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ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR 10-205

	Opinion Delivered November 10, 2010
LOUIS CORTIS TOWNSELL APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SEVENTH DIVISION [NO. CR-2009-1103]
V.	HONORABLE BARRY SIMS, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

M. MICHAEL KINARD, Judge

Louis Cortis Townsell appeals following his conviction for second-degree attempted murder, arson, and second-degree domestic battery. Specifically, he argues that the trial court erred by refusing to instruct the jury as to the lesser-included offense of attempted extreme-emotional-disturbance manslaughter. We affirm.

Facts

The State initially charged appellant with attempted capital murder, rape, arson, and second-degree domestic battery. At the jury trial, the victim testified that, between the end of 2007 and the beginning of 2009, she and appellant had a nonexclusive romantic relationship. She stated that she and appellant had been intimate, that appellant would stay at her home occasionally, but that appellant wanted the relationship to be more serious than she wanted it to be.

The victim testified that appellant stayed with her at her apartment on the nights of January 14, 15, and 16, 2009. On January 17, she and appellant got into a verbal altercation about the status of their relationship, and she left the apartment around noon. When she returned at approximately 6:00 p.m., appellant was still at the apartment. Appellant asked her for something to eat, and when she refused, appellant proceeded to attack her. The victim stated that appellant stabbed her in her left breast with a knife, poured rubbing alcohol all over her, lit a small pillow on fire from the gas burner on her stove, and using the pillow, threw fire all over her and the contents of her apartment. She also testified that appellant stabbed her twice more in her thigh and raped her. Afterward, and while the apartment was still burning, appellant choked her and threw part of her stereo at her. The victim sustained burns to her scalp and leg and a broken elbow as a result of the attack.

The victim's downstairs neighbor and friend, John Davis, testified that on January 17, 2009, he heard a commotion upstairs and began to smell smoke. He stated that he heard the victim pounding on her floor upstairs and telling him to call the police. Davis also stated that he heard appellant say, "I'm going to kill you. I'm going to kill you." Davis then called the police and ran outside. From outside the apartment, he could see appellant upstairs, waving around a flaming pillow and setting various things on fire inside the victim's apartment. Davis stated that appellant exited the apartment and was visibly angry. Afterward, the victim tumbled down the stairs naked. Appellant then went inside Davis's apartment and tore up Davis's TV and stereo.

The victim's landlord, Finney Harris, also testified that he heard a commotion and saw appellant slinging fire around the victim's apartment. Harris stated that he saw the victim tumble down the stairs naked. He also saw appellant enter Davis's apartment.

During appellant's case, Detective Damon Whitener testified that he took a photograph of an injury on appellant's left leg that appeared to be an old laceration approximately half an inch long. The photograph was taken on February 4, 2009, after appellant's arrest.

Appellant testified that he had stayed with the victim the nights of January 15 and 16, 2009, and that on the night of January 16, he and the victim got into a verbal altercation because he had called her by his ex-girlfriend's name. The following morning, according to appellant, the victim went downstairs to John Davis's apartment, where appellant heard them "getting romantic." When she returned to her apartment, appellant asked her what was going on, and she told him she was mad at him. Appellant stated that the victim then went back downstairs and did not return until approximately 6:30 p.m. When she returned, appellant asked her if she had brought him something to eat, and that made the victim angry. Appellant admitted that he grabbed a pillow, lit it on fire, and used the pillow to set the curtains on fire. According to appellant, he and the victim "tussled." Appellant stated that he was angry with her because of John Davis and because she had not brought him any food, but he denied threatening her or stabbing her with a knife. Instead, appellant stated, the victim grabbed the knife from underneath the mattress and used it to stab him in the leg.

After all of the evidence had been presented, appellant proffered jury instructions for attempted first-degree murder, attempted second-degree murder, and attempted manslaughter, among others. The proffered instruction for attempted manslaughter read as follows:

CRIMINAL ATTEMPT TO COMMIT MANSLAUGHTER

> Louis Townsell is charged with the offense of attempted manslaughter. A person commits the offense of manslaughter if the person causes the death of another person under circumstances that would be murder, except that he causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse. To sustain the charge of attempted manslaughter, the State must prove beyond a reasonable doubt:
>
> First: That Louis Townsell intended to commit the offense of manslaughter;
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> Second: That Louis Townsell purposely engaged in conduct that was a substantial step in a course of conduct intended to culminate in the commission of manslaughter;
>
> and
>
> Third: That Louis Townsell's conduct was strongly corroborative of the criminal purpose.
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> Definition
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> "Purposely" — A person acts purposely with respect to his conduct when it is his conscious object to engage in the conduct.

