



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA v. CHRISTEPHER E. LUA  
CR-14-0283-PR**

**PARTIES:**

*Petitioner:* Christopher E. Lua

*Respondent:* The State of Arizona

**FACTS:**

D.G. and D.C. were leaving a convenience store when Lua and several other men began verbally taunting them. Events progressed to a physical altercation. D.G. and D.C. returned to their vehicle, but after hearing someone yell “coward,” D.C. gestured as if he were grabbing something from his car. He then ran back toward Lua with his hand behind his back. When he was about two feet away, Lua shot him. D.G. then ran toward Lua, grabbed his arm, and hit him. Lua shot D.G. before fleeing. During a police interview, Lua admitted shooting D.C. several times but said that he did so because he believed D.C. had a gun and “was going to shoot us.”

Lua was ultimately tried on two counts of attempted second-degree murder. The trial court instructed the jury, over Lua’s objection, regarding the offense of attempted manslaughter upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim (“provocation manslaughter”), which the court ruled was a lesser-included offense of attempted manslaughter. The instructions listed the following as elements of second-degree murder: “(1) The Defendant caused the death of another person; AND (2) [t]he Defendant intended or knew that his conduct would cause death.” The elements listed for provocation manslaughter were: “(1) The Defendant committed Second Degree Murder; AND (2) [t]he Defendant did so upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim.”

The jury returned guilty verdicts for attempted provocation manslaughter. Lua timely appealed, claiming he was improperly convicted of a crime that is not a lesser-included offense of second-degree murder.

The court of appeals first noted that under the “elements test,” a lesser-included offense is one that is comprised solely of some, but not all, elements of the greater offense, such that it is impossible to commit the charged crime without also committing the lesser one. *State v. Hines*, 232 Ariz. 607, 610 ¶ 10, 307 P.2d 1034, 1037 (App. 2013).

The court then rejected Lua’s argument that *Peak v. Acuna*, 203 Ariz. 83, 84-85 ¶ 6, 50 P.3d 833, 834-35 (2002), stands for the proposition that provocation manslaughter is not a lesser-included offense of second-degree murder. The defendant in *Peak* was charged with the first-degree murder of her husband. At trial, jurors were instructed regarding first-degree murder, second-degree murder, and provocation manslaughter. The jury acquitted the defendant of first-degree murder and provocation manslaughter but convicted her of second-degree murder. The

trial court ordered a new trial, and the State sought special action review.

The Arizona Supreme Court rejected the *Peak* defendant's contention "that because [provocation] manslaughter is a lesser-included offense of second-degree murder, her acquittal of manslaughter bars the state from retrying her for second-degree murder." *Id.* at ¶ 5. The court noted that the statute defining provocation manslaughter is unusual in that "[i]nstead of deleting an element of the greater offense, it specifies a different circumstance as a requirement to find the lesser offense[,]" specifically that the defendant acted after a sudden quarrel or in the heat of passion. *Id.* at ¶ 6. Thus, acquittal of manslaughter does not necessarily bar retrial on second-degree murder because the acquittal may mean the jury found the defendant did not act after a sudden quarrel or in the heat of passion. *Id.* at 84-85 ¶ 6, 50 P.3d at 834-35.

The court in this case noted that *Peak* did not equate the "different circumstance" required for provocation manslaughter to an element of the offense, in addition to the elements of second-degree murder. "Elements of crime," as defined in Black's Law Dictionary 597 (9<sup>th</sup> ed. 2009), are "[t]he constituent parts of a crime . . . that the prosecution must prove to sustain a conviction." The State does not carry the burden of proving a sudden quarrel or heat of passion resulting from adequate provocation by the victim. Rather, the existence of this "different circumstance" is a question of fact for the jury to determine based on the evidence presented.

The court also cited *State v. Kamai*, 184 Ariz. 620, 911 P.2d 626 (App. 1995), which considered whether unlawful use of a means of transportation is a lesser-included offense of theft of an automobile. The unlawful use statute provided that the crime occurs when, "without intent permanently to deprive," a person knowingly takes unauthorized control over another's means of transportation. 184 Ariz. at 622, 911 P.2d at 628. But the phrase "without intent permanently to deprive" did not appear in the theft statute. *Kamai* held that the phrase did not "describe an element of the crime [of unlawful use] which the state must prove." *Id.* Rather, it distinguished unlawful use from auto theft. *Id.* Similarly, a "sudden quarrel or heat of passion resulting from adequate provocation by the victim" distinguishes provocation manslaughter from second-degree murder. As in *Kamai*, the phrase does not "describe an element of the crime which the state must prove." *Id.* at 622, 911 P.2d at 628. Provocation manslaughter is comprised solely of elements of the greater offense of second-degree murder.

Lua did not contend the trial evidence was insufficient for jurors to find the "different circumstance" set forth in the provocation manslaughter statute. Thus, under the facts of this case, the court of appeals held, the trial court properly instructed the jury regarding attempted provocation manslaughter as a lesser-included offense of attempted second-degree murder.

#### ISSUE:

"Is attempted 'provocation manslaughter' a lesser included offense to the charged offense of attempted second degree murder?"

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