In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00305-CR

BRENNON GAGE GUERRA, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 286th District Court
Hockley County, Texas
Trial Court No. 20-05-9841, Honorable Pat Phelan, Presiding

December 1, 2022

MEMORANDUM OPINION

Before QUINN, CJ., and PARKER and YARBROUGH, JJ.

Appellant, Brennon Gage Guerra, appeals his conviction for the offense of murder and sentence of 55 years' incarceration and $10,000 fine. Appellant's sole issue contends that the trial court erred by refusing his request for jury instructions on the lesser-included offenses of manslaughter and criminally negligent homicide. We affirm.

BACKGROUND

Appellant does not dispute that he shot and killed Anthony Delgado. Instead, he contends that he did not possess the requisite intent for his killing of Delgado to constitute murder. At trial, Appellant testified that he went to Delgado's residence to confront him regarding allegations that Delgado had been sexually inappropriate with a mutual female acquaintance. Appellant took a loaded handgun with him because Delgado was a drug dealer who always had a weapon of some sort on his person. Upon arrival at Delgado's residence, Appellant went to the back door and, instead of knocking, "called [Delgado] out." Appellant claims that Delgado exited the house with a lead pipe in his hand. At some point, Appellant pulled his pistol out of his waistband and held it at his side. Delgado advanced on Appellant, causing him to back up. While backing up, Appellant told Delgado to stop three times, but Delgado continued to close the distance between them. Appellant, feeling his life was in danger, "just reacted, and . . . shot him." He did not aim the gun, rather, he "just lifted the gun and shot him." His sole shot was fatal. After shooting Delgado, Appellant fled the scene. There were no eyewitnesses to the shooting.

At the charge conference, Appellant's attorney requested an instruction on self-defense and the lesser-included offenses of manslaughter and negligent homicide. The trial court gave the instruction on self-defense but denied it as to the lesser-included offenses. The jury implicitly rejected the self-defense theory and convicted Appellant of murder as charged in the indictment.

STANDARD OF REVIEW

Reviewing a claim of charge error requires us to determine whether error exists and, if so, whether the resulting harm is sufficient to warrant reversal. *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015). We follow a two-step test in determining whether a trial court is required to give a requested instruction on a lesser-included offense. *Bullock v. State*, 509 S.W.3d 921, 924 (Tex. Crim. App. 2016). First, we determine, as a matter of law, whether the requested instruction is a lesser-included offense of the charged offense. *Id.* An offense is a lesser-included offense if it is within the proof necessary to establish the offense charged. *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011). The second step is to determine whether there is some evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense. *Rice v. State*, 333 S.W.3d 140, 145 (Tex. Crim. App. 2011).

APPLICATION

Manslaughter and negligent homicide are lesser-included offenses of murder. *Cardenas v. State*, 30 S.W.3d 384, 392 (Tex. Crim. App. 2000) (en banc).

Turning to the second prong of our analysis, we must determine whether the record evidence supports giving the instructions. Here, the ultimate question is one of intent. Murder, manslaughter, and negligent homicide are distinguished by their differing requisite mental states. A person commits murder if he "intentionally or knowingly causes the death of an individual" or "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual." TEX. PENAL CODE

ANN. § 19.02(b)(1), (2). A person commits manslaughter if he "recklessly causes the death of an individual." *Id.* § 19.04(a). A person is reckless when he is "aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." *Id*. § 6.03(c). A person commits criminally negligent homicide if he causes "the death of an individual by criminal negligence." *Id.* § 19.05(a). "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." *Id.* § 6.03(d).

We look to the record for evidence that Appellant was aware of but consciously disregarded a substantial and unjustifiable risk that taking a loaded gun to confront Delgado, brandishing it, and eventually discharging it would result in Delgado's death or, if he was not aware of the risk but should have been, that the same conduct would result in Delgado's death. Again, there were no witnesses to the shooting. The evidence establishes that 1) Appellant went to Delgado's with a gun he had previously loaded with ammunition, 2) he took the loaded gun for protection because he was scared of Delgado, and 3) he shot Delgado because he was afraid that Delgado would strike him with a pipe. This evidence does not support a finding that the shooting was accidental or the result of negligence. Rather, Appellant's own testimony indicates that he pulled the trigger intentionally—not by accident, in some bungled attempt to brandish the weapon to scare Delgado, or to fire a warning shot. Appellant stated he shot Delgado because he was scared for his own safety. While this certainly raises the issue of self-defense, it is unclear how it presents a reckless or negligent act.

Further, Appellant's trial strategy was to establish that he shot Delgado in self-defense. It is logically inconsistent to assert self-defense, which is an intentional act to protect oneself from perceived harm, while simultaneously arguing that the act was done recklessly or negligently. Multiple decisions have found that lesser-included instructions on reckless or negligent intent is inappropriate when self-defense is the defensive theory because one cannot simultaneously act intentionally and recklessly or negligently. *See Shannon v. State*, No. 08-13-00320-CR, 2015 Tex. App. LEXIS 10812, at *32 (Tex. App.—El Paso Oct. 21, 2015, no pet.) (not designated for publication) ("A claim of self-defense is incompatible with a claim of recklessness or negligence."); *Nevarez v. State*, 270 S.W.3d 691, 694–95 (Tex. App.—Amarillo 2008, no pet.) (mem. op.) (defendant in murder trial who admitted intentional action resulting in death in arguing self-defense not also entitled to manslaughter instruction); *Martinez v. State*, 16 S.W.3d 845, 848 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (". . . one cannot accidentally or recklessly act in self-defense."); *Avila v. State*, 954 S.W.2d 830, 843 (Tex. App.—El Paso 1997, pet. ref'd) (defendant's testimony that he acted in self-defense precludes an instruction on accident or recklessness).

Appellant received the proper instruction raised by the evidence and it was rejected by the jury. On this record, there is not enough evidence to satisfy the second prong of our inquiry regarding instructions on the lesser-included offenses of manslaughter or negligent homicide. We overrule Appellant's sole issue.

CONCLUSION

Having overruled Appellant's sole issue on appeal, we affirm the judgment of conviction.

Judy C. Parker
Justice

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