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STATE OF NEBRASKA, APPELLEE, V. RONALD G. SMITH, APPELLANT.

806 N.W.2d 383

Filed November 18, 2011. No. S-09-1107.

1. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
2. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Homicide: Words and Phrases.** A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.
4. ____: ____. A sudden quarrel does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim.
5. **Homicide: Intent.** It is not the provocation alone that reduces the grade of the crime, but, rather, the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements necessary to constitute murder are absent.
6. ____: ____. In determining whether a killing constitutes murder or sudden quarrel manslaughter, the question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment. The test is an objective one. Qualities peculiar to the defendant which render him or her particularly excitable, such as intoxication, are not considered.
7. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes be strictly construed.
8. **Statutes: Legislature: Intent.** The principal objective of construing a statute is to determine and give effect to the legislative intent of the enactment.
9. ____: ____: ____. In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
10. **Homicide: Intent: Case Overruled.** An intentional killing committed without malice upon a sudden quarrel constitutes the offense of manslaughter. To the extent that *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), holds otherwise, it is overruled.
11. **Jury Instructions: Proof: New Trial: Appeal and Error.** In order to find that a trial court's error in giving an incorrect jury instruction warrants a new trial, it must be shown that a substantial right of the defendant was adversely affected and that the defendant was prejudiced thereby.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Affirmed.

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

On February 13, 2009, Ronald G. Smith was charged by information with one count of murder in the second degree; one count of first degree forgery, which was later amended to second degree forgery; and one count of theft by taking. All three charges related to the death of Terri Harris. After a jury trial, Smith was convicted and sentenced on all three counts. He then filed this timely appeal, assigning error only with respect to his conviction for second degree murder, for which he was sentenced to 40 to 70 years' imprisonment.

FACTS

Smith and Harris lived together in a single family residence in Syracuse, Nebraska. In November 2008, both were laid off from their jobs at a Syracuse manufacturing company. Both received severance checks in December as a result of the layoffs; Harris' check was for $3,067.51, and Smith's check was for $3,218.97.

Smith cashed his check at a Syracuse bank on December 19, 2008. Smith cashed Harris' check at the drive-through window of the same bank at approximately 10 a.m. on December 23. He was driving Harris' vehicle at the time and told the teller that he needed the money because Harris had broken her leg and was in the hospital. Smith left Syracuse after cashing the check.

From December 23 to 25, 2008, both Harris' adult son and Harris' sister tried unsuccessfully to contact her on her cellular telephone. Finally, on December 25, Harris' sister called Smith on his cellular telephone to ask if he knew where Harris was. Smith told the sister that Harris was having trouble with her cellular telephone, but that he had seen her that morning

and that she was fine. Smith also told the sister that he was in St. Louis, Missouri, and that he would be back home the next day.

Harris' sister remained concerned after speaking with Smith, so she called Harris' son and asked him to go to the house and check on Harris. The son went to the house at approximately 5:30 p.m. on December 25, 2008. He discovered Harris' body on the floor of the bedroom. The body was face up, lodged between the bed and the wall, and partially covered with a blanket.

A pillow covered in a dark-blue pillowcase was found on the floor near Harris' head, and strands of her hair and blood were found on the pillowcase and pillow. Investigators did not observe any defensive wounds on Harris' hands or arms and saw no signs that a struggle had occurred in the room. Investigators noticed that the mattress on the bed was shifted about 6 inches to one side, so that the mattress and boxspring did not meet on the side of the bed where Harris' body was found.

After finding his mother's body, Harris' son made several calls to Smith's cellular telephone and left angry messages, informing Smith that the police were looking for him. Smith did not return the calls. On December 27, 2008, a tearful Smith called the 911 emergency dispatch service in Illinois and stated that he had been on a drug and alcohol binge for 2 weeks and thought he had killed someone in Nebraska. When Smith was subsequently arrested by Illinois law enforcement authorities, he was extremely intoxicated; hospital records show he had a blood alcohol content of .435 on the evening of December 27.

Smith was interviewed by Nebraska law enforcement authorities on December 28, 2008, at 2:35 p.m. He was informed of and waived his *Miranda* rights prior to this interview. The interview was recorded and was played to the jury at trial.

