In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00329-CR

HAROLD "BUD" ERIC HAM, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 100th District Court
Hall County, Texas
Trial Court No. 3477-B, Honorable Stuart Messer, Presiding

July 20, 2016

MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and HANCOCK, JJ.

Through two issues, appellant Harold "Bud" Eric Ham appeals his conviction for the offense of murder[1] and sentence of life in prison. Finding no error, we will affirm.

Background

Appellant does not challenge the sufficiency of the evidence supporting his conviction. We discuss only so much of the factual background as necessary for

[1] TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2011).

disposition of the issues raised. The evidence from trial shows that during the evening of August 15, 2008, Darrell Randell, Larry Dozier, Joe Mark Davis and appellant were socializing and drinking beer outside Davis's Turkey, Texas home. Appellant and Davis began drinking together earlier in the day. There was evidence that by evening appellant was intoxicated. Randell decided to leave the gathering at Davis's home and walked to his bicycle. Appellant then shot him with a .22 caliber handgun.

Davis testified he was looking toward Randell when he heard the shot. Randell stepped away from the bicycle and appellant shot him a second time. Randell said to Davis, "I am hit. I don't think I am going to make it, get help." Davis yelled at appellant, "[P]ut the gun up, you're in serious trouble . . . . [Y]ou have done shot [Randell]." Appellant then shot Randell a third time and Davis testified he told appellant, "You have killed [Randell]." According to Davis, appellant responded he "took care of the problem, don't worry about it." Davis described appellant's facial expression as he held up the gun as "pretty hard"; "pretty mean."

Dozier testified he heard Randell say "he was hit" and "I've been shot in the head, too, or something," and "he didn't think he was going to make it." According to Dozier, Randell turned and looked at appellant and appellant shot him a third time in the head and then lowered the gun. Dozier said that before appellant shot Randell the third time he, Dozier, yelled something like, "no Bud, don't." Dozier called the local EMS but Randell died, apparently before aid arrived. According to the medical examiner who conducted the autopsy, the cause of death was multiple gunshot wounds to the head.

At the scene appellant spoke with the Hall County chief deputy sheriff. The chief deputy testified that appellant was obviously upset. He had a "distant stare" and his speech was "real thick and slurred." Referring to Randell, appellant stated to the chief deputy, "that mother f------ was trying to get in my ice chest." The chief deputy testified that he gave appellant the *Miranda*[2] warnings and telephoned the dispatcher to note the time the warnings were given. As he ended the call appellant volunteered, "I killed that asshole out of meanness; . . . I killed the son-of-a-bitch out of meanness; . . . I killed him, he was trying to steal beer out of my ice chest."

According to Dozier, in the months preceding Randell's death, appellant was "really distressed" because of a family dispute involving land. Dozier also described appellant as depressed over the death of his father and breakup of his marriage, both of which occurred during the year preceding Randell's death. Asked about the relationship between appellant and Randell, Dozier said, "I don't believe they liked each other." He recalled appellant sometimes told Randell not to take appellant's beer.

Appellant was indicted for murder. Although the offense occurred in Hall County, venue was changed to Collingsworth County. A jury convicted appellant and assessed punishment. The trial court imposed the noted sentence and made an affirmative deadly-weapon finding based on the use of a firearm. This appeal followed.[3]

---

[2] *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[3] Appellant was originally tried for Randell's murder in 2009. A Hall County jury convicted him and assessed punishment at ninety-nine years' imprisonment. We affirmed the judgment and the Texas Court of Criminal Appeals refused discretionary review. *Ham v. State,* 355 S.W.3d 819 (Tex. App.—Amarillo 2011, pet. refused). In a later habeas corpus proceeding, appellant argued his trial counsel erroneously advised

Analysis

In his first issue appellant argues the trial court erred by failing to instruct the jury according to Code of Criminal Procedure article 38.22 section 6 on the voluntariness of statements he made to law enforcement while intoxicated. The error, appellant continues, caused him egregious harm.

