Circuit Court for Prince George's County
Case No. CT-10-0775X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 552

September Term, 2021

ADRIAN LEWIS

v.

STATE OF MARYLAND

Nazarian,
Leahy,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: February 4, 2022

In 2011, a jury, in the Circuit Court for Prince George's County, convicted Adrian Lewis, appellant, of attempted second-degree murder, second-degree depraved heart murder, and two counts of use of a handgun in the commission of a crime of violence. Lewis filed an appeal in this Court. We affirmed his convictions in an unreported opinion. *Lewis v. State*, No. 515, September Term 2011 (filed 23 February 2012).

Several years later, Lewis filed a petition for post-conviction relief in the circuit court. In that petition, Lewis argued, among other things, that appellate counsel had rendered ineffective assistance in failing to argue that the trial court erred in refusing to instruct the jury on the crime of involuntary manslaughter. The post-conviction court agreed and granted Lewis the right to file a belated appeal. Lewis noted this timely appeal, in which he raises a single question:

> Did the trial court abuse its discretion in refusing to instruct the jury as to the offense of involuntary manslaughter?

For reasons we shall explain, we hold that the trial court did not err in refusing to give that instruction. We, therefore, affirm the court's judgments.

BACKGROUND

In the early morning hours of 10 April 2010, two individuals were shot outside of Andrew's Bar and Grill, a pool hall in District Heights. One of the victims, Walter Corey Britt, was shot five times, but survived. The other victim, Cynthia Aaron, was shot in the back of the neck and killed.

Charging

Lewis was arrested and charged in the shooting. As to the first victim, Britt, Lewis was charged with attempted first-degree murder, attempted second-degree murder, first-degree assault, and use of a handgun in the commission of a crime of violence. As to the second victim, Aaron, Lewis was charged with murder and use of a handgun in the commission of a crime of violence. The murder indictment was charged using the "statutory short form" indictment. Under such an indictment, a defendant is deemed charged with first-degree murder, second-degree murder, and manslaughter. Md. Code, Crim. Law § 2-208; *see also Dishman v. State*, 352 Md. 279, 285-90 (1998).

Trial Testimony

At trial, Britt testified that he arrived at Andrew's Bar and Grill at approximately 1:00 a.m. on the day of the shooting. Approximately one hour later, as the bar was closing, he left the bar and walked to his vehicle, which was parked just outside the bar's entrance/exit. While he was standing by his vehicle, Britt observed a vehicle arrive and park behind his vehicle. An individual, whom Britt later identified as Lewis, got out of the vehicle through the passenger-side door and approached him. Lewis "leaned across the front" of Britt's vehicle and stated, "What the fuck are you looking at?" In response, Britt "basically looked" at Lewis and "kind of gave him like a slight giggle." Lewis then stated, "I will kill all you fuckers out here anyway." Concurrently, Lewis pulled a gun from the waistband of his pants. After a short struggle, Britt ran away. As he was running away, he was shot five times. Britt continued running for a short distance. He collapsed eventually against a nearby building. He retrieved his cell phone from his pocket and called 911.

Edgardo Davis testified that, at approximately 1:43 a.m. on the day of the shooting, he went to Andrew's Bar and Grill and had a drink. Shortly after Davis arrived at the bar, a woman came in and stated that "somebody just shot some people outside and there is a woman out … on the sidewalk dead." Davis testified that he then went outside and saw a woman, later identified as Aaron, "laying on her stomach on the side of the curb." Davis testified further that he recognized Aaron as having been in the bar prior to the shooting. As he got closer to where she was lying, Davis could see that she had been shot in the back of the neck or head. Aaron was taken to the hospital, where she was pronounced dead. The cause of death was a gunshot wound to the back of the neck.

Lewis testified in his defense. He acknowledged that he had been at Andrew's Bar and Grill on the day of the shooting. Prior to the shooting, however, he claimed to have left the bar and got into a fight with some unidentified individuals in the parking lot. Lewis said that the fight lasted a few minutes and, following the fight, he went to his nearby vehicle and drove away. Lewis asserted that he did not return to the bar. He denied being involved in the shooting.

