Affirmed and Opinion filed October 12, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00727-CR

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EDWARD EARL MASSINGIL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 782,673

O P I N I O N

Appellant, Edward Earl Massingil, was convicted of capital murder and sentenced to life imprisonment. On appeal, he contends the trial court erred in refusing to submit an instruction on the lesser included offense of manslaughter. He also asserts the court erred in refusing to admit the remainder of a statement under the rule of optional completeness. We affirm.

Appellant had been romantically involved with Deborah Flowers, the complainant, for several years. They had three children together, but were unmarried and lived apart. Deborah lived in an

apartment with her grandparents, Melvin and Verdell, as well as, her children and several cousins. One evening, after their relationship had soured, appellant arrived at the apartment to see Deborah.

Appellant first identified himself as "Michael," who was the boyfriend of a house-mate, and then as "April." When Verdell refused to open the door, appellant kicked it in. Deborah ran to her grandfather's room. Verdell immediately ran to the management office seeking help, while the others hid in a bathroom. Appellant kicked in the bathroom door, put a gun to the head of an eleven-year-old boy and asked, "Where is she at?" The child pointed to his grandfather's bedroom. Appellant then entered the bedroom and fired six shots from his revolver, killing Deborah.

Lesser Included Offense

In his first point of error, appellant contends the trial court erred in refusing to give the jury an instruction on the lesser included offense of manslaughter. A defendant is entitled to a charge on a lesser offense only if the lesser offense is included within the proof necessary to establish the offense charged, and there is some evidence that would permit the jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense. *See Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App.1993); *Dowden v. State*, 758 S.W.2d 264, 268 (Tex. Crim. App.1988). The credibility of the evidence and whether it conflicts with other evidence or is controverted may not be considered in determining whether an instruction on a lesser included offense should be given. *See Banda v. State*, 890 S.W.2d 42, 60 (Tex. Crim. App.1994). Regardless of its strength or weakness, if any evidence raises the issue that the defendant was guilty only of the lesser offense, then the charge must be given. *See Saunders v. State*, 840 S.W.2d 390, 391 (Tex. Crim. App.1992).

Appellant was charged and convicted of capital murder, namely, that he intentionally committed murder in the course of committing or attempting to commit a burglary. *See* TEX. PEN. CODE ANN. § 19.03(a)(2) (Vernon 1994). The jury was also charged on the lesser included offense of murder. *See*

TEX. PEN. CODE ANN. § 19.02 (Vernon 1994).[1] The jury was not charged on manslaughter, which is defined as recklessly causing the death of another and which, in some circumstances, may be a lesser included offense of capital murder. *See* TEX. PEN. CODE ANN. § 19.04 (Vernon 1994); *see also Adanandus v. State*, 866 S.W.2d 210, 232 (Tex. Crim. App.1993). Because appellant's aunt testified that appellant said he only intended to "scare" the complainant, appellant contends the issue of recklessness was raised by the evidence. Moreover, appellant asserts this is some evidence which, if believed, would permit a rational jury to find him guilty *only* of manslaughter. *See Rousseau*, 855 S.W.2d at 673. We agree; thus, we find the trial court erred in denying appellant's request for an instruction on the lesser included offense of manslaughter.

Having found error in the charge, we must next determine whether sufficient harm resulted from the error to require reversal. *See Irizarry v. State*, 916 S.W.2d 612, 614 (Tex. App.—San Antonio 1996, pet. ref'd). Where, as here, appellant objected to the charge and affirmatively requested an instruction on the lesser included offense, reversal is required so long as appellant has suffered *some* harm. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984).

We begin our analysis by observing that the trial court submitted instructions on three variations of the lesser included offense of murder. This fact does not, *a fortiori*, render the trial court's error harmless. *See Saunders v. State*, 913 S.W.2d 564, 574 (Tex. Crim. App. 1995). However, the jury did not face the dilemma of deciding whether to convict on the greater inclusive offense about which it may have had a reasonable doubt, or acquit a defendant it did not believe to be wholly innocent. *See id.* at 573. Here, the entire defensive theory presented in closing argument was that appellant did not specifically intend to kill the complainant and, thus, was not guilty of capital murder. Appellant's counsel repeatedly asserted that the evidence might tend to support a conviction for felony murder or murder, but not capital

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[1] All three permutations of murder were submitted, i.e.,: (1) intentionally or knowingly caused the death of the victim; (2) while intending to cause serious bodily injury, committed an act clearly dangerous to human life that caused the victim's death; and (3) committed or attempted to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, committed or attempted to commit an act clearly dangerous to human life that caused the victim's death. *See id.*

murder. He focused on the fact that only one of the six bullets fired by appellant actually struck the complainant. While he conceded that firing a gun six times in a small room might be an act "clearly dangerous to human life," he argued it did not rise to the level of culpability required for capital murder.

By convicting appellant of capital murder, rather than the lesser included offense of murder or felony murder, the jury implicitly rejected appellant's contention. Moreover, there was abundant evidence to support a finding that appellant intentionally killed the deceased. Appellant kicked in the door with a loaded revolver in his hand. He terrorized the complainant's family, conducted a search specifically for the victim, forced his way into the bedroom where she was hiding, waived the revolver in her face, and then fired all six rounds in her direction. Apart from appellant's poor marksmanship in a darkened room and some self-serving hearsay declarations, there is little evidence to indicate the killing was anything other than intentional.

Under the facts presented here, we are convinced beyond any reasonable doubt that the jury was permitted to fulfill its full role as fact finder, and appellant suffered no harm. *See Saunders*, 913 S.W.2d at 517; *Otting v. State*, 8 S.W.3d 681, 689-690 (Tex. App.—Austin 1999, pet. ref'd untimely); *Irizarry*, 916 S.W.2d at 614-15; *Jiminez v. State*, 953 S.W.2d 293, 299-300 (Tex. App.—Austin 1997, pet. ref'd) (all holding the trial court's denial of a lesser included offense charge was harmless under the particular facts of each case). In light of the defensive theory presented to the jury, the jury's rejection of other lesser offenses, and the evidence before us, we find that the inclusion of a charge on the lesser included offense of manslaughter would not have altered the outcome. Accordingly, the error is harmless; appellant's first point of error is overruled.

Optional Completeness

In his second point of error, appellant contends the trial court erred in refusing to permit him to offer the remainder of a statement, a portion of which had been elicited by the State. During her direct examination of appellant's aunt, the State's attorney asked:

> Q. Did he tell you why he shot the gun?
>
> A. No, he didn't.
>
> Q. He didn't tell you that he wanted to scare her?
>
> A. Yes, I guess.

Later, outside the presence of the jury, appellant's counsel elicited additional hearsay from the same conversation:

> Q. So in the first telephone conversation he did say: I was trying to scare her?
>
> A. Uh-huh.
>
> * * *
>
> Q. And did he give any more details about how he shot the gun?
>
> A. All he was saying that the next thing he knowed, he pulled the gun out and he was just shooting because whoever said that they was in the room. And so, I guess he assumed that it was Deborah and a guy in the room.

The trial court refused to allow this testimony in evidence.

To preserve error, the complaint on appeal must comport with the objection lodged in the trial court. *See* TEX. R. APP. P. 33.1(a). Here, the only theories advanced by appellant at trial were that the evidence was admissible as an exception to hearsay because it was (1) a statement against penal interest and (2) a present sense impression. Appellant has now raised the theory for the first time on appeal that the aforementioned statements were admissible under the doctrine of optional completeness. Because this argument was not advanced in the trial court, the issue has not been preserved for appellate review.

Appellants second point of error is overruled, and the judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed October 12, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).