Before engaging in an *Almanza*[4] egregious-harm analysis, we must first determine whether the trial court committed the complained-of charge error. *Barrios v. State,* 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). We assume for this purpose that appellant was entitled to the "general voluntariness" instruction he claims was omitted from the charge. *See Oursbourn v. State,* 259 S.W.3d 159, 173. (Tex. Crim. App. 2008); TEX. CODE CRIM. PROC. ANN. art. 38.22 § 6 (West Supp. 2015) ("Upon the finding by the judge as a matter of law and fact that the statement was voluntarily made, evidence pertaining to such matter may be submitted to the jury and it shall be instructed that unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof").

The State argues the court's charge contained a proper general voluntariness instruction. We agree. In the charge, under the heading "General Voluntariness

---

him of the availability of community supervision. The Court of Criminal Appeals granted relief and set aside the trial court's judgment. *Ex parte Ham,* 2014 Tex. Crim. App. Unpub. LEXIS 863 (Tex. Crim. App. Oct. 8, 2014) (per curiam) (not designated for publication).

[4] *Almanza v. State,* 686 S.W.2d 157, 171 (Tex. Crim. App.1985) (op. on reh'g) (explaining egregious harm analysis).

Instruction," we find an instruction complying with article 38.22 section 6. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22 § 6 (stating instruction). Appellant's first issue is overruled.

By his second issue, appellant contends the trial court erred by denying his request for a lesser-included-offense instruction on the crime of manslaughter.

The trial court's decision not to submit a lesser-included-offense instruction is reviewed for abuse of discretion. *Jackson v. State,* 160 S.W.3d 568, 574 (Tex. Crim. App. 2005); *Threadgill v. State,* 146 S.W.3d 654, 666 (Tex. Crim. App. 2004). The circumstances under which an offense is a lesser-included offense of another are defined by statute. TEX. CODE CRIM. PROC. ANN. art. 37.09 (West 2006); *Hall v. State,* 225 S.W.3d 524, 527-28 (Tex. Crim. App. 2007).

Texas courts apply a two-step test to determine whether a lesser-included-offense instruction requested by a defendant must be given. *Grey v. State,* 298 S.W.3d 644, 645 (Tex. Crim. App. 2009). The first step examines whether the asserted lesser offense is included within the proof necessary to establish the greater offense. *Rousseau v. State,* 855 S.W.2d 666, 672-73 (Tex. Crim. App. 1993); *Royster v. State,* 622 S.W.2d 442, 446 (Tex. Crim. App. 1981). Application of the first step of the test is a question of law. *Hall,* 225 S.W.3d at 535.

The second step of the test considers whether there is evidence to permit the jury rationally to find that the defendant, if guilty, is guilty only of the lesser offense. *Rousseau,* 855 S.W.2d at 673; *Nevarez v. State,* 270 S.W.3d 691, 693 (Tex. App.—Amarillo 2008, no pet.). Regardless of its strength or weakness, if any evidence raises

the issue that the defendant was guilty only of the lesser offense, then the charge must be given. *Saunders v. State,* 840 S.W.2d 390, 391 (Tex. Crim. App. 1992). However, it is not enough that the jury might disbelieve crucial evidence pertaining to the greater offense. *Bignall v. State,* 887 S.W.2d 21, 24 (Tex. Crim. App. 1994). The evidence must establish that the lesser offense is a valid, rational alternative to the charged offense. *Rice v. State,* 333 S.W.3d 140, 145 (Tex. Crim. App. 2011).

