Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00148-CR

Benjamin **POEHLMANN**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 187th Judicial District Court, Bexar County, Texas
Trial Court No. 2015CR10018
Honorable Steve Hilbig, Judge Presiding

Opinion by: Marialyn Barnard, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: May 16, 2018

AFFIRMED

A jury found appellant Benjamin Poehlmann guilty of murder, and the trial court sentenced him to thirty-five years' confinement. In his sole issue on appeal, Poehlmann contends the trial court erred in failing to include the lesser-included offense of criminally negligent homicide in the jury charge. We affirm the trial court's judgment.

BACKGROUND

On December 25, 2014, San Antonio police officers responded to a 9-1-1 call, reporting a shooting in progress at a home where Poehlmann, his girlfriend Roxann Sanchez, and his sister

Christina lived. Poehlmann and Roxann lived in an addition to the house, which was located next to the kitchen of the main house and could only be accessed from the kitchen. The addition was comprised of a small living area, bedroom, and bathroom. The living area and bedroom were separated by a wall and a door, and the bathroom was accessible only by way of the bedroom. When officers arrived, they entered the main part of the house and found Roxann lying on her stomach on the floor between the kitchen of the main house and living area of the addition. Poehlmann, who is a paraplegic, was sitting on the floor with Roxann. His wheelchair was overturned in his bedroom. Officers described Poehlmann as crying and screaming.

The evidence showed Roxann had been struck by a bullet, which entered her back and exited her upper chest. A nine-millimeter Glock handgun, along with a spent shell casing, was found on the floor in the bedroom of the addition. Police also discovered a gunshot hole in the wall between the living area and bedroom of the addition. Poehlmann was arrested and ultimately charged with felony murder[1] and murder.

At trial, the State produced testimony from a number of witnesses, including Christina, who had called 9-1-1 to report the shooting. Christina testified her brother and Roxann were dating and living in the addition of the house. Christina stated Roxann had been her brother's home health care provider before the couple started dating and cohabitating. Christina testified that when Poehlmann was 15 years old, he was shot, rendering him a paraplegic. Poehlmann had been riding in a car with a friend on the way to a concert when someone, who according to Christina "had some issues with [Poehlmann's] friend," opened fire on them as they were driving. As a result of the shooting, Poehlmann was paralyzed and his friend was killed.

[1] It is undisputed that at the time of the shooting, Poehlmann was a felon. Thus, the indictment alleged Poehlmann, having been previously convicted of a felony offense, committed the felony offense of felon in possession of a firearm while in the course of shooting Roxann and causing her death.

As to the morning of the shooting, Christina testified Roxann was helping her brother take a shower in preparation for a visit with family members. Christina stated her brother was "grumpy" that morning, and she heard him "kind of yelling" about needing a clean towel. Christina testified Roxann was trying to accommodate her brother by getting a clean towel from Christina's closet. Christina stated that after about half an hour, she heard a loud noise, "like a thump or a bang kind of." She went over to the addition of the house and found Roxann lying on the floor. Christina described Roxann as lying on her stomach with her face turned toward the bathroom. Her brother was sitting on the floor, leaning against the doorway of his bedroom in shock; his wheelchair was overturned in the bedroom. Christina testified she began shaking Roxann, trying to rouse her. Meanwhile, Poehlmann dragged himself to Roxann and tried to help. Christina testified that when she tried to turn Roxann over, she saw a hole "where the top of [a woman's] bra would be." She immediately called 9-1-1.

The jury also heard testimony from Officer Crystal Aguero, one of the officers who responded to the 9-1-1 call. Officer Aguero testified that when she arrived, she and three other officers entered the main part of the house. She testified she could hear a man screaming or shouting, and as she made her way through the kitchen of the main house, she saw Roxann lying on the floor. Poehlmann was lying with Roxann, and he was crying and screaming. Officer Aguero testified she and other officers pulled Roxann away from Poehlmann. She described Roxann as having a gray color. Officer Aguero further testified it appeared as if Roxann's bra and shirt had been pulled down, and she could see a small bullet hole on her left breast. She administered CPR until emergency services arrived and took over.

Officer Thaddeus Stout testified that when he arrived at the home, he met Christina, who was being detained outside of the house. He testified Christina was frantic and panicked, claiming her brother shot his girlfriend. He testified Christina told him her brother and his girlfriend were

always fighting and had been arguing that morning. Officer Stout stated that after he spoke to Christina, he went inside the house. By that time, emergency services had placed Roxann on a gurney. Officer Stout testified he found Poehlmann lying on the floor in his bedroom, very frantic and upset.

The jury heard testimony that the gun was discharged from a distance; in other words, Roxann was not shot at close range. Senior Crime Scene Investigator Robert Ross testified he investigated the area, concluding the gun was fired from the back of the bedroom and the bullet traveled in a slightly upward direction and went through the wall between the bedroom and living room before it hit Roxann. In addition to his testimony, forensic scientist Christina Vachon testified that after examining swabs of Poehlmann's hands, she concluded Poehlmann "may have discharged a firearm, handled a firearm, or was in close proximity to a discharging firearm."