The State objected to the instruction regarding attempted manslaughter, arguing that attempted manslaughter was not a lesser-included offense of attempted capital murder. Appellant argued that the offense was a lesser-included offense of attempted capital murder and that the instruction for attempted manslaughter was appropriate because the evidence

demonstrated extreme emotional disturbance. The trial court denied the request to instruct on attempted manslaughter.[1]

After deliberating, the jury found appellant guilty of attempted second-degree murder, arson, and second-degree domestic battery. The trial court sentenced appellant to fifteen years in the Arkansas Department of Correction for attempted second-degree murder, twelve years and a $10,000 fine for arson, and twenty years and a $10,000 fine for second-degree domestic battery, to be served consecutively. The judgment and commitment order was entered on November 10, 2009, and appellant timely filed his notice of appeal on December 4, 2009.

Standard of Review and Controlling Law

We will not reverse a trial court's refusal to instruct a jury on a particular point of law absent an abuse of discretion. *Grillot v. State*, 353 Ark. 294, 318, 107 S.W.3d 136, 150 (2003). An instruction should be excluded when there is no rational basis for giving it. *Id.* A party is entitled to an instruction on a defense or a lesser-included offense if there is sufficient evidence to raise a question of fact or if there is any supporting evidence for the instruction. *Norris v. State*, 2010 Ark. 174, at 8, ___ S.W.3d ___.

A person commits manslaughter if he causes the death of another person under circumstances that would be murder except that he causes the death under the influence of

[1]The trial court did not articulate its reasons for rejecting the attempted-manslaughter instruction. In its brief, the State points out that the proffered instruction lacked some of the relevant statutory language for manslaughter. However, because there is no indication that the trial court rejected the instruction for that reason, and because the issue was not raised below, we do not address the matter here.

extreme emotional disturbance for which he has reasonable excuse. Ark. Code Ann. § 5-10-104(a)(1)(A) (Repl. 2006). The reasonableness of the excuse should be determined from the viewpoint of a person in the actor's situation under the circumstances as the actor believed them to be. *Id.* § 5-10-104(a)(1)(B). When causing a particular result—such as death—is an element of an offense, a person commits the offense of criminal attempt if, acting with the required culpable mental state of the target offense, he purposely engages in conduct that constitutes a substantial step in a course of conduct intended or known to cause the particular result. *Id.* § 5-3-201(b) (Repl. 2006). In order to be considered a "substantial step," conduct must be strongly corroborative of the person's criminal intent. *Id.* § 5-3-201(c).

In order for a jury to be instructed on extreme-emotional-disturbance manslaughter—or its attempt—there must be evidence of provocation, such as physical fighting, a threat, or a brandished weapon, resulting in an extreme emotional disturbance. *Jackson v. State*, 375 Ark. 321, 342–43, 290 S.W.3d 574, 589 (2009). Anger alone is not enough to show an extreme emotional disturbance. *Spann v. State*, 328 Ark. 509, 515, 944 S.W.2d 537, 540 (1997). When deciding whether a certain instruction should be given, we view the evidence in the light most favorable to the defendant. *Davis v. State*, 97 Ark. App. 6, 10–11, 242 S.W.3d 630, 634 (2006). However, where the only basis for an instruction is the defendant's self-serving statements or testimony, contradicted by other witnesses, the trial court's refusal to submit the instruction should be affirmed. *See Pollard v. State*, 2009 Ark. 434, at 7, ___ S.W.3d ___.

Discussion

Appellant argues that, because the jury found him guilty of the least serious form of attempted homicide for which they were instructed, the jury might have found him guilty of an even less serious form—attempted manslaughter—if given the opportunity. He argues that there was a rational basis for instructing the jury as to attempted extreme-emotional-disturbance manslaughter based on his testimony that the victim provoked him by coming at him with a knife after he set her apartment on fire. However, this self-serving testimony was the only evidence of provocation presented, and it was contradicted by other evidence and the testimony of other witnesses. In particular, the victim testified that appellant stabbed her with the knife—which appellant denied—and her injuries corroborated her testimony. Also, John Davis testified that he heard appellant threatening to kill the victim and the victim calling for help. Because the only basis for giving the requested instruction was appellant's refuted testimony, the trial court was not obligated to grant the request.

For these reasons, we hold that the trial court did not err by refusing the proffered jury instruction on attempted manslaughter.

Affirmed.

GLADWIN, J., agrees.

PITTMAN, J., concurs without opinion.