REL: July 10, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-0355

Terri Lynn Grant

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-17-1626)

McCOOL, Judge.

Terri Lynn Grant appeals her conviction for reckless manslaughter, a violation of § 13A-6-3(a)(1), Ala. Code 1975, and her resulting sentence of 20 years' imprisonment. For the reasons set forth herein, we affirm.

Facts and Procedural History

At approximately 11:00 p.m. on March 26, 2016, Michael Williams, who was in his apartment at the Turtle Creek apartment complex ("Turtle Creek") in Mobile, heard "a verbal and physical altercation coming from the apartment next to [him]" (R. 71), followed by "four to five" gunshots. (R. 72.) Williams then heard "footsteps go[ing] downstairs" (R. 72), and, according to Williams, "[w]hoever it was, they were in a hurry." (R. 73.) Steely Hurst, who was also in her apartment at Turtle Creek at that time, testified that her apartment faced the Turtle Creek parking lot and that she "heard what seemed to be a girl scream, so that kind of made [her] look out the window." (R. 156.) Hurst testified that she saw a male and a female "running to a [Dodge truck] parked in the parking [lot]" (R. 156) and that it "appeared that [the male] had a pistol in his right hand." (R. 157.) Hurst further testified that the female entered the driver's side of the truck, that the male entered the passenger's side of the truck, and that she "observed [the male] maybe ... stuff[] [something] underneath ... the seat of the truck and then they sped off." (R. 161.) After hearing the gunshots and hurried footsteps, Williams emerged from his apartment and found Khaled Almashni lying just inside the door to Almashni's apartment, which was open, and suffering from multiple gunshot wounds to the chest and stomach. When police officers arrived at the scene, they found no evidence of forced entry and "[n]o indication of a struggle or anything." (R. 375.) Rather, Cpl. Jennifer Wilson, a crime-scene investigator with the Mobile Police Department, testified that, based on the evidence she observed at the scene, it appeared that Almashni had "answered the door and he was shot." (R. 317.) Specifically, Cpl. Wilson testified that the location of the entry wounds in Almashni's body, the empty shell casings lying just inside and just outside the door of the apartment, and the "angles" of blood spatters in the apartment were "consistent with someone standing at the door firing in towards the ... apartment." (R. 327.) Almashni died as a result of his wounds shortly after police officers arrived at the scene.

On March 24, 2017, a Mobile County grand jury indicted Grant and Jordan Daniel Johnson for the intentional murder of Almashni, a violation of § 13A-6-2(a)(1), Ala. Code 1975. In

January 2018, Johnson was convicted of the intentional murder of Almashni and was sentenced to life imprisonment. This Court affirmed Johnson's conviction and sentence on August 31, 2018, by unpublished memorandum. See Johnson v. State, 286 So. 3d 21 (Ala. Crim. App. 2018) (table). Grant's trial commenced in October 2018, and the evidence presented at Grant's trial tended to establish the following facts.

The day after Almashni was murdered, Grant was interviewed by detectives with the Mobile Police Department. That interview was recorded, and an audio recording of the interview was played for the jury. During the interview, Grant informed detectives that she and Almashni had recently begun a romantic relationship and that she and Johnson were friends. Grant also informed detectives that Johnson kept a gun at her house because he was not allowed to keep the gun at his father's house, where Johnson lived at that time. According to Grant, Almashni was unhappy with her relationship with Johnson because, Grant said, Almashni "assumed [Grant and Johnson] were sleeping together." (State's Exhibit 94, at 3:10:34.)

Grant informed detectives that, on the day Almashni was murdered, Johnson attempted to contact her because he wanted to retrieve his gun from her house but that she had not answered Johnson's telephone calls because she had "been hanging out with [Almashni]." (State's Exhibit 94, at 1:52:56.) According to Grant, later that day she and Almashni were at Almashni's apartment when, Grant said, Almashni "snapped" (State's Exhibit 94, at 15:33) and

> "told [her] that he had picked up [her] phone and went through [her] messages, and he knew that [Johnson] had a gun in [her] house. And he told [her] that he was gonna go get the gun and he was gonna do something, called [Johnson], told [Johnson] that [Johnson] was no longer in control and [Johnson] no longer had his gun and that [Almashni] had his gun and if [Johnson] wanted it he was gonna have to get it. But [Almashni] didn't really have the gun; it was still at [her] house."

