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SUPREME COURT OPINION

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SUPREME COURT OF ARKANSAS

No. CR10-1104

LOUIS RICARDO BUTLER APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** September 22, 2011 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. CR07-4949] HONORABLE HERBERT THOMAS WRIGHT, JR., JUDGE AFFIRMED.

JIM HANNAH, Chief Justice

Louis Ricardo Butler was convicted of first-degree unlawful discharge of a firearm from a vehicle in violation of Arkansas Code Annotated section 5-74-107(a)(1) (Repl. 2005) and sentenced to a term of life imprisonment, plus 120 months' imprisonment pursuant to Arkansas Code Annotated section 16-90-120 (Supp. 2007) for commission of a felony with a firearm. He alleges on appeal that the circuit court erred in refusing to instruct the jury pursuant to his proffered instruction on manslaughter based on imperfect self-defense and manslaughter committed under extreme emotional disturbance. We find no error and affirm. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(a)(2).

About midnight on October 28, 2007, Butler shot William Whisenhunt as Butler sat in his car outside Joubert's tavern in Little Rock. Whisenhunt was struck by bullets from two .22 rounds. One bullet entered the upper front of his chest, and one bullet entered his upper

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back. The front chest wound was fatal.

Prior to the shooting, Butler and his friend Rodney Slater had been in Joubert's. Whisenhunt and his friends had also been in Joubert's. Whisenhunt's group included Tamara Atkins, Donna Inmon, Ramona Petti, and Brian Smith. The record does not reveal any contact between the Butler and Whisenhunt parties until they both left the tavern at the same time. Upon exiting, an altercation arose regarding Slater's alleged failure to hold open the door for Whisenhunt's friend Atkins. According to Slater, as they were leaving the bar, the door accidentally closed on Atkins.

Slater testified that he apologized and that Whisenhunt stated, "you niggers can't open a door for a white woman." Butler and Slater are black. Whisenhunt was white. His friends are also white. Several witnesses testified that Whisenhunt was drunk. Petti testified that Atkins hugged Slater to show there was no problem and said, "I know it was an accident." Slater testified that Whisenhunt referred to him and Butler as "niggers" and stated that he hated "niggers."

Inmon and Petti testified that upon leaving the tavern parking lot, Butler blocked their vehicle. Slater testified that Butler did not block Whisenhunt's car but that Butler did leave the lot by a route that took him by Whisenhunt rather than use other available routes that would have avoided contact with Whisenhunt.

Several witnesses, including Slater and Inmon, testified that Whisenhunt approached Butler's vehicle. While Inmon and other witnesses testified that Butler's vehicle was stationary when Whisenhunt approached it, Slater testified that it was moving. Slater testified

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that when Whisenhunt got to their vehicle, he reached inside to grab the gear shift and stop it stating, "like" . . . "throw it in park and I'll whip both of you niggers." Slater testified that he wasn't scared and felt no need to get out of the car to fight. He also testified that he thought this was more of the earlier argument, that he just thought there was going to be an exchange of words, "a brief little argument," but as he turned his head for a "quick brief second" the shots were fired.

Butler was charged with capital murder under Arkansas Code Annotated section 5-10-101(a)(10)(A), discharge of a firearm from a vehicle at a person. Other charges were brought that are not relevant to this appeal. Butler asserted that he killed Whisenhunt in self-defense.

The State agreed with Butler that first-degree unlawful discharge of a firearm from a vehicle at a person was a lesser-included offense of the capital-murder charge. The circuit court rejected second-degree unlawful discharge of a firearm as a lesser-included offense of capital murder because it did not require a fatality but did instruct on manslaughter as a lesser-included offense insofar as causing the death of another by reckless conduct. The circuit court rejected Butler's proffered instruction, which would have permitted the jury to find him guilty of a lesser-included offense of manslaughter because he shot Whisenhunt based on a reckless belief that Whisenhunt posed a threat to him. A self-defense instruction was also given to the jury.

