IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

APRIL 1999 SESSION

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	CCA
# M1998 00264CCA R3 CD	)	
vs.	)	Montgomery County
	)	
MICHAEL JASON POWERS,	)	Hon. John H. Gasaway, Judge
	)	
Appellant.	)	(Second Degree Murder)

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OPINION FILED:_____

REVERSED AND REMANDED

JAMES CURWOOD WITT, JR., JUDGE

OPINION

The defendant, Michael Jason Powers, appeals from his conviction

for second degree murder[1] in the Montgomery County Circuit Court. The trial court imposed a sentence of 25 years in the Department of Correction. In this appeal, the defendant challenges the trial court's refusal to instruct the jury on the lesser offenses of voluntary manslaughter and criminally negligent homicide. After a review of the record, the briefs of the parties, and the applicable law, we reverse the judgment of the trial court for failure to instruct the jury on criminally negligent homicide, reckless homicide, and facilitation.

At the defendant's jury trial, the following evidence was presented. Tenille Harvey, Heather Oliver and Cassie Bowers went to a Motel 6 in Clarksville, Tennessee between 7:00 and 9:00 pm on September 1, 1996. Bowers wanted to see her boyfriend, the defendant, who was in a room at the Motel 6 with some friends. The defendant, Jeffery Miller[2] and others were in the room playing cards and talking. Harvey testified that she saw someone hand Jeffery Miller a gun as he was leaving the room. Bowers, Harvey and Oliver left the room after approximately 45 minutes to drive down Riverside Drive. They stopped at Page and Taylor's Sporting Goods Store to switch drivers. As they switched drivers, someone in the parking lot yelled "suck [my] d--- or leave." After this remark, they drove back to Motel 6 and told the defendant about the remark. They told the defendant that they wanted an apology. The defendant asked Jeffery Miller if he wanted to accompany the defendant to Page and Taylor's for an apology. The defendant and Jeffery Miller followed the young women to Page and Taylor's.

The defendant testified that Miller had the gun in the room at Motel 6 showing it to the other people in the room. The defendant asked Miller why he had a gun, and Miller responded that he was going to shoot someone instead of fighting. When they left to drive to Page and Taylor's, Miller took the gun with him. As they were driving to Page and Taylor's, Miller placed the gun on the floor between the

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[1] Tenn. Code Ann. § 39-13-210(a)(1) (1997).

[2] The state indicted the defendant and Jeffery Miller for the first degree premeditated murder of Joshua Kelley. In the interests of justice, their trials were severed. Miller appealed his conviction for first degree murder, and this court affirmed. See State v. Jeffery Miller, No. 01C01-9801-CC-00029 (Tenn. Crim. App., Nashville, June 18, 1999).

defendant's feet. Prior to exiting the vehicle, the defendant placed the gun in his pocket because he "thought it would make [him] more of a man."

In another part of town, Leslie Darnell met the victim, Joshua Kelley, at his home around 9:00 pm on the evening of September 1, 1996. They drove down Riverside Drive, and after seeing their friends at Page and Taylor's, Darnell and Kelley drove into the parking lot in front of Page and Taylor's. At some point, the defendant and Miller entered the parking lot in a white Cougar, parked on the side of the building, exited the Cougar and walked around the corner to the front of the building where the victim and a group of people were standing. The defendant asked the group who made the remark to his girlfriend. The unarmed victim stepped toward the defendant and Jeffery Miller and indicated that no one knew the defendant or his girlfriend. Several witnesses testified that the victim said "Get the hell out of here." Every witness, including the defendant, testified that there was no physical contact between the victim and the defendant or Miller. Many witnesses testified that the victim had his hands up, but there was a dispute among the witnesses regarding whether this was a threatening gesture.

The defendant brandished the gun but then said "I can't do this." Some witnesses testified that the defendant handed the gun to Miller and said "cap him." Eric Justice testified that Jeffery Miller said "cap him" to the defendant. Other witnesses testified that Jeffery Miller grabbed the gun from the defendant. Mr. Miller first shot at the ground near the victim's feet. The second shot hit the victim in the chest area causing him to bleed to death. On this evidence, the jury found the defendant criminally responsible for second degree murder.

