumstances. *See State v. Brocks*, 587 N.W.2d 37, 41 (Minn. 1998).

Heat of Passion

Although the district court did not address “heat of passion,” Hall argues that his “emotional state at the time of the killing was consistent with heat of passion.” “The first element of the heat of passion defense is subjective: whether the killing was actually

committed in the heat of passion. The defendant's emotional state at the time of the killing is of primary importance," although "[a] defendant's behavior before, during and after the crime is relevant" *State v. Carney*, 649 N.W.2d 455, 461 (Minn. 2002) (citation omitted); *see also State v. Shepherd*, 477 N.W.2d 512, 515 (Minn. 1991) (stating that first inquiry requires subjective analysis with primary focus on emotional status of defendant). To qualify for the voluntary manslaughter instruction, the heat of passion must "cloud[] a defendant's reason and weaken[] his willpower. Anger alone is not enough." *Carney*, 649 N.W.2d at 461 (citation omitted).

Prior to the shooting, Hall and his girlfriend went to a convenience store for cigarettes. Winfield, a store employee, and M.G., a customer, were the only two others there. Hall and Winfield argued after Hall said to M.G. "Quit looking at my woman, faggot," or "Why you looking at my girl?", and Winfield told Hall that he could not "speak to our customers like that." Hall's girlfriend was embarrassed by his behavior, and when Hall refused to leave the store, she returned to her apartment without him. At some point Winfield came from behind the cashier's booth, locked the store door, and demanded that Hall put back the items he could not pay for. Hall challenged Winfield to a fight and, referring to the cashier's booth, said, "[This] glass isn't going to save you." But after Hall put back the items, Winfield unlocked the door and Hall left. After leaving the store, Hall was attacked by three unidentified persons, and the fight ended after Winfield went out and announced that he would call the police.

Witnesses agree that Hall was bloody, bruised, and angry when he arrived at his girlfriend's apartment. Hall berated his girlfriend for leaving him at the store alone,

grabbed her by the shoulders and shook her, and threw and broke two telephones. While still visibly angry, Hall armed himself and left the apartment. Hall returned to the vicinity of the convenience store ostensibly in search of his three attackers. There, outside the store, Hall confronted, shot, and killed Winfield.

Viewed, as *Dahlin* requires, in the light most favorable to Hall, the evidence of Hall's emotional state *before* the shooting supports his claim that the events of the evening had clouded his mind and weakened his willpower.

However, Hall's behavior *after* the shooting demonstrates that he was capable of rational thought and was not acting with a clouded mind or weakened willpower. Immediately after the shooting, Hall fled the scene and returned to his girlfriend's apartment. Although the girlfriend testified that Hall appeared calmer, a witness, C.S., testified that when Hall returned, he "looked the same way he looked when he left" and she had difficulty understanding what Hall was saying because he was still angry. Hall told C.S. that he "killed that n---r," and he demonstrated the act by pointing "the gun and [saying], pop, pop, pop." Another witness to this conversation, P.S., testified that Hall acted nonchalantly. Hall then asked C.S. to dispose of the gun and gave her instructions on how to wipe it off and where to throw it.

Viewing this evidence in the light most favorable to Hall, Hall's actions, statements, and instructions to others *after* the shooting demonstrate that he was capable of rational thought and that he was not acting with a clouded mind or weakened willpower.

Moreover, the Minnesota Supreme Court has routinely held that the most important heat-of-passion factor is the defendant's emotional state at the time of the killing. *See State v. Johnson*, 719 N.W.2d 619, 626-27 (Minn. 2006). M.G., the only eyewitness to the shooting, testified that Winfield was outside of the store to change bags in the trash cans when Hall came straight toward Winfield and pulled a gun from the waistband of his pants "as soon as he got up next to him." Winfield's act of dropping the trash bags is consistent with Hall's theory that Winfield was ready to fight or to defend himself. But evidence that Winfield sustained gunshot wounds to his chest, arm, shoulder, and skull undermines Hall's assertion that Winfield was shot during a struggle and is consistent with M.G.'s testimony that Hall simply approached Winfield and shot him repeatedly at point-blank range.

Although the district court made no findings supporting the refusal of Hall's proposed lesser-included-offense instruction, viewing the record most favorably to Hall, his acts of going to his girlfriend's apartment to arm himself, returning to the convenience store, and repeatedly shooting Winfield do not support a finding that the killing was done in the heat of passion.

Adequate Provocation

The second prong of the heat-of-passion defense, whether the acts and words were sufficient to provoke a person of ordinary self-control under the circumstances, requires an objective analysis. *State v. Buntrock*, 560 N.W.2d 383, 387 (Minn. 1997); *see also State v. Van Keuren*, 759 N.W.2d 36, 40 (Minn. Dec. 2008) (stating that "the legislature

created heat of passion to mitigate culpability for a killing when the defendant behaves as a reasonable person would behave.”).

First, Hall notes that “[t]he comments to the first-degree manslaughter statute specifically list ‘assault’ as a circumstance that would provoke a reasonable man under like circumstances.” One comment to section 609.20 states:

The usual test developed by courts is whether a reasonable man under like circumstances would be so provoked. The situations principally recognized are: assault, finding a spouse in an act of adultery, seduction of daughter, rape of close relative, and a few others. Words and civil trespasses are not considered sufficient provocation.

Minn. Stat. Ann. § 609.20 advisory comm. cmt. (West 2003). This comment, however, does not state that in *all* cases of assault there is sufficient provocation to satisfy the objective prong required for a heat-of-passion instruction. Moreover, even if that were true, there is no evidence in the record to support Hall’s claim that he was assaulted by Winfield. There is only evidence that Winfield freed his hands by dropping the trash bags before he was shot.

Second, Hall argues that other than being assaulted by Winfield, the attack by the three unidentified assailants (coupled with another attack earlier in the week) was adequate provocation to support the heat-of-passion instruction. In *State v. Stewart*, the Minnesota Supreme Court addressed the issue of whether the heat-of-passion instruction may be given if the provocateur is someone other than the victim. 624 N.W.2d 585, 588-90 (Minn. 2001). The supreme court held that in some circumstances “section 609.20 permits the transference of heat of passion from a provocateur to a victim who is not a

provocateur” when a person of ordinary self-control would have been provoked to do so under the same circumstances. *Id.* at 590. The state contends that Hall cannot reasonably transfer provocation from the prior attack by the three unidentified persons to the shooting of Winfield. We agree.

It is undisputed that Hall was attacked by unidentified assailants after he left the convenience store and that he also had been attacked sometime earlier in the week. But Hall’s post-attack actions and the length of time that passed between the attack by the three assailants and the shooting of Winfield, together with the fact that it was Winfield’s intervention that ended the attack, negates a conclusion that a rational jury could find that a person of ordinary self-control would transfer provocation by the assailants to Winfield in these circumstances.

On this record, the district court did not abuse its discretion by refusing to give the first-degree (heat of passion) manslaughter instruction.

Prejudice

Because we determine that Hall failed to establish that the district court erred by failing to give the proposed lesser-included-offense instruction, we need not address the *Dahlin* factor of prejudice.

Affirmed.