(State's Exhibit 94, at 1:54:26-1:55:01.) Grant also alleged that Almashni "started talking about people, [her] friends, [her] family, [she was] trailer trash, [she was] all kinds of things, ... [and] when [she] tried to leave, he choked [her], threw [her] up against the wall, told [her] she wasn't leaving." (State's Exhibit 94, at 15:42-56.) However, Grant claimed that she "finally got away from" Almashni (State's

Exhibit 94, at 15:53-58) by "pok[ing] his eye" and that she then left the apartment. (State's Exhibit 94, at 21:49.)

There was testimony that tended to corroborate Grant's allegation that she and Almashni argued and engaged in a physical altercation a few hours before he was murdered. Alexandria Simpson testified that she had a relationship with Almashni that "was a little complicated," by which she meant that she considered their relationship to be "more friends, but sometimes it overlapped into romantic." (R. 104.) According to Simpson, on the day Almashni was murdered, he telephoned her while Grant was in the shower at his apartment, told her "that he missed [her] and that it really wasn't working out with [Grant]" (R. 111), and asked her to meet him at a school near Turtle Creek. Simpson testified that she agreed to meet Almashni but that, after she had been at the school approximately five minutes, Almashni telephoned her and told her he would not be able to meet her because Grant "found out that he had been calling [Simpson]," and he and Grant "were having an argument." (R. 112.) However, Simpson testified that Almashni telephoned her again approximately 10 minutes later, told her that Grant had left his apartment, and asked her to come to the apartment. According to Simpson, she arrived at Turtle Creek at approximately 7:30 or 8:00 p.m. and encountered Grant in the parking lot. Simpson testified that Grant was visibly angry and "pretty much went off on" Simpson and "called [Simpson] names." (R. 112.) However, Simpson testified that she "did not engage with" Grant and that she simply went to Almashni's apartment. (R. 113.) According to Simpson, when she arrived at Almashni's apartment, Almashni was "very upset" (R. 114), and "[i]t looked ... like [Almashni] had scratches kind of around his ... neck, shoulder area maybe." (R. 115.) Simpson testified that she stayed at Almashni's apartment approximately one hour and left after she "put [Almashni] in bed." (R. 114.)

Michael Oliviera, who lived at Turtle Creek in March 2016, testified that he arrived home between 8:00 p.m. and 8:30 p.m. on the day Almashni was murdered and that Grant was sitting in the parking lot in a Dodge truck. According to Oliviera, Grant "look[ed] like she was distraught" (R. 99), was "[v]isibly upset" (R. 99), and told him that Almashni "had choked her down, put her against the wall, and ... she almost passed out." (R. 99-100.) Oliviera testified that he told

Grant she needed to call the police but that Grant said "[s]he didn't want to get the police involved" and "got in her vehicle and left." (R. 101.)

According to Grant, after she left Almashni's apartment, she returned to her house, where she discovered that the door to her house had been "kicked in" because, she believed, Johnson was looking for his gun. (State's Exhibit 94, at 1:55:12.) Grant claimed that she telephoned Johnson and "begged him to come to [her] house to meet [her] so [she] could tell him what was going on" (State's Exhibit 94, at 3:11:10), i.e., that Almashni did not have Johnson's gun and that Almashni had choked her. According to Grant, Johnson did come to her house at her request. However, Grant alleged that Johnson was "ready to hurt [her] when he came in" (State's Exhibit 94, at 3:14:22) and that Johnson said she "had crossed him, and he said [she] was gonna die, or [Almashni] was gonna die. And [Johnson] put [a] gun to [her] head." (State's Exhibit 94, at 1:55:18-31.) Grant claimed that she tried to explain to Johnson that Almashni did not have Johnson's gun and that Almashni had choked her, but, according to Grant, Johnson said that she "could either get in the car and take him to [Almashni], and he could kill [Almashni] for threatening him, or he would kill [her]." (State's Exhibit 94, at 2:05:38-47.) Grant claimed that she initially refused to drive Johnson to Almashni's apartment but that, when Johnson "put the gun to [her] head, ... [she] looked in his eyes and knew he would pull the trigger," so she drove Johnson and Sara McKenzie Lewis, who was Johnson's girlfriend at that time, to Almashni's apartment in Grant's Dodge truck because she "didn't know what else to do." (State's Exhibit 94, at 2:06:05-16.)

Grant claimed that she "tried to talk [Johnson] out of it" on the drive to Turtle Creek but that Johnson "told [her] [she] was gonna go in and [she] was gonna watch." (State's Exhibit 94, at 2:06:21-30.) According to Grant, when she, Johnson, and Lewis arrived at Turtle Creek, Johnson "made [her] back [the truck] in[to]" (State's Exhibit 94, at 2:10:07) a parking space and then

> "walked behind [her] the whole way with the gun. And then when [she and Johnson] got to the door, [Johnson] put [the gun] back up at [her] head, and [she] opened the door. [Johnson] told [her] [she] had to touch [the door] so [her] fingerprints were on it, not his, since [hers] were already there."