Charges Submitted to the Jury

At the conclusion of the State's case-in-chief, the prosecutor informed the trial court that, with respect to the victim Aaron, the State would be submitting to the jury only the charges of first-degree premeditated murder, second-degree specific intent murder, second-degree depraved heart murder, and use of a handgun in the commission of a crime of violence. Defense counsel appeared to acquiesce in the State's decision by limiting its

response to only those crimes. As to the victim Britt, the State indicated its intent to proceed with attempted first-degree murder, attempted second-degree murder, and use of a handgun in the commission of a crime of violence.

Jury Instruction on Involuntary Manslaughter

During trial, defense counsel submitted a written request for jury instructions. Included in that request was Maryland Criminal Pattern Jury Instruction 4:17.8, which sets forth the elements for second-degree depraved heart murder, grossly negligent act involuntary manslaughter, and unlawful act involuntary manslaughter. MPJI-CR 4:17.8.

Later, while discussing potential jury instructions with the trial court, defense counsel reiterated that he was requesting an instruction on "a second-degree depraved heart misdemeanor version which involved involuntary manslaughter." Defense counsel argued that a rational juror could make a finding on involuntary manslaughter given "the razor-thin differentiation between second-degree depraved requirements and requirements for … involuntary manslaughter." The court declined defense counsel's request, finding that an involuntary manslaughter instruction was "inappropriate … based upon the facts that have been presented in this case."

Conviction and First Appeal

The jury convicted Lewis of attempted second-degree murder of Britt, second-degree depraved heart murder of Aaron, and both counts of use of a handgun in the commission of a crime of violence. The jury acquitted Lewis of the remaining charges.

Lewis noted an appeal in this Court. *Lewis v. State*, No. 515, September Term 2011 (opinion filed 23 February 2012). In that appeal, Lewis did not argue that the trial court had erred in refusing to instruct the jury on involuntary manslaughter. *Id.* We affirmed Lewis's convictions in an unreported opinion. *Id.*

Post-Conviction Proceedings

In 2019, Lewis filed a petition for post-conviction relief, arguing, among other things, that appellate counsel had rendered ineffective assistance in failing to argue that the trial court erred in refusing to instruct the jury on involuntary manslaughter. The post-conviction court granted Lewis 120 days to file a belated appeal. This timely appeal followed.

DISCUSSION

Parties' Contentions

Lewis argues that the trial court abused its discretion by failing to instruct the jury on involuntary manslaughter. He asserts that, pursuant to Maryland Rule 4-325, the court was required to give the instruction because it was requested by the defense and was generated by some evidence. He notes that, because he was indicted under the statutory "short form" indictment for murder, he could have been convicted of involuntary manslaughter. Had the involuntary manslaughter instruction been given, he imagines that the jury would have had the opportunity to better assess his "level of blameworthiness" and would have found him likely guilty of involuntary manslaughter, rather than second-

degree depraved heart murder. He maintains that he should be granted a new trial "in the interests of justice."

The State counters that the trial court did not err. The State argues that an instruction on involuntary manslaughter was not required pursuant to Rule 4-325 because the prosecutor, in informing the court at the close of the State's case that the State was proceeding on first and second-degree murder, had "nolle prossed" effectively the involuntary manslaughter charge. The State asserts, in other words, that the involuntary manslaughter charge was not a "charged" offense when the court declined to give the instruction and that, as a result, Rule 4-325 did not apply. The State maintains, rather, that the court's decision should be reviewed for abuse of discretion as to whether, based on the evidence presented at trial, any rational trier of fact could have found Lewis guilty of involuntary manslaughter, but not guilty of second-degree depraved heart murder. The State avers that, when viewed under that standard, the court did not abuse its discretion in refusing to give the involuntary manslaughter instruction.

Analysis

Maryland Rule 4-325 states, in relevant part, that a "court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." Md. Rule 4-325(c). That Rule "has been interpreted consistently as requiring the giving of a requested instruction when the following three-part test has been met: (1) the instruction is a correct statement of law; (2) the instruction is applicable

to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given." *Dickey v. State*, 404 Md. 187, 197-98 (2008).

When, as here, a defendant is charged with murder by the statutory short form, he may be entitled to an instruction on manslaughter. *Dishman*, *supra*, 352 Md. at 290-92. That is due, in part, to the fact that a murder indictment in the statutory short form includes implicitly the charges of first-degree murder, second-degree murder, and manslaughter. *Id.* at 285-90. If a defendant is tried pursuant to such an indictment and the manslaughter charge remains a part of the case when it is submitted to the jury, then the trial court may be required to give a manslaughter instruction pursuant to Rule 4-325(c). *Id.* at 292.