During the interview, Smith stated that after losing his job, he began drinking and using methamphetamine on a regular basis. Smith said that he arrived at the home which he and Harris shared at approximately 1 a.m. on December 22, 2008, after a night of drinking and drug use. Harris was asleep in the bedroom when he arrived, and Smith slept on the couch. When

Smith awoke at approximately 5:30 or 6 a.m., he and Harris began arguing in the bedroom. They argued about Smith's drinking and drug use, their recent layoffs, and money. At some point during the argument, Smith pushed Harris from her bed. She hit the floor hard and lay there motionless with her face up. Smith took a pillow from the bed and held it over Harris' face for 1 to 2 minutes. She did not resist. Smith covered Harris with a blanket, kissed her, and left the house in Harris' vehicle. He admitted that he took Harris' severance check, cashed it, and then left the state. Harris' cellular telephone and $15.65 in cash was found in Smith's motel room at the time of his arrest in Illinois. During his interrogation, Smith wrote a note to Harris' family in which he stated: "There is nothing I can say to justify my actions. . . . I just hope your family can move on. Sorry is not enough I know that but its [sic] all I can do right now."

Two medical experts testified as to the cause of Harris' death. The pathologist who testified for the State had performed the autopsy on Harris and had authored a report stating that Harris' cause of death was "undetermined," but that nothing in the autopsy was inconsistent with a death caused by smothering. A forensic pathologist testified for Smith. He reviewed photographs of the autopsy, the autopsy report, photographs of the crime scene, and Harris' medical records. He testified that Harris died from natural causes, specifically, heart disease and sleep apnea. He opined that smothering could not have been the cause of Harris' death, because there was no forensic evidence of a struggle prior to her death.

During the jury instruction conference, Smith objected to the trial court's proposed instruction on the elements of second degree murder, and submitted his own. The district court refused to give Smith's requested instruction and instead gave a pattern second degree murder instruction to the jury. The jury was instructed that to convict Smith of murder in the second degree, the State had to prove beyond a reasonable doubt that Smith killed Harris intentionally but without premeditation. The jury was then instructed that if it found the State had proved each element beyond a reasonable doubt, it was its "duty to find [Smith] guilty of the crime of murder in

the second degree." The jury was instructed that it could proceed to consider whether Smith committed manslaughter if it found that the State had failed to prove any one or more of the material elements of second degree murder beyond a reasonable doubt.

Smith was convicted of second degree murder, second degree forgery, and theft by taking. After he was sentenced for each offense, he filed this timely appeal, challenging only his conviction for second degree murder. We granted his petition to bypass.

ASSIGNMENTS OF ERROR

Smith assigns that the district court (1) erred in failing to give his requested jury instruction on second degree murder and (2) violated his constitutional right to due process by failing to instruct the jury that the distinction between second degree murder and manslaughter is based on whether the specific intent to kill was or was not the result of a "'sudden quarrel.'"

STANDARD OF REVIEW

[1] Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.[1]

[2] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.[2]

ANALYSIS

Smith contends that the jury was not properly instructed on the distinction between second degree murder and manslaughter. Because all crimes are statutory in Nebraska, and no act is criminal unless the Legislature has in express terms declared it

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[1] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010); *State v. Schmidt*, 276 Neb. 723, 757 N.W.2d 291 (2008).

[2] *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009); *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009).

to be so,[3] we begin with the statutory elements of the offenses. "A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation."[4] Second degree murder is a Class 1B felony, punishable by imprisonment for a minimum term of 20 years and a maximum term of life.[5] The statutory definition of manslaughter is expressed in an "inclusive disjunction,"[6] namely: "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act."[7] Manslaughter is a Class III felony punishable by a maximum term of imprisonment of 20 years, a $25,000 fine, or both.[8] The statutes defining the elements of these offenses have remained unchanged since 1977.[9]

In this case, we are concerned with the first type of manslaughter defined by § 28-305(1), which we shall refer to as "sudden quarrel manslaughter" or "voluntary manslaughter."

Nature of Sudden Quarrel

[3-6] A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.[10] It does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the

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[3] See, *State v. Claussen*, 276 Neb. 630, 756 N.W.2d 163 (2008); *State v. Gozzola*, 273 Neb. 309, 729 N.W.2d 87 (2007).

[4] Neb. Rev. Stat. § 28-304(1) (Reissue 2008).

[5] Neb. Rev. Stat. § 28-105(1) (Reissue 2008) and § 28-304(2).

[6] *State v. Pettit*, 233 Neb. 436, 445, 445 N.W.2d 890, 896 (1989), *overruled on other grounds, State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994).

[7] Neb. Rev. Stat. § 28-305(1) (Reissue 2008).

