

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GENESIS KEVIN XAVIER LEWIS,

Defendant-Appellant.

UNPUBLISHED

September 09, 2026

8:52 AM

No. 369675

Kent Circuit Court

LC No. 22-007617-FC

Before: BOONSTRA, P.J., and YOUNG and KOROBKIN, JJ.

BOONSTRA, P.J. (*concurring in part and dissenting in part*).

I respectfully dissent from the majority’s finding of instructional error, and accordingly I dissent from its decision to vacate defendant’s conviction and to remand for a new trial. I otherwise concur in the majority opinion.¹

I. VOLUNTARY MANSLAUGHTER

The trial court did not err by not instructing the jury on voluntary manslaughter as a lesser included offense of second-degree murder. Such an instruction was never requested by defense counsel, defense counsel was not ineffective in failing to request the instruction, and the trial court was not required to provide the instruction sua sponte.

A. THE TRIAL COURT DID NOT ERR BY NOT INSTRUCTING ON VOLUNTARY
MANSLAUGHTER SUA SPONTE

Generally, a trial court has no duty to instruct a jury sua sponte on lesser included offenses when counsel has not requested it. *People v Reese*, 242 Mich App 626, 629 n 2; 619 NW2d 708 (2000). Our Supreme Court has instructed that “with the *sole exception* of first degree murder

¹ Defendant, in his Standard 4 Brief and through counsel, raised several other issues that the majority did not address because it vacated defendant’s convictions on the basis of the supposed error in the jury instructions. Like the majority, I express no opinion regarding those other issues.

cases, failure of the trial court to instruct on lesser included offenses will not be regarded as reversible error, absent requests for such instructions before the jury retires to consider its verdict.” *People v Henry*, 395 Mich 367, 374; 236 NW2d 489 (1975) (emphasis added). In other words, it is only “in every trial for first-degree murder, including felony murder, [that] the trial court is required to instruct the jury *sua sponte*, and even over objection, on the lesser included offense of second-degree murder.” *People v Jenkins*, 395 Mich 440, 442; 236 NW2d 503 (1975), overruled in part on other grounds *People v Cornell*, 466 Mich 335, 357-358; 626 NW2d 127 (2002) (overruling *Jenkins* to only to the extent that it conflicts with the Court’s holding that an instruction on a lesser included offense is proper only if “a rational view of the evidence would support it”).

I appreciate that *Henry* and *Jenkins* were decided long before our Supreme Court recognized voluntary manslaughter and common-law involuntary manslaughter as lesser included offenses of second-degree murder. See *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). But the majority wrongly seems to assume that *Mendoza* somehow altered the rule set forth in *Henry* and *Jenkins*. It did not. *Mendoza* simply held that manslaughter is a necessarily included lesser offense of murder, and that a manslaughter instruction therefore “is warranted when a rational view of the evidence would support it.” *Id.* at 548. But it reached that conclusion in the context of a defense request for a manslaughter instruction, and *Mendoza* is therefore entirely consistent with the general rule set forth in *Henry* and *Jenkins*. *Mendoza* did not in any way alter that general rule so as to require a trial court to *sua sponte* provide a manslaughter instruction. Indeed, as the concurring Justice in *Mendoza* noted, *Mendoza* merely “affirms that a defendant facing a murder charge *may request* a manslaughter instruction if supported by the evidence.” *Id.* at 555 (CAVANAUGH, J., concurring) (emphasis added).²

Our Supreme Court could, of course, expand the holding of *Henry* and *Jenkins* to require a trial court to *sua sponte* provide a manslaughter jury instruction even if not requested by defense counsel. But it did not do so in *Mendoza*, nor has it done so elsewhere. Indeed, the Supreme Court in *Henry* long ago announced its intention to formulate a court rule that would address all circumstances in which *sua sponte* instructions are required:

We have not yet been able to establish and consistently follow a rule which would require the trial judge to instruct on lesser included offenses without relying on requests from counsel. That is the goal toward which we are striving. It is our intention to formulate a court rule which will require instructions on lesser included

² I note that defense counsel in *Mendoza*, 478 Mich at 530, requested both a voluntary manslaughter instruction and a common-law involuntary manslaughter instruction. The trial court denied both requests. On appeal, this Court held that the trial court did not err by denying the voluntary manslaughter instruction, but that it did err by denying the involuntary manslaughter instruction, and it therefore reversed and remanded for a new trial. *Id.* at 530-531. Our Supreme Court, as noted, held that both instructions should have been given if supported by a rational view of the evidence, yet it held that the involuntary manslaughter instruction was not warranted. *Id.* at 555. It reinstated the defendant’s conviction without further addressing the requested voluntary manslaughter instruction. *Id.*

offenses in every appropriate case, without requests from counsel. [*Henry*, 395 Mich at 374.]