(State's Exhibit 94, at 2:07:30-54.) Grant could not recall whether the door to Almashni's apartment was unlocked or whether she unlocked the door with a key Almashni had given her. Regardless, Grant claimed that, when she opened the door, Almashni was asleep in the living room and that Johnson "had the gun at [her] head until [Almashni] got up ..., and then when [Almashni] got up, [she] just heard a shot and [she] took off running" toward the truck. (State's Exhibit 94, at 2:09:06-15.) According to Grant, Johnson then forced her to drive back to her house so that he and Lewis could pick up Lewis's car, and Johnson told her that "if [she] talked, he would kill [her], too." (State's Exhibit 94, at 2:10:44.)

Text messages on Johnson's cellular telephone tended to support Grant's contention that Johnson believed Grant had "crossed" him, that Johnson believed Almashni had taken his gun, and that Johnson was anticipating a confrontation with Almashni. Specifically, text messages sent from Johnson's cellular telephone on the day Almashni was murdered to someone identified in Johnson's telephone as "Whakko" stated that "Terri Grant crossed me and got me mixed up" (C. 329-30), that Almashni "has my guns now" (C. 321) and "is saying all kind of crazy shit how he can make me or break me" (C. 325), that "I'm sitting here like should I go to war or should I play it cool" (C. 318), and that "they just fucked with the wrong guy. About to show them the demon. Snake style." (C. 315.) There were also text messages sent from Johnson's cellular telephone that same day to someone identified in Johnson's telephone as "Hunter." Those messages stated that "Terri got me in some shit" (C. 346), that "I might get into some shit if y'all don't hear from me" (C. 342), and that "if anything happens[,] [Almashni] at the car dealership across from the flea market." (C. 335-36.)

Lewis testified that, on the day Almashni was murdered, she met Johnson at his house at approximately 3:00 p.m. so that they could "go see some friends [and] just hang out" (R. 177) but that they first went to Grant's house so that Johnson could "get his gun that [Grant] had been holding for him." (R. 178.) Lewis testified, however, that, "after the fact, [she] found out that [Johnson] had forced entry, kicked the door in to get inside." (R. 178.) According to Lewis, after she and Johnson left Grant's house, they went to Kimberly Borlovan's house. Evidence established that Grant and Johnson "had a group of friends that they knew growing up" (R. 179), that Borlovan was the mother of one of those friends, and that Grant and Johnson were "just ... part of the kids that come to [Borlovan's] house." (R. 636.) Lewis testified that Johnson "sat on the porch and talked to [Borlovan] for about 45 minutes to an hour" while Lewis remained in the car. (R. 180.)

According to Borlovan, Johnson and Lewis arrived at her house sometime between 5:00 p.m. and 7:00 p.m. Borlovan testified that Johnson "was angry" with Almashni (R. 641); that Johnson asked her if she knew where Almashni lived, which Borlovan did not; that Johnson asked her to telephone Grant because he "had tried to call her multiple times and wasn't getting an answer" (R. 660); and that Johnson informed her that he was attempting to locate or retrieve a gun. Borlovan also testified that, approximately 90 minutes after Johnson and Lewis left her house, she received a telephone call from Grant and that Grant "was scared" (R. 645), was in fear for her life, "was very, very upset" (R. 675), and "was like crying hard." (R. 676.) According to Borlovan, during that conversation Grant stated: "I just want you to know that ...

one of them is going to kill me tonight. I don't know which one is going to kill me, but [Johnson] or [Almashni] is going to kill me tonight." (R. 674.)

According to Lewis, after she and Johnson left Borlovan's house, Borlovan "called and said that [Grant] wanted to see [Johnson] or ... wanted [Johnson] to come over or something of that sort," so Lewis and Johnson returned to Grant's house. (R. 180.) Lewis testified that, when she and Johnson arrived at Grant's house, Johnson "told [her] to stay back and wait a minute and then come up after." (R. 181.) Thus, Lewis testified, she entered Grant's house "maybe a minute-and-a-half, two minutes" after Johnson entered. (R. 180.) According to Lewis, when she entered Grant's house, Grant and Johnson "weren't saying much" (R. 181), but shortly thereafter, Grant asked Johnson "if he would ride with her to get her belongings or stuff from somewhere." (R. 182.) Thus, contrary to Grant's version of the events, Lewis testified that she, Grant, and Johnson went to Almashni's apartment at Grant's request and that she did not observe Johnson threaten Grant or force her at gunpoint to take him to Almashni's apartment. Rather, Lewis testified, "we were just going there ... to get [Grant's] stuff. It wasn't a big deal." (R. 183.)

