Casenotes

State v. Shane: Confessions of Infidelity as Reasonable Provocation for Voluntary Manslaughter

I. Introduction

In *State v. Shane*,[1] the Supreme Court of Ohio faced a difficult question: how much provocation is reasonably sufficient to reduce a murder charge to voluntary manslaughter? Traditionally, the classic examples where reasonably sufficient provocation—sometimes called adequate provocation—warrants a voluntary manslaughter jury instruction are assault, battery, mutual combat, illegal arrest, and discovery of a spouse in the act of adultery.[2] Mere words, no matter how provocative, are rarely sufficient.[3]

In *Shane*, the Supreme Court of Ohio affirmed the trial court's ruling that a murder charge could not be mitigated to voluntary manslaughter where provocation was based on confessions of infidelity.[4] The supreme court held that "words alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations."[5] The court also held that the trial judge should determine whether evidence is reasonably sufficient to warrant a voluntary manslaughter instruction.[6] On their face, these holdings both clarify the concept of "reasonably sufficient" provocation and provide trial judges with wider discretion. However, it seems unlikely that trial judges will have any substantial discretion in cases where provocation is based on confessions of infidelity alone.[7] After *Shane*, it appears a judge has little choice but to deny a voluntary manslaughter instruction in such instances.

II. Statement of the Facts

Robert Shane II shared an apartment in New Philadelphia with his fiancee, Tina Wagner, and their infant child.[8] On October 13, 1989, Shane strangled Wagner to death when she confessed to sleeping

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1. 590 N.E.2d 272 (Ohio 1992).
2. *Id.* at 277.
3. *See, e.g.*, Girouard v. State, 583 A.2d 718 (Md. 1991) (words alone are not adequate provocation to mitigate murder to manslaughter).
4. *Shane*, 590 N.E.2d at 279.
5. *Id.* at 278.
6. *Id.*
7. In *Shane*, the court stated that "[t]he killing of a spouse . . . by a spouse . . . who has just been made aware of the victim spouse's adultery simply is not an acceptable response to the confession of infidelity." *Id.*
8. *Id.* at 273.

with other men and told him she no longer cared for him.[9] Shane was indicted on one count of murder, to which he pled not guilty.[10] At trial, the judge gave the jury instructions on both murder and voluntary manslaughter.[11] The jury found Shane guilty of murder.[12] Shane appealed, asserting that "the jury instruction [on manslaughter] improperly placed upon him the burden of proving that he acted under the influence of sudden passion or rage."[13] After affirming the jury instruction, the Court of Appeals for Tuscarawas County certified the record of this case to the Supreme Court of Ohio for review and final determination.[14]

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9. Shane had questioned Wagner repeatedly in an attempt to extract a confession of infidelity from her. *Shane*, 590 N.E.2d at 278. Wagner denied these allegations; however, Shane did not believe her and called her a liar. *Id.* Finally, Wagner confessed to sleeping with other men. *Id.* Upon hearing Wagner's confession, Shane lost control. *Id.* Shane's testimony revealed that he had telephoned the police at 6:00 a.m. and confessed to the homicide. *Id.* at 273. When the police arrived, they found Wagner dead with a red shirt wrapped tightly around her throat. *Id.* At trial, Shane testified that he had become upset and that he remembered nothing until he "came to" with Wagner beneath him. *Id.* An autopsy revealed that Wagner had died of asphyxiation by strangulation and that she had an alcohol content of .27 grams per deciliter. *Id.*

10. *Id.* Shane's indictment was based on a violation of Ohio's murder statute. *Id.* The law states in pertinent part: "(A) No person shall purposely cause the death of another." OHIO REV. CODE ANN. § 2903.02 (Anderson 1987).

