
YEAR 2005 CASE SUMMARIES

By
The Honorable Pat Garza

Associate Judge
386th District Court
San Antonio, Texas

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In a felony-murder prosecution, the culpable mental state for the act of murder is supplied by the mental state of the accompanying felony. [In the Matter of E.B.M.] (05-4-9)

On August 31, 2005, the Fort Worth Court of Appeals held that, in a felony-murder prosecution, the evidence was sufficient to establish the mens rea to unauthorized use of a motor vehicle (the underlying felony), and did not relate to the mens rea of the lesser included offenses of criminally negligent homicide or manslaughter.

05-4-9. **In the Matter of E.B.M.**, MEMORANDUM, No. 2-04-201-CV, 2005 Tex.App.Lexis 7255 (Tex.App.— Fort Worth, 8/31/05).

Facts: The evidence showed that on February 13, 2004, at approximately 10:45 p.m., Lindsay Roberts left her pickup truck running while she was inside the Quick-Sak convenience store. Appellant stole Roberts's pickup truck and proceeded down White Settlement Road. When Appellant approached the intersection with Churchill Road, he collided with a vehicle driven by Philip Andress, who died as a result. After the accident, Appellant fled the scene and was arrested a short time later. At the time of the accident, Appellant was driving without headlights, and his speed was calculated to be between 61 and 63 mph in a 35 mph zone. Appellant submitted to a blood test at the hospital and was found to have a blood alcohol level of 0.11 percent.

Appellant urges this court to adopt an interpretation of the definition of felony murder set forth in *section 19.02(b)(3) of the Texas Penal Code* as excluding unauthorized use of a vehicle as an underlying offense. n5 As support for his argument, Appellant contends that he has found no Texas case upholding a conviction for felony murder based upon unauthorized use of a motor vehicle as the underlying offense.

n5 Under the felony murder statute, a person commits an offense if he commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

TEX. PENAL CODE ANN. § 19.02(b)(3) (Vernon 2003).

Held: Affirmed.

Other Issues Omitted.

Memorandum Opinion: In his fifth point, Appellant argues that the trial court erred in denying his request for a jury instruction regarding the lesser-included offenses of manslaughter and criminally negligent homicide.

A two-step test applies when assessing whether a charge on a lesser-included offense should be given. *Threadgill v. State*, 146 S.W.3d 654, 665 (Tex. Crim. App. 2004); *Feldman v. State*, 71 S.W.3d 738, 750 (Tex. Crim. App. 2002). The first step is to determine whether the offense is actually a lesser-included offense of the offense charged. *Threadgill*, 146 S.W.3d at 665. The second step of the test requires that the record contain some evidence that would permit a rational jury to find that the defendant is guilty only of the lesser offense. *Id.*; *Feldman*, 71 S.W.3d at 750. There must be some evidence from which a rational jury could acquit the defendant of the greater offense while convicting him of the lesser-included offense. *Threadgill*, 146 S.W.3d at 665. The evidence must establish the lesser-included offense as a valid rational alternative to the charged offense. *Id.*

Criminally negligent homicide is a lesser-included offense of felony murder when the intended felony is other than an underlying assaultive offense. *See Jones v. State*, 100 S.W.3d 1, 6 (Tex. App.--Tyler 2002, *pet. ref'd*) (citing *Kuykendall v. State*, 609 S.W.2d 791, 797-98 (Tex. Crim. App. [Panel Op.] 1980), *overruled on other grounds by Cook v. State*, 858 S.W.2d 467, 469-70 (Tex. Crim. App. 1993)). Additionally, because manslaughter and criminally negligent homicide differ only in the required mens rea, manslaughter is a possible lesser-included offense of felony murder. *Id.*

Because manslaughter and criminally negligent homicide can be lesser-included offenses of felony murder, we must determine whether there is some evidence that would permit a rational jury to find that the defendant is guilty only of the lesser offense. Manslaughter requires proof that the defendant acted recklessly, that is, that he consciously disregarded a substantial risk of which he was aware. *Jones*, 100 S.W.3d at 6; *see TEX. PENAL CODE ANN. § § 6.03(c), 19.04(a)* (Vernon 2003). Criminally negligent homicide requires proof that the defendant acted with criminal negligence, that is, that he ought to have been aware of a substantial and unjustifiable risk that the result would occur. *Jones*, 100 S.W.3d at 6; *see TEX. PENAL CODE ANN. § § 6.03(d), 19.05(a)*.

Appellant contends that there was no evidence that he intentionally or knowingly caused the death of Andress, the driver of the other vehicle. Therefore, he argues that the mens rea of criminally negligent homicide and manslaughter "more closely relate to the actual actions of the Appellant than the offense for which he was ultimately convicted, felony murder."

In felony murder, the culpable mental state for the act of murder is supplied by the mental state accompanying the underlying felony. *Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005); *Rodriguez v. State*, 548 S.W.2d 26, 28-29 (Tex. Crim. App. 1977). In the instant case, it is undisputed that Appellant intentionally operated Roberts's vehicle without her effective consent, thereby intentionally committing the underlying offense of unauthorized use of a vehicle. *See TEX. PENAL CODE ANN. § 31.07(a)*. In reviewing the record, we have found no evidence that Appellant acted recklessly or with criminal negligence in this regard, nor has Appellant cited any such evidence in his brief. Therefore, we conclude that Appellant was not entitled to a lesser-included offense instruction. We overrule Appellant's fifth point.

Conclusion: Having overruled all of Appellant's points, we affirm the trial court's judgment.

