IN THE SUPREME COURT OF THE STATE OF NEVADA

ERNEST KENT SIMKINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51863

FILED

JUL 06 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count of voluntary manslaughter. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge. The district court sentenced appellant Ernest Kent Simkins to serve a prison term of 16 to 72 months with credit for 165 days time served.

Simkins contends that the district court erred by instructing the jury on a lesser-included offense over his objection. Simkins claims that the district court erroneously relied upon Lisby v. State, 82 Nev. 183, 414 P.2d 592 (1966), because (1) his defense was that he did not kill the victim and (2) the district court based its decision to give the lesser-included instruction on "evidence [that] was solely from [the] attitude of prosecution's cross-examination and not based on any admission [by him] in response to it."

We have observed that "NRS 175.501 makes no distinction between prosecution and defense in providing that a defendant 'may be found guilty of an offense necessarily included in the offense charged,'" and we have sustained the propriety of instructions on lesser-included offenses obtained by the State over defendant's objections. Rosas v. State,

122 Nev. 1258, 1268, 147 P.3d 1101, 1108 (2006). We have "held that if there is any evidence to support a lesser-included offense, the trial court should instruct on it, leaving the jury to determine all questions of fact about which there might be any controversy among reasonable men." Id. at 1268-69, 147 P.3d at 1108-09 (internal quotation marks and citations omitted). And we have consistently held that manslaughter, whether voluntary or involuntary, is necessarily included in a charge of murder. See Wrenn v. Sheriff, 87 Nev. 85, 87, 482 P.2d 289, 291 (1971); Sepulveda v. State, 86 Nev. 898, 899, 478 P.2d 172, 173 (1970); Miner v. Lamb, 86 Nev. 54, 58, 464 P.2d 451, 453 (1970); Parsons v. State, 74 Nev. 302, 307-08, 329 P.2d 1070, 1073 (1958); State v. Oschoa, 49 Nev. 194, 202, 242 P. 582, 585 (1926).

Here, the district court found:

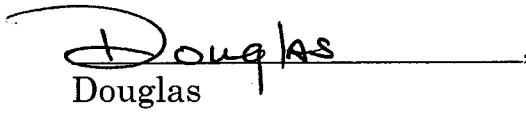
> [W]ith regard to the voluntary manslaughter instruction, the Court would believe that there is sufficient evidence in this record to show that the defendant killed the victim in this case, the killing was unlawful, and it was done with the intent to kill but such intent being the result of an irresistible passion caused by legal, sufficient provocation.
>
> Court heard evidence about a bunch of sexual foreplay and sexual acts going on up to a certain point. One could infer, and I think it was alluded to in the examination, that one could infer that the defendant was made fun of as a result of being unable to perform.
>
> That there was a -- an altercation that ensued after that as a result of that, and that [the victim] was killed as a result of that altercation. So there is evidence of voluntary manslaughter.

Given the district court's finding and our jurisprudence regarding this matter, we conclude that the district court did not err by

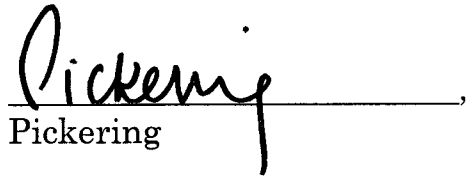
instructing the jury on the lesser-included offense of voluntary manslaughter, and we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Parraguirre



_____, J.
Douglas



_____, J.
Pickering

cc: Hon. Andrew J. Puccinelli, District Judge
Elko County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Elko County District Attorney
Elko County Clerk