

SUPREME COURT OF ARKANSAS

No. CR12-266

JAMES HOLIAN

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered January 17, 2013

APPEAL FROM THE FAULKNER
COUNTY CIRCUIT COURT
[NO. 23CR-10-1120]HONORABLE CHARLES E.
CLAWSON, JR., JUDGEAFFIRMED.

JOSEPHINE LINKER HART, Associate Justice

A Faulkner County jury convicted James Holian of four counts of first-degree felony murder and single counts of first-degree battery and failure to stop after an accident with injury or death. He received concurrent sentences in the Arkansas Department of Correction of 240 months for each of the first-degree felony-murder convictions and 120 months and 72 months respectively for the two other convictions. On appeal, Holian argues that the trial court erred by refusing to instruct the jury on the offense of felony manslaughter, which he contends is a lesser-included offense of felony murder. We granted Holian's motion to transfer this case to our docket from the Arkansas Court of Appeals because it involves statutory interpretation, clarification of the law, and possibly overruling our precedent. Accordingly, our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(b)(5) (2012). We affirm.

The convictions arose from a "road rage" incident that resulted in a catastrophic motor-vehicle accident. On September 12, 2010, Holian was driving with his girlfriend,

Beverly Uptigrove, from Cabot to Conway. Holian stopped at a red light at the intersection of Arkansas Highway 107 and U.S. Highway 64, waiting to turn left. In front of him was a Nissan Pathfinder operated by Russell Johnston. When the light changed, the Nissan failed to move. Holian sounded his horn twice, then went around the Nissan. This maneuver apparently enraged Johnston. Johnston pulled right up on Holian's bumper, which, by Holian's admission, angered Holian. Johnston passed Holian, then cut in sharply, causing Holian to apply his brakes. Holian passed Johnston and threw a water bottle at Johnston's vehicle. Johnston again came up behind Holian, swerving right and left, and gesturing for Holian to pull over. Holian aggressively tried to avoid Johnston, speeding up and changing lanes. Witnesses reported that the two vehicles were traveling in excess of eighty miles per hour. This activity continued for several miles.

Eventually, Johnston lost control of his vehicle and "t-boned" a Cadillac occupied by five members of the San Felippo family. Four of them were killed, and one was seriously injured. Johnston's vehicle also collided with a truck driven by Matthew Heindrich who was heading east on U.S. Highway 64. Johnston was ejected from his vehicle by the impact, but survived and was airlifted from the scene. Holian continued toward Conway, unscathed.

Holian was charged with four counts of first-degree felony murder and single counts of first-degree battery and failure to stop after an accident with injury or death. By written motion, Holian requested that the trial court instruct the jury on felony manslaughter¹ as

¹In pertinent part, Arkansas Code Annotated section 5-10-104 (Repl. 2006) states:

(a) A person commits manslaughter if:

a lesser-included offense of felony murder.² Relying on our holdings in *Perry v. State*, 371 Ark. 170, 264 S.W.3d 498 (2007), and *Hill v. State*, 344 Ark. 216, 40 S.W.3d 751 (2001), overruled on other grounds by *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003), the trial court denied Holian’s motion. *Perry* and *Hill* hold that felony manslaughter is not a lesser-included offense of felony murder because while felony manslaughter requires proof that the person “negligently causes” the death, felony murder does not require proof that the person has caused the death with a specific level of culpability.

On appeal, Holian argues that the trial court erred by refusing to give the jury the felony-manslaughter instruction. He acknowledges that *Perry* and *Hill* support the trial court’s ruling. However, he asserts that these cases “completely ignore” Arkansas Code Annotated section 5-2-203(b) (Repl. 2006), which states that if a statute does not prescribe a culpable mental state, the requisite mental state must be imputed to be purposely, knowingly, or recklessly. Holian further asserts that “other courts have recognized” that the

...
(4) Acting alone or with one (1) or more persons:

(A) The person commits or attempts to commit a felony; and

(B) In the course of and in furtherance of the felony or in immediate flight from the felony:

(i) The person or an accomplice negligently causes the death of any person.

²Arkansas Code Annotated section 5-10-102 (Repl. 2006), states, in pertinent part, as follows :

(a) A person commits murder in the first degree if:

(1) Acting alone or with one (1) or more other persons:

(A) The person commits or attempts to commit a felony; and

(B) In the course of and in the furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life.

elements of the underlying felony are not elements of felony murder. *State v. Hartz*, 828 P.2d 618 (Wash. Ct. App. 1992). Thus, Holian concludes that our felony-murder statute has an imputed mental state for commission of the homicide of purposeful, knowing, or reckless—mental states with greater culpability than negligent, which is an element of our felony-manslaughter statute.

Proceeding from the basic premise that *Perry* and *Hill* must be overruled because our criminal code requires that a mental state to the homicide itself be imputed, rather than satisfied by the culpable mental state to commit the underlying felony, Holian argues further that Arkansas Code Annotated section 5-1-110(b) (Repl. 2006), as clarified by our decision in *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002), requires this court to hold that felony manslaughter is a lesser-included offense of felony murder. This being so, he reasons that “negligently,” the mens rea for the homicide in our felony-manslaughter statute, is a lower state of culpability than the “purposefully, knowingly, or recklessly” mental state that must be imputed to felony murder. Finally, Holian asserts that there was sufficient evidence adduced at his trial to require that the trial court instruct the jury on felony manslaughter.

We reject Holian’s contention that we erred in deciding *Perry*, and *Hill* by failing to apply Arkansas Code Annotated section 5-2-203(b). Those cases are firmly grounded in our long-recognized felony-murder rule that the mental state to commit the underlying felony is the mens rea for the homicide. The felony-murder rule, recognized at common law, predated and was codified in our current criminal code. See *Jefferson v. State*, 372 Ark. 307, 276 S.W.3d 214 (2008). Contrary to Holian’s suggestion that our decisions ignore the

legislature's mandate stated in section 5-2-203(b), our felony-murder jurisprudence is completely in concert with the legislature's intent, as evidenced by the original commentary that accompanied the enactment of the Arkansas Criminal Code in 1975. We have long held that the commentary is highly persuasive in determining legislative intent. *See Doss v. Norris*, 2010 Ark. 199 (per curiam).

We also reject Holian's suggestion that our analysis is somehow inconsistent with the decisions of "other courts." In his only cited authority from foreign jurisdictions, *Hartz, supra*, the Washington Court of Appeals held that the underlying crime in felony murder "functions as a substitute for the mental state the State would otherwise be required to prove." 828 P.2d 618, 620. Accordingly, the Washington court declined to require proof that the appellant's intent to commit a robbery was present at the exact moment he committed the homicide. *Id.*

Having declined Holian's invitation to overrule *Perry* and *Hill*, we need not address the balance of Holian's argument because it is predicated on our concession that we ignored the requirements of section 5-2-203(b).

James Law Firm, by: *William O. "Bill" James, Jr.*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Christian Harris*, Ass't Att'y Gen., for appellee.