REL: March 12, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-18-0673

Steven Chalmers Varnado

v.

State of Alabama

Appeal from Montgomery Circuit Court
(CC-17-1604)

MINOR, Judge.

A jury convicted Steven Chalmers Varnado of three counts of capital murder, see §§ 13A-5-40(a)(10) and 13A-5-40(a)(16), Ala Code 1975,[1] and

[1]The jury found Varnado guilty of two counts of murder made capital because the murders were committed by use of a deadly weapon fired into an occupied dwelling and one count of murder made capital because two persons were killed pursuant to one course of conduct.

one count of attempted murder, see §§ 13A-4-2 and 13A-6-2, Ala. Code 1975. The circuit court sentenced Varnado to life imprisonment without the possibility of parole on the three capital-murder convictions and to life imprisonment on the attempted-murder conviction; the sentences were ordered to run concurrently.[2]

Varnado argues that the circuit court erred by not charging the jury on heat-of-passion manslaughter as a lesser-included offense of capital murder. We agree, and we reverse the capital-murder convictions; we affirm the attempted-murder conviction.

On Thanksgiving Day 2015, Legarian Huffman and his sister Sherika Huffman Packer and her husband Anthony Packer, as well as Legarian's friend, Shaquille "Shaq" Brown, were together at Legarian's mother's house in Montgomery. Legarian and Shaq left in a vehicle to get alcohol and marijuana. When they returned, they saw Legarian's mother's next-door neighbors Varnado and his brother Kelly, as well as another

[2]The circuit court also ordered Varnado to pay court costs, attorney fees, $8,963.76 in restitution, and a $10,000 crime-victims-compensation assessment.

man, Donte Cooper, standing in Varnado and Kelly's front yard. The group of men talked about Legarian having been robbed near the Gas Light area earlier that night, after which Legarian and Shaq walked inside Legarian's mother's house.

Later, Legarian, Shaq, and Anthony were sitting around talking about sports when Legarian heard a knock at the door. Legarian asked who was there and heard someone respond, "It's Steve." Legarian testified that when he opened the door, Varnado punched Legarian in the face. Shaq testified that he heard Varnado yell: "Oh, you broke in my house. You broke in my house," apparently referring to some break-ins that had occurred at Varnado's house.[3] (R. 329.) Legarian and Shaq pushed Varnado out the door and closed it. Varnado, Kelly, and Cooper then "bum-rushed" the door.[4] (R. 330.) A fight broke out during which Anthony hit Kelly with a beer bottle and knocked him out.

---

[3]Legarian also testified that at some point after the police arrived, he heard Varnado say: "Y'all broke in my shit." (R. 216.)

[4]Varnado disputes this fact, claiming that he never tried to get into the house, only that he "got loud" with Legarian. (R. 473-74.)

Sometime during the fight, Varnado ran back to his house and grabbed a gun. Legarian and Shaq saw Varnado fire the gun toward them; police found .40 caliber cartridge casings on the ground outside the house. Legarian was shot in the hand. Anthony was shot once in the chest and died at the scene. Sherika was shot twice in the chest and died later at the hospital; while at the scene, Officer J.A. Crook asked Sherika who shot her and she responded, "They're next door. They're next door. Next door." (R. 242.).

Varnado testified that he fired the gunshots that hit Legarian and killed the Packers but he also admitted that he "didn't mean to do it." Varnado then made several inconsistent statements revealing that, although he did intend to fire the gunshots, he did so only because he was provoked. First, Varnado testified that Legarian's "homeboy Shaq" started the fight by punching Varnado in the face and that that was when he hit Legarian. (R. 474.) When asked if he would have pulled the gun out if he had not feared for his brother's life, Varnado responded: "No. sir." (R. 482.) Varnado testified, "I returned to the house, I grabbed my firearm, and I used it as a protection, trying to get them off my brother." (R. 502.)