Lewis testified that when she, Grant, and Johnson arrived at Turtle Creek, Grant circled the parking lot twice "looking for a vehicle to see if [Almashni] was home" (R. 183) and that Grant then parked the truck. According to Lewis, Grant then stated that she "was going to get her stuff," and Johnson "asked [Grant] if she needed help." (R. 184.) However, Lewis testified, Grant stated that "she didn't think ... she needed help" and "got out of the vehicle and started heading toward the apartments." (R. 184.) Although Grant told Johnson she did not need help, Lewis testified that Johnson followed Grant "[m]aybe 30 seconds, not even a minute" after Grant got out of the truck. (R. 185.) Lewis, who remained in the truck, testified that she could not see Grant and Johnson once they entered the apartment complex but that, at some point thereafter, she heard gunshots and saw Grant and Johnson "running back to the truck." (R. 185.) According to Lewis, Grant and Johnson were "screaming profusely," and Lewis testified that she "smelled gunshot residue, gunpowder." (R. 185.) Lewis testified that she, Johnson, and Grant then "sped off" to Grant's house, where Grant and Johnson "were pretty much still just panicking." (R. 186.) However, according to Lewis, neither Grant nor Johnson ever mentioned calling the police, and, to her knowledge, no one ever did call the police. Lewis testified that, throughout the course of the evening, she never heard Grant and Johnson discuss killing Almashni and that she never saw Grant in possession of a gun.

Although neither Grant nor the State requested a reckless-manslaughter charge as a lesser-included offense of intentional murder, the trial court informed them that it intended to submit a reckless-manslaughter charge to the jury if either party requested such a charge because the court believed that "the evidence is sufficient to at least meet the threshold of some rational basis for a reckless manslaughter charge." (R. 684.) Thereafter, the State requested a reckless-manslaughter charge "out of an abundance of caution." (R. 685.) Grant objected to the reckless-manslaughter charge, arguing that she "[did not] believe there has been any evidence ... of reckless behavior as opposed to the intentional killing of another person." (R. 703.) See Harbin v. State, 14 So. 3d 898, 906 (Ala. Crim. App. 2008) (noting that, "'on occasion, an accused may choose not to request instructions on lesser included offenses as a matter of trial strategy, usually in the belief that he can defeat the greater charge, but might not be able to defeat a lesser included offense'" (quoting State v. Howell, 649 P.2d 91, 94 (Utah 1982))). The trial court overruled Grant's objection and submitted the reckless-manslaughter charge to the jury. The trial court also instructed the jury on the theory of accomplice liability and instructed the jury that accomplice liability "applies to the indicted charge of intentional murder and to the lesser included offense of manslaughter." (R. 804.)

On October 22, 2018, the jury found Grant guilty of reckless manslaughter, and the trial court sentenced Grant to 20 years' imprisonment. Grant filed a timely notice of appeal.

Analysis

Grant's sole claim on appeal is that the trial court erred by submitting the reckless-manslaughter charge to the jury because, she says, "there was no rational evidentiary basis" for such a charge. (Grant's brief, at 38.)

"The standard of review for jury instructions is abuse of discretion." Petersen v. State, [Ms. CR-16-0652, January 11, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019). A trial court may sua sponte instruct the jury on lesser-included offenses -- even over the defendant's objection, Harbin, 14 So. 3d at 908 -- "'when there is a reasonable theory from the evidence supporting those lesser included offenses'" and when such instructions "'would not be misleading, ... correctly state the law of [the] case, and ... are supported by any evidence, however[] weak, insufficient, or doubtful in credibility[.]'" Clark v. State, 896 So. 2d 584, 641 (Ala. Crim. App. 2000) (quoting, respectively, MacEwan v. State, 701 So. 2d 66, 69 (Ala. Crim. App. 1997), and Ex parte Chavers, 361 So. 2d 1106, 1107 (Ala. 1978)).