11. *Shane*, 590 N.E.2d at 274. The supreme court summarized the trial judge's charge to the jury:

> [I]f they found that Shane acted ". . . under the influence of sudden passion or in a sudden fit of rage brought on by serious provocation occasioned by the victim reasonably sufficient to incite him into using deadly force" they must find him guilty of voluntary manslaughter, and that "[t]he burden of going forward with the evidence of these mitigating circumstances and the burden of proving them are upon the defendant. He must establish such circumstances by a preponderance of the evidence."

Id.

Ohio's voluntary manslaughter statute reads:

> (A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another.
>
> (B) Whoever violates this section is guilty of voluntary manslaughter, an aggravated felony of the first degree.

OHIO REV. CODE ANN. § 2903.03 (Anderson 1987).

12. *Shane*, 590 N.E.2d at 274.

13. *Id.*

14. *Id.* The court of appeals found its judgment to be in conflict with the judgments of the Court of Appeals for Franklin County in the cases of State v. Griffin, No. 86AP-759, 1988 WL 4651 (Ohio App. Jan. 19, 1988) (relying on State v. Muscatello, 378 N.E.2d 738 (Ohio 1978), in holding that a defendant is not required to prove a mitigating circumstance by a preponderance of the evidence), and State v. Rhodes, No. 90AP-289, 1990 WL 190234 (Ohio App. Nov. 27, 1990) (relying on *Muscatello* in holding that a defendant was not required to establish the circumstance of extreme emotional stress beyond a reasonable doubt or a preponderance of the evidence).

Ironically, the supreme court never reached the certified issue in *Shane*, and affirmed the court of appeals on other grounds. *Shane*, 590 N.E.2d at 274. *See* discussion *infra* part III.

III. COURT'S DECISION AND RATIONALE

Associate Justice Alice Robie Resnick, writing for the supreme court, confronted three issues in this case.[15] First, when a defendant is charged with murder, what are the proper considerations for giving the jury a voluntary manslaughter instruction?[16] Second, what is the test for determining whether provocation is reasonably sufficient to bring on sudden passion or a sudden fit of rage?[17] Third, are the "mere words" of a victim, which inform a defendant of the victim's infidelity, reasonably sufficient provocation to incite the use of deadly force?[18] The court dealt with each issue in turn.

Addressing the first issue, the court stated that voluntary manslaughter is not a lesser included offense of murder.[19] Instead, it is an inferior degree of the crime.[20] In spite of this distinction, the same test is applied whether the charge is voluntary manslaughter or a lesser included offense.[21] Therefore, according to Justice Resnick's opinion, "a defendant charged with murder is entitled to an instruction on voluntary manslaughter when the evidence presented at trial would reasonably support both an acquittal on the charged crime of murder and a conviction for voluntary manslaughter."[22]

The court next addressed the trial judge's role when a defendant presents only some evidence of reasonable provocation.[23] The court distinguished its former opinion in *State v. Muscatello*[24] and held that where a defendant presents only some evidence which satisfied the

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However, in State v. Rhodes, 590 N.E.2d 261 (Ohio 1992), decided on the same day as *Shane*, the supreme court held:

> [A] defendant on trial for murder or aggravated murder bears the burden of persuading the fact finder, by a preponderance of the evidence, that he or she acted under the influence of sudden passion or in a sudden fit of rage . . . that was reasonably sufficient to incite the defendant into using deadly force.

Id. at 265.

15. *Shane*, 590 N.E.2d at 274.

16. *Id.* at 276.

17. *Id.* at 278.

18. *Id.* at 274.

19. *Id.* The court explained this by noting that the elements of voluntary manslaughter "are . . . contained within the indicted offense [of murder], except for one or more additional mitigating elements." *Id.* (quoting State v. Tyler, 553 N.E.2d 576, 592 (Ohio 1990) (quoting State v. Deem, 533 N.E.2d 294, 298 (Ohio 1988)).

20. *Shane*, 590 N.E.2d at 274.

21. *Id.*

22. *Id.*

23. *Id.* at 275.

