IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

STATE OF TENNESSEE,	)	FOR PUBLICATION
	)	
Appellee,	)	FILED:
	)	
v.	)	MCMINN COUNTY
	)	
GUSSIE WILLIS VANN	)	HON. R. STEVEN BEBB, JUDGE
	)	
Appellant.	)	NO. 03-S-01-9706-CR-00068

DISSENTING OPINION

I agree with the majority's resolution of every issue in this case but one: the effect of the trial court's failure to instruct the jury on second-degree murder. The majority concludes that the trial court's failure to instruct the jury on the offense of second-degree murder is not error because the evidence in the record does not support that offense. Because I find the evidence can indeed support a conviction of second-degree murder, I respectfully dissent.

As the majority explained, the State charged the defendant with both premeditated first-degree murder and first-degree murder in the perpetration of rape. Before the case was submitted to the jury, the State requested that the charge of premeditated murder be dismissed. The trial court dismissed that charge, and the case was submitted to the jury on the theory of felony-murder. The trial court instructed the jury solely on the offense of felony-murder.

In State v. Cleveland, 959 S.W.2d 548, 553 (Tenn. 1997), this Court held that trial courts are statutorily required to instruct juries on all lesser-included and "lesser-grade or

class"[1] offenses, if the evidence introduced at trial is legally sufficient to support a conviction for the lesser offenses. If the record is devoid of such evidence, then failure to charge a lesser offense does not constitute error.

The evidence in the instant case is legally sufficient to support a conviction for the lesser offense of second-degree murder. Under Tenn. Code Ann. § 39-13-210(a)(1) (1991), second-degree murder requires proof of a knowing killing. The act of strangulation with a rope, the probable murder instrument, is certainly an act which suggests the intent to kill, particularly in this case, where the strangulation was described as "violent." Thus, the jury could infer from the evidence presented that the strangulation was perpetrated knowingly or intentionally. Indeed, the State proceeded on the theory of premeditated murder up to the point when closing arguments were made and the case was submitted to the jury for deliberation. Clearly, then, the State interpreted the evidence as having established intentional conduct.[2]

Furthermore, the forensic evidence of the rape and strangulation injuries does not conclusively show that they were inflicted at the same time. Ron Toolsie, M.D., who performed the autopsy on the victim, testified that the injuries to the vagina had occurred "very shortly" prior to her death. An estimation of how much time the phrase "very shortly" encompassed is not provided. And because there was no evidence of recent injury to the anus, he could not determine when the anus had last been penetrated. Thus, the evidence supports the inference that the sexual injuries were prior to, and separate from, the strangulation, just as well as it supports the inference that the injuries were inflicted concurrently.

Because the evidence could support a conviction for second-degree murder, the trial court erred in failing to instruct the jury on that offense. The next question is, of what effect is the error? The majority in State v. Williams applied a harmless error analysis and affirmed the conviction in that case. ___ S.W.2d ___.

In my view, however, the right to a jury instruction on lesser offenses supported by the evidence is not merely a statutory right provided by Tenn. Code Ann. § 40-18-110(a) (1990). Essentially, it is an inherent component of the basic constitutional right to trial by jury, the violation of which can never be treated as harmless error. Williams, ___ S.W.2d at ___ (Birch, J., dissenting); see also Tenn. Const. art. I, § 6 ("the right of trial by jury shall remain inviolate"); State v. Bobo, 814 S.W.2d 353, 358 (Tenn. 1991); State v. Staggs, 554 S.W.2d 620, 626-27 (Tenn. 1977); Strader v. State, 210 Tenn. 669, 679-82, 362 S.W.2d 224, 229-30 (1962). Thus, I

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[1]An offense is "lesser-included" if it contains no elements that are not contained in the greater offense. A "lesser-grade" offense is "established by the legislature and is determined simply by looking at the offenses set forth in a statutory chapter and part." A "lesser-grade" offense may contain elements not contained in the greater offense. Cleveland, 959 S.W.2d at 553.

[2]If the evidence shows intent, then necessarily it also shows knowledge. Tenn. Code Ann. § 39-11-301(a)(2) (1991)("When acting knowingly suffices to establish an element, that element is also established if a person acts intentionally.")

would hold that the failure to provide such instruction is not subject to harmless error analysis.

Moreover, even if the harmless error analysis is applied, the error in this case would still require reversal. In Williams, the finding of harmlessness was predicated on the fact that the trial court provided instructions on two lesser offenses, second-degree murder and reckless homicide. The defendant argued that the trial court committed reversible error by refusing to also instruct the jury on voluntary manslaughter, an offense the State conceded was supported by the evidence. The majority disagreed, reasoning that "by finding the defendant guilty of the highest offense, to the exclusion of the immediately lesser offense, second degree murder, the jury necessarily rejected all other lesser offenses, including voluntary manslaughter." In contrast, here the jury did not have an opportunity to reject the "immediately lesser offense," or any other lesser offense. They instead were offered the choice of first-degree murder or acquittal. Surely, one must conclude that this error more probably than not affected the judgment to the defendant's prejudice, particularly in light of the sordid facts before the jury.

Perhaps the majority's reluctance to recognize that a conviction for second-degree murder is supportable may be attributable, at least in part, to the sordid nature of the facts involved. But constitutional rights must be protected with equal vigor for every defendant, regardless of the heinousness of the crime for which he or she is charged. Consequently, under the circumstances of this case I would be constrained to remand the case for retrial. Thus, I must respectfully dissent.

I am authorized to state that Special Justice Reid joins this dissenting opinion.

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ADOLPHO A. BIRCH, JR., Justice