Varnado continued, "I'm trying to stop the -- the immediate attack." (R. 503.) When asked if he would do the same thing if he had to go back, Varnado responded, "I would do the same thing, anything to protect my brother." (R. 506.) Varnado continued, "I'm just ... trying to protect him." (R. 510.)

I.

Varnado argues that the circuit court erred by not charging the jury on heat-of-passion manslaughter as a lesser-included offense of capital murder. Relying on Riggs v. State, 138 So. 3d 1014 (Ala. Crim. App. 2013), Varnado argues that he had a constitutional right to the requested jury charge and that it was error for the circuit court not to give it because, he says, he interjected sufficient legal provocation.[5] Varnado's brief, pp. 28-42.

[5]At the jury-instruction charge conference with counsel, the circuit judge initially stated, "Now, is there going to be a requested charge of sudden passion? That's been interjected." (R. 513.) Varnado points to that statement in his brief as evidence that heat-of-passion had been interjected. (Varnado's brief, p. 37.) The circuit court ultimately refused to give an instruction on heat-of-passion-manslaughter as a lesser-included offense to capital murder. (R. 523-529.)

" 'The standard of review for jury instructions is abuse of discretion.' " Grant v. State, [Ms. CR-18-0355, July 10, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020) (quoting Petersen v. State, [Ms. CR-16-0652, January 11, 2019] ___ So. 3d ___,___ (Ala. Crim. App. 2019)).

In Riggs v. State, 138 So. 3d 1014 (Ala. Crim. App. 2013), Riggs shot his ex-girlfriend Payne after she approached Riggs with what he believed to be a knife. "According to Riggs, he believed that Payne was about to stab him; therefore, he reached for the gun he had in his pants and began shooting." Riggs, 138 So. 3d at 1020. In holding that Riggs had sufficient legal provocation to support a heat-of-passion jury instruction, this Court held:

> "In Ex parte McGriff, 908 So. 2d [1024] at 1033–34, [(Ala. 2004),] the Alabama Supreme Court explained that once a defendant on trial for capital murder has 'injected the issue of provoked heat of passion,' the circuit court must instruct the jury that ' "[t]o convict, the state must prove beyond a reasonable doubt [that] the defendant was not lawfully provoked to do the act which caused the death of the deceased by a sudden heat of passion." ' (quoting Alabama Pattern Jury Instructions—Criminal, pp. 6–8, emphasis omitted).
>
> "Further, it is well settled that ' "[a] killing in sudden passion excited by sufficient provocation, without malice, is manslaughter." ' Roberson v. State, 217 Ala. 696, 699, 117 So.

412, 415 (1928) (quoting Vaughan v. State, 201 Ala. 472, 474, 78 So. 378, 380 (1918)). Specifically, § 13A–6–3(a)(2), Ala. Code 1975, provides that a person commits the crime of manslaughter if

> " '[h]e causes the death of another person under circumstances that would constitute [intentional murder]; except, that he causes the death due to a sudden heat of passion caused by provocation recognized by law, and before a reasonable time for the passion to cool and for reason to assert itself.'

"Although courts have reached different conclusions as to what constitutes adequate legal provocation, in Rogers v. State, 819 So. 2d 643, 662 (Ala. Crim. App. 2001), this Court recognized the following three situations in which murder may be reduced to manslaughter on the basis that there existed legal provocation: '(1) when the accused witnesses his or her spouse in the act of adultery; (2) when the accused is assaulted or faced with an imminent assault on himself; and (3) when the accused witnesses an assault on a family member or close relative.' See also Cox v. State, 500 So. 2d 1296, 1298 (Ala. Crim. App. 1986) (holding that 'the mere appearance of imminent assault may be sufficient to arouse heat of passion'). Thus, once a defendant has injected into the trial the issue of provocation related to one or more of those three situations, the defendant is entitled to have the circuit court instruct the jury that the State bears the burden of disproving that the defendant acted out of the heat of passion brought about by adequate provocation. McGriff, 908 So. 2d at 1033–34.

