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ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR12-678

Opinion Delivered April 17, 2013

RODRICK ALEXANDER APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SEVENTH DIVISION [NO. CR-2011-2367]
V.	HONORABLE BARRY SIMS, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

BRANDON J. HARRISON, Judge

A jury found Rodrick Alexander guilty of second-degree murder. He appeals his conviction, arguing that the circuit court abused its discretion by denying his request for a modified jury instruction. We affirm.

Because Alexander does not challenge the sufficiency of the evidence against him, we will only state facts that are important to the jury-instruction issue. *See Banks v. State*, 2010 Ark. 108, 366 S.W.3d 341. In a felony information filed 8 July 2011, Alexander was charged with murder in the first degree in the death of Corean Sims, who was the boyfriend of Alexander's neighbor, Kaeundra Houston. A jury trial was held in April 2012, at which the State presented evidence that Alexander and Sims were involved in a physical altercation and that, during the fight, Alexander stabbed Sims in the chest with a knife.

While finalizing jury instructions, Alexander objected to the instruction on lesser-included offenses, AMI Crim. 2d 301, which stated:

> Rodrick Alexander is charged with murder in the first degree. This charge includes the lesser offenses of murder in the second degree, manslaughter and negligent homicide. You may find the defendant guilty of one of these offenses or you may acquit him outright.
>
> If you have a reasonable doubt of the guilt of the defendant on the greater offense, you may find him guilty only of the lesser offense. If you have a reasonable doubt as to the defendant's guilt of all offenses, you must find him not guilty.

Specifically, Alexander objected to the second paragraph of the instruction and argued that "the way this case is going up at the Supreme Court could go to any part that they believe, not necessarily have to start at murder one, murder two. They can start on any of these and go up or down." He then proffered a modified 301 instruction that eliminated the second paragraph of the model instruction. The court declined to use the modified instruction and instructed the jury according to AMI Crim. 2d 301 and 302. Instruction 302 is a transitional one, reiterating that if the jury has a reasonable doubt of the defendant's guilt on a greater charge, then it should then consider the lesser charge.

Alexander was found guilty of murder in the second degree and sentenced to twenty years' imprisonment. He has timely appealed from the 23 April 2012 sentencing order.

A circuit court's ruling on whether to submit a jury instruction will not be reversed absent an abuse of discretion. *Sweet v. State*, 2011 Ark. 20, 370 S.W.3d 510. There is a presumption that the model instruction is a correct statement of the law, and as such, any

party who wishes to challenge the accuracy of a model instruction must rebut the presumption of correctness. *See Thomas v. State*, 370 Ark. 70, 257 S.W.3d 92 (2007). Non-model jury instructions should be given only when the circuit court finds that the model instructions do not accurately state the law or do not contain a necessary instruction on the subject. *Bond v. State*, 374 Ark. 332, 288 S.W.3d 206 (2008).

Alexander's argument on appeal is based on the United States Supreme Court's decision in *Blueford v. Arkansas*, 132 S. Ct. 2044 (2012). In *Blueford*, the State of Arkansas charged Alex Blueford with capital murder in the death of one-year-old Matthew McFadden, Jr. The circuit court instructed the jury that the charge of capital murder included three lesser offenses—first-degree murder, manslaughter, and negligent homicide. The circuit court also addressed the order in which the jury was to consider these charges:

> If you have a reasonable doubt of the defendant's guilt on the charge of capital murder, you will consider the charge of murder in the first degree. . . . If you have a reasonable doubt of the defendant's guilt on the charge of murder in the first degree, you will then consider the charge of manslaughter. . . . If you have a reasonable doubt of the defendant's guilt on the charge of manslaughter, you will then consider the charge of negligent homicide.

Id. at 2048.

After a few hours of deliberation, the jurors sent a note to the court asking what would happen if they could not agree on a charge. The jury was instructed on the importance of reaching a verdict and sent back to deliberations, but a short time later, the jury notified the court that it was deadlocked. The foreperson explained to the court that the jurors were unanimous against capital murder and murder in the first degree, but they could not agree on the manslaughter charge and had not yet voted on the negligent-homicide charge. After

further deliberations yielded no change, the court declared a mistrial and discharged the jury.