[8] §§ 28-105(1) and 28-305(2).

[9] See 1977 Neb. Laws, L.B. 38, §§ 19 and 20.

[10] *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002); *State v. Lyle*, 245 Neb. 354, 513 N.W.2d 293 (1994).

victim.[11] It is not the provocation alone that reduces the grade of the crime, but, rather, the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements necessary to constitute murder are absent.[12] The question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment.[13] The test is an objective one.[14] Qualities peculiar to the defendant which render him or her particularly excitable, such as intoxication, are not considered.[15]

In *State v. Vosler*,[16] we reversed a conviction for second degree murder because the jury had not been instructed on sudden quarrel manslaughter. In that case, the defendant's wife was hospitalized after a suicide attempt stemming from her despondency over an extramarital affair she was having with her husband's close friend. The defendant came to the hospital with a weapon, intending to kill himself in his wife's presence. When he arrived in the hospital room and observed his friend hugging and kissing his wife, he shot and killed his friend. On these facts, we held the jury should have been instructed on sudden quarrel, because the jury would have been justified in finding that the defendant "was provoked into killing the victim by the display of affection between his wife and the victim."[17]

But in *State v. Lyle*,[18] we held that a trial judge did not err in convicting the defendant of first degree murder, and not

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[11] *Lyle, supra* note 10; *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984).

[12] See *Lyle, supra* note 10.

[13] See, *id.*; *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992).

[14] See *id.*

[15] See *Cave, supra* note 13.

[16] *Vosler, supra* note 11.

[17] *Id.* at 465, 345 N.W.2d at 809.

[18] *Lyle, supra* note 10.

sudden quarrel manslaughter. After fighting with his brother, the defendant left and then returned about 20 minutes later and fatally shot his brother. We noted that while the defendant's anger may have been the motivating factor behind the killing,

> the fact that [the defendant] was angry is not the standard for reducing a murder to manslaughter. Rather, it is whether [the defendant's] anger was prompted by a provocation which would so provoke a reasonable person to obscure and disturb his power of reasoning to the extent that he acted rashly and from passion, without due deliberation and reflection.[19]

We further noted: "The concept of manslaughter '"is a concession to the infirmity of human nature, not an excuse for undue or abnormal irascibility . . . ."'"[20]

Jury Instructions

Smith contends that the step instruction given by the district court deprived him of due process because it did not allow the jury to consider whether his specific intent to kill was the result of a sudden quarrel. Smith acknowledges that this argument runs contrary to current Nebraska law as set forth in *State v. Jones*,[21] in which this court reversed *State v. Pettit*[22] and held that "there is no requirement of an intention to kill in committing manslaughter. The distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill."[23] Smith effectively argues that *Jones* should be overruled, because it is based upon the same reasoning as prior cases holding that malice was an element of second degree murder, which we overruled in *State v. Burlison.*[24]

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[19] *Id.* at 364, 513 N.W.2d at 302.

[20] *Id.*, quoting *Com. v. Pirela*, 510 Pa. 43, 507 A.2d 23 (1986).

[21] *Jones, supra* note 6.

[22] *Pettit, supra* note 6.

[23] *Jones, supra* note 6, 245 Neb. at 830, 515 N.W.2d at 659.

[24] *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

The question of whether an intentional killing may constitute sudden quarrel manslaughter has vexed this court for many years. At its root is the statutory language defining manslaughter as a killing which is committed "without malice."[25] In *State v. Batiste*,[26] this court considered an argument that the evidence was insufficient to support a first degree murder conviction and established, at most, only sudden quarrel manslaughter. Focusing on the phrase "without malice," this court reasoned:

> "Malice," in a legal sense, denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. . . . Thus, to constitute manslaughter, the slayer must have no intention of doing the wrongful act of killing another without just cause or excuse.[27]

From this, the court reasoned that if a killing "is done intentionally without legal cause or excuse, then there is malice, and the degree of killing is greater than manslaughter because malice is involved."[28]

Several months after the *Batiste* decision, this court revisited the meaning of the phrase "without malice" in *Pettit*.[29] There, the defendant was convicted of manslaughter in the death of his wife, which occurred after an argument. The defendant contended that he intended to kill himself, but accidentally shot his wife. The State countered that because the fatal shooting occurred during a "sudden quarrel," it constituted manslaughter, regardless of the defendant's intent. This court framed the issue as "whether manslaughter 'upon a sudden quarrel' requires the element of intent to kill or whether strict accountability for another's death 'upon a sudden quarrel' eliminates intent to kill as an element of the felony designated as 'manslaughter.'"[30] Examining the common-law roots of the crime of

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[25] § 28-305(1).