"Here, Riggs was charged with the capital offense of murder during the course of a burglary, in violation of § 13A–5–40(a)(4), Ala. Code 1975, but claimed that he was either acting in self-defense at the time of the shooting or

> guilty of the lesser-included offense of provocation manslaughter. See (R. 1452–53.) At trial, Riggs did not deny that he shot and killed Payne; instead, he 'injected the issue of provoked heat of passion,' Ex parte McGriff, 908 So. 2d at 1033, by claiming that he shot Payne only after she hit him in the eye with a door and came after him with what he believed to be a knife. Specifically, Riggs presented evidence indicating that Payne met him at the back door to talk. During the conversation, Payne became angry after Riggs asked about her relationship with Battle and slammed the door in Riggs's face, striking him in the eye and causing him to hit his head. Riggs further stated that after he followed Payne into her bedroom, she picked up what he believed to be a knife and appeared to be getting ready to attack him. Riggs stated that he feared for his safety, and, therefore, reached for the gun he was carrying in his pants and began firing. (R. 1396, 1409.)
>
> "By this evidence, Riggs adequately 'injected the issue of provoked heat of passion.' Ex parte McGriff, 908 So. 2d at 1033. See Shultz v. State, 480 So. 2d 73, 76 (Ala. Crim. App. 1985) ('T]he fact that the victim was about to cut the appellant before he shot the victim could constitute legal provocation.') (citing Roberson, 217 Ala. 696, 117 So. 412). Therefore, Riggs was entitled to a proper instruction during the capital-murder charge regarding the State's burden to disprove that he acted by provoked heat of passion."

Riggs v. State, 138 So. 3d at 1023–24.

Under the facts here, we hold that Varnado sufficiently "injected the issue of provoked heat of passion." Riggs, supra. As noted above, Varnado testified that Legarian's "homeboy Shaq" started the fight by punching

him in the face. Varnado also testified that he fired the gunshots because he feared for his brother's life, who was lying unconscious on the ground, getting "stomped" and "kicked." (R. 476.) For those reasons, Varnado said he grabbed a gun and fired gunshots "to get them off my brother." We do not find a difference between Varnado's statements[6] and those of Riggs. Riggs, 138 So. 2d at 1020 fn.7 (holding that Riggs was entitled to provocation-manslaughter instruction where Riggs believed that Payne was about to stab him with a knife that was actually a fork before he reached for the gun and began shooting); compare Fuller v. State, 231 So. 3d 1207, 1219 (Ala. Crim. App. 2015) (holding that court did not err in refusing requested provocation-manslaughter instruction where Fuller gave no testimony that he fired the shots as a result of "heated blood"). Based on that, the circuit court erred by not charging the jury on heat-of-passion manslaughter as a lesser-included offense of capital murder; thus this Court reverses Varnado's capital-murder convictions and sentences

[6]Officer G.J. Marshall testified that when he arrived on the scene, he saw bruising on Varnado and witnessed Varnado's brother's injuries.

of life imprisonment without parole, and we remand this case for further proceedings. Riggs, supra.

II.

Varnado argues that there was insufficient evidence to support his conviction for attempted murder because, he says, the State failed to prove that he acted with the specific intent to kill Legarian. Varnado also argues that the doctrine of transferred intent does not apply to the charge of attempted murder. (Varnado's brief, pp. 43-50.)

> " 'In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution. Furthermore, a judgment of conviction will not be set aside on the ground of insufficiency of the evidence unless, allowing all reasonable presumptions for its correctness, the preponderance of the evidence against the judgment is so decided as to clearly convince the reviewing court that it was wrong and unjust.'

"Powe v. State, 597 So. 2d 721, 724 (Ala. 1991) (citations omitted).

