Affirmed and Memorandum Opinion filed June 8, 2010

In The

Fourteenth Court of Appeals

NO. 14-08-01119-CR

RAYMOND LEE SHAW, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 1116673

M E M O R A N D U M O P I N I O N

Appellant Raymond Lee Shaw was convicted of murder, a first degree felony, and sentenced to fifteen years in the Institutional Division of the Texas Department of Criminal Justice. On appeal, he contends the court erred by (1) denying his request for a jury instruction on criminally negligent homicide and (2) denying two of his *Batson*[1] challenges. We affirm.

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

I. BACKGROUND

The complainant, Jonathon, and his sister were playing at appellant's house with appellant's son and two other young boys. Appellant told his son that he wanted the children to leave; that led to conflict and shoving between the two. Appellant got angry, told the children to leave, and they complied. However, upon leaving, Jonathon realized he had left his wallet at appellant's house, so his sister and one of the boys returned to the house to look for it. Jonathon and the other boy did not go back to the house.

At that point, appellant grabbed his sawed-off shotgun and left the house, heading for Jonathon and the other boy. Appellant's son called out to his father, "They [are] kids, Daddy. Daddy, don't, don't." Appellant's son unsuccessfully wrestled appellant for his gun. After he pulled loose, appellant chased after the two boys with his gun in the air, and they fled. Jonathon's asthma, however, eventually forced him to slow down and catch his breath. Appellant overtook Jonathon, aimed his gun at him, and fired.

Jonathon was hit by four shotgun pellets: two in the back of his head, one in his shoulder, and one in his back. Appellant broke open the gun and reloaded it. At that point, Jonathon collapsed from his wounds.

Jonathon's sister rushed to Jonathon and cradled him in her arms. Several of appellant's neighbors applied pressure to Jonathon's wounds, but Jonathon died on the grass where he fell. The police arrived, arrested appellant, and took him to the police station. There, he gave a statement describing the shooting. He was subsequently charged with murder.

At trial, appellant testified that the shooting was an accident. He claimed to have acquired the shotgun from his mother-in-law and fired it only once prior to the shooting. He could not remember any details of the shooting, but he did remember giving his statement at the police station. He also acknowledged (and actually demonstrated) that he knew how to load and shoot the shotgun. Two of appellant's neighbors, Louis Hunter and Ronald Thibodeaux, testified they had seen the shotgun at appellant's home prior to the shooting.

Houston Police Officer Allen Boskey testified that appellant's shotgun is a single-action firearm. Officer Boskey testified that the hammer on a single-action firearm must be manually cocked prior to shooting each round. Officer Boskey further testified that a person shooting appellant's shotgun would need to hold it tightly with two hands while firing it or else the shotgun would fly from that person's hands, thus diminishing the possibility of an accidental discharge. Hunter testified that he took the shotgun from appellant's hands after appellant shot Jonathon.

The court instructed the jury on murder and manslaughter, but it denied appellant's request for an instruction on criminally negligent homicide. The jury found appellant guilty of murder, and sentenced him to fifteen years' imprisonment. On appeal, appellant contends the court erred by (1) denying appellant's request for a jury instruction on criminally negligent homicide and (2) denying two of appellant's *Batson* challenges.

II. DISCUSSION

A. Jury Charge

A defendant is entitled to a jury instruction on a lesser-included offense of the offense charged if there is some evidence that, if the defendant is guilty at all, he is guilty only of the lesser offense. *Guzman v. State*, 188 S.W.3d 185, 188 (Tex. Crim. App. 2006). Criminally negligent homicide is a lesser-included offense of murder. *See Grotti v. State*, 273 S.W.3d 273, 276 (Tex. Crim. App. 2008). Thus, we must consider whether there is any evidence in the record that would permit a rational jury to determine that appellant is guilty only of criminally negligent homicide. *See Guzman*, 188 S.W.3d at 188; *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994). In other words, the evidence must establish criminally negligent homicide as a valid, rational alternative to murder. *See Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007).

The offenses of murder, manslaughter, and criminally negligent homicide differ in the culpable mental state required for each. *See* Tex. Penal Code Ann. §§ 19.02(b)(1), 19.04(a), 19.05(a) (Vernon 2003). A person who causes the death of another commits (a) murder if he acts intentionally or knowingly; (b) manslaughter if he acts recklessly; and

(c) criminally negligent homicide if he acts in a criminally negligent manner. *See id.* Generally speaking, the Penal Code describes these categories of conduct as follows:

> (a) A person acts *intentionally* with respect to the nature of his conduct or result when it is his conscious objective or desire to engage in the conduct or cause the result.
>
> (b) A person acts *knowingly* with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist, and that his conduct is reasonably certain to cause the result.
>
> (c) A person acts *recklessly* . . . with regard to the circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.
>
> (d) A person acts *with criminal negligence* . . . with respect to the circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Tex. Penal Code Ann. § 6.03 (Vernon 2003) (emphases added).