[26] *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989).

[27] *Id.* at 488, 437 N.W.2d at 130 (citations omitted).

[28] *Id.*

[29] *Pettit, supra* note 6.

[30] *Id.* at 445, 445 N.W.2d at 896.

manslaughter, this court noted that "adequate legal provocation eliminated malice from murder," and "[f]or that reason, the phrase 'without malice,' in reference to voluntary manslaughter, does not mean 'without intention,' but means a 'willful act, characterized by the presence of an intent to kill . . . .'"[31] After further analysis of decisions by other state courts holding that an accidental killing is not voluntary manslaughter, the *Pettit* court concluded:

> Consequently, we hold that, to sustain a conviction for voluntary manslaughter under § 28-305(1), that is, a conviction for killing another, without malice, "upon a sudden quarrel," the State, by evidence beyond a reasonable doubt, must prove that the defendant intended to kill, and did kill, another. Thus, intentional criminal homicide as the result of legally recognized provocation distinguishes voluntary manslaughter "upon a sudden quarrel" from another intentional criminal homicide, murder in the second degree, namely, "A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation."[32]

Pettit disapproved of the language in *Batiste* to the effect that an intentional killing is not an element of voluntary manslaughter as defined by § 28-305(1). But the opinion in *Pettit* was not unanimous. A dissent reasoned that "common-law voluntary manslaughter was subsumed by the crime of second degree murder" and that "'malice' is a judicially supplied essential element in second degree murder to distinguish second degree murder from an intentional killing that is permitted by law under certain circumstances."[33] The dissent concluded:

> If a person is killed intentionally, whether done "upon a sudden quarrel" or not, the act is obviously done with malice, because killing another is an unlawful act unless the killing is exempt under §§ 28-1406 to 28-1416. It

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[31] *Id.* at 450-51, 445 N.W.2d at 899, quoting *People v. Brubaker*, 53 Cal. 2d 37, 346 P.2d 8 (1959).

[32] *Id.* at 460, 445 N.W.2d at 905.

[33] *Id.* at 470, 474-75, 445 N.W.2d at 910, 913-14 (Fahrnbruch, J., dissenting; White, J., joins).

> is logically impossible to distinguish between a killing done intentionally and one done without malice. A killing committed without malice is one committed unintentionally.[34]

In *State v. Myers*,[35] we held that malice was an element of second degree murder, notwithstanding the fact that it is not included in the statutory definition of that crime. In holding that a jury instruction which did not include malice as an element constituted plain error, the *Myers* court reasoned: "By omitting the element of malice from the second degree murder instruction, the instruction in effect became one for the crime of intentional manslaughter as defined by this court in [*Pettit*]. Malice is not an essential element of manslaughter."[36]

Jones, decided approximately 5 months after *Myers*, extended this reasoning to the issue before us in this case: whether an intentional killing can constitute sudden quarrel manslaughter. The court concluded:

> Since our statutes define manslaughter as a killing without malice, there is no requirement of an intention to kill in committing manslaughter. The distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill. [*Pettit*] was incorrect in its reasoning and holding, and to that extent, it is overruled.[37]

In *Burlison*,[38] this court reversed the holdings of *Myers* and its progeny, including *Jones*, that malice was an element of second degree murder. We held that the elements of second degree murder included only those stated in the statutory definition of the crime and that the definition was not constitutionally overbroad. *Burlison* did not address the distinct but analytically related holding of *Jones* that because the statutory definition of

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[34] *Id.* at 476, 445 N.W.2d at 913-14 (Fahrnbruch, J., dissenting; White, J., joins).

[35] *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994).

[36] *Id.* at 909, 510 N.W.2d at 63.

[37] *Jones, supra* note 6, 245 Neb. at 830, 515 N.W.2d at 659.

[38] *Burlison, supra* note 24.

manslaughter includes the phrase "without malice," an intentional killing can never constitute sudden quarrel manslaughter. We turn to that issue now.

