

## ARKANSAS COURT OF APPEALS

DIVISION III  
No. CACR10-20

JUSTIN A. NICHOLSON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 22, 2010

APPEAL FROM THE FAULKNER  
COUNTY CIRCUIT COURT  
[NO. CR-2007-1342]

HONORABLE DAVID LEE  
REYNOLDS, JUDGE

AFFIRMED

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### RAYMOND R. ABRAMSON, Judge

A Faulkner County jury convicted Justin Nicholson of second-degree murder in the death of Justin “Hopper” McKinney. Nicholson was sentenced to thirty years’ imprisonment and ordered to pay a \$10,000.00 fine and various other costs and fees. Nicholson appeals, challenging the sufficiency of the evidence.

#### Facts

Nicholson shared a house with his wife and several other people. The house was a gathering point for the housemates’ group of friends, and people were constantly coming and going. At some point, Hopper began coming around the house. Hopper’s irritating and bizarre behavior, which included drinking his own urine in exchange for a cigarette, became too much for Nicholson and some of the other regulars. When Hopper began threatening people, Nicholson kicked him out of the house and told him not to come back. Hopper,

however, continued to show up and would try to get in the house.

Nicholson, Timothy King, and his wife, Shannon, among others, ran into Hopper some time later at Wal-Mart. Nicholson, Timothy, and Hopper exchanged words and an altercation ensued. A couple of days later, Nicholson and some others again encountered Hopper at Wal-Mart. As before, Nicholson and Hopper began arguing. According to Shannon King, Nicholson threatened to hogtie Hopper, put him in the trunk, take him out to Lolly Bottoms, and kill him. Hopper encouraged Nicholson to do it and then voluntarily got in the trunk of Nicholson's wife's car. The group went back to Nicholson's house, leaving Hopper in the trunk.

After nightfall, Nicholson grabbed a baseball bat, and he, Timothy and Shannon King, and a woman named Katie loaded into the car with Hopper still in the trunk. The group headed out toward Lolly Bottoms. Along the way, they smoked some marijuana, and Nicholson stopped to take the license plate off the car. Shannon King's disputed testimony was that when they arrived, Timothy and Nicholson opened the trunk and began beating Hopper while he was still in the trunk. Nicholson then dragged Hopper from the car down to the ditch where the two men continued to beat Hopper. Shannon testified that she could hear Hopper pleading for his life and that she and Katie were yelling at Nicholson and Timothy to stop. When Nicholson and Timothy started back to the car, Shannon said that she heard Hopper say "[p]lease don't leave me." At that point, according to Shannon, Nicholson then went back and beat Hopper some more. Nicholson and Timothy left

Hopper there, and the foursome then drove to Toad Suck, where Nicholson and Timothy discarded the bat.

The next day Shannon told her mother, a traffic officer for the Conway Police Department, what had happened. Shannon led her mother out to Lolly Bottoms, where they found Hopper's body. Nicholson was charged with first-degree murder. The jury ultimately convicted him of second-degree murder, a lesser-included offense.

### **Sufficiency of the Evidence**

When faced with a sufficiency challenge, we view the evidence in the light most favorable to the verdict and affirm if the verdict is supported by substantial evidence. *Williams v. State*, 375 Ark. 132, 135–36, 289 S.W.3d 97, 100 (2008). “Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture.” *Id.* “[I]n order to preserve challenges to the sufficiency of the evidence supporting convictions for lesser-included offenses, defendants must address the lesser-included offenses either by name or by apprising the trial court of the elements of the lesser-included offenses questioned by their motions for directed verdict.” *Mainard v. State*, 102 Ark. App. 210, 214, 283 S.W.3d 627, 630 (2008).

A person commits second-degree murder if he “knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life” or “[w]ith the purpose of causing serious physical injury to another person, the person causes the death of any person.” Ark. Code Ann. § 5-10-103(a)(1)–(2) (Repl. 2006). During the trial,

Nicholson moved for a directed verdict at the appropriate times. At the close of the State's case, his attorney argued,

Judge, on the existing charge of Murder in the First Degree, the formulation is "With purpose of causing death, Justin Nicholson caused the death." There's not a submissible case for the jury on those two elements, First Degree Murder. There's not a submissible case to the jury that he had the reckless and culpable mental state to attempt to kill; secondly, that there's not a submissible case for the jury on the issue that he was the one who caused the death, so we'd move for a directed verdict on First Degree Murder.

I think the State's position, then, will be that secondaries, sort of charge would be Accomplice to First Degree Murder. And, so I - that's probably the correct analysis for you to look at accomplice liability.

It's our position, Judge, that Shannon King was an accomplice to this offense under the definition of accomplice liability of aiding and abetting, counseling, soliciting, encouraging, advising, and so forth; that her testimony, one, has to be corroborated. And the level of corroboration has to be more than just the existence of the offense. Just to corroborate the defendant's conduct, we would submit that her testimony standing alone, as a matter of law, is insufficient to make a submissible case to the jury on accomplice liability for First Degree Murder.

At the close of all the evidence, Nicholson renewed his directed-verdict motion. His attorney argued,

Your Honor, we renew our Motion for Directed Verdict based on First Degree Murder, the lack of elements and purposefulness and causation. Assumably, also on Accomplice Liability that the testimony has not been corroborated by what we assert is of the accomplice, Shannon.

In these motions, Nicholson did not challenge, either by name or by elements, the lesser-included offense of second-degree murder, of which he was ultimately convicted. Because he failed to address this lesser-included offense in his directed-verdict motions,

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Nicholson's sufficiency challenge is not preserved on appeal. *Mainard*, 102 Ark. App. at 214, 283 S.W.3d at 630; *see also Grillot v. State*, 353 Ark. 294, 303–07, 107 S.W.3d 136, 141–43 (2003). We therefore affirm his conviction.

GLADWIN and GLOVER, JJ., agree.