

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
November 19, 2019 Session

FILED

04/15/2020

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. RHASEAN LOWRY

**Appeal from the Criminal Court for Hamilton County
No. 294418 Don W. Poole, Judge**

No. E2019-00113-CCA-R3-CD

THOMAS T. WOODALL, J., joining in part, concurring in result only in part.

I join the majority in all issues except the issue regarding the trial court's denial of Defendant's request for the trial court to charge facilitation as a lesser included offense of felony murder. As to that issue, I concur in results only.

At trial, the State made no objection to Defendant's request for facilitation to be added as a lesser included offense on the basis that the request was not in writing. Likewise, on appeal, the State only argues the merits of the issue and does not assert the issue is waived by Defendant.

The majority opinion, *sua sponte*, has treated the issue as waived. The majority is correct that a written request for the instruction is not in the record. However, the majority's conclusion that no written request was made at all in the trial court is not the only logical speculation. In light of no objection by the State either in the trial court or on appeal, and nothing mentioned by the trial court that the request should be denied because it was not in writing, it is just as logical to speculate that a written request was made, but was not included in the appellate record.

However, after summarizing applicable law regarding plain error review, the majority essentially analyzes the issue on its merits in order to conclude that Defendant is not entitled to plain error relief.

Instead of providing plenary review in order to deny plain error review when, as in this case, the issue of waiver is not raised by the appellee State, I believe that the issue should be addressed on its merits with the ultimate conclusion reached by the majority opinion – Defendant is not entitled to relief.

THOMAS T. WOODALL, JUDGE