[7-9] We begin our analysis, as we did in *Burlison*, with the language which the Legislature used to define the crime: "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act."[39] It is a fundamental principle of statutory construction that penal statutes be strictly construed.[40] The principal objective of construing a statute is to determine and give effect to the legislative intent of the enactment.[41] In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[42]

The first clause of the statute defines manslaughter as a killing "without malice," and the remainder of the sentence describes two ways in which the offense of manslaughter can be committed. Logically and semantically, the phrase "without malice" applies to both categories of manslaughter. In the second clause of the sentence, which describes those categories, the Legislature used the term "unintentionally." But given its syntactic placement in § 28-305(1), the word "unintentionally" modifies the language of the statute describing the second category of manslaughter, i.e., a killing committed "in the commission of an unlawful act," but not the first, i.e., "upon a sudden quarrel." There is no corresponding reference to intent, or the absence thereof, in the preceding phrase defining sudden quarrel manslaughter. Had the Legislature intended the word "unintentionally" to apply to both categories, it could have

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[39] § 28-305(1).

[40] See, *State v. Huff, ante* p. 78, 802 N.W.2d 77 (2011); *State v. Lasu*, 278 Neb. 180, 768 N.W.2d 447 (2009).

[41] *State v. Lebeau*, 280 Neb. 238, 784 N.W.2d 921 (2010).

[42] *State v. Wester*, 269 Neb. 295, 691 N.W.2d 536 (2005); *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

placed the word in the first clause of the sentence along with the phrase "without malice."

In *Jones*, this court essentially rewrote § 28-305(1) to accomplish exactly that. It did so based upon a perceived necessity of distinguishing sudden quarrel manslaughter from second degree murder, which was a part of the rationale for judicially grafting the element of malice into the statutory definition of second degree murder in *Myers* and subsequent second degree murder cases prior to *Burlison*. The holding in *Jones* was based on the premise that malice is the equivalent of intent to kill. For the reasons which underlie our decision in *Burlison,* we now conclude that this was error.

It is the province of the legislative branch, not the judiciary, to define criminal offenses within constitutional boundaries.[43] "[J]udicial construction is constitutionally permissible, but judicial legislation is not."[44] The plain and unambiguous language used by the Legislature to define the crime of manslaughter clearly specifies the different factors which distinguish the two categories of manslaughter from second degree murder. With respect to manslaughter involving a killing in the commission of an unlawful act, the distinguishing factor is the absence of an intent to kill. But with respect to sudden quarrel manslaughter, the distinguishing factor is that the killing, even if intentional, was the result of a legally recognized provocation, i.e., the sudden quarrel, as that term has been defined by our jurisprudence.[45]

The holding of *Jones* that an intentional killing cannot constitute sudden quarrel manslaughter is inconsistent not only with the language of § 28-305(1), but also with its common-law roots. At common law, "homicide, even if intentional, was said to be without malice and hence manslaughter if committed

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[43] See *Burlison, supra* note 24.

[44] *Id.* at 201-02, 583 N.W.2d at 39 (Wright, J., concurring; Connolly and Gerrard, JJ., join).

[45] See *State v. Woods*, 249 Neb. 138, 542 N.W.2d 410 (1996) (Gerrard, J., concurring).

in the heat of passion upon adequate provocation."[46] More than a century ago, this court stated in *Boche v. State*[47] that statutory language which defined manslaughter as a killing "'without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act'" made no change in the common-law definition of manslaughter. The court further stated:

> In the first class of cases referred to in the statute the homicide must have been intentional, but in sudden passion or heat of blood caused by a reasonable provocation, and without malice; in the latter clause the killing must have been unintentional, but caused while the slayer was committing some act prohibited by law . . . .[48]

In *Pettit*, this court undertook a thorough review of decisions by other state courts which construed similar or identical statutory provisions in a manner consistent with *Boche*.[49] The same holds true today. As one commentator notes:

> Voluntary manslaughter in most jurisdictions consists of an intentional homicide committed under extenuating circumstances which mitigate, though they do not justify or excuse, the killing. The principal extenuating circumstance is the fact that the defendant, when he killed the victim, was in a state of passion engendered in him by an adequate provocation (i.e., a provocation which would cause a reasonable man to lose his normal self-control).[50]

Common examples of this type of manslaughter include a killing provoked by the sudden discovery of a spouse in the act of committing adultery and a killing provoked during a physical altercation in which the participants voluntarily engaged.[51]

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[46] A.L.I., Model Penal Code and Commentaries § 210.3, comment 1 at 44 (1980).

[47] *Boche v. State*, 84 Neb. 845, 853, 122 N.W. 72, 75 (1909).