It appears that those plans never came to fruition. Until our Supreme Court revisits this issue, we are left with the general rule that instructions on lesser included offenses are not required unless requested by counsel, with the “sole exception” of an instruction on second-degree murder as a lesser included offense of first-degree murder. *Jenkins*, 395 Mich at 442. This case does not fall into that exception, so the trial court did not err when it did not instruct the jury on voluntary manslaughter sua sponte.

B. THE EVIDENCE DID NOT SUPPORT A VOLUNTARY MANSLAUGHTER INSTRUCTION IN ANY EVENT

Furthermore, by noting that voluntary manslaughter was not at issue in this case, the trial court essentially held that the evidence did not support a voluntary manslaughter theory, which made the voluntary manslaughter instruction inapplicable. A trial court’s determination of whether an instruction applies to the facts of a case is reviewed for an abuse of discretion. *People v Mitchell*, 301 Mich App 282, 286; 835 NW2d 615 (2013). “[T]o show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions.” *Mendoza*, 468 Mich at 535. This principle “reflects the philosophical distinction between emotions that only cause choice and emotions so intense that they distort the very process of choosing.” *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991) (quotation marks and citation omitted).

In *Pouncey*, the defendant, the victim, and several other individuals got into a verbal argument outside of a house. *Id.* at 384-385. The victim called the defendant names and threatened to put him “on his head.” *Id.* at 384. The defendant disengaged from the argument, walked into the house, retrieved a shotgun from a closet, then returned to the scene of the argument. *Id.* at 385. As he came out of the house, he instructed another person to hit the victim with a monkey wrench, but the victim ducked out of the way. *Id.* The defendant then shot and killed the victim. *Id.* Our Supreme Court held that the trial court properly denied the defendant’s request for a voluntary manslaughter instruction in part because the defendant was not acting in the heat of passion. *Id.* at 390.

This case is similar to *Pouncey* in that defendant disengaged from the altercation, left to retrieve his guns, and then returned. Both defendants also initially chose the less lethal option available to them—the defendant in *Pouncey* initially chose to have the victim attacked with a monkey wrench, and defendant in this case chose to use his gun with the less dangerous ammunition. He did not see his father “on the ground and being jumped by multiple individuals” until *after* he had retrieved his guns and was returning to the fight. These facts indicate that “[e]ven if he was scared and confused, his decision to retrieve the gun[s] was a deliberate and reasoned act.” *Id.* Unlike the defendant in *Pouncey*, who testified that he was not angry, defendant in this case testified that he was “angry,” that he “had a lot of adrenaline going” and was emotionally overwhelmed, but he nonetheless stated that his intention in aiming his gun was “to get them off my dad.” He also testified that as he was grabbing his guns, he noticed someone run past, and he was “wondering who the guy was” because that man “wasn’t involved at first.” When he shot into

the crowd, he consciously chose to shoot the gun he was holding in his left hand because he did not want to use the more lethal gun in his right hand.³ Therefore, defendant's own testimony indicates that "his emotional state did not reach such a level that he was unable to act deliberately." *Id.* Despite the anger, adrenaline, and flood of emotions,⁴ defendant remained aware of his surroundings well enough to identify others around him, and he reasoned that to get the attackers away from his father, he should only use the less lethal of the two guns. A person who is overwhelmed by "emotions so intense that they distort the very process of choosing" would not be able to identify a specific goal and analyze the best available means to achieve that goal. *Id.* at 389 (quotation marks and citation omitted). Given these facts, the trial court did not abuse its discretion by determining that the voluntary manslaughter instruction was inapplicable, so it would not have been required to give the instruction even if defense counsel had requested it. MCR 2.512(D)(2).