If, however, the manslaughter portion of the charge is no longer part of the case, because the prosecution has either entered a *nolle prosequi* to that charge or has decided not to submit that charge to the jury, then a request for a manslaughter instruction is not evaluated pursuant to the strictures of Rule 4-325(c). *Lee v. State*, 186 Md. App. 631, 661-62 (2009), *rev'd on other grounds by* 418 Md. 136 (2011). Rather, the request must be evaluated under the principles governing requests for instructions regarding uncharged offenses. *Id.* at 658-63 (discussing *Hook v. State*, 315 Md. 25 (1989)).

That analysis demands a two-step review process. First, we must determine if the uncharged offense is a "lesser included" offense to the remaining charge. *Id.* at 662-63. If it is not a lesser included offense, then the instruction need not be given. *Id.*

If, on the other hand, the offense is a lesser included offense, then "we must consider whether there exists, in light of the evidence presented at trial, a rational basis upon which

the jury could have concluded that the defendant was guilty of the lesser offense, but not guilty of the greater offense." *Ball v. State*, 347 Md. 156, 191 (1997). Under that second prong, "it is not enough to determine that the evidence would be sufficient for the jury to convict on [the lesser included] offense[.]" *Burrell v. State*, 340 Md. 426, 434 (1995); *see also Ball*, 347 Md. at 190-92. "In other words, 'the test is not whether there is sufficient evidence to convict of the lesser included offense but whether the evidence is such that the jury could rationally convict *only* on the lesser included offense.'" *Henry v. State*, 184 Md. App. 146, 165 (2009) (emphasis added) (citing *Burch v. State*, 346 Md. 253, 279 (1997)). "If a rational jury could not reach this conclusion, then the judge need not submit the lesser offense to the jury." *Ball*, 347 Md. at 191. The court's decision in that regard is reviewed for an abuse of discretion. *Henry*, 184 Md. App at 165.

Here, the record shows that the prosecutor entered effectively a *nolle prosequi* to the offense of involuntary manslaughter when he informed the trial court at the close of the State's case-in-chief that he would not be submitting that portion of the murder charge to the jury for consideration. *See Dean v. State*, 325 Md. 230, 234 (1992) (noting that a "*nolle prosequi* is simply the prosecution's abandonment of a charging document count or part of a count" and that it "need not be couched in any particular language or take any specific form"). In light of the prosecutor's decision, to which defense counsel acquiesced, the charge of involuntary manslaughter was not going before the jury at the time the court denied Lewis's request that the jury be instructed on that charge. *See Lee*, 186 Md. App. at 661-62. As a result, the trial court's denial of that request is not governed by Rule 4-

325(c) but rather is governed by the aforementioned two-prong test regarding requests for instructions on uncharged offenses.

Turning to that test, we begin by setting forth the elements of the pertinent charges, namely, second-degree depraved heart murder, which was submitted to the jury, and involuntary manslaughter, which was not. "Second-degree depraved heart murder requires 'the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not.'" *Owens v. State*, 170 Md. App. 35, 102 (2006) (citing *Robinson v. State*, 307 Md. 738, 744 (1986)). "Depraved heart murder has been described as one of the unintentional murders … that is punishable as murder because another element of blameworthiness fills the place of intent to kill." *Beckwitt v. State*, 249 Md. App. 333, 352 (2021) (citing *Alston v. State*, 101 Md. App. 47, 56 (1994)), *aff'd, ___ Md. ___ (op. filed 28 January 2022)*. "'The critical feature of depraved heart murder is that the act in question be committed under circumstances manifesting extreme indifference to the value of human life.'" *Alston*, 101 Md. App. at 56 (citing *Robinson v. State*, 307 Md. 738, 745 (1986)). Stated another way, depraved heart murder involves "the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not." *Id.* (citations omitted). In terms of the act itself, "the question is whether the defendant engaged in conduct that created a very high risk of death or serious bodily injury to others." *Id.* at 57 (citations omitted).