After the State rested, Poehlmann's counsel did not call any witnesses. At the charge conference, Poehlmann's counsel requested an instruction on the lesser-included offense of criminally negligent homicide. According to Poehlmann's attorney, there was no evidence to prove Poehlmann intentionally shot Roxann, and thus, it could reasonably be inferred that the shooting was an accident. The trial court denied the requested instruction, and the jury ultimately found Poehlmann guilty "as charged in the indictment." The trial court rendered a judgment of conviction for the offense of murder and sentenced Poehlmann to thirty-five years' confinement. This appeal followed.

ANALYSIS

As stated in the introduction, Poehlmann raises one issue on appeal, arguing the trial court erred by refusing to include in the jury charge an instruction on the lesser-included offense of criminally negligent homicide. According to Poehlmann, there was some evidence in the record that would have permitted the jury to rationally find him guilty of only criminally negligent

homicide. To support his assertion, Poehlmann points to evidence he contends shows he did not know Roxann was in the living area when he discharged the gun from the bedroom; therefore, a rational jury could have reasonably inferred he failed to perceive the risk created by his conduct.

In response, the State argues the trial court did not err in refusing to include an instruction on criminally negligent homicide. With respect to felony murder, the State contends criminally negligent homicide is not a lesser-included offense because it cannot be proved by the same or less evidence that is required to establish felony murder. As to murder, the State concedes criminally negligent homicide is a lesser-included offense of murder as charged in the indictment, but there was no evidence that would have permitted a rational jury to conclude that if Poehlmann was guilty, he was guilty only of criminally negligent homicide.

Standard of Review and Applicable Law

To determine whether a defendant was entitled to a charge on a lesser-included offense instruction, we employ a two-prong test. *Bullock v. State*, 509 S.W.3d 921, 924 (Tex. Crim. App. 2016); *Sweed v. State*, 351 S.W.3d 63, 67 (Tex. Crim. App. 2011). First, we determine whether the requested offense is a lesser-included offense of the charged offense. *Bullock*, 509 S.W.3d at 924; *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007). This first step is a question of law in which we engage in a de novo review and compare the elements alleged in the indictment with the elements of the potential lesser offense. *Cavazos v. State*, 382 S.W.3d 377, 382 (Tex. Crim. App. 2012); *Rice v. State*, 333 S.W.3d 140, 144 (Tex. Crim. App. 2011); *Zapata v. State*, 449 S.W.3d 220, 224 (Tex. App.—San Antonio 2014, no pet.). "An offense is a lesser-included offense if, *inter alia,* 'it is established by proof of the same or less than all the facts required to establish the commission of the offense charged.'" *Zapata*, 449 S.W.3d at 224 (quoting TEX. CODE CRIM. PROC. ANN. art. 37.09(1) (West 2006)).

Second, we determine whether there is some evidence that would permit a rational jury to find that the defendant is guilty of the lesser offense but not guilty of the greater. *Hall*, 225 S.W.3d at 536; *Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005). This second step is a question of fact based on the evidence produced at trial. *See Zapata*, 449 S.W.3d at 225. The evidence must show that the lesser-included offense is a valid rational alternative to the charged offense. *Mathis v. State*, 67 S.W.3d 918, 925 (Tex. Crim. App. 2002). Anything more than a scintilla of evidence may be sufficient to entitle a defendant to a charge on the lesser offense. *Hall*, 225 S.W.3d at 536. However, "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather, there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted." *Hampton v. State*, 109 S.W.3d 437, 441 (Tex. Crim. App. 2003). Accordingly, in making our determination under the second step of our analysis, we must review all the evidence presented at trial, and facts must not be isolated and taken out of context. *Zapata*, 449 S.W.3d at 225. "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." *Cavazos*, 382 S.W.3d at 385.

Application

A. Step One

In examining the first step of the two-prong test, we look to the definition of criminally negligent homicide and the charged offenses, comparing the elements of each to determine whether the offense of criminally negligent homicide can be established by proof of the same or less than that required to establish the charged offenses. *See Cavazos*, 382 S.W.3d at 382. *Hall*, 225 S.W.3d at 535; *Zapata*, 449 S.W.3d at 224. In this case, Poehlmann was charged with felony murder and murder.

Section 19.05 of the Texas Penal Code defines criminally negligent homicide as causing the death of another by criminal negligence. *See* TEX. PENAL CODE ANN. § 19.05 (West 2011). The Texas Penal Code further provides:

> A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct, or the result of his conduct, when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes 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.

See id. § 6.03(d).

In comparison, a person commits felony murder if he commits or attempts to commit a felony (other than manslaughter), and in the course of and in furtherance of the felony commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual. *See id.* § 19.02(b)(3). Put simply, felony murder is an unintentional murder committed in the course of committing a felony. *Threadgill v. State*, 146 S.W.3d 654, 665 (Tex. Crim. App. 2004). The State must prove the elements of the underlying felony, including the culpable mental state for that felony; however, no culpable mental state is required for the murder committed. *Lomax v. State*, 233 S.W.3d 302, 306-07 (Tex. Crim. App. 2007).