When considering whether an instruction on criminally negligent homicide was required, we examine the case in light of its particular facts and circumstances and determine whether the defendant was aware of the risk of death associated with his conduct. *See Thomas v. State*, 699 S.W.2d 845, 850 (Tex. Crim. App. 1985). For the instruction to be required, the record must contain evidence showing the defendant was unaware of the risk of death associated with his conduct. *See* § 6.03(d); *Mendieta v. State*, 706 S.W.2d 651, 653 (Tex. Crim. App. 1986). Evidence that a defendant knew a gun was loaded, was familiar with guns and their potential for injury, and pointed a gun at another, indicates that the defendant was aware of a risk created by that conduct and disregarded the risk. *Thomas*, 699 S.W.2d at 850; *Salinas v. State*, 644 S.W.2d 744, 746

(Tex. Crim. App. 1982) (holding that a defendant who exhibits a loaded, cocked pistol is presumed to be aware of the risk, regardless of whether he is aware of actually shooting the deceased).

The evidence here tends to show appellant was, at the very least, aware of the risk associated with his conduct. Appellant left his house with his shotgun loaded and with several extra shells in his pocket. Appellant refused his son's pleas not to shoot the boys and his son's attempts to wrestle the shotgun away from him. Appellant chased after the boys with his gun. As Jonathon slowed down to catch his breath, appellant overcame him, aimed, and fired. Prior to shooting each round, appellant had to manually load and cock the shotgun. After shooting his first round and hitting Jonathon, he opened the shotgun and reloaded it.

We cannot hold the evidence here raised the inference that appellant was unaware of the risk associated with his conduct. *Id.* Accordingly, we overrule appellant's first issue.[2]

B. *Batson* Challenges

In his second issue, appellant contends the trial court erred by denying his *Batson* challenges to two of the State's peremptory strikes which the State used on two African-American jurors, Juror 30 and Juror 43. Generally, under *Batson*, a party may not

[2] We note that appellant argues the shooting was an accident. Specifically, in an attempt to justify an instruction on negligent homicide, appellant argues that at the time he shot Jonathon, he was in a dramatically disoriented state of mind. We find appellant's argument inapposite. First, appellant appears to confuse the issue of intent with sanity, an issue not submitted to the jury. *See* Tex. Penal Code Ann. § 8.01 (Vernon 2003). Second, while the accidental discharge of a gun may constitute criminally negligent homicide, appellant does not actually claim that the gun accidentally discharged in this case. *See Branham v. State*, 583 S.W.2d 782, 785 (Tex. Crim. App. 1979) (accidental discharge raised the issue where the gun discharged when the defendant was grabbed by a third party and where the defendant thought the gun was unloaded, did not intend to fire the gun, and did not have her finger on the trigger); *Moore v. State*, 574 S.W.2d 122, 124 (Tex. Crim. App. 1978) (accidental discharge raised the issue of criminal negligence where the defendant was unfamiliar with guns, had never before seen the particular shotgun causing the decedent's death, thought the gun was unloaded, and grabbed the gun from another's hands when the gun discharged).

exercise its peremptory strikes during jury selection to exclude a potential juror solely on the basis of race or ethnicity. *See Batson v. Kentucky*, 476 U.S. 79, 85–86 (1986).

A defendant objecting that the State has violated *Batson* must make a *prima facie* showing of racial discrimination in the State's exercise of its peremptory strikes. *See Herron v. State*, 86 S.W.3d 621, 630 (Tex. Crim. App. 2002). If the defendant makes a *prima facie* showing, a presumption arises that the peremptory challenges were used to discriminate on a racial basis, and the burden then shifts to the State to come forward with race-neutral explanations for the strikes. *Herron*, 86 S.W.3d at 630; *Keeton v. State*, 749 S.W.2d 861, 862 (Tex. Crim. App. 1988).

To justify its strikes, the State must present race-neutral explanations that are nondiscriminatory, clear, specific, and legitimate, and they must relate to the particular case to be tried. *Keeton*, 749 S.W.2d at 867–68. The State's explanations, however, need not rise to the level of a challenge for cause. *Id.* at 868.