Involuntary manslaughter may be defined in one of three ways: "(1) unlawful act manslaughter, which is 'doing some unlawful act endangering life but which does not amount to a felony'; (2) gross negligence manslaughter, which is 'negligently doing some act lawful in itself'; and (3) 'the negligent omission to perform a legal duty.'" *Beckwitt*, 249 Md. App. at 352 (citing *State v. Thomas*, 464 Md. 133, 152 (2019)). Relevant here is the "gross negligence" form of involuntary manslaughter.[1]

"It is well-settled that the 'gross negligence' theory of involuntary manslaughter is a less culpable form of depraved heart murder." *Id.* Although both offenses involve an unintended death resulting from some careless or negligent act, the requisite "level of blameworthiness" is less severe for gross negligence involuntary manslaughter than for depraved heart murder. *Id.* at 352-53. "In general, the 'gross negligence' *mens rea* is established by asking whether the accused's conduct, under the circumstances, amounted to a disregard of the consequences which might ensue and indifference to the rights of others[.]" *Thomas, supra*, 464 Md. at 153 (citations and quotations omitted). "The act must manifest such a gross departure from what would be the conduct of an ordinarily

[1] The State argues that the record is unclear as to which form of manslaughter defense counsel wished to have submitted to the jury. The State points to the colloquy between defense counsel and the trial court that occurred during the discussion of jury instructions, in which defense counsel referred to the "misdemeanor version" of involuntary manslaughter. The State posits that defense counsel's statement could be construed as a reference to unlawful act involuntary manslaughter, which is not a lesser included offense of depraved heart murder. *See Tolen v. State*, 242 Md. App. 288, 198-99 (2019). Although we agree that defense counsel's choice of words may have muddied the waters somewhat, the record makes plain that defense counsel, in including MPJI-Cr 4:17.8 in his written request for instructions, wanted the court to instruct the jury on the gross negligence version of involuntary manslaughter.

careful and prudent person under the same circumstances so as to furnish evidence of indifference to the consequences." *Id.* at 153-54 (citations and quotations omitted).

Determining whether an act constitutes gross negligence "also involves an assessment of whether [the act] is more or less likely at any moment to bring harm to another, as determined by weighing the inherent dangerousness of the act and environmental risk factors." *Id.* at 160-61 (internal citations and quotations omitted). "This weighing must amount to a 'high degree of risk to human life' – falling somewhere between the unreasonable risk of ordinary negligence and the very high degree of risk necessary for depraved-heart murder." *Id.* at 161. The primary difference between depraved heart murder and gross negligence involuntary manslaughter is that "depraved heart murder requires an extreme indifference to the value of human life, … whereas gross negligence involuntary manslaughter requires only a wanton and reckless disregard for human life." *Beckwitt*, 249 Md. App. at 355 (citations and quotations omitted).

Returning to the present case, it is clear that gross negligence involuntary manslaughter is a "lesser included" offense of depraved heart murder. Thus, the first prong of the two-prong test regarding requests for instructions on uncharged offenses is satisfied. We now turn to the second prong to determine whether, based on the evidence presented at trial, a rational jury could have concluded that Lewis was guilty of gross negligence involuntary manslaughter, but not guilty of depraved heart murder.

On that point, *Burch v. State*, 346 Md. 253 (1997) and *Costley v. State*, 175 Md. App. 90 (2007) are instructive. In *Burch*, the defendant was charged with murder after he

killed an elderly couple during a home invasion. *Burch*, 346 Md. at 259. At trial, the defendant asked the court to instruct the jury on second-degree depraved heart murder, arguing that the instruction was warranted by the evidence. *Id.* at 275. The court refused to give the instruction, instead instructing the jury on premeditated first-degree murder, felony murder, and the specific intent versions of second-degree murder. *Id.* On appeal, Burtch argued that the court should have given the depraved heart instruction because the jury could have concluded that he did not have the requisite intent as to one of the victims. *Id.* at 276. The Court of Appeals disagreed, holding that, based on the facts, no rational juror could have convicted the defendant only of depraved heart murder:

> [The defendant] pummeled a 78-year old, 97-pound frail woman, apparently with a telephone receiver, with such force as to break 13 ribs and two other bones and cause extensive bleeding. Neither the fact that he could have done even more damage and thus ended her life even quicker nor the fact that the victim was still alive when he left the house detracts, in the least, from the compelling inference that the beating he did administer must have been with the intent either to kill or to do such serious bodily harm that death would be the likely result. Under [the defendant's] theory, virtually any murder committed by beating or that does not involve instantaneous death could qualify as depraved heart murder. That is not the law.
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> The jury … was instructed on two varieties of second-degree murder upon which a plausible verdict could have been returned. It is simply beyond the realm of reasonableness to suppose that any rational jury could find that [the defendant] administered the beating to [the victim] with mere recklessness or indifference as to the result.

