DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2012

THOMAS DAUGHERTY,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D08-4624

[May 23, 2012]

TAYLOR, J.

Thomas Daugherty appeals his convictions for second-degree murder and two counts of attempted second-degree murder. The charges arose from a violent crime spree in which appellant and some friends randomly selected and severely beat three homeless men, one of whom died from the attack. Appellant raises five issues, arguing that (1) the trial court committed fundamental error in instructing the jury on the lesser included offenses of manslaughter and attempted voluntary manslaughter; (2) the trial court abused its discretion in denying appellant's motion to sever the murder counts from the attempted murder counts; (3) the trial court fundamentally erred in using the phrase "and/or" between the defendants' names in the jury instructions; (4) the trial court erred in denying appellant's motion to change venue due to pre-trial publicity, and (5) appellant's sentence to life without the possibility of parole as a juvenile violates the Eighth Amendment of the United States Constitution and Article I, Section 17, of the Florida Constitution. We affirm on all these issues.

Appellant and co-defendant Brian Hooks were tried together. In the appeal of Hooks' convictions for the same underlying crimes, we held that the trial court did not err in denying Hooks' motion for change of venue due to pre-trial publicity. *See Hooks v. State*, 82 So. 3d 905 (Fla. 4th DCA 2011), *rev. denied,* 83 So. 3d 707 (Fla. 2012). Because appellant and the co-defendant were tried together, the *Hooks* decision compels an affirmance on the denial of appellant's motion to change venue.

As to appellant's contention that the trial judge committed fundamental error in instructing the jury on manslaughter and attempted voluntary manslaughter, we affirm, based on our precedents in *Singh v. State*, 36 So. 3d 848 (Fla. 4th DCA 2010) (holding that the standard jury instruction on the lesser-included offense of manslaughter was not fundamentally erroneous where the trial court gave an instruction on manslaughter by culpable negligence), and *Williams v. State*, 40 So. 3d 72 (Fla. 4th DCA 2010) (holding that standard jury instruction on attempted voluntary manslaughter was not fundamental error in a prosecution for attempted first degree murder in which the defendant was convicted of the lesser included offense of attempted second-degree murder), *rev. granted*, 64 So. 3d 1262 (Fla. 2011).

Even without considering the fact that the jury received the manslaughter by culpable negligence instruction, there is yet another reason why the manslaughter instruction, given as a lesser included offense of the murder charge, was not fundamental error in this case. As our supreme court has explained, "when the trial court fails to properly instruct on a crime two or more degrees removed from the crime for which the defendant is convicted, the error is not per se reversible, but instead is subject to a harmless error analysis." *Pena v. State*, 901 So. 2d 781, 787 (Fla. 2005). Here, because the jury was instructed on the lesser included offense of third-degree felony murder, manslaughter was actually two steps removed from second-degree murder under the facts of this case. *See Echols v. State*, 484 So. 2d 568, 574 (Fla. 1985) (holding that manslaughter was a lesser included offense that was three steps removed from first degree murder where the jury, if inclined to exercise its "pardon" power, could have returned verdicts of second-degree or third-degree murder). If the jury had been inclined to exercise its pardon power, it could have returned a verdict of third-degree felony murder, which was the next lower crime on the verdict form; the evidence in this case would have supported a conviction for third-degree felony murder. We conclude that the error in the manslaughter by act instruction was harmless and did not constitute fundamental error.

We also reject appellant's argument that his sentence to life in prison without the possibility of parole constituted "cruel and unusual punishment" because he was seventeen years old when he committed the crimes. Notably, in *Graham v. Florida*, 130 S.Ct. 2011, 2034 (2010), the Supreme Court held that the Eighth Amendment to the Constitution "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." As the *Graham* Court explained, "'[l]ife is over for the victim of the murderer,' but for the victim of even a very serious nonhomicide crime, 'life . . . is not over and normally is not

beyond repair.'" *Id.* at 2027 (quoting *Coker v. Georgia,* 433 U.S. 584, 598 (1977) (plurality opinion)).

Appellant concedes that a life sentence imposed on a juvenile who actually committed a homicide is not categorically barred by the Eighth Amendment. However, he argues that his sentence is unconstitutional as applied to him because the trial court failed to consider his age and culpability when sentencing him to life in prison without the possibility of parole. The record, however, does not support this argument. At the sentencing hearing, the trial court considered extensive evidence of appellant's age and other factors that lessened his culpability, including his difficult childhood. The trial court nonetheless concluded that appellant's diminished culpability was outweighed by his heinous conduct that resulted in the victim's death. *See Phillips v. State*, 807 So. 2d 713, 717–18 (Fla. 2d DCA 2002) (affirming life sentence of 14-year-old convicted of first-degree murder and stating that although appellant's "culpability may be diminished somewhat because of his age at the time of the commission of the crime, the factor of his age is outweighed by his heinous conduct and the ultimate harm—death—that he inflicted upon his victim."). Here, the evidence at trial showed that appellant, acting out of boredom, beat a man to death. Under the facts of this case, we cannot say that the trial court's sentence of life in prison without the possibility of parole was disproportionate and a violation of the Eighth Amendment. We therefore affirm as to the sentence imposed and on all remaining issues raised by appellant.

Affirmed.

MAY, C.J. and CONNER, J., concur.

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Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Cynthia Imperato, Judge; L.T. Case No. 06-878 CF10B.

Donna Duncan and Steven Seliger of Sanders and Duncan, P.A., Apalachicola, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Jeanine M. Germanowicz, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.