C. DEFENSE COUNSEL WAS NOT INEFFECTIVE IN NOT REQUESTING A VOLUNTARY MANSLAUGHTER INSTRUCTION

Because it apparently relies on a nonexistent duty to sua sponte give a voluntary manslaughter instruction, the majority does not contend that defense counsel was ineffective for failing to request the instruction. But clearly he was not. To succeed on a claim of ineffective assistance, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). There is a "strong presumption that counsel's performance was born from a sound trial strategy." *Id.* at 52. "Even if the defense counsel does not request a jury instruction that the trial court would have been required to grant, that decision may be a matter of sound trial strategy." *People v Geary*, ___ Mich App ___, ___; ___ NW3d ___ (2025) (Docket No. 371889); slip op at 3. For example, the defense counsel may reasonably decide not to request an instruction (even if supported by the evidence) if the instruction is "inconsistent with the primary defense theory," which "could confuse the jury and weaken both defenses." *Id.* at 5.

In this case, defense counsel's primary defense theory was that after seeing his father tackled to the ground by his attackers, defendant fired into the crowd in lawful defense of his father. During his closing argument, defense counsel also emphasized that defendant never intended to kill anyone because between his two guns, he chose to fire the one with less damaging ammunition, he only fired about a third of the bullets in the magazine, and he waited for police to arrive after the shooting. This theory of the case was consistent with the instructions on defense of others and statutory involuntary manslaughter⁵—instructions that defense counsel requested and

³ Defendant testified that although he was left-handed, he had trained to shoot a gun with his right hand, just as he had learned to shoot a basketball with his right hand. He nonetheless chose to shoot the gun he was holding in his left hand.

⁴ As our Supreme Court noted in *Pouncey*, "[t]he law cannot countenance the loss of self-control; rather, it must encourage people to control their passions." *Pouncey*, 437 Mich at 389.

⁵ The relevant involuntary manslaughter statute, MCL 750.329(1), states that "[a] person who wounds, maims, or injures another person by discharging a firearm that is pointed or aimed

that the trial court gave to the jury. But the theory was inconsistent with voluntary manslaughter, which is an impulsive killing resulting not from malice, but from a heat of passion and not from an exercise of deliberation, judgment, and reflection. See *Mendoza*, 468 Mich at 541. Furthermore, defense counsel may have been concerned that the jury would be confused about whether defendant's decision to shoot should be considered the lawful defense of another (which allows the jury to "consider how the excitement of the moment affected the choice the defendant made," M Crim JI 7.21), or voluntary manslaughter (which requires the jury to consider whether the defendant was "disturbed by emotional excitement," M Crim JI 16.9). The instructions are not inconsistent, but the distinction between the two can be very nuanced and difficult to apply.

Defense counsel employed a sound trial strategy: his "Plan A" was to argue for acquittal on a defense-of-others theory. If the jury did not believe that defendant was lawfully defending his father, then his "Plan B" was to present involuntary manslaughter as an alternative to murder because defendant was only trying to scare or mildly injure the alleged victim to break up the fight. Introducing voluntary manslaughter as a "Plan C" could have confused the jury and could have increased the risk that defendant would be convicted of voluntary manslaughter when he otherwise might have been acquitted. Therefore, regardless of whether a rational view of the evidence supported an instruction on voluntary manslaughter, defense counsel's decision not to request the instruction did not fall below an objective standard of reasonableness. See *Trakhtenberg*, 493 Mich at 51. Accordingly, defendant was not denied the effective assistance of counsel on that basis.

II. MITIGATING CIRCUMSTANCES

The majority also finds error in the trial court's denial of defendant's requested mitigating-circumstances instruction, M Crim JI 17.4. The majority notes that "[t]he principles underlying the mitigating-circumstances instruction flow from our state's voluntary-manslaughter jurisprudence," and that "these instructions ought to have traveled together." To that extent, I agree. Because the trial court did not err by not giving a voluntary manslaughter instruction, it also did not err by denying defendant's requested mitigating-circumstances instruction.