Id. at 280 (internal citations and footnote omitted).

In *Costley*, the defendant was charged with murder after he stabbed to death a woman in her home. *Costley*, 175 Md. App. at 96, 129. At trial, the court instructed the

jury on first-degree murder and the specific intent versions of second-degree murder, but refused the defendant's request for an instruction on second-degree depraved heart murder and involuntary manslaughter. *Id.* at 126-30. On appeal before this Court, the defendant argued that the trial court had erred in refusing his request because the jury could have concluded that he had a general intent to engage in life-threatening conduct but not necessarily a specific intent to kill. *Id.* at 126-27. We disagreed, holding that, based on the Court of Appeals's holding in *Burch*, no rational jury could have convicted the defendant only of the offenses of depraved heart murder and involuntary manslaughter:

> In the present case, the evidence established that [the defendant] went to a Target store and bought a chef's knife, then immediately went to the [victim's] home. He immediately began to choke [the victim]. Then, when she fell, [the defendant] stabbed her as she lay on the ground. The autopsy report established that there were thirteen stab wounds[.] … In addition, [the victim] suffered blunt force injuries to the head with enough force to cause hemorrhaging on the surface of the brain. There were also seven cutting wounds.
>
> As in *Burch*, the jury was instructed on second degree murder based on [the defendant's] engaging in conduct either with the intent to kill [the victim] or the intent to inflict such serious bodily harm that death would be the likely result. Given the nature and number of the injuries inflicted on [the victim], the jury in this case was faced with a "compelling inference" that [the defendant's] actions "must have been with the intent either to kill or to do such serious bodily harm that death would be the likely result." *Burch*, 346 Md. at 280.

Id. at 129-30.

In the present case, evidence established that, on the day of the shooting, Lewis got into a physical altercation with several unidentified individuals outside of Andrew's Bar and Grill and then left scene. Sometime later, Lewis returned to the scene with a gun and

confronted Britt, who, along with several other people, had just left the bar. There was no evidence that Britt had been involved in the prior altercation. Upon confronting Britt, Lewis brandished the gun and declared that he was going to "kill all you fuckers out here." When Britt ran away, Lewis fired multiple shots in his direction, striking him five times. A sixth shot struck and killed Aaron, who was standing also outside of the bar. Lewis admitted that he had gotten into a physical altercation prior to the shooting, but claimed that he did not return to the bar afterward. He denied categorically any involvement in the shooting.

We hold that no rational jury could have convicted Lewis of gross negligence involuntary manslaughter, but acquitted him of second-degree depraved heart murder. The evidence showed that Lewis confronted Britt, an otherwise innocent bystander, outside of a crowded bar at closing time, brandished a gun, and then declared that he was going to kill everyone outside. When Britt ran away, Lewis took action to make good on that promise, firing at least six shots in Britt's direction. Five of those shots struck Britt, while the sixth shot struck and killed Aaron, another innocent bystander who happened to be standing in Lewis's line of fire.

Given those circumstances, we are persuaded that Lewis's "level of blameworthiness" in killing Aaron was, at the very least, that of depraved heart murder. Purposefully firing a weapon six times in the direction of multiple people, after declaring an intent to kill everyone in that area, is nothing short of "the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not." *Alston*, 101 Md. App. at 56 (citations omitted). No

rational jury could have found that the killing of Aaron constituted merely "a wanton and reckless disregard for human life," but not "an extreme indifference to the value of human life." *Beckwitt*, 249 Md. App. at 355 (citations and quotations omitted). As was the case in *Burch* and *Costley*, it is beyond the realm of reasonableness to suppose, based on the evidence presented, that a rational jury could have found that Lewis was guilty *only* of the lesser crime. Accordingly, the trial court did not abuse its discretion in refusing to instruct the jury on the lesser charge of gross negligence involuntary manslaughter.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0552s21cn.pdf