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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0660**

State of Minnesota,
Respondent,

vs.

Fue Her,
Appellant.

**Filed March 23, 2020
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge**

Anoka County District Court
File No. 02-CR-18-105

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Johnson, Judge; and Slieter, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his convictions and sentences for second-degree intentional murder and second-degree felony murder for the death of his girlfriend following a court

trial. He argues that the district court erred by (1) failing to determine whether he was also guilty of the lesser-included offense of first-degree manslaughter (heat of passion), and (2) convicting him of both second-degree murder and second-degree felony murder. We observe no error in the district court's failure to make express findings regarding the manslaughter offense but reverse and remand for the district court to vacate the second-degree felony murder conviction.

FACTS

On December 31, 2017, appellant Fue Her killed his girlfriend, L.V., at his Fridley apartment. L.V.'s body was discovered the next afternoon in the third-row seat of Her's SUV. Police recovered security-camera videos showing what appeared to be Her and L.V. enter his apartment at about 2:44 a.m. on December 31. No other person entered or left the apartment until Her carried L.V.'s limp body out over his shoulders at about 4:01 a.m. Police located bloody towels and clothing in Her's garbage, and also found blood evidence in the apartment hallway and on a sofa inside the apartment. Police arrested Her on January 2.

At the time of her death, L.V. was 5'2" tall and weighed 120 pounds. Her is about 5'10" or 5'11" tall and weighs about 260 pounds. The medical examiner determined that L.V. died from "multiple blunt force injuries and strangulation." She had a closed head injury with injuries to her face and chin, neck injuries consistent with strangulation, deep hemorrhages in her lower back, a lacerated liver, and "numerous bruises and abrasions" on her arms and legs.

The state charged Her with second-degree intentional murder and second-degree felony murder. Before trial, Her asserted a self-defense claim and argued that his voluntary intoxication negated an intent to commit murder. He also moved to submit for consideration the lesser-included offenses of first-degree manslaughter (heat of passion), Minn. Stat. § 609.20, subd. 1 (2016), and first-degree manslaughter (while committing a misdemeanor), Minn. Stat. § 609.20, subd. 2 (2016). The state agreed, and the case proceeded to a court trial.

Her testified that he and L.V. had been drinking and using cocaine on the night in question.¹ They were not arguing or fighting. But when they retired to the bedroom, L.V., who liked “rough sex,” was more aggressive than usual.² At some point, L.V. began striking him. This was not unusual, but when he finally struck her back, “[s]he got more violent.” He eventually had to kick L.V. off him two or three times. She fell from the bed to the floor; Her realized she was injured because she was “on the ground moaning.” Her carried L.V. to his SUV, intending to take her to a nearby hospital. But he instead drove around for 15-20 minutes before realizing that L.V. was dead. Her sent his brother a text message at 4:55 a.m. stating, “I’m in big trouble bro. I f-cked up I need ur help now[.]” Her then drove to Duluth to visit his father’s grave.

In finding Her guilty of both second-degree murder offenses, the district court specifically found that Her’s testimony was not credible. The district court made no finding

¹ L.V.’s blood contained cocaine and methamphetamine, and narcotics metabolites.

² Her testified that their “rough sex” included “grabbing, hair pulling, [and] tugging on clothes.” His testimony was corroborated by the testimony of a former boyfriend.

as to whether Her committed manslaughter, concluding it need not do so because it found Her guilty on the murder charges. At sentencing, the court convicted Her of both murder offenses. But the court imposed a single 367-month sentence on the second-degree intentional murder conviction, an upward durational departure. Her appeals.

D E C I S I O N

I. The district court did not err by failing to make an express finding on the lesser-included offense of first-degree (heat of passion) manslaughter.