> " ' "In Alabama a person commits the crime of attempt to murder if he intends to cause the death of another

> person and does any overt act towards the commission of that intent. Alabama Code 1975, Sections 13A–4–2 (the attempt statute), and 13A–6–2 (murder)." Chaney v. State, 417 So. 2d 625, 626–27 (Ala. Crim. App. 1982). See also Barnes v. State, 571 So. 2d 372, 374 (Ala. Crim. App. 1990). "Attempted murder is a specific intent crime.... An attempt to commit murder requires the perpetrator to act with the specific intent to commit murder.... A general felonious intent is not sufficient." Free v. State, 455 So. 2d 137, 147 (Ala. Crim. App. 1984).'
>
> "Minshew v. State, 594 So. 2d 703, 704 (Ala. Crim. App. 1991). ' "While proof of the intent to murder is an element of the burden of proof resting on the state, this intent is not susceptible of positive proof, but rests in inference to be drawn by the jury from all the evidence in the case." ' Id. at 708, quoting Williams v. State, 13 Ala. App. 133, 137, 69 So. 376, 377 (1915). Intent may be presumed from the use of a deadly weapon, the character of the assault, and other attendant circumstances surrounding the assault. Chaney v. State, 417 So. 2d 625 (Ala. Crim. App. 1982). Furthermore, '[t]he question of intent in an attempt case "belong[s] exclusively to the jury to decide." ' Minshew, 594 So. 2d at 708, quoting United States v. Quincy, 31 U.S. (6 Pet.) 445, 8 L. Ed. 458 (1832)."

Wells v. State, 768 So. 2d 412, 415 (Ala. Crim. App. 1999).

The State's evidence showed that Legarian heard a knock at the door and heard someone respond, "It's Steve." When Legarian opened the door,

Varnado punched Legarian in the face. Legarian's friend Shaq heard Varnado yell: "Oh, you broke in my house. You broke in my house"; Varnado had admitted that he was "angry" with Legarian because Varnado suspected Legarian of having been involved in burglarizing his house and vehicle on several occasions. Varnado, Kelly, and Cooper then burst through the door and initiated a brawl during which Varnado grabbed a gun and fired multiple shots toward Legarian and his friends. Viewing the evidence in a light most favorable to the State, a jury could have reasonably inferred from the circumstances surrounding the shooting that Varnado intended to kill Legarian, whom Varnado suspected of stealing from him, when he fired the gun toward the group of people of which Legarian was a part. Thus, the circuit court did not err when it denied Varnado's motion for a judgment of acquittal on the attempted-murder conviction.[7] And, "[Varnado] did not request a jury instruction on attempted heat-of-passion manslaughter; therefore, we need not reach the

[7]To the extent that Varnado argues that transferred intent did not apply, we do not have to decide that question to affirm Varnado's attempted-murder conviction.

issue whether attempted heat-of-passion manslaughter is an offense in Alabama." Rogers v. State, 819 So. 2d 643, 662 (Ala. Crim. App. 2001).

Varnado's capital-murder convictions and sentences are reversed, and Varnado's attempted-murder conviction and sentence is affirmed. This Court remands this case for proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Cole, J., concurs. Kellum, J., concurs in the result. Windom, P.J., and McCool, J., concur in part and dissent in part, with opinions.

WINDOM, Presiding Judge, concurring in part and dissenting in part.

I agree with the majority's decision to affirm Steven Chalmers Varnado's conviction for attempted murder. I disagree, however, with the portion of the main opinion that holds that the circuit court abused its discretion in denying Varnado's requested jury instruction on heat-of-passion manslaughter. I, like Judge McCool, believe an instruction on heat-of-passion manslaughter would have been inconsistent with Varnado's theory of defense, and this Court has held that "[a] trial court does not err in refusing to give an instruction that is inconsistent with the defense strategy." Harbin v. State, 14 So. 3d 898, 911 (Ala. Crim. App. 2008) (citing Ex parte McWhorter, 781 So. 2d 330, 339 (Ala. 2000); Stallworth v. State, 868 So. 2d 1128, 1165 (Ala. Crim. App. 2001); and Johnson v. State, 820 So. 2d 842, 865 (Ala. Crim. App. 2000)). Therefore, I respectfully dissent from the portion of the main opinion that reverses Varnado's convictions for capital murder.