A trial court is only required to use a model criminal jury instruction if it is applicable, accurately states the applicable law, and is requested by a party. MCR 2.512(D)(2). "The elements of assault with intent to commit murder [AWIM] are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Ericksen*, 288 Mich App 1912, 195-196; 793 NW2d 120 (2010) (quotation marks and citation omitted). It is well established that a defense to AWIM exists when the killing would have been manslaughter instead of murder. *Maher v People*, 10 Mich 212, 217 (1862). See also *People v Lipps*, 167 Mich App 99, 206; 421 NW2d 586 (1988) ("[I]f a defendant would have been guilty of manslaughter had the assault resulted in death (due to an absence of malice), there can be no conviction of assault with intent to

intentionally but without malice at another person is guilty of manslaughter if the wounds, maiming, or injuries result in death." This crime differs from common-law involuntary manslaughter in that it contains two additional elements: "(1) that the death resulted from the discharge of a firearm and (2) that the defendant intentionally pointed a firearm at the victim." *People v Smith*, 478 Mich 64, 72; 478 Mich 1201 (2007).

murder.”). That is why the requested jury instruction, M Crim JI 17.4, directs the jury to consider a hypothetical scenario in which the alleged victim had actually died:

(1) The defendant can only be guilty of the crime of assault with intent to commit murder if [he / she] would have been guilty of murder had the person [he / she] assaulted actually died. If the assault took place under circumstances that would have reduced the charge to manslaughter if the person had died, the defendant is not guilty of assault with intent to commit murder.

(2) Voluntary manslaughter is different from murder in that for manslaughter, the following things must be true:

(3) First, when the defendant acted, [his / her] thinking must have been disturbed by emotional excitement to the point that an ordinary person might have acted on impulse, without thinking twice, from passion instead of judgment. This emotional excitement must have been caused by something that would cause an ordinary person to act rashly or on impulse. The law does not say what things are enough to do this. That is for you to decide. [If the defendant is mentally or emotionally impaired in some way, you may consider that.]

(4) Second, the killing itself must have resulted from this emotional excitement. The defendant must have acted before a reasonable time had passed to calm down and before reason took over again. The law does not say how much time is needed. That is for you to decide. The test is whether a reasonable time passed under the circumstances of this case.

(5) If you find that the crime would have been manslaughter had the person died, then you must find the defendant not guilty of assault with intent to murder [and decide whether (he / she) is guilty of any lesser offense].

M Crim JI 17.4 is not necessarily inaccurate—it correctly states the elements for voluntary manslaughter and that the defendant cannot be guilty of AWIM if a completed killing would have been manslaughter rather than murder. But in the context of this case, the instruction would have been misleading and confusing to the jury. Paragraph (2) states that “voluntary manslaughter is different from murder,” but then it frames the following list of requirements as the elements “for manslaughter.” But the jury had already heard instructions for statutory involuntary manslaughter, which was charged as an alternate theory to second-degree murder.⁶ If the jury was also instructed with M Crim JI 17.4, then it would hear the elements of two different forms of manslaughter, but only the involuntary manslaughter elements would be associated with the murder charge, and only

⁶ The trial court described the statutory involuntary manslaughter as a “lesser included offense” of second-degree murder and instructed the jury to only consider the charge if it found defendant not guilty of second-degree murder. But unlike common-law involuntary manslaughter, statutory involuntary manslaughter is not a lesser included offense of second-degree murder. *Smith*, 478 Mich at 71.

the voluntary manslaughter elements would be associated with the AWIM charge (and somehow those elements are simply referred to as “manslaughter”). This scenario could be confusing to a jury—should it consider involuntary manslaughter as a defense to AWIM? Should it consider voluntary manslaughter when determining defendant’s guilt on the murder charge? One instruction would likely influence the jury’s deliberation on the other.

The instructions for statutory involuntary manslaughter and mitigating circumstances as a defense to AWIM “are not inherently in conflict,” but they would likely leave the jury “understandable confused.” *People v Nelson*, ___ Mich ___, ___; ___ NW3d ___ (2025) (Docket No. 166297); slip op at 12. Under these circumstances, relying on the presumption that jurors follow their instructions “is overly simplistic here, where it was likely unclear to the jury how to apply the jury instructions.” *Id.* The trial court noted that the mitigating-circumstances instruction would likely confuse the jury given that voluntary manslaughter was not at issue for the murder charge, and it did not err when it denied defendant’s request for that instruction.

For the reasons stated, and while I concur in part in the majority opinion, I respectfully dissent from the majority’s finding of instructional error and from its resulting decision to vacate defendant’s conviction and to remand for a new trial.

/s/ Mark T. Boonstra