[48] *Id.* at 854, 122 N.W. at 75.

[49] See *Pettit, supra* note 6.

[50] 2 Wayne R. LaFave, Substantive Criminal Law § 15.2 at 491 (2d ed. 2003).

[51] *Id.*, § 15.2(b)(2) and (5).

It is nonsensical to regard "sudden quarrel" as a provocation, as this court and many others have, but then conclude that lethal response to the provocation must be unintentional in order to constitute voluntary manslaughter. Provocation is that which incites another to do something.[52] As one commentator has observed, in the context of sudden quarrel manslaughter, "[p]rovocation not only causes anger; it motivates the actor to want to kill the provoker. Proof, then, of adequate provocation does not negat[e] intent. It magnifies it."[53]

[10] In *Burlison*, we recognized that our duty "to ensure that statutes are interpreted correctly is in no way diminished when the error we perceive is our own."[54] For the foregoing reasons, we conclude that the analysis and holding of *Pettit* was correct and that the holding of *Jones* that "[t]he distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill" was error.[55] We therefore overrule this holding in *Jones* and reaffirm the holdings of *Pettit* and *Boche* that an intentional killing committed without malice upon a "sudden quarrel," as that term is defined by our jurisprudence, constitutes the offense of manslaughter.

Because of our holding today, the step instruction given in this case was not a correct statement of the law. Specifically, the step instruction required the jury to convict on second degree murder if it found that Smith killed Harris intentionally, but it did not permit the jury to consider the alternative possibility that the killing was intentional but provoked by a sudden quarrel, and therefore constituted manslaughter.

PREJUDICE

[11] Having identified trial error, we must now consider whether it was prejudicial or harmless. Before an error in the giving of jury instructions can be considered as a ground for

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[52] Black's Law Dictionary 1346 (9th ed. 2009).

[53] Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. Crim. L. & Criminology 421, 462 (1982).

[54] *Burlison, supra* note 24, 255 Neb. at 196, 583 N.W.2d at 36.

[55] *Jones, supra* note 6, 245 Neb. at 830, 515 N.W.2d at 659.

reversal of a conviction, it must be considered prejudicial to the rights of the defendant.[56] The appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[57]

A trial court is required to give an instruction where there is any evidence which could be believed by the trier of fact that the defendant committed manslaughter and not murder.[58] But a trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record.[59] In the context of this case, Smith was prejudiced by the erroneous jury instruction only if the jury could reasonably have concluded on the evidence presented that his intent to kill was the result of a sudden quarrel.

The only evidence of the events which transpired immediately prior to Harris' death is the video recording of Smith's interrogation following his arrest, as summarized above. From this, the jury could reasonably infer that Smith and Harris had been arguing and that Smith was angry. But there is no evidence explaining how or by whom the argument was started, its duration, or any specific words which were spoken or actions which were taken before Smith pushed Harris to the floor. And most importantly, there is no evidence that Harris said or did anything which would have provoked a reasonable person in Smith's position to push her from the bed and smother her with a pillow. In the absence of some provocation, a defendant's anger with the victim is not sufficient to establish the requisite heat of passion.[60] Nor does evidence of a string of prior arguments and a continuing dispute without any indication of some sort of instant incitement constitute a sufficient showing to warrant a voluntary manslaughter instruction.[61]

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[56] *State v. Almasaudi, ante* p. 162, 802 N.W.2d 110 (2011); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

[57] See *State v. Almasaudi, supra* note 56.

[58] See Neb. Rev. Stat. § 29-2027 (Reissue 2008).

[59] *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

[60] *Lyle, supra* note 10.

[61] *Id.*

We conclude that there is no evidence in this record upon which the jury could have concluded that Smith committed sudden quarrel manslaughter instead of second degree murder. We therefore conclude that the improper jury instruction did not prejudice Smith or affect his substantial rights, and does not require the reversal of his second degree murder conviction.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., not participating in the decision.

STATE OF NEBRASKA, APPELLEE, V.
RICHARD A. HALVERSTADT, APPELLANT.
809 N.W.2d 480

Filed November 18, 2011. No. S-11-145.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law on which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. ____: ____. Statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

Appeal from the District Court for Lancaster County, JODI NELSON, Judge, on appeal thereto from the County Court for Lancaster County, JEAN A. LOVELL, Judge. Judgment of District Court affirmed in part and in part reversed, and cause remanded with directions.

Jeffry D. Patterson, of Bartle & Geier Law Firm, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.