24. 378 N.E.2d 738 (Ohio 1978). "Where in a prosecution for aggravated murder, the defendant produces . . . some evidence of the mitigating circumstances of extreme emotional stress . . ., the question of his having committed the lesser included offense of voluntary manslaughter must be submitted to the jury under proper instructions from the court." *Id.* at paragraph four of the syllabus. *See also Tyler*, 553 N.E.2d at 592.

elements of the voluntary manslaughter statute a voluntary manslaughter instruction is not automatically required.[25] The reasoning was that "[t]he jury would be unduly confused if it had to consider . . . a lesser included offense when it could not reasonably return such a verdict."[26] Thus, the trial judge was given discretion on this matter.

Moving to the second major issue, Justice Resnick stated that provocation is reasonably sufficient to bring on sudden passion or a sudden fit of rage when it meets the terms of the voluntary manslaughter statute.[27] The statute requires that a sudden passion or fit of rage must be "brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force . . . ."[28] The crucial determination, however, is what specifically constitutes reasonably sufficient provocation.[29]

The court held that a determination of reasonably sufficient provocation requires analysis of both objective and subjective components.[30] First, an objective standard should be applied by the trial judge to determine whether the provocation was reasonably sufficient to bring on sudden passion or fit of rage.[31] Provided the objective standard is met, a subjective analysis follows.[32] The jury determines whether the particular actor was either "under the influence of sudden passion or in a sudden fit of rage."[33] Thus, both the emotional and mental state of the defendant, and the conditions surrounding him or her at the time, are considered only after the objective standard is satisfied.[34]

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25. *Shane*, 590 N.E.2d at 275.
26. *Id.*
27. *Id.*
28. *Id.* at 275-76 (citing OHIO REV. CODE ANN. § 2903.03(A) (Anderson 1987)).
29. *Shane*, 590 N.E.2d at 276.
30. *Id.* Justice Resnick explained:

> [t]here are four obstacles for the defendant to overcome before he can have his intentional killing reduced from murder to voluntary manslaughter: (1) There must have been a reasonable provocation; (2) The defendant must have been in fact provoked; (3) A reasonable man so provoked would not have cooled off in the interval of time between the provocation and the delivery of the fatal blow; and (4) the defendant must not in fact have cooled off during that interval.

Id. (quoting 2 LAFAVE & SCOTT, SUBSTANTIVE CRIMINAL LAW § 7.10, at 255 (1986)). Factors (1) and (3) are objective; factors (2) and (4) are subjective. *Shane*, 590 N.E.2d at 276 n.1.

Since the evidence had to be considered in the light most favorable to the defendant, the court accepted factors (2), (3), and (4) as true in Shane's case. *Id.* at 276. The focus of the inquiry was on factor (1). *Id.*

31. *Id.*
32. *Id.*
33. *Id.*
34. *Shane*, 590 N.E.2d at 276. The court quoted the Supreme Court of Michigan in support of this assertion:

> The determination of what is reasonable provocation is a question of fact for the

If the trial judge determines that no reasonable jury would conclude that the provocation would cause a reasonable person to act out of passion rather than reason, then "the trial judge must, as a matter of law, refuse to give a voluntary manslaughter instruction."[35] Reasonably sufficient provocation must be sufficient enough "to arouse the passions of an ordinary person beyond the power of his or her control."[36]

The court next discussed the third issue; whether the mere words of a victim, informing his or her fiancee of acts of infidelity, are reasonably sufficient provocation to incite the use of deadly force.[37] A majority of jurisdictions hold that mere words, no matter how inflammatory, are not sufficient provocation to warrant reduction of murder to voluntary manslaughter.[38] Some courts permit a voluntary manslaughter charge where words alone trigger the provocation, provided a special relationship exists between the defendant and the victim.[39] Finally, a few courts approve a voluntary manslaughter jury instruction where words alone were the provocation.[40]

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factfinder. However, the judge does play a substantial role. The judge furnishes the standard of what constitutes adequate provocation, i.e., that provocation which would cause a reasonable person to act out of passion rather than reason.