> "However, '[t]he court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense.' § 13A-1-9(b), Ala. Code 1975. 'The basis of a charge on a lesser-included offense must be derived from the evidence presented at trial and cannot be based on speculation or conjecture.' Broadnax v. State, 825 So. 2d 134, 200 (Ala. Crim. App. 2000), aff'd, 825 So. 2d 233 (Ala. 2001), cert. denied, 536 U.S. 964, 122 S. Ct. 2675, 153 L. Ed. 2d 847 (2002). '"A court may properly refuse to charge on a lesser included offense only when (1) it is clear to the judicial mind that there is no evidence tending to

> bring the offense within the definition of the lesser offense, or (2) the requested charge would have a tendency to mislead or confuse the jury."' Williams v. State, 675 So. 2d 537, 540-41 (Ala. Crim. App. 1996), quoting Anderson v. State, 507 So. 2d 580, 582 (Ala. Crim. App. 1987)."

Clark, 896 So. 2d at 641. Thus, to resolve whether the trial court abused its discretion by submitting the reckless-manslaughter charge to the jury, we must determine whether there was a rational basis in the evidence for convicting Grant of reckless manslaughter.

"A person commits the crime of reckless manslaughter if ... [h]e recklessly causes the death of another person[.]" § 13A-6-3(a)(1).

> "A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

§ 13A-2-2(3), Ala. Code 1975. Conversely, "[a] person acts intentionally with respect to a result or to conduct described by a statute defining an offense, when his purpose is to cause that result or to engage in that conduct." § 13A-2-2(1), Ala. Code 1975.

In this case, there was no evidence that would support a finding that Grant shot Almashni. Rather, Grant testified that it was Johnson who shot Almashni, and the only other eye-witness to the shooting -- Johnson -- refused to testify as to who shot Almashni. (R. 622-23.) Thus, in this case, the legal propriety of a reckless-manslaughter charge rests on (1) whether Grant was complicit in Johnson's act of killing Almashni or (2) whether Grant was independently reckless to the point of committing manslaughter herself.[1]

I. Complicity

We first consider whether Grant could be convicted of reckless manslaughter as an accomplice to Johnson's act of killing Almashni. Alabama's complicity statute states, in pertinent part:

> "A person is legally accountable for the behavior of another constituting a criminal offense if, with the intent to promote or assist the commission of the offense:

[1]As noted above, the trial court instructed the jury that the theory of accomplice liability applied to both the intentional-murder charge and the reckless-manslaughter charge.

> "(1) He procures, induces or causes another person to commit the offense; or
>
> "(2) He aids or abets such other person in committing the offense ...."

§ 13A-2-23, Ala. Code 1975 (emphasis added.) As set forth in the plain language of § 13A-2-23, the Alabama legislature has expressly provided that the mental state required for complicity liability is "intent to promote or assist the commission of the offense." _See_ Commentary, § 13A-2-23 ("The necessary mental state requisite for [complicity] liability is couched in the explicit terms of 'with the intent to promote or assist.' ... Rather than including recklessness or criminal negligence, the thrust here is to place liability upon one who has the more positive mental state of promoting or actively assisting the perpetration of an offense."). Therefore, a person is not subject to liability under a complicity theory unless he or she _intentionally_ promotes or assists another person in the commission of a criminal offense.

However, the fact that intent to promote or assist the commission of the offense is the mental state required for accomplice liability does not mean that a person cannot be convicted as an accomplice to another person's reckless criminal offense. As the Alabama Supreme Court has noted, a person can be convicted of a reckless offense under a complicity theory if "the accomplice ... ha[s] knowledge that the principal is engaging in reckless conduct and intentionally assist[s] or encourage[s] that conduct with the intent to promote or facilitate its commission." Ex parte Simmons, 649 So. 2d 1282, 1285 (Ala. 1994) (emphasis added). Thus, where evidence establishes that a defendant intentionally rendered assistance or encouragement to a principal who recklessly caused the death of another person, the defendant can be convicted as an accomplice to reckless manslaughter or reckless murder. See Ex parte Simmons, 649 So. 2d at 1285 ("[W]e point out that this Court has held that one can be an accomplice to manslaughter, which is ... a reckless crime."); and Butler v. State, 781 So. 2d 994, 1005 n.5 (Ala. Crim. App. 2000) ("We note that a defendant can be an accomplice to reckless manslaughter."). Conversely, however, if the evidence leaves no doubt that the principal committed an intentional killing -- i.e, if there is no rational basis in the evidence, Clark, supra, for a finding that the principal's killing was reckless -- an accomplice to that killing cannot be convicted of reckless manslaughter or reckless murder.[2] The Illinois Court of Appeals aptly explained the reasoning for this principle in People v. Baney, 229 Ill. App. 3d 770, 595 N.E.2d 188 (1992).[3]