The state prosecuted the defendant on the theory of criminal responsibility for the conduct of Jeffery Miller. To be criminally responsible for the conduct of Miller, the defendant must have "act[ed] with intent to promote or assist the commission of the offense . . . [by] solicit[ing], direct[ing], aid[ing], or attempt[ing] to aid [Miller] to commit the offense." Tenn. Code Ann. § 39-11-402(2) (1997). The extent of criminal responsibility is far reaching because of the applicability of the

natural and probable consequence rule when the commission of the charged offense resulted from the commission or attempt to commit a threshold offense. Our supreme court found the natural and probable consequence rule applies to criminal responsibility under Tennessee Code Annotated section 39-11-402. See State v. Carson, 950 S.W.2d 951, 956 (Tenn. 1997). The natural and probable consequence rule is the common law rule which applied to accessories before the fact and aiders and abettors. Id. at 954. The rule has been stated as follows:

> The common purpose need not be to commit the particular crime which is committed; if two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal, if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose, or as a natural and probable consequence thereof.

Id. (quoting Key v. State, 563 S.W.2d 184, 186 (Tenn. 1978)).

The defendant contends the trial court erred by refusing to instruct the jury on the lesser offenses of voluntary manslaughter and criminally negligent homicide. The court reasoned that neither an instruction on voluntary manslaughter nor criminally negligent homicide was appropriate under the facts of this case.

A trial judge must instruct the jury on all lesser included offenses and on all lesser grade offenses for which the evidence is sufficient to support a conviction. See State v. Bolden, 979 S.W.2d 587, 593 (Tenn. 1998); State v. Trusty, 919 S.W.2d 305, 311 (Tenn. 1995); Tenn. Code Ann. § 40-18-110(a) (1997). In deciding whether the evidence is sufficient to warrant an instruction on a lesser offense, "the trial court must determine whether the evidence, when viewed in the light most favorable to the *defendant's theory* of the case, would justify a jury verdict in accord with the defendant's theory, and would permit a rational trier of fact to find the defendant guilty of the lesser offense and not guilty of the greater offense." State v. Elder, 982 S.W.2d 871, 877 (Tenn. Crim. App. 1998) (citations and footnote omitted) (emphasis in original). The trial court is not confined to the state's theory or the defendant's theory of the case when deciding which jury instructions on lower offenses should be given. Instead, it must instruct the jury on all lesser offenses raised by the evidence and included in the indictment. See State

v. Mario Hawkins, No. 01C01-9701-CR-00014, slip op. at 10 (Tenn. Crim. App., Nashville, July 2, 1998). If the trial court finds no evidence to support a finding of guilt of the lesser offense, and the "record clearly shows that the defendant was guilty of the greater offense . . . the trial court's failure to charge on a lesser offense is not error." State v. Stephenson, 878 S.W.2d 530, 550 (Tenn. 1994) (citations omitted). However, error based on the failure to instruct the jury on a lesser offense may be harmless.

See State v. Williams, 977 S.W.2d 101, 105 (Tenn. 1998).

I. Voluntary Manslaughter

The defendant contends the trial court erred in refusing to instruct the jury on voluntary manslaughter. The defendant argues that slight evidence of provocation is sufficient for a voluntary manslaughter jury instruction. The state responds that the record contains no evidence of adequate provocation.

Voluntary manslaughter is a lesser grade of first degree premeditated murder, but not a lesser included offense. See Trusty, 919 S.W.2d at 311. Voluntary manslaughter is defined as "the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Tenn. Code Ann. § 39-13-211(a) (1997). The defendant testified he became mad when Cassie told him about the rude comment someone made to her. Additionally, he perceived the victim's throwing his hands up as a threatening gesture. Other witnesses testified that a fight seemed imminent the way the defendant and the victim were throwing up their hands. According to the defendant, the victim said, "Get the hell out of here."