A defendant may be convicted of the offense charged or an included offense, but not both. Minn. Stat. § 609.04 (2016). An included offense is “[a] crime necessarily proved if the crime charged were proved.” *Id.* A district court must instruct a jury on a lesser-included offense if “(1) the offense in question is an included offense; and (2) a rational basis exists for the jury to convict the defendant of the lesser-included offense and acquit the defendant of the greater crime.” *State v. Slaughter*, 691 N.W.2d 70, 76 (Minn. 2005). This standard also applies in court trials. *Id.* at 76-77. Failure to submit a lesser offense to a fact-finder “is a ground for reversal only if defendant is prejudiced thereby.” *Bellcourt v. State*, 390 N.W.2d 269, 273 (Minn. 1986).

Heat-of-passion manslaughter is a lesser-included offense of second-degree intentional murder. *State v. Johnson*, 719 N.W.2d 619, 626 (Minn. 2006). A person commits second-degree intentional murder if the person “causes the death of a human being with intent to effect the death of that person or another, but without premeditation.” Minn. Stat. § 609.19, subd. 1 (2016). A person commits first-degree manslaughter if the person “intentionally causes the death of another person in the heat of passion provoked by such

words or acts of another as would provoke a person of ordinary self-control under like circumstances.” Minn. Stat. § 609.20, subd. 1; see *Stiles v. State*, 664 N.W.2d 315, 322 (Minn. 2003) (“Two elements are necessary for an intentional killing to be mitigated to heat-of-passion manslaughter—the defendant must kill in the heat of passion and the provocation must have been sufficient to induce a person of ordinary self-control under like circumstances.”). Our supreme court has described the difference between intentional murder and heat-of-passion manslaughter as follows:

Whether a person who kills is guilty of first-degree manslaughter or murder depends primarily upon the state of his emotions. If he was in the “heat of passion,” this would cloud his reason and weaken his willpower and therefore, in the eyes of the law, reduce the criminal culpability of the death-producing act. But, “hot blood” is not a complete excuse for the killing of another. It is an extenuating circumstance which the law considers in fixing the measure of the guilt and the consequent punishment for it. It is only when the conduct of others would provoke a person of ordinary self-control under like circumstances that the fact that the killing was done “in the heat of passion” becomes relevant to this extent.

State v. Boyce, 170 N.W.2d 104, 112 (Minn. 1969).

Her argues that the district court’s findings are incomplete because “intent—on its own—does not preclude a finding that the killing was committed in the heat of passion.” We disagree because we are not persuaded that the evidence supports a rational basis for acquitting Her of intentional murder and convicting him of heat-of-passion manslaughter.

First, the evidence does not support a finding that Her acted in the heat of passion. The first heat-of-passion manslaughter element is subjective. *State v. Carney*, 649 N.W.2d 455, 461 (Minn. 2002). A person’s “emotional state at the time of the killing” is paramount

in “determining whether the killing occurred in the heat of passion.” *State v. Van Keuren*, 759 N.W.2d 36, 40 (Minn. 2008) (quotation omitted). “[A]nger alone” does not constitute heat of passion. *Id.*; see *State v. Swain*, 269 N.W.2d 707, 715 (Minn. 1978) (ruling that a “mere finding that the defendant was angry, without some evidence of the victim’s acts or words, is insufficient to support a finding of ‘heat of passion’ manslaughter”). Other than wanting a person half his size to stop hitting him, Her offered no explanation as to how L.V.’s words and actions in the moments preceding her death provoked his violent response. And his suggestion that his two or three kicks and L.V.’s resulting fall to the floor caused her death is inconsistent with the number and location of her extensive injuries. L.V. sustained blunt force internal and external injuries throughout her entire body, resulting in a traumatic brain injury, lacerated liver, broken thyroid cartilage consistent with strangulation, and bruising throughout her body. These injuries go far beyond those that would be expected from two or three kicks occasioned by a momentary loss of self-control during “rough sex.”