We first consider Butler's argument that the circuit court erred in failing to give the proffered instruction on Butler's claim of imperfect self-defense. With respect to Butler's alleged imperfect self-defense and claim that he ought to be entitled to an instruction on

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manslaughter as a lesser-included offense based on reckless belief, he is correct that if a person is reckless in forming a belief that the use of force is necessary, he or she may be subject to prosecution for an offense that requires recklessness as the intent. *See Harshaw v. State*, 344 Ark. 129, 134, 39 S.W.3d 753, 757–58 (2001) (citing Ark. Code Ann. § 5-10-214(a)(3) (Repl. 1997)). Harshaw was convicted of second-degree murder and on appeal alleged that the jury should have been instructed on manslaughter under section 5-10-214 and reckless belief. Harshaw shot a man under a mistaken belief that he was about to pull a pistol on him, and this court reversed and remanded the case for the jury to be instructed on reckless belief and whether Harshaw committed manslaughter based on a reckless belief, the relief Butler now seeks. But, in *Harshaw*, the victim made multiple statements that he would settle a problem with a gun. While the belief that the victim in *Harshaw* possessed a firearm and intended to use it may have been reckless, there was a basis in fact for some belief, however reckless, that the victim posed a threat.

In the present case, the circuit court did not find "a scintilla of evidence" to support any form of manslaughter other than the question of whether Butler recklessly caused Whisenhunt's death. The circuit court instructed the jury that to find Butler guilty of manslaughter, it must find he "recklessly caused" Whisenhunt's death. The circuit court refused to instruct the jury that it could find Butler guilty of manslaughter if it found that Butler killed Whisenhunt under a reckless belief that Whisenhunt posed a threat.

A circuit court should instruct the jury on a lesser-included offense when it is supported by even the slightest evidence and where there is a rational basis upon which a jury

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could find the defendant not guilty of the offense charged and convict on the lesser-included offense. *Sweet v. State*, 2011 Ark. 20, at 14, 370 S.W.3d 510, 521. The decision of the circuit court on whether to instruct on a lesser-included offense is reviewed under an abuse of discretion standard. *Id.*, 370 S.W.3d at 521.

The evidence reveals that Butler left the parking lot by a route that took him by Whisenhunt, and that if he had taken one of the other available routes, he could have avoided contact with Whisenhunt. The evidence also reveals that Butler obstructed Whisenhunt's vehicle. Slater testified that Whisenhunt reached into the car to grab the gear shift to stop them from leaving and expressed a racial epithet and a threat to beat them. But, Slater further testified that he was not scared and did not feel a need to get out and fight. He thought this was just going to be a brief exchange of words. Butler shot Whisenhunt in the chest and back. Dr. Frank Peretti, M.D., testified that he could not offer an opinion on whether the first shot hit Whisenhunt in the chest or in the back. There was no evidence that Whisenhunt held or brandished a weapon. In sum, there was no evidence that Butler shot Whisenhunt under a reckless belief that Whisenhunt posed a threat; therefore, there was no rational basis on which to give the proffered instruction. We hold that there was no abuse of discretion in refusing to give the proffered instruction based on imperfect self-defense.

We next turn to Butler's assertion that the same proffered instruction should have been offered on extreme emotional distress as a basis for a manslaughter instruction. Butler asserts that Whisenhunt's conduct so unnerved him that he suffered extreme emotional distress causing him to shoot Whisenhunt under a reckless belief that Whisenhunt posed a threat to

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him. We are again faced with the same facts regarding Butler's conduct at the time of the shooting. To support extreme emotional distress, there must be a provocation inducing passion, such as an assault with violence, or the brandishing of a weapon, that makes acting on the passion irresistible. *See Jackson v. State*, 375 Ark. 321, 343, 290 S.W.3d 574, 589 (2009). The evidence in the present case does not support an instruction for extreme emotional distress. Butler chose to put himself in a place where the altercation could continue. Again, as noted, Slater testified that he was not scared and did not feel he needed to get out and fight. In other words, there was no immediate threat so far as Slater could discern. There was no rational basis on which to give the proffered instruction. We hold that there was no abuse of discretion in refusing to give the proffered instruction based on extreme emotional distress.

Pursuant to Arkansas Supreme Court Rule 4-3(i) (2011), the record has been examined for all objections, motions, and requests made by either party that were decided adversely to Butler, and no prejudicial error has been found.

Affirmed.

Terrence Cain, for appellant.

Dustin McDaniel, Att'y Gen., by: *Eileen W. Harrison*, Ass't Att'y Gen., for appellee.