In Baney, the evidence tended to establish that Edward Baney was driving Christopher Ster to a library when Ster "stated, without any prodding, that he wanted to kill somebody." Baney, 229 Ill. App. 3d at 772, 595 N.E.2d at 189. Baney continued driving to the library and gave Ster a knife before they reached the library. After arriving at the library, Ster stated that he wanted to steal a woman's purse, and Baney, at Ster's suggestion, moved his car to a nearby alley while Ster returned to the library. Inside the library, Ster went into a bathroom and stabbed a man in the neck when the man entered the bathroom. Ster then fled to Baney's car

[2]Of course, that is not to say that the accomplice is guilty of no crime at all, only that the accomplice is not guilty of reckless manslaughter or reckless murder in the absence of evidence indicating that the principal committed a reckless killing.

[3]Illinois's statutes governing accomplice liability and defining "recklessly" are essentially identical to Alabama's. See §§ 5/5-2(c) and 5/4-6, Ill. Rev. Stat. 1989.

and told Baney that he had killed someone, and Baney drove Ster home. At trial, Baney was charged with first-degree murder, i.e., intentional or felony murder, and the State attempted to convict Baney on a complicity theory. At the close of evidence, Baney requested a jury instruction "on reckless conduct as a lesser included offense," which the trial court denied, and the jury convicted Baney of first-degree murder. 229 Ill. App. 3d at 772, 595 N.E.2d at 190.

On appeal, Baney argued that the trial court erred by refusing to instruct the jury "on the offense of reckless conduct as a lesser included offense of first degree murder[.]" Baney, 229 Ill. App. 3d at 773, 595 N.E.2d at 190. In rejecting that argument, the Illinois Court of Appeals stated:

> "To establish a defendant's legal accountability for a crime, in this case first degree murder, the State must prove, beyond a reasonable doubt, that the accused solicited, aided, abetted, agreed, or attempted to aid another person in the planning or commission of the offense, that such participation occurred either before or during perpetration of the crime, and that this participation was with concurrent specific intent to promote or facilitate commission of the offense. (Ill. Rev. Stat. 1989, ch. 38, par. 5-2(c)[.] ...
>
> "In contrast to the mental state of intent required to find a defendant guilty on an

> accountability theory, a person commits the offense of reckless conduct 'if he performs recklessly the acts which cause the harm or endanger safety, whether they otherwise are lawful or unlawful.' (Emphasis added.) (Ill. Rev. Stat. 1989, ch. 38, par. 12–5(a).) ...
>
> "....
>
> "In this case, defendant contends that he is entitled to an instruction on reckless conduct as a lesser included offense of first degree murder because his actions in providing the knife and the transportation to and from the scene of the crime were reckless. However, defendant was found guilty on an accountability theory. According to the express terms of the statute defining accountability, a defendant can only be found guilty of an offense by this theory if he had the specific intent to aid or abet in committing the offense. Thus, a defendant's actions in committing an offense as an accomplice cannot be reckless. The mental states are mutually exclusive. For this reason, we find defendant's contention that he was entitled to a jury instruction on reckless conduct because he acted recklessly in providing the knife to be without merit.
>
> "Thus, the issue is not whether defendant acted recklessly in providing Christopher Ster, the principal, with the knife, in driving him to the library, or in aiding in his escape. Rather, the issue is whether there was some evidence to suggest that the principal's actions in stabbing the victim were done recklessly. The evidence in this case is clear and uncontradicted that Christopher Ster intentionally stabbed the victim without warning or provocation. The lack of evidence that the fatal act was anything but intentional negates any claim of recklessness. Thus, defendant was not entitled to an instruction on reckless conduct as a lesser included offense of first degree murder as there was

> insufficient evidence to conclude that the principal, Christopher Ster, acted recklessly in stabbing the victim."

