DIVISION III

CACR06-1020

May 30, 2007

NATHANA BARBER

APPELLANT

APPEAL FROM THE CIRCUIT COURT OF CRITTENDEN COUNTY
[NOS. CR-05-630; CR-05-631]

V.

HON. RALPH EDWIN WILSON, JR., JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

The appellant in this criminal case was charged with two counts of first-degree murder. Appellant admitted that he shot and killed Darryl White and Thomas White in 2005, but asserted that the killings were justified because appellant killed them in defense of his son, Jonathan Barber. After a jury trial, appellant was found guilty of the second-degree murder of Darryl White and the manslaughter of Thomas White. On appeal, he argues that the trial judge erred in refusing to give appellant's proffered modified jury instruction on justification with regard to Thomas White, and his proffered modified jury instruction on second-degree murder with regard to Darryl White. We affirm.

The record contains evidence that Darryl White was fighting appellant's son and beat him into unconsciousness. Appellant attempted to intervene when Darryl continued to beat the bloody and unconscious boy, but Thomas White prevented the attempted rescue by pushing

appellant away. Appellant shot Thomas White and then shot Darryl White as Darryl turned to flee.

Appellant first argues that the trial court erred in refusing to give a modification of AMCI 2d 705 to the effect that appellant was justified in using deadly force in defense of his son "if he believed that Tommy White *or an accomplice* was committing or about to commit" violent battery or use unlawful deadly physical force. (Emphasis added.) Appellant's proffered instructions defined "accomplice" as one who, with the purpose of promoting of facilitating the commission or an offense, aids, agrees to aid, or attempts to aid the other person in planning or committing the offense.

Where a defendant has offered sufficient evidence to raise a question of fact concerning a defense, the instruction must fully and fairly declare the law applicable to the defense. *Walton v. State*, 53 Ark. App. 18, 918 S.W.2d 192 (1996). An appellant may not complain of the refusal of the trial court to give an instruction that is only partially correct, as it is his duty to submit a wholly correct instruction. *Ghoston v. State*, 84 Ark. App. 387, 141 S.W.3d 907 (2004). Here, it was not error to refuse the proffered instruction because it did not contain a complete and correct statement of the law. It is true that the defense of members of one's family is an extension of the right of self-defense. *Brockwell v. State*, 260 Ark. 807, 545 S.W.2d 60 (1976). However, the right of self-defense does not permit the use of deadly force against all accomplices of the assailant; even a person who is not at the scene may be liable as an accomplice if he assists in the planning of the crime, *see* Ark. Code Ann. § 5-2-403 (Repl.

2005), and it cannot seriously be maintained that one is justified in using deadly force against an accomplice who merely assisted in the planning of a battery without taking any other action. Although appellant may well have been justified in using deadly force against Thomas White under the circumstances of this case, the term "accomplice" was too broad, and the proffered instruction was therefore incorrect.

Appellant next argues that the trial court erred in rejecting his proffered addition to the model second-degree murder instruction, AMCI 2d 1003, defining the phrase "under circumstances manifesting extreme indifference to the value of human life" as meaning "an intent to engage in some life-threatening activity against the victim." Appellant argues that this addition was necessary to establish the mental state required for commission of the offense. However, the requisite mental state is clearly established by an instruction that guilt of second-degree murder required proof that appellant knowingly caused the death and defining "knowingly" as a state of mind in which a person is aware that it is practically certain that his conduct will cause such a result. This conveys a concept that is virtually identical to the non-model definition preferred by appellant. Because a trial court should give a jury a non-model instruction only when the model instructions fail to correctly state the law, the trial judge did not err in refusing to give the proffered instruction. *See Stivers v. State*, 354 Ark. 140, 118 S.W.3d 558 (2003).

Affirmed.

BIRD and GRIFFEN, JJ., agree.