McCOOL, Judge, concurring in part and dissenting in part.

I concur with the main opinion insofar as it affirms Steven Chalmers Varnado's attempted-murder conviction. However, I respectfully dissent from the main opinion insofar as it reverses Varnado's capital-murder convictions because I do not believe the trial court abused its discretion by refusing to instruct the jury on heat-of-passion manslaughter. See Harris v. State, 2 So. 3d 880 (Ala. Crim. App. 2007) (noting that a trial court has broad discretion in formulating jury instructions, including whether to instruct on lesser-included offenses).

Regarding the crime of heat-of-passion (or provocation) manslaughter, the Alabama Supreme Court has stated:

> "Section 13A-6-3(a)(2), Ala. Code 1975, provides that a person commits provocation manslaughter if he
>
> > "'causes the death of another person under circumstances that would constitute murder under Section 13A-6-2[, Ala. Code 1975,] [intentional murder]; except, that he causes the death due to a sudden heat of passion caused by provocation recognized by law, and before a reasonable time for the passion to cool and for reason to assert itself.'
>
> "(Emphasis added.) Thus, when the jury finds a person guilty of provocation manslaughter, the person is deemed guilty of

> intentional murder ('under circumstances that would constitute murder under § 13A-6-2'), but the conviction is reduced to manslaughter because a legally recognized mitigating circumstance (provocation) has been found to exist.
>
> "The Commentary to § 13A-6-3(a)(2) explains that 'the law, recognizing the frailties of man and his loss of reason and control in certain provocative situations overlooks or forgives the "malice" and mitigates the homicide from murder to a lesser grade.' (Emphasis added.) The 'malice,' or intent, is not negated, but merely forgiven because of the circumstances. As the Court of Criminal Appeals has itself observed in the past: 'Heat-of-passion provocation implies that [the defendant's] actions were intentional but that, because of the circumstances, they were excused by law.' McGriff v. State, 908 So. 2d 961, 1005 (Ala. Crim. App. 2000). In fact, as the Wisconsin Supreme Court has succinctly stated: '[M]any such homicides [i.e., those resulting from heat-of-passion provocation] do involve an actual intent to take the life of another. This very intent is typically the result of the heat of passion.' State v. Lee, 108 Wis. 2d 1, 9, 321 N.W.2d 108, 112 (1982). In sum, provocation does not negate intent."

Carter v. State, 843 So. 2d 812, 815 (Ala. 2002).

Thus, because heat-of-passion manslaughter requires an intentional killing and because an instruction on a lesser-included offense must be supported by the evidence, Satterwhite v. City of Auburn, 945 So. 2d 1076, 1083 (Ala. Crim. App. 2006), Varnado was not entitled to an instruction on heat-of-passion manslaughter unless there was evidence indicating (1)

that he intentionally killed Anthony Packer and Sherika Huffman Packer and (2) that he did so under heat of passion caused by provocation recognized by law. § 13A-6-3(a)(2).

As the main opinion notes, this Court has recognized that legal provocation sufficient to reduce murder to manslaughter may exist when the defendant witnesses an assault on a family member or close relative. Riggs v. State, 138 So. 3d 1014, 1024 (Ala. Crim. App. 2013). Thus, as to the element of provocation, I agree that Varnado's testimony that he fired the fatal gunshots because he feared for the life of his brother, "who was lying unconscious on the ground, getting 'stomped' and 'kicked,' " ___ So. 3d at ___, was evidence upon which the jury could find that Varnado killed the Packers under heat of passion caused by provocation recognized by law. As to the element of intent, I acknowledge that there was evidence upon which the jury could find that Varnado intentionally killed the Packers -- namely, Varnado's use of a deadly weapon. See Stoves v. State, 238 So. 3d 681, 691 (Ala. Crim. App. 2017) (noting that the intent to kill may be inferred from the defendant's use of a deadly weapon). Thus, if Varnado had not testified, I would be inclined to agree with the main

opinion's conclusion that Varnado was entitled to an instruction on heat-of-passion manslaughter. However, Varnado did testify, and I believe the substance of his testimony precluded his request for such an instruction.

