IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs March 5, 2014

STATE OF TENNESSEE v. KHALIQ RA-EL

Appeal from the Criminal Court for Shelby County
No. 1105196 W. Mark Ward, Judge

No. W2013-01130-CCA-R3-CD - Filed July 11, 2014

JAMES CURWOOD WITT, JR., J., concurring.

I concur in the result reached by the majority. I write separately to respectfully depart from the majority's undertaking an analysis of the sufficiency of the evidence of passion and provocation.

In my view, the reference to passion and provocation in the voluntary manslaughter statue does not denote an essential element of the offense. It describes a dispensation to a defendant who, having intentionally or knowingly killed another, would otherwise be guilty of first degree or second degree murder respectively.

Caselaw evinces a disdain for uprooting a voluntary manslaughter conviction as a lesser included offense when the evidence would have supported first degree or second degree murder, despite that no evidence showed a state of passion produced by provocation sufficient to lead a reasonable person to act in an irrational manner. *See*, *e.g.*, *State v. Donald Knight*, No. M2008-01023-CCA-R3-CD, slip op. at 7 (Tenn. Crim. App., Nashville, Aug. 17, 2009) (holding that sufficient evidence of felony murder supported voluntary manslaughter conviction); *State v. Thomas David Collins*, No. E2004-01133-CCA-R3-CD, slip op. at 5 (Tenn. Crim. App., Knoxville, July 29, 2005) (holding that sufficient evidence of second degree murder supported voluntary manslaughter conviction); *State v. Lewis Christian*, W2004-01688-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Jackson, June 1, 2005) (holding that sufficient evidence of second degree murder supported voluntary manslaughter conviction). In such cases, whether we admitted it or not, we treated the passion/provocation formulation not as a true element of the proscribed offense to be established by the State but rather as a dispensational defense to a defendant who committed

an otherwise intentional or knowing killing. This rule has been reasonably–even prudently–employed by the courts to uphold voluntary manslaughter convictions against defendants' sufficiency challenges because we recognized the sophistry of requiring the State to prove the application of dispensations granted to those defendants by the legislature and a jury.[1]

Sound policy reasons underlie taking this approach. First, when a defendant is charged with first degree or second degree murder and the evidence supports a murder conviction but the jury returns a verdict of voluntary manslaughter, an appellate court should not further reduce the conviction to reckless homicide because the intentional or knowing killing was committed in the absence of passion produced by adequate provocation.

Second, precedential danger lies in treating dispensantional terms in a proscriptive statute as elements of the crime proscribed. Pursuant to recent changes in Tennessee Code Annotated section 48-18-110, "[a]n offense is [generally] a lesser included offense if: . . . All of its statutory elements are included within the statutory elements of the offense charged." T.C.A. § 48-18-110(f). If someday we happen to review some other statute that contains outlying terms that precedentially we treat as true elements, subsection (f) would preclude that offense from being included in a greater offense charged. The legislature has guarded against that anomaly occurring in the case of voluntary manslaughter because it expressly provided that "[v]oluntary manslaughter is a lesser included offense of premeditated first degree murder and second degree murder." *See id*. § 40-18-11(g)(2). As a policy matter, however, we should not unleash the hound of overstating elements that could vex our analyses of other convictions in the future.

JAMES CURWOOD WITT, JR., JUDGE

[1] For example, when the State charges a defendant with second degree murder, we cannot credibly expect the State to *prove* that the killing resulted from passion produced by adequate provocation as a means of preventing the jury from reducing the crime to reckless or negligent homicide. To require the State to do so would be to require it to *disprove* its charged offense.