This evidence is not sufficient to support a conviction of criminal responsibility for voluntary manslaughter. There is no evidence that the defendant or Miller were in a state of passion from adequate provocation. Although the defendant testified that he was mad when he arrived at Page and Taylor's, he placed the gun in his pocket because he "thought it would make [him] more of a

man." The defendant did not testify that he or Miller feared the victim or that either of them were provoked by any of the victim's words or actions. See State v. Robert William Breeden, No. 03C01-9606-CR-00217, slip op. at 5-6 (Tenn. Crim. App., Knoxville, Sept. 30, 1997) (victim's actions failed to constitute reasonable provocation where unarmed victim threatened armed defendant); cf. State v. Summerall, 926 S.W.2d 272, 278-79 (Tenn. Crim. App. 1995) (reversible error found where trial court failed to instruct the jury on voluntary manslaughter when the defendant testified that he feared the victim and the victim fired shots at him first). In this case, the record is devoid of any evidence supporting an inference of guilt of voluntary manslaughter. See State v. Elder, 982 S.W.2d 871, 878-79 (Tenn. Crim. App. 1998) (evidence regarding an argument over four hours prior to the killing was not sufficient for a finding of provocation or a state of passion). Accordingly, we find no error in the trial court's failure to instruct the jury on the lesser grade offense of voluntary manslaughter.

II. Criminally Negligent Homicide

Regarding a criminally negligent homicide jury instruction, the defendant argues the jury could have found the defendant's negligent act of bringing a gun to the scene of the crime caused the victim's death. The state responds that there was no evidence the defendant failed to perceive the risk of pulling a gun out of his pocket.

Criminally negligent homicide is a lesser grade and lesser included offense of first degree premeditated murder. See State v. Lynn, 924 S.W.2d 892, 899 (Tenn. 1996). Criminally negligent homicide is defined as "criminally negligent conduct which results in death." Tenn. Code Ann. § 39-13-212 (1997). A person who should be aware of a substantial and unjustifiable risk that certain circumstances exist or a certain result will occur is criminally negligent. See Tenn. Code Ann. § 39-11-302(d) (1997).

The defendant was prosecuted on the theory of criminal responsibility. For a jury instruction on criminally negligent homicide to be appropriate under these

circumstances, the evidence would have to show the defendant was criminally responsible for Miller's negligence. There is absolutely no evidence in the record to support this proposition. Cf. State v. Frank Whitmore, No. 03C01-9404-CR-00141, slip op. at 32 (Tenn. Crim. App., Knoxville, June 19, 1997) (defendant could not have been found criminally responsible for codefendant's negligent act when codefendant brought knife to scene of crime and only intended to scare victim). Robert Royse, a firearms examiner with the Tennessee Bureau of Investigation Crime Lab, testified that more than seven pounds of pressure would need to be applied in order to fire the gun which killed the victim. The evidence adduced at trial clearly showed Miller intentionally shot the victim.[3] Accordingly, we find no error in the trial court's refusal to instruct the jury on criminally negligent homicide based on the defendant's criminal responsibility.

However, there is evidence in this case to support a conviction for criminally negligent homicide based on the defendant's own negligent conduct. The defendant testified that he was "stupid" for putting the gun in his pocket prior to exiting Miller's car. After brandishing the gun, the defendant said, "I can't do this" and wanted to leave. Although Miller had earlier indicated that he would shoot someone, the defendant thought Miller was joking. However, certain witnesses testified that the defendant handed the gun to Miller knowing that Miller earlier stated he would shoot someone instead of fighting. This was sufficient evidence from which the jury could conclude the defendant engaged in criminally negligent conduct which resulted in the death of the victim. See State v. Darron Clayton, No. 02C01-9304-CR-00071, slip op. at 34 (Tenn. Crim. App., Jackson, July 23, 1998) (evidence susceptible of inferring guilt for criminally negligent homicide where defendant testified he did not intend to kill the victim); State v. Kevin Tate, No. 02C01-9605-CR-00164, slip op. at 24 (Tenn. Crim. App., Jackson, Dec. 3, 1997) (evidence susceptible of inferring guilt for criminally negligent homicide where defendant ran up to victim with gun in hand); State v. Frank Whitmore, No. 03C01-

[3] At Miller's trial, Miller claimed the second shot was fired accidentally. See State v. Jeffery Miller, No. 01C01-9801-CC-00029, slip op. at 5 (Tenn. Crim. App., Nashville, June 18, 1999). However, this evidence was not introduced at the defendant's trial, and we may not consider evidence outside of the record before us. See Tenn. R. App. P. 13(c).

