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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Chief Justice, dissenting:

I dissent from the majority opinion because I believe the trial court committed reversible error by not granting defense counsel's request to instruct the jury on the lesser included offense of voluntary manslaughter considering the strategical change the State made during the course of the trial.

Initially, based on evidence of premeditation and deliberation, the State proceeded to present its case and seek only a conviction for first degree murder. The defendant relied on this representation in preparing his defense and in deciding to waive a jury instruction for voluntary manslaughter. When the State began to question the strength of its evidence and sought and obtained a jury instruction for the lesser included offense of second degree murder, then fairness dictates that the defendant should have been permitted to adjust to this "mid-stream" change in direction and obtain a jury instruction for voluntary manslaughter as there was evidence that the intentional killing was the result of sudden heat of passion rather than malice.

The critical distinction between murder and voluntary manslaughter is the element of malice. *State v. Kirtley*, 162 W.Va. 249, 254, 252 S.E.2d 374, 376-77 (1978) (citation omitted). Stated somewhat more descriptively, “The distinguishing feature between murder and manslaughter is that murder comes from the wickedness of the heart, and manslaughter, where voluntary, arises from the sudden heat of passion[.]” due to gross provocation. *State v. Wilson*, 95 W.Va. 525, 531, 121 S.E. 726, 729 (1924). In *State v. McGuire*, 200 W. Va. 823, 490 S.E.2d 912 (1997), we held that “[g]ross provocation and heat of passion are not essential elements of voluntary manslaughter, . . . [which would require proof] beyond a reasonable doubt. It is intent without malice, not heat of passion, which is the distinguishing feature of voluntary manslaughter.” *Id.* at Syl. Pt. 3. In footnote seven of *State v. Starkey*, 161 W.Va. 517, 527, 244 S.E.2d 219, 225 (1978), we said: “It is important to note that provocation is not a defense to the crime [of voluntary manslaughter], but merely reduces the degree of culpability[.]” (Citations omitted). In other words, while an accused may not avoid conviction by using proof of heat of passion as a *complete defense*, an accused may make use of such evidence to defend against the greater crimes of first and second degree murder. In this context, evidence of provocation and heat of passion is used by a defendant to disprove the existence of malice. This Court long ago stated that “[m]alice is of the essence of murder, and the prisoner has a right to disprove it in any legitimate manner.” *State v. Evans*, 33 W. Va. 417, 424, 10 S.E. 792, 794 (1890). These words are especially relevant in the circumstances at hand where the defendant’s exposure to liability

was broadened due to a material change in the prosecution which the State initiated during the course of a trial.

The evidence in this case demonstrated that the defendant was incensed when he realized that his mother was eavesdropping on a phone call that he was having with a married woman with whom he was having an affair. Admittedly, eavesdropping is not generally considered a source of gross provocation. However, in circumstances where the State is permitted to change its strategy during the course of trial and in so doing obtains an increased opportunity for conviction, a defendant should be given the opportunity to develop a defense to counter that advantage. In this case, the defendant wanted to challenge the State's proof of malice with the evidence of heat of passion and he should have been afforded that opportunity. While the State had every right to have the second degree murder instruction, the defendant should not be prejudiced in his defense because the State delayed in making its intentions known. Under these circumstances, I believe that the requested voluntary manslaughter instruction should have been given and that the failure to give the instruction prejudiced the defendant.

As I believe an unfair advantage was afforded the State in this case resulting in prejudice to Appellant, I respectfully dissent.