229 Ill. App. 3d at 773-75, 595 N.E.2d at 190-92 (some emphasis added; some internal citations omitted).

As the Illinois Court of Appeals explained in Baney, and consistent with the Alabama Supreme Court's holding in Ex parte Simmons, supra, whether Grant could be convicted of reckless manslaughter under a complicity theory hinged on whether there was evidence tending to establish that Grant "intentionally assist[ed] or encourage[d]" Johnson in some reckless act that caused Almashni's death. Ex parte Simmons, 649, So. 2d at 1285. However, there is absolutely no basis in the evidence for finding that Johnson recklessly caused Almashni's death. To the contrary, the evidence relevant to Johnson's mental state unequivocally points to the conclusion that Johnson intended to kill Almashni. Specifically, Grant claimed that Johnson went to Almashni's apartment so that "he could kill [Almashni] for threatening him," which clearly indicates that Johnson intended to kill Almashni, and text messages sent from Johnson's cellular telephone on the day Almashni was murdered -- including messages that Johnson was considering "go[ing] to war" and was "[a]bout to show [Almashni] the demon" -- provided circumstantial evidence tending to corroborate Grant's claim that Johnson intended to kill Almashni. As was the case in Baney, the "lack of evidence that the fatal act was anything but intentional negates any claim of recklessness." Baney, 595 N.E.2d at 191. Thus, because there was no evidence indicating that Johnson recklessly caused Almashni's death, Grant could not be convicted of reckless manslaughter under a complicity theory.[4]

II. Independent Recklessness

However, the fact that Grant could not be convicted of reckless manslaughter under a complicity theory does not end our inquiry.

> "Section 13A-2-5(a), Ala. Code 1975, provides that '[a] person is criminally liable if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was sufficient to

[4]The State suggests that Johnson's conduct was reckless because, according to the State, Johnson might have gone to Almashni's apartment with the intent only "to scare him or hurt him without killing him." (State's brief, at 14.) However, there is no evidence to support such a theory, and "'[t]he basis of a charge on a lesser-included offense must be derived from the evidence presented at trial and cannot be based on speculation or conjecture.'" Clark, 896 So. 2d at 641 (quoting Broadnax v. State, 825 So. 2d 134, 200 (Ala. Crim. App. 2000)).

produce the result and the conduct of the actor clearly insufficient.' The Commentary to § 13A-2-5 explains that

> "'this section is a modified "but for" test, with an express exclusion of those situations in which the concurrent cause was clearly sufficient to produce the result and the defendant's conduct clearly insufficient .... If the actual result is not within the contemplation of the actor, or within the area of risk of which he should have been aware, he is not deemed to have "caused" the result. But if the difference is only one concerning which person or what property would be affected by defendant's act, or one of the degree of harm which would result, he is still held to have "caused" the result.'

"The accused's conduct is not the cause-in-fact of an injury if there was an <u>unforeseen</u> 'supervening, intervening cause sufficient to break the chain of causation.' <u>Lewis v. State</u>, 474 So. 2d 766, 771 (Ala. Cr. App. 1985).

"In <u>Lewis</u>, the victim shot himself after having played Russian roulette earlier in the day with the accused. The accused was charged with murder in connection with the victim's death and was convicted of criminally negligent homicide. In reversing that conviction, this Court determined that the victim's conduct was a 'supervening, intervening cause sufficient to break the chain of causation,' <u>id.</u>, because it occurred after the Russian roulette game had ended and the accused had put the gun away and left the room. We held that '[e]ven though the victim might never have shot himself in this manner if the appellant had not taught him to play Russian [r]oulette, <u>we cannot say that the appellant should have perceived the risk that the victim would play</u>

> the game by himself.' Lewis, 474 So. 2d at 771 (emphasis added).
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> "As Lewis illustrates, foreseeability is the key issue in a causation inquiry. The 'controlling question[]' is 'whether the ultimate result was foreseeable to the original actor.' Henderson v. Kibbe, 431 U.S. 145, 151 n.9, 97 S. Ct. 1730, 1735 n.9, 52 L. Ed. 2d 203 (1977). If the accused 'should have perceived' that his own conduct would concur with another cause to bring about the injury to the victim, then the other cause is concurrent, not supervening. See Shirah v. State, 555 So. 2d 807, 812-13 (Ala. Cr. App. 1989) (conduct of accused, who supplied morphine to victim, was the cause-in-fact of victim's death from overdose of Secobarbital and morphine combined). On the other hand, a supervening cause 'breaks the chain of causation' precisely because it is not a reasonably foreseeable result of the accused's conduct. Lewis, 474 So. 2d at 771."

Pearson v. State, 601 So. 2d 1119, 1126-27 (Ala. Crim. App. 1992) (some emphasis added).