The State sought to retry Blueford, and he moved to dismiss the capital murder and first-degree murder charges on double-jeopardy grounds. The circuit court denied the motion, and on interlocutory appeal, the Arkansas Supreme Court affirmed, noting that the foreperson's report to the circuit court was not the equivalent of a formal announcement of acquittal.

The United States Supreme Court granted certiorari and affirmed our supreme court. The Supreme Court explained:

> The foreperson's report was not a final resolution of anything. When the foreperson told the court how the jury had voted on each offense, the jury's deliberations had not yet concluded. The jurors in fact went back to the jury room to deliberate further, even after the foreperson had delivered her report. . . . The fact that deliberations continued after the report deprives that report of the finality necessary to constitute an acquittal on the murder offenses.
>
> Blueford maintains, however, that any possibility that the jurors revisited the murder offenses was foreclosed by the instructions given to the jury. Those instructions, he contends, not only required the jury to consider the offenses in order, from greater to lesser, but also prevented it from transitioning from one offense to the next without unanimously—and definitively—resolving the greater offense in his favor. . . . So, Blueford says, the foreperson's report that the jury was deadlocked on manslaughter necessarily establishes that the jury had acquitted Blueford of the greater offenses of capital and first-degree murder.
>
> But even if we assume that the instructions required a unanimous vote before the jury could consider a lesser offense . . . nothing in the instructions prohibited the jury from reconsidering such a vote. The instructions said simply, "If you have a reasonable doubt of the defendant's guilt on the charge of [the greater offense], you will [then] consider the charge of [the lesser offense]." App. 51–52. The jurors were never told that once they had a reasonable doubt, they could not rethink the issue. The jury was free to reconsider a greater offense, even after considering a lesser one.

Blueford, 132 S. Ct. at 2050–51.

Here, Alexander argues that the *Blueford* decision "obliterated AMI Crim. 2d 301 and 302 insofar as these two model instructions require a one-direction, 'acquit first' jury deliberations of lesser included offenses." According to Alexander, because the U.S. Supreme Court stated that the jury was free to reconsider a greater offense, even after considering a lesser one, the Court "in effect" held that a jury's deliberations in Arkansas are not bound by the model criminal jury instructions. And, Alexander contends, "if the 'acquit first' model jury instructions are no longer valid, the circuit court judge should have granted defense counsel's request that these model instructions not be used to restrict the jury's deliberations of the lesser offenses."

In response, the State first asserts that Alexander only objected to AMI Crim. 2d 301 below, but argues both 301 and 302 on appeal. While acknowledging that 302 is more on point with the practice that Alexander is challenging on appeal, the State argues that Alexander cannot change his argument on appeal and is bound by the scope of the argument made before the circuit court.

The State further contends that *Blueford* does not support Alexander's argument because the Supreme Court did not invalidate 301 or 302 and that, on the contrary, its decision "clearly contemplated the jury following the instructions by considering the greater charge before the lesser—thus, its statement that the jury could *reconsider* a greater offense even after considering a lesser one."

Finally, the State disagrees that 301 and 302 require an "acquit first" approach before

lesser charges may be considered by the jury. The instructions state only that if the jury has a reasonable doubt as to the greater offense, it should then consider, and can only find him guilty of, the lesser offense. There is no requirement of "acquittal," which was the conclusion reached by the Court in *Blueford*.

We find no abuse of the circuit court's discretion in this case. Alexander's challenge on appeal is limited to AMI Crim. 2d 301 because his objection below was based only on that instruction. We also hold that *Blueford* did not modify or "obliterate" the model jury instructions; *Blueford*'s holding is consistent with the instructions. We also disagree with Alexander's contention that the jury instructions dictate an "acquit first" approach to deliberations. The instructions only require a reasonable doubt, not an "acquittal," before a jury may consider a lesser-included offense. As the Supreme Court stated, the jury is always free to reconsider its determination on any charge while deliberations are ongoing.

Affirmed.

GRUBER and BROWN, JJ., agree.

William R. Simpson, Jr., Public Defender, by: *Dan Hancock* and *Clint Miller*, Deputy Public Defenders, for appellant.

Dustin McDaniel, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.