Id. (quoting People v. Pouncey, 471 N.W.2d 346, 350 (Mich. 1991)).

35. *Id.*

36. *Id.*

37. *Id.* at 278.

38. *Id.* at 277. *See, e.g.*, People v. Chevalier, 544 N.E.2d 942 (Ill. 1989) ("Mere words are insufficient provocation . . . no matter how aggravated, abusive, opprobrious or indecent the language"); Perigo v. State, 541 N.E.2d 936 (Ind. 1989) (victim's words alone, though highly emotional, were not sufficient provocation to reduce murder to manslaughter); Bracewell v. State, 506 So. 2d 354 (Ala. 1987) (mere words, no matter how insulting or abusive, cannot reduce a killing to manslaughter); Hambrick v. State, 353 S.E.2d 177 (Ga. 1987) (provocation by words alone is inadequate to reduce murder to manslaughter); State v. Guebara, 696 P.2d 381 (Kan. 1985) ("Mere words or gestures, however insulting, do not constitute adequate provocation"); Commonwealth v. Weaver, 479 N.E.2d 682 (Mass. 1985) (threatening gestures and insulting words alone are not an adequate provocation to reduce a killing from murder to manslaughter); People v. Eagen, 357 N.W.2d 710 (Mich. App. 1984) (defendant's claim of provocation based on former girlfriend's remark about sex was without merit); State v. Lujan, 608 P.2d 1114 (N.M. 1980) (words alone are not sufficient provocation to reduce a murder charge to voluntary manslaughter); Nicholson v. United States, 368 A.2d 561 (D.C. App. 1977) (words alone, regardless of how insulting, offensive, or abusive, are not adequate provocation). *See generally* R.A. Horton, Annotation, *Insulting Words as Provocation of Homicide or as Reducing the Degree Thereof*, 2 A.L.R.3d 1292 (Supp. 1991).

39. *Shane*, 590 N.E.2d at 277. Most courts that permit words alone as sufficient provocation tend to allow confessions of infidelity to mitigate murder to voluntary manslaughter only when there is a relationship involving marriage. *Id. See, e.g.*, People v. McCarthy, 547 N.E.2d 459, 463 (Ill. 1989); People v. Williams, 576 N.E.2d 68 (Ill. App. 1991) (admission of adultery is equivalent to a discovery of the act itself), *appeal denied*, 584 N.E.2d 139 (Ill. 1991); Commonwealth v. Schnopps, 417 N.E.2d 1213 (Mass. 1981) (sufficient provocation may be found in information conveyed to a defendant by words alone when there is a marital relationship). *See generally* Joel E. Smith, Annotation, *Spouse's Confession of Adultery as*

Justice Resnick and the supreme court found the majority approach attractive because it offered a bright line test which would apply to an entire class of cases.[41] However, the court expressed concern that this rule imposed "an unnecessary limitation on the use of voluntary manslaughter as a mitigating defense."[42] The court held the provocation must be serious to be reasonably sufficient.[43] Since mere words are generally not as inflammatory as aggressive actions, the court concluded that "words alone [would] not constitute reasonably sufficient provocation to incite the use of deadly force in most situations."[44]

The Supreme Court of Ohio's view that mere words are usually not sufficient provocation closely resembles the common law doctrine. However, Justice Resnick, however, distinguished the court's holding in *Shane* from the common law approach in two ways.[45] First, the common law supports an exception which recognizes adequate provocation where one spouse informs the other spouse of adultery.[46] However, the Supreme Court of Ohio rejected this exception, stating that "[t]he killing of a spouse . . . by a spouse . . . who has just been made aware of the victim spouse's adultery simply is not an acceptable response to the confession of infidelity."[47] Second, the court specifically clarified its holding that mere words are not sufficient provocation by adding the words "*in most situations.*"[48] Thus, the opinion in *Shane* augments the common law approach by allowing for a manslaughter instruction based on verbal provocation in rare situations, while rejecting its automatic use when married individuals are involved.