In this case, it was undisputed that Johnson did not know where Almashni lived. Thus, it is clear that, but for Grant taking Johnson to Almashni's apartment, Almashni would not have been murdered by Johnson on March 26, 2016. In addition, there was evidence indicating that Grant knew Johnson was angry with Almashni when Johnson came to her house shortly before Almashni was murdered, that Grant knew Johnson was armed at that time, and that Grant drove Johnson to Almashni's apartment after Johnson told her that he intended to kill Almashni. Given that evidence, we have no trouble concluding that it was foreseeable to Grant, i.e., that Grant "'should have perceived,'" Pearson, 601 So. 2d at 1127 (quoting Shirah v. State, 555 So. 2d 807, 812 (Ala. Crim. App. 1989)), that taking Johnson to Almashni's apartment would result in Johnson killing Almashni. Thus, because Johnson would not have been in a position to kill Almashni but for Grant taking him to Almashni's apartment and because it was foreseeable that Johnson would kill Almashni if given the opportunity, Grant's act of taking Johnson to Almashni's apartment was a cause in fact of Almashni's death. Pearson, supra. Of course, Johnson's act of shooting Almashni was also obviously a cause in fact of Almashni's death, but because that act was the foreseeable result of Grant's act, Johnson's act of shooting Almashni was a concurrent cause of Almashni's death that did not break the chain of causation and thereby shield Grant from liability. See Pearson, 601 So. 2d at 1127 ("The accused's conduct is not the cause-in-fact of an injury if there was an unforeseen 'supervening, intervening cause sufficient to break the chain of causation.'" (quoting Lewis v. State, 474 So. 2d

766, 771 (Ala. Crim. App. 1985) (emphasis added)). See also Brooks v. State, 629 So. 2d 717, 718 (Ala. Crim. App. 1993) (holding, on appeal from conviction for reckless manslaughter, that the State presented sufficient evidence of causation where the appellant "beat the victim helpless and left him on the ground behind the wheels of an automobile while a crowd of people were assaulting that automobile in an attempt to extract its three occupants" because it was foreseeable "that under those conditions those inside the vehicle would attempt to escape by driving away" and because, "but for the actions of the appellant," the victim "would not have been in a position to have been run over by his friend's car" (citations omitted)).

However, evidence indicating that Grant's conduct was a cause in fact of Almashni's death is not sufficient, in and of itself, to convict Grant of reckless manslaughter. As the Commentary to § 13A-2-5, Ala. Code 1975, notes, "merely establishing causation does not necessarily establish criminality. The prosecution must still prove whatever particular mental culpability is required." Therefore, to find Grant guilty of reckless manslaughter, independent of a complicity theory, the State was required to prove not only that Grant caused Almashni's death, but also that she did so recklessly. Thus, to justify a reckless-manslaughter charge in this case, there must have been evidence tending to establish that Grant caused Almashni's death by being "aware of and consciously disregard[ing] a substantial and unjustifiable risk that" Almashni would be killed and that disregarding such risk "constitute[d] a gross deviation from the standard of conduct that a reasonable person would observe in [Grant's] situation." § 13A-2-2(3).

As noted, it was undisputed that Johnson did not know where Almashni lived, and there was evidence indicating that Grant knew Johnson was angry with Almashni; that Grant knew Johnson was armed; that Johnson told Grant he intended to kill Almashni; and that, despite those facts, Grant drove Johnson to Turtle Creek and led him to Almashni's apartment. In our opinion, by leading Johnson to Almashni's apartment under such circumstances, Grant was "aware of and consciously disregard[ed] a substantial and unjustifiable risk" that Almashni would be killed. § 13A-2-2(3). Cf. United States v. Jones, 313 F.3d 1019, 1024 (7th Cir. 2002) (concluding that the defendant's actions were reckless where the defendant "'put into motion' a series of events that resulted in the death" of the victim). We are further of the opinion that the conscious disregard of such a substantial risk "constitutes a gross deviation from the standard of conduct that a reasonable person would observe in [Grant's] situation." § 13A-2-2(3). That is to say, we do not believe a reasonable person would have taken Johnson to Almashni's apartment under the circumstances set forth above because doing so provided Johnson, who did not know where Almashni lived, with the opportunity to kill Almashni by, in a manner of speaking, leading the slaughterer to the lamb.[5] Thus, there was evidence supporting a reasonable theory that Grant recklessly caused Almashni's death, Clark, supra, and, as a result, we cannot say that the trial court abused its discretion by submitting the reckless-manslaughter charge to the jury.

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[5]We recognize that Grant alleged she took Johnson to Almashni's apartment only because Johnson forced her at gunpoint to do so. However, the jury was not required to accept that allegation as truth, and, by its verdict, the jury clearly rejected Grant's defense of coercion. See Flint Constr. Co. v. Hall, 904 So. 2d 236, 250 (Ala. 2004) (noting that a jury may disregard all or any part of a witness's testimony if the jury finds that the witness was willfully untruthful about a material aspect of his or her testimony).

Petersen, supra. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

Windom, P.J., and Kellum, Cole, and Minor, JJ., concur.