Once the prosecutor has articulated race-neutral explanations, the burden shifts back to the defendant to show the explanations are actually a pretext for discrimination. *See Herron*, 86 S.W.3d at 630. The trial court then determines whether the defendant carried his burden of proving discrimination. *Id.* Because the trial court's decision often turns largely on an evaluation of credibility, we give the trial court's decision great deference and will not overturn it on appeal unless it is clearly erroneous. *Id.*

1. Prima Facie Showing

At trial, appellant alleged the State struck Juror 30 and Juror 43 based on their race.

2. Race-Neutral Explanations

The State's race-neutral explanation for striking Juror 30 was that the juror did not assess punishment in a previous trial in which he sat as a juror. A juror's record during prior jury service may be a race-neutral explanation for striking a venire person. *See Levy v. State*, 749 S.W.2d 176, 178 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd)

(prior service on a criminal jury that fails to reach a verdict is a race-neutral explanation for striking a juror); *Irvine v. State*, 857 S.W.2d 920, 926 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd) (same); *Webb v. State*, 840 S.W.2d 543, 545–46 (Tex. App.—Dallas 1992, no pet.) (same); *Invatury v. State*, 792 S.W.2d 845, 848 (Tex. App.—Dallas 1990, pet. ref'd) (bad record during prior jury service serves as a race-neutral explanation for striking a juror).

Additionally, the presumption of discrimination may be overcome by showing that the State relied upon the same characteristic to challenge a juror of a difference race. *Keeton*, 749 S.W.2d at 868. We note that, in the present case, the State struck a Caucasian male because he previously served on a jury unable to reach a verdict—a reason similar to that for striking Juror 30.

The State's race-neutral explanation for striking Juror 43 was that he was employed by the Texas Department of Corrections. Striking a juror based on his occupation does not violate *Batson*. *Harris v. State*, 996 S.W.2d 232, 235 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Barnes v. State*, 855 S.W.2d 173, 174 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). Where, as here, the State indicates that it struck a prospective juror based on his employment and that the State, in the past, has had poor jury experience with a member of that trade or profession, the reason is a race-neutral explanation. *See id.*

3. Rebuttal

Appellant argues that the trial court is not bound to accept all of the prosecutor's explanations at face value, and he claims that the five nonexclusive factors set forth in *Keeton* weigh heavily against the legitimacy of a race-neutral explanation. *See Keeton*, 749 S.W.2d at 866. Those factors are whether the prosecutor (1) provided an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically; (2) treated venire members with the same or similar characteristics as the challenged juror differently; (3) examined venire members differently; (4) failed to meaningfully question the challenged juror; and (5) provided an explanation for striking

the juror that is unrelated to the facts of the case. *Id.*

While these factors may be considered, they are not determinative. *Vargas v. State*, 838 S.W.2d 552, 554 (Tex. Crim. App. 1992). The overriding standard is still that which we apply here: whether the trial judge's decision was supported by the record so that it was not clearly erroneous. *Id.*

Appellant relies on the second, fourth, and fifth *Keeton* factors in contending that the State's proffered explanation for striking Juror 30 is invalid. He contends that the State treated venire members with the same or similar characteristics as the challenged juror differently, failed to meaningfully question the challenged juror, and provided an explanation for striking the juror that is unrelated to the facts of the case. We reject this argument because the record shows the State asked Juror 30 whether he had assessed punishment in a previous case, explained it struck him for his prior record as a juror, and struck a Caucasian juror for a similar reason.

Appellant relies on the first, fourth, and fifth *Keeton* factors in contending that the State's proffered explanation for striking Juror 43 is invalid. He contends that the State provided an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically, failed to meaningfully question the challenged juror, and provided an explanation for striking the juror that is unrelated to the facts of the case. We reject this argument because the record shows the State meaningfully questioned Juror 43 about his employment with the Department of Corrections and obtained his views on sentencing. The prosecutor justified the strike by stating that, based on his experience, a worker with the Department of Corrections would have undesirable employment experience and potential bias on sentencing issues.

For the reasons set forth, we cannot conclude on this record that the trial court's rulings as to appellant's *Batson* challenges are clearly erroneous. Accordingly, we overrule appellant's second issue on appeal.

III. CONCLUSION

Having overruled both of appellant's issues, we affirm the judgment of the trial court.

/s/ Kent C. Sullivan
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.

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