Affecting Degree of Homicide Involved in Killing Spouse or His or Her Paramour, 93 A.L.R.3d 925 (Supp. 1991).

40. *Shane*, 590 N.E.2d at 277. *See, e.g.*, State v. Boyd, 532 P.2d 1064, 1067 (Kan. 1975) (defendant has the right to present his theory to the jury though his evidence may be weak and nonconclusive); State v. Harwood, 519 P.2d 177, 181 (Ariz. 1974) (when the testimony of the defendant establishes the elements of manslaughter, he is entitled to present his theory to the jury).

41. *Shane*, 590 N.E.2d at 277.

42. *Id.* (quoting Leo M. Romero, *Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice*, 12 N.M. L. REV. 747, 776 (1982)).

43. *Id.* at 278.

44. *Id.*

45. *Id.*

46. *Id. See* Tripp v. State, 374 A.2d 384 (Md. App. 1977). The Maryland Court of Appeals explained that "[t]he rule of mitigation does not, however, extend beyond the marital relationship so as to include engaged persons, divorced couples and unmarried lovers as where a man is enraged at the discovery of his mistress in the sexual embrace of another man." *Id.* at 394 (quoting LAFAVE & SCOTT, CRIMINAL LAW 576 (1972)). *See also* Smith, *supra* note 39.

47. *Shane*, 590 N.E.2d at 278. In addition, the court explained that "[w]ords informing another of infidelity should not be given special treatment by courts trying to determine what provocation is reasonably sufficient. . . ." *Id.*

48. *Id.* (emphasis added).

In the present case, the court found that Shane's sudden fit of rage was not adequately triggered by Wagner.[49] The court determined that Shane's anger was attributable to his provoking Wagner into confessing her infidelity.[50] A reasonable person would not have been provoked in the circumstances of this case, the court concluded.[51] Therefore, the objective portion of the provocation inquiry was not satisfied and the subjective evidence of Shane's emotional and mental state was irrelevant.[52] Since no reasonable jury could have decided that Shane was sufficiently provoked by the victim,[53] the court held that the trial judge should have refused to give the jury an instruction on voluntary manslaughter.[54] The court affirmed the court of appeals and upheld Shane's murder conviction.[55]

IV. Evaluation and Analysis

In *Shane*, the Supreme Court of Ohio clarified the erroneous impression that the trial judge must always give an instruction on voluntary manslaughter when a defendant presents at least some evidence of reasonable provocation.[56] The court held that when merely some evidence of adequate provocation is presented, the judge should grant a voluntary manslaughter instruction only if the jury could reasonably find the defendant guilty of the lesser offense.[57] This decision is logical because it gives the trial judge more discretion when deciding whether to give a voluntary manslaughter instruction.[58] To require such a jury instruction whenever some evidence of a lesser included offense is presented would mean no trial judge could refuse an instruction in these situations.[59] The holding in *Shane* reduces the risk of unnecessary jury confusion since the jury does not have to consider the lesser offense "when it could not reasonably return such

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49. *Id.*
50. *Id.*
51. *Id.*
52. *Shane*, 590 N.E.2d at 276.
53. *Id.* at 279.
54. *Id.*
55. *Id.* The court held that even though the trial judge actually gave the jury the voluntary manslaughter instruction, such instruction was harmless error. *Id.* at 274.
56. *Shane*, 590 N.E.2d at 275. *See Muscatello*, 378 N.E.2d at 738 (paragraph four of the syllabus); *Tyler*, 553 N.E.2d at 592.
57. *Shane*, 590 N.E.2d at 275.
58. *Id.* at 278. The court stated that "in each case, the trial judge must determine whether evidence of reasonably sufficient provocation occasioned by the victim has been presented to warrant a voluntary manslaughter instruction." *Id.* "'The judge furnishes the standard of what constitutes adequate provocation . . . which would cause a reasonable person to act out of passion rather than reason.'" *Id.* at 276 (quoting *Pouncey*, 471 N.W.2d at 350).
59. *Id.* at 275.

a verdict."[60] By allowing broader judicial discretion, this clarification of the "some evidence rule" provides a more efficient method of determining whether a voluntary manslaughter jury instruction should be given.

