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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-14-817

JAMES WILLIAMS APPELLANT	**Opinion Delivered** April 22, 2015
V.	APPEAL FROM THE MILLER COUNTY CIRCUIT COURT [NO. 46CR-1-71]
	HONORABLE BRENT HALTOM, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

PHILLIP T. WHITEAKER, Judge

Appellant James Williams was convicted of "reckless conduct" manslaughter and sentenced to ten years in the Arkansas Department of Correction. On appeal, Williams does not challenge the sufficiency of the evidence supporting his conviction; instead, he argues that the circuit court erred in rejecting his proffered jury instruction that would have placed the issue of "extreme emotional disturbance" manslaughter before the jury. We affirm.

Arkansas allows a conviction of manslaughter as a result of extreme emotional disturbance. Under Arkansas Code Annotated section 5-10-104(a)(1)(A) (Supp. 2011), a person commits manslaughter if the person causes the death of another person under circumstances that would be murder, except that he or she causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse. Ark. Code

Ann. § 5-10-104(a)(1)(A). The reasonableness of the excuse is determined from the viewpoint of a person in the defendant's situation under the circumstances as he or she believes them to be. Ark. Code Ann. § 5-10-104(a)(1)(B). With this statutory framework in mind, we will now consider the evidence.

Williams attended a New Year's Eve party at the G-Spot nightclub in Garland City with his two brothers, one of whom is named Brandon. Brandon became involved in a fight on the dance floor, and Williams responded to the altercation, as did club security. One of the club's security officers, Preston Lamay, tried to break up the fight (eventually using his Taser on Brandon) and told the three brothers to leave the club. Williams went to his car, retrieved a gun, returned to the club, and attempted to re-enter. When Lamay prevented Williams's re-entry, Williams put the gun in Lamay's face and then stepped to the side and fired three times. One shot went into the air; another hit the ceiling of the club's porch; and the third struck a bystander, George Foster, killing him.

As a result of Foster's death, James Williams was charged with, and tried on, one count of first-degree murder. At the conclusion of the trial, the State agreed that an instruction on second-degree murder would be appropriate. In addition, however, Williams asked the court to instruct the jury on both extreme-emotional-disturbance manslaughter, pursuant to Arkansas Code Annotated section 5-10-104(a)(1), and reckless-conduct manslaughter, pursuant to Arkansas Code Annotated section 5-10-104(a)(3),[1] as a lesser-

[1] Under section 5-4-104(a)(3), a person commits manslaughter if he recklessly causes the death of another person.

included offense. The circuit court agreed that an instruction on reckless-conduct manslaughter would be appropriate, but it denied Williams's request for an instruction on extreme-emotional-disturbance manslaughter. Following deliberations, the jury found Williams guilty of manslaughter and sentenced him to ten years in prison and a $10,000 fine.

Williams's sole argument on appeal is that the circuit court abused its discretion in refusing to instruct the jury on a lesser-included offense. It is reversible error to refuse to instruct on a lesser-included offense when there is the slightest evidence to support the instruction. *Morris v. State*, 351 Ark. 426, 94 S.W.3d 913 (2003); *Taylor v. State*, 2009 Ark. App. 627, 331 S.W.3d 597. The appellate courts have made it clear, however, that we will affirm a trial court's decision not to give an instruction on a lesser-included offense if there is no rational basis for giving the instruction. *Morris*, *supra*. An appellate court will not reverse a trial court's decision regarding the submission of such an instruction absent an abuse of discretion. *Davis v. State*, 2011 Ark. 433; *Boyle v. State*, 363 Ark. 356, 214 S.W.3d 250 (2005).

Williams specifically argues that the circuit court abused its discretion in refusing to instruct the jury on the lesser-included offense of extreme-emotional-disturbance manslaughter. This court has recently made it clear that a jury instruction on extreme-emotional-disturbance manslaughter under section 5-10-104(a)(1) requires evidence that the defendant killed the victim in the moment following provocation by the victim such as "physical fighting, a threat, or a brandished weapon." *Cody v. State*, 2014 Ark. App. 686, at 5, 449 S.W.3d 712, 715 (citing *Pollard v. State*, 2009 Ark. 434, 336 S.W.3d 866). *See also*

Davis v. State, 2011 Ark. 433; *Boyle v. State*, 363 Ark. 356, 214 S.W.3d 250 (2005); *Kail v. State*, 341 Ark. 89, 14 S.W.3d 878 (2000). Such a provocation can occur when the victim is armed or is attempting to commit violence toward the defendant. *Cody*, 2014 Ark. App. 686, at 6, 449 S.W.3d at 716; *see also Davis*, 2011 Ark. 433, at 4 (The instruction requires "a basis in fact indicating that appellant killed [the victim] in the moment following provocation in the form of physical fighting, a threat, or a brandished weapon."). When no evidence of such a provocation is presented at trial, no rational basis exists upon which the trial court could have instructed the jury on manslaughter due to extreme emotional disturbance. *Cody*, 2014 Ark. App. 686, at 4–5.

In the instant case, the evidence failed to show that Williams was provoked by the victim or that the victim was threatening Williams or attempting to commit violence on Williams at the time of the murder. Indeed, at trial, Williams testified that he did not know Foster and that he had not intended to shoot anyone. Moreover, in his brief, Williams concedes that Foster was "an innocent bystander." Although Williams did respond to a physical fight prior to the shooting, Foster was not a party to that fight and thus was not the source of any "provocation" that might have spurred or incited Williams to fire his gun. *See, e.g.*, *Jackson v. State*, 375 Ark. 321, 343, 290 S.W.3d 574, 589 (2009) (extreme-emotional-disturbance-manslaughter instruction was not warranted where, although the defendant claimed to have been provoked by witnessing the victim fighting with the defendant's brother, there was no evidence that the victim's actions in fighting the brother were "calculated to provoke" the defendant to take action). In short, the facts of this case

demonstrated that there was no rational basis for giving an extreme-emotional-disturbance-manslaughter instruction. We therefore hold that the circuit court did not abuse its discretion by refusing to give such an instruction.

Williams also briefly argues that, had the jury been instructed on extreme-emotional-disturbance manslaughter, it might have reached a different punishment. This argument, however, is purely speculative. Extreme-emotional-disturbance manslaughter and reckless manslaughter are both Class C felonies, *see* Ark. Code Ann. § 5-10-104(c) (Supp. 2011), and are subject to the same sentencing range. As the State notes, the jury would have heard exactly the same evidence to convict Williams of either version of manslaughter, and Williams points to no mitigating evidence that would have warranted a lesser sentence. We therefore reject Williams's contention. *See, e.g.*, *Perry v. State*, 2011 Ark. 434, at 5 (rejecting a claim of prejudice based on the severity of the defendant's sentence as "speculative and bereft of factual support").

Affirmed.

VIRDEN and GRUBER, JJ., agree.

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