A person’s “behavior before, during and after the crime is relevant to whether the crime was committed in the heat of passion.” *Carney*, 649 N.W.2d at 461. There is no evidence that Her and L.V. were arguing or physically fighting before they began having sex. And Her’s calculated actions after he inflicted the fatal injuries belie his contention that he momentarily lost control. Rather than seek help when he noticed that L.V. was injured, he carried her over his shoulders to his vehicle and drove around until she died. He then called and texted his brother and drove to Duluth and back. Upon his return, Her cleaned his apartment and repositioned L.V.’s body in his SUV. This “rational, calculating

and controlled” state of mind is inconsistent with heat of passion. *State v. Stewart*, 624 N.W.2d 585, 591 (Minn. 2001); see *State v. Radke*, 821 N.W.2d 316, 328 (Minn. 2012) (finding no error in the district court’s denial of a heat-of-passion jury instruction when “there was no rational basis upon which a jury could have found [the defendant] acted in the subjective heat of passion”).

Second, the evidence does not support a finding that a person exercising ordinary self-control would have killed L.V. under like circumstances. An intentional killing is not mitigated when the provocative act would not “induce a person of ordinary self-control under like circumstances” to kill. *Stiles*, 664 N.W.2d at 322. “[A] ‘person of ordinary self-control’ does not include a person under the influence of intoxicants or a controlled substance.” Minn. Stat. § 609.20 (2016). Her testified that he was impaired when he killed L.V. because he had been ingesting alcohol and cocaine for hours. This testimony establishes that he was not a “person of ordinary self-control” whose culpability should be mitigated by L.V.’s conduct—a person of ordinary self-control would not have been provoked under the circumstances existing at the time of L.V.’s death.³ See *State v. Bird*, 734 N.W.2d 664, 677 (Minn. 2007) (ruling that “[b]ecause the reasonableness of a defendant’s provocation is an objective determination,” the fact-finder was not to consider

³ The district court rejected Her’s voluntary-intoxication defense, finding that Her’s testimony regarding his level of intoxication was not credible and that the numerous, diffuse, and serious injuries Her inflicted proved that he “acted with the purpose of killing” L.V. Her does not argue that this finding requires a determination that he was a “person of ordinary self-control.”

the fact of defendant's psychosis in determining whether a person of reasonable self-control would have been provoked under like circumstances).

In sum, the evidence does not provide a rational basis to convict Her of first-degree manslaughter. Her's admitted conduct bears "none of the characteristics of the outrage and loss of self-control" that are hallmarks of heat-of-passion manslaughter. *Stewart*, 624 N.W.2d at 591. Because Her cannot show that he was prejudiced by the district court's failure to make express findings regarding the lesser offense, we affirm the district court's findings of guilt on the second-degree murder charges. *See State v. Zumberge*, 888 N.W.2d 688, 697 (Minn. 2017) ("A defendant is prejudiced when the [fact-finder] may have convicted the defendant of only the lesser offense had the lesser-included-offense instruction been given.").

II. The district court erred by entering a conviction for second-degree felony murder.

As noted above, a defendant "may be convicted of either the crime charged or an included offense," which is defined to include "a crime necessarily proved if the crime charged were proved." Minn. Stat. § 609.04, subd. 1(4). Because "[s]econd-degree felony murder does not require a showing of intent," *State v. Dimmick*, 586 N.W.2d 127, 129 (Minn. 1998), it is a "lesser-included offense of second-degree intentional murder," *State v. Lory*, 559 N.W.2d 425, 426 (Minn. App. 1997) (syllabus), *review denied* (Minn. Apr. 15, 1997). *See State v. Leinweber*, 228 N.W.2d 120, 125 (Minn. 1975) (stating that every lesser degree of murder is an "included offense" for purposes of Minn. Stat. § 609.04).

The state concedes that the district court erred by entering convictions on both second-degree murder offenses. We agree. When a district court erroneously convicts on both a crime and a lesser-included offense, the proper disposition on appeal is to reverse the lesser conviction “and remand to the district court with instructions to vacate that conviction” but leave intact the determination of guilt on that conviction. *State v. Hallmark*, 927 N.W.2d 281, 300 (Minn. 2019). Accordingly, we reverse and remand for the district court to vacate Her’s second-degree felony murder conviction.

Affirmed in part, reversed in part, and remanded.