The Supreme Court of Ohio also disapproved of the common law exception which recognizes confessions of adultery as adequate provocation.[61] Because this exception on its face applies only to confessions involving marital relationships, it has been criticized.[62] The test developed in *Shane* for determining reasonably sufficient provocation to reduce murder to voluntary manslaughter contains no such general exception. It instead mirrors a four part objective and subjective test espoused by criminal law scholars LaFave and Scott.[63]

In addition, the court defined both the judge and jury's role in determining reasonable provocation.[64] The court explained that the trial judge decides when to give the jury a voluntary manslaughter instruction.[65] Determination of subjective reasonable provocation is then a question of fact for the jury.[66] Thus, the trial judge is responsible for determining the adequate provocation standard of a reasonable man and the jury considers the subjective factors.

The *Shane* opinion also concluded that a trial judge's determination of whether to instruct the jury on voluntary manslaughter is

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60. *Id.*

61. *Shane*, 590 N.E.2d at 278. The foundation for this exception originated from the ancient common law concept that a man's wife was his property. *Id.*

62. *Id.* Particularly controversial discussions arise where the relationship in question is long-standing or comparable to marriage. *See McCarthy*, 547 N.E.2d at 463. Compare criminal law scholar Joshua Dressler's criticism of the same limitation in the cases where one unmarried lover discovers another being unfaithful:

> [A]n unmarried individual who kills upon sight of unfaithfulness by one's lover or fiance is [considered] a murderer. Only a highly unrealistic belief about passion can explain this rule in terms of excusing conduct. It is implausible to believe that when an actor observes his or her loved one in an act of sexual disloyalty, that actor will suffer from less anger simply because the disloyal partner is not the actor's spouse. Instead, this rule is really a judgment by courts that adultery is a form of injustice perpetrated upon the killer which merits a violent response, whereas "mere" sexual unfaithfulness out of wedlock does not. Thus, it has been said that adultery is the "highest invasion of [a husband's] property," whereas in the unmarried situation the defendant "has no such control" over his faithless lover.

Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 440 (Summer 1982) (citing Regina v. Mawgridge, 84 ENG. REP. 1107, 1115 (1707)).

63. *See supra* note 30; 2 LAFAVE & SCOTT, SUBSTANTIVE CRIMINAL LAW § 7.10, at 255 (1986). *Compare* MODEL PENAL CODE § 210.3(1)(b) (1962). The Model Penal Code avoids exceptions to sufficient provocation by combining objectivity and subjectivity in its test for determining the reasonableness of the provocation. *Id.*

64. *Shane*, 590 N.E.2d at 276.

65. *Id.* at 275.

66. *Id.* at 276 n.2 (quoting *Pouncey*, 471 N.W.2d at 350).

case specific.[67] However, the supreme court also broadly stated that the killing of a spouse by the other spouse "is not an acceptable response to [a] confession of infidelity."[68] This holding suggests that the trial judge will have little choice but to refuse a voluntary manslaughter instruction in cases where provocation from a confession of infidelity is at issue. Thus, the discretion of the trial judge in these cases will be nominal.