9404-CR-00141, slip op. at 33 (Tenn. Crim. App., Knoxville, June 19, 1997) (defendant could have been found criminally negligent for his own negligent conduct). We find the trial court erred in failing to instruct the jury on criminally negligent homicide based on the defendant's own negligence.

Because we find the trial court erred in failing to instruct the jury on criminally negligent homicide, we must determine if the trial court's error was harmless. See State v. Williams, 977 S.W.2d 101, 105 (Tenn. 1998). "Reversal is required if the error affirmatively appears to have affected the result of the trial on the merits, or in other words, reversal is required if the error more probably than not affected the judgment to the defendant's prejudice." Id. (citations omitted).

Usually harmless error is found when a jury convicts the defendant of the highest offense to the exclusion of a lower offense or offenses on which the jury was instructed. See State v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990); State v. Roger Dale Bennett, No. 01C01-9607-CC-00319, slip op. at 12-13 (Tenn. Crim. App., Nashville, Dec. 31, 1998); State v. Alvin Robinson, Jr., No. 02C01-9608-CR-00208, slip op. at 5 (Tenn. Crim. App., Jackson, Nov. 25, 1998) (opinion on remand). This conclusion is based on the idea that if the jury rejected the first lower offenses instructed, any offense still lower, on which the jury was not instructed, would have been rejected likewise. For example, in State v. Williams, 977 S.W.2d 101, 106 (Tenn. 1998), the jury convicted Williams of first degree premeditated murder to the exclusion of the charges of second degree murder and reckless homicide. Our supreme court concluded that the jury would have similarly rejected a charge on voluntary manslaughter. See Williams, 977 S.W.2d at 106.

In the case at hand, the jury convicted the defendant of the lowest offense on which the jury was instructed, second degree murder, to the exclusion of the highest offense, first degree premeditated murder. The evidence adduced at trial would support a jury's conclusion that the defendant was criminally negligent for his own conduct and not criminally responsible for second degree murder. If given the choice between criminal responsibility for second degree murder and

criminally negligent homicide based on the defendant's own conduct, we cannot conclude with any level of confidence that the jury would have convicted the defendant of criminal responsibility for second degree murder rather than criminally negligent homicide. See State v. Brandon R. Patrick, No. 03C01-9712-CC-00548, slip op. at 6 (Tenn. Crim. App., Knoxville, Feb. 19, 1999) ("We cannot conclude that the proof of the greater offense was so overwhelming that the jury would have chosen the greater offense over the lesser offense if given the choice.") We find the error more probably than not affected the verdict in this case. See Williams, 977 S.W.2d at 105. Therefore, the trial court's failure to instruct the jury on the lower offense of criminally negligent homicide was reversible error. See State v. Belser, 945 S.W.2d 776, 791 (Tenn. Crim. App. 1996) (reversible error found in failure to instruct the jury on voluntary manslaughter where jury convicted the defendant of second degree murder under indictment for first degree murder); State v. Summerall, 926 S.W.2d 272, 279 (Tenn. Crim. App. 1995) (reversible error found where trial court failed to instruct the jury on voluntary manslaughter where jury convicted the defendant of second degree murder under indictment for first degree murder).

III. Reckless Homicide

Although the defendant neither requested an instruction on reckless homicide at trial nor claims it should have been given on appeal, we must determine if the trial court erred in failing to instruct the jury on reckless homicide. Reckless homicide is a lesser grade of first degree murder. See State v. Trusty, 919 S.W.2d 305, 310-11 (Tenn. 1995). "Reckless homicide is a reckless killing of another." Tenn. Code Ann. § 39-13-215 (1997). A person who is aware of and consciously disregards a substantial and unjustifiable risk that certain circumstances exist or a certain result will occur is reckless. See Tenn. Code Ann. § 39-11-302(c) (1997).

As stated above, there is no evidence in the record to suggest Miller's shooting the victim was anything other than intentional. Therefore, a jury instruction on criminal responsibility for reckless homicide is inappropriate in this case. We find the trial court did not err in failing to instruct the jury on criminal responsibility for

reckless homicide.