Applying the second step, we consider whether there was some evidence raised at trial on which a rational jury could acquit appellant of the greater offense of murder and convict him of the lesser-included offense of manslaughter. *Cavazos v. State,* 382 S.W.3d 377, 385 (Tex. Crim. App. 2012). "While it is true that the evidence may be weak or contradicted, the evidence must still be directly germane to the lesser-included offense and must rise to a level that a rational jury could find that if [the defendant] is guilty, he is guilty only of the lesser-included offense." *Id.* at 385. "Meeting this threshold requires more than mere speculation—it requires affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense." *Id.*

The indictment alleged that on August 15, 2008, appellant "[d]id then and there intentionally or knowingly cause the death of an individual, namely, Darrell Wayne Randell, by shooting the said Darrell Wayne Randell in the head with a .22 caliber revolver." *See* TEX. PENAL CODE ANN. § 19.02(b)(1) ("A person commits an offense if he intentionally or knowingly causes the death of an individual").

A person commits the offense of manslaughter "if he recklessly causes the death of an individual." TEX. PENAL CODE ANN. § 19.04(a) (West 2011). A person acts recklessly as to 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." TEX. PENAL CODE ANN. § 6.03(c) (West 2011). The risk involved must constitute "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. *Id.* Manslaughter is a lesser-included offense of murder. *Schroeder v. State,* 123 S.W.3d 398, 400 (Tex. Crim. App. 2003) ("Under Code of Criminal Procedure article 37.09(3), voluntary manslaughter is a lesser-included offense of murder"). The State concedes the first step of the *Rousseau* test is satisfied in this case, and we agree.

To meet the second step of the test, appellant must point to affirmative evidence he did not intentionally or knowingly cause Randell's death when he shot him in the head, and affirmative evidence from which the jury could infer that he instead acted merely recklessly. *Cavazos,* 382 S.W.3d at 385. Under the Penal Code's definitions of intentionally and knowingly, in this case the record must contain affirmative evidence appellant did not have the conscious objective or desire to cause Randell's death, nor was he aware that shooting Randell was reasonably certain to cause his death. TEX. PENAL CODE ANN. § 6.03(a), (b) (West 2011). And the record must contain affirmative evidence appellant was aware of but consciously disregarded a substantial and unjustifiable risk that Randell's death would occur.

Testimony showed that appellant first shot Randell from twenty to thirty feet away. At some point before the third shot Randell said he was hit and did not think he would "make it." Davis helped Randell stand up. Appellant then shot Randell the third time, this time from a distance of some six to eight feet.

To support his contention the second *Rosseau* prong is met on this record, appellant points to his intoxication. Evidence of appellant's voluntary intoxication, however, would not operate to negate evidence he intentionally or knowingly shot Randell to death. *See Sakil v. State*, 287 S.W.3d 23, 28 (Tex. Crim. App. 2009) (elements of offense, including requisite mental state, not affected by evidence of intoxication).

Appellant also points to exclamations Davis and Dozier shouted during the shooting, and evidence of their thoughts at the time. As we noted in our summary of the evidence, for example, there was testimony Davis yelled at appellant that he had "shot Darrell." Of similar import is Dozier's testimony that at first, Dozier "thought, you know, [appellant] was just shooting over [Randell's] head or something at the time." Dozier later said, describing his thoughts after appellant's second shot, "And at this time, I still wasn't too sure, you know, it was just a bad prank or something. I didn't know." Those witnesses' statements and impressions speak to their mental states during the events they were witnessing, but appellant does not explain how, on this record, they are "directly germane" to the issue of appellant's mental state. We cannot agree that evidence reflecting only Davis's and Dozier's initial thoughts and reactions when appellant unexpectedly opened fire on Randell constitutes affirmative evidence rebutting or negating the evidence of appellant's intentional or knowing state of mind and tending

to show he was acting only recklessly. *Cavazos,* 382 S.W.3d at 385. Nor can we agree the evidence appellant emphasizes establishes manslaughter as a valid, rational alternative to the charged offense. *Rice,* 333 S.W.3d at 145.

The trial court did not abuse its discretion by refusing to charge the jury on manslaughter as a lesser-included offense of murder. Appellant's second issue is overruled.

Conclusion

Having overruled appellant's two issues on appeal, we affirm the judgment of the trial court.

James T. Campbell
Justice

Do not publish.