The holding in *Shane* may generate criticism when a trial judge denies a defendant's request for a voluntary manslaughter jury instruction. The court held that the trial judge is solely responsible for conducting the objective portion of the reasonable provocation test.[69] If the judge determines that the provocation is not reasonable, the jury will not be permitted to consider voluntary manslaughter as an option.[70] As a result, when a defendant presents a confession of infidelity as reasonable provocation, it is likely the issue will never reach the jury. This restraint demonstrates an unfortunate inconsistency in the *Shane* rationale. While the court's decision grants the trial judge wide discretion for determining whether to present the jury with a voluntary manslaughter instruction, the court's disapproval of confessions of infidelity as sufficient provocation seems to permanently settle the issue for trial courts in this area.[71] Thus, the defendant's right to present his theory to the jury is arguably infringed.[72]

V. CONCLUSION

There were three major holdings by the Supreme Court of Ohio in *Shane*. First, when a defendant is charged with murder, the trial judge must determine whether adequate evidence of reasonably sufficient provocation has been presented.[73] If adequate evidence has been

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67. *Id.* at 278.
68. *Id.*
69. *Id.* at 276.
70. *Id.* at 279.
71. *See supra* note 58.
72. *See supra* note 47.
73. *Shane*, 590 N.E.2d at 276. For commentary on this critical issue, see Leo M. Romero, *Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice*, 12 N.M. L. REV. 747 (1982).

> To say that words alone cannot amount to adequate provocation is to deny to the jury the assessment of whether the words, by themselves, might "arouse anger, rage, fear, sudden resentment, terror or other extreme emotions . . . such as would affect the ability to reason and to cause a temporary loss of self control in an ordinary person of average disposition."

Id. at 776 (quoting N.M.U.J.I. CRIM. § 2.22 (Supp. 1981)). *See* People v. Valentine, 169 P.2d 1 (Cal. 1946). The California Supreme Court stated:

> [I]n the present condition of our law it is left to the jurors to say whether or not the facts and circumstances in evidence are sufficient to lead them to believe that the

presented, a voluntary manslaughter instruction is given to the jury.[74] The trial judge's decision should be based on the specific facts of each individual case.[75]

Second, determination of whether provocation is reasonably sufficient to bring on sudden passion, or a sudden fit of rage, requires a two-prong analysis.[76] Initially, an application of an objective test, based on a reasonable person standard, is conducted by the trial judge.[77] If the defendant's conduct meets the objective standard, then the jury conducts a subjective inquiry.[78] If the jury decides the particular actor was actually under the influence of sudden passion or in a sudden fit of rage, then the provocation is reasonably sufficient to support a finding of voluntary manslaughter.[79]

Finally, the supreme court followed the common law mere words doctrine in part, but refused to adopt its major exception.[80] The court held that "words alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations."[81] However, Justice Resnick explicitly stated that the court would not create a specific exception where the provocation consists of one spouse informing the other of infidelity.[82]

These holdings will have a substantial impact on the role of the state's trial judges and Ohio law in general. Both the elements of reasonably sufficient provocation and the requirements for giving voluntary manslaughter instructions are now clearer. However, it now seems impossible in Ohio to assert that confessions of infidelity constitute reasonably sufficient provocation to reduce murder to manslaughter.

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> defendant did . . . commit his offense under a heat of passion . . . . [A]s to the nature of the passion itself, our law leaves that to the jury. . . .

Id. at 12 (quoting People v. Logan, 164 P. 1121, 1122 (Cal. 1914). *See also* State v. Boyd, 532 P.2d 1064, 1067 (Kan. 1975) (defendant has the right to present his theory to the jury though his evidence may be weak and nonconclusive); State v. Harwood, 519 P.2d 177, 181 (Ariz. 1974) (when the testimony of the defendant establishes the elements of manslaughter, he is entitled to present his theory to the jury).

74. *Shane*, 590 N.E.2d at 278.
75. *Id.*
76. *Id.* at 276.
77. *Id.*
78. *Id.*
79. *Id.* at 279.
80. *Id.*
81. *Id.*
82. *Id.*