We must determine whether there was sufficient evidence to warrant an instruction on reckless homicide due to the defendant's own reckless conduct. For the same reasons which led us to conclude that the court should have instructed the jury on the lower offense of criminally negligent homicide, we conclude that the court should have instructed the jury on the lower offense of reckless homicide. But cf. State v. Willie D. Graham, No. 03C01-9707-CC-00314, slip op. at 20 (Tenn. Crim. App., Knoxville, May 7, 1998) (evidence showed the defendant was either negligent or reckless). There is evidence the defendant acted recklessly. Accordingly, the trial court erred in failing to instruct the jury on reckless homicide for the defendant's own reckless conduct.

IV. Facilitation

Additionally, we must determine if the trial court erred in failing to instruct the jury on facilitation, the lesser included offense of first degree murder via criminal responsibility. "A person is criminally responsible for the facilitation of a felony if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony." Tenn. Code Ann. § 39-11-403(a) (1997).

This court has stated that "virtually every time one is charged with a felony by way of *criminal responsibility* for the conduct of another, *facilitation* of the felony would be a lesser included offense." State v. Lewis, 919 S.W.2d 62, 67 (Tenn. Crim. App. 1995) (italics in original). In Lewis, we found error in the trial court's failure to instruct the jury on facilitation of felony murder where there was evidence to support a conviction for facilitation . Id. at 68. The prosecution of the defendant in Lewis was predicated upon criminal responsibility under section 39-11-402(2). However, the defendant in Lewis did not participate in the robbery or murder of the victim, but he drove his codefendant to the victim and provided the gun. Id. at 65-66; cf. State v. Michael Tyrone Gordon, No. 01C01-9605-CR-00213,

slip op. at 9-10 (Tenn. Crim. App., Nashville, Sept. 18, 1997) (proof in record supports a conclusion that the defendant did not aid his codefendant with the intent to benefit or share in the proceeds). Accordingly, the court concluded that the defendant could have been found guilty of facilitation of felony murder instead of criminal responsibility for felony murder. Id. at 68.

Lewis was distinguished in the case of State v. Utley, 928 S.W.2d 448 (Tenn. Crim. App. 1995). In Utley, this court affirmed the trial court's refusal to charge the jury on facilitation of felony murder where the defendant planned and participated in the robbery which resulted in a death. Utley, 928 S.W.2d at 453. In distinguishing Lewis, the court found the evidence did not support a jury charge on facilitation because there was no evidence that the defendant's participation was accidental or unintentional. Id. at 452; see also State v. Richard Bruce Halfacre and Blake Edward Hallum, No. 01C01-9703-CR-00083, slip op. at 6-7 (Tenn. Crim. App., Nashville, Oct. 29, 1998) (no proof of limited participation in the crimes).

The facts of this case could credibly support an "all or nothing" theory in that either the defendant directed and assisted Miller in killing the victim, or he was unaware of Miller's intent to kill the victim. Being unaware of Miller's intent arguably precludes an instruction on facilitation because facilitation requires "know[ledge] that another intends to commit a specific felony." Tenn. Code Ann. § 39-11-403(a) (1997). In some similar cases, this court found a facilitation charge was not warranted. See State v. Julius E. Parker, No. 02C01-9606-CR-0018, slip op. at 14-15 (Tenn. Crim. App., Jackson, Apr. 23, 1997); State v. Brenda Anne Burns, No. 02C01-9605-CC-00184, slip op. at 10 (Tenn. Crim. App., Jackson, Oct. 9, 1997), perm. app. granted (Tenn. 1998); State v. Spadafina, 952 S.W.2d 444, 452 (Tenn. Crim. App. 1996). However, given the fact that the state's theory of prosecution was the defendant's responsibility for first degree murder and lesser offenses, and the fact that the jury could well have concluded that the defendant lacked the intent to promote or assist Miller's actions, we conclude that Lewis controls, and the facilitation instruction was warranted and, in the context of this case, the instruction should have been given.

We find the trial court erred in failing to instruct the jury on reckless and criminally negligent homicide and on facilitation. Accordingly, the trial court is reversed and the case is remanded for a new trial.

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JAMES CURWOOD WITT, JR., JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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DAVID H. WELLES, JUDGE