Comparing the offenses side by side, this court has recognized "criminally negligent homicide requires proof of an element that felony murder does not — a specific mental state, i.e., criminal negligence — with regard to the death of an individual." *Munoz v. State*, 533 S.W.3d 448, 453 (Tex. App.—San Antonio 2011, pet. ref'd); *see also Driver v. State*, 358 S.W.3d 270, 279 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (holding criminally negligent homicide cannot be a lesser-included offense of felony murder). Thus, in accordance with our prior decision,

we hold criminally negligent homicide is not a lesser-included offense of felony murder. *See Munoz*, 533 S.W.3d at 453; *see also Driver*, 358 S.W.3d at 279.

Turning to the charged offense of murder, the Texas Penal Code defines murder as intentionally or knowingly causing the death of another, or alternatively, intentionally or knowingly causing serious bodily injury to another by committing an "act clearly dangerous to human life," resulting in that person's death. *See* TEX. PENAL CODE ANN. § 19.02. In light of this definition, the State concedes in its brief that "[i]t is well established law that criminally negligent homicide is a lesser-included offense of murder." *See Saunders v. State*, 840 S.W.2d 390, 391 (Tex. Crim. App. 1992) ("Criminally negligent homicide is a lesser-included offense of murder."); *Jackson v. State*, 248 S.W.3d 369, 371 (Tex. App—Houston [1st. Dist.] 2007, pet. ref'd) (same). Thus, with regard to the offense of murder, we must determine whether there was any evidence produced at trial from which a rational jury could have found Poehlmann guilty of criminally negligent homicide as opposed to murder.

B. Step Two

Under the second step of the two-prong test, to be entitled to an instruction on criminally negligent homicide, the record must contain some evidence that Poehlmann should have been aware of the substantial risk of discharging a gun in the house, but did not perceive that his conduct would result in Roxann's death. *See* TEX. PENAL CODE ANN. § 6.03. The key to criminal negligence is the failure of the actor to perceive the risk created by his conduct. *Jackson*, 248 S.W.3d at 371. If the evidence shows the defendant perceived the risk his conduct created, he is not entitled to a charge of criminally negligent homicide. *See id.*; *Trujillo v. State*, 227 S.W.3d 164, 168 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

A careful review of the record shows Poehlmann was familiar with the potential for harm caused by guns, i.e., he perceived the risk of firing a gun. *See Thomas v. State*, 699 S.W.2d 845,

849 (Tex. Crim. App. 1985) ("Evidence that a defendant knows a gun is loaded, that he is familiar with guns and their potential for injury, and that he points a gun at another indicates a person who is aware of a risk created by that conduct and disregards the risk."); *Whipple v. State*, 281 S.W.3d 482, 503 (Tex. App.—El Paso 2008, pet. ref'd) (holding appellant not entitled to lesser-included offense of criminally negligent homicide when evidence showed appellant was familiar with risk of firearms). The record reflects Poehlmann was rendered a paraplegic when he was shot by someone who was attempting to shoot his friend. The jury heard testimony from Poehlmann's sister that Poehlmann was riding in a car with his friend when someone from another vehicle started shooting at them; as a result, Poehlmann's friend was killed and Poehlmann was seriously injured. Accordingly, the evidence shows Poehlman was personally familiar with the risks associated with firearms and what can happen when they are fired.

Poehlmann, however, argues that because there was no evidence establishing he knew Roxann was in the living area when he discharged the gun from the bedroom, a rational jury could have reasonably inferred that he did not perceive that his conduct — firing a gun in the house — would result in Roxann's death. We disagree. To the extent Poehlmann is arguing there is evidence establishing he accidentally shot Roxann, "[e]vidence of accidental discharge of a weapon does not necessarily raise the issue of criminal negligence." *Whipple*, 281 S.W.3d at 503 (citing *Thomas*, 699 S.W.2d at 850)). Rather, the evidence must show Poehlmann was unaware of the risk created by his conduct. *See id*. And in this case, contrary to his contention, there is nothing in the record establishing he was unaware that Roxann was in the living area when he fired the gun. Rather, when viewing all the evidence as we must, the record reflects Poehlmann, having been seriously injured by a firearm himself, was aware of the risks associated with firearms, had been fighting with Roxann in the house, and then discharged a firearm in the house. Thus, there is nothing in the record affirmatively showing Poehlmann failed to perceive the risks associated

with discharging a firearm in the house when Roxann may or may not have been in the next room. *See Jackson*, 248 S.W.3d at 371. Accordingly, we conclude the trial court did not err in failing to instruct the jury on the lesser-included offense of criminally negligent homicide. We therefore overrule Poehlmann's sole issue.

CONCLUSION

Based on the foregoing, the judgment of the trial court is affirmed.

Marialyn Barnard, Justice

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