As noted, a defendant's intent to kill is an essential element of heat-of-passion manslaughter, Carter, supra, and Varnado argued that the evidence supported such an instruction in this case. However, Varnado's own testimony provided direct proof that he lacked the intent to kill the Packers. Specifically, although Varnado admitted that he intentionally fired the shots that killed the Packers, he testified that his "intentions were never to hurt anyone" (R. 477), that he "never wanted anybody to die" (R. 477), that the Packers' deaths "w[ere not] on purpose" (R. 486), that he "never wanted anybody to get hurt" (R. 505, 506), that he "didn't mean to shoot anybody" (R. 511), and that he "didn't mean to kill anybody." (R. 511.) In addition, Varnado testified that he was "just shooting recklessly" when the Packers were killed. (R. 510.) (Emphasis added.) Thus, although Varnado testified that he acted intentionally by firing gunshots in defense of his brother, he testified no less than eight times that he did not intend to kill the Packers when he fired those shots.

In short, then, Varnado requested an instruction on an offense that requires an intentional killing, yet he expressly and repeatedly testified that he did not commit an intentional killing. In my opinion, such inconsistency precluded an instruction on heat-of-passion manslaughter in this case, even though there was other evidence to support a finding of Varnado's intent to kill.

By way of analogy, this Court has held that a defendant accused of murder cannot pursue a theory of self-defense, which " 'necessarily serves as an admission that one's conduct was intentional,' " Harbin v. State, 14 So. 3d 898, 911 (Ala. Crim. App. 2008) (quoting Lacy v. State, 629 So. 2d 688, 689 (Ala. Crim. App. 1993)), and also request a jury instruction on criminally negligent homicide. This is so because an instruction on an offense requiring proof of a negligent killing is inconsistent with a defense that serves as an admission that the defendant's conduct was intentional, and a defendant is not entitled to take such inconsistent positions at trial. Id. Similarly, I do not believe a defendant accused of intentional murder should be allowed to offer self-serving testimony that he did not intentionally kill his or her victims and yet claim entitlement to an

instruction on an offense that requires an intentional killing. To hold otherwise would allow a defendant to request and receive an instruction on an offense that is wholly inconsistent with the theory of defense presented at trial.[8] See Harbin, 14 So. 3d at 911 ("A trial court does not err in refusing to give an instruction that is inconsistent with the defense strategy."). Thus, given that Varnado testified that he did not have the requisite intent to kill the Packers, it is my opinion that he was not entitled to his requested instruction on heat-of-passion manslaughter because his theory of defense cut directly against such an instruction. Compare Morton v. State, 154 So. 3d 1065 (Ala. Crim. App. 2013) (holding that a defendant on trial for capital murder was entitled to an instruction on the lesser-included offense of felony murder, even though he denied

[8]I recognize that Varnado pursued a defense of self-defense, but that defense served as an admission that Varnado's conduct was intentional, i.e., that he intentionally fired the gunshots that killed the Packers, not that Varnado had the intent to kill the Packers. See Harbin, 14 So. 3d at 911 (" 'It is a well accepted principle of law that a claim of self-defense necessarily serves as an admission that one's conduct was intentional.' " (quoting Lacy, 629 So. 2d at 689) (emphasis added)).

committing that offense, because his own testimony supported a felony-murder charge).

I acknowledge that the jury was not required to believe Varnado's testimony that he did not intentionally kill the Packers, and, as I have already noted, there was evidence from which the jury could have found that Varnado committed an intentional killing if it chose not to believe Varnado's testimony. Thus, to be clear, by pointing out that Varnado testified that he did not intend to kill the Packers, I am not suggesting that there was insufficient evidence of Varnado's intent to kill. To the contrary, the State clearly presented sufficient evidence to convict Varnado of capital murder. That, however, is not the issue. The issue is whether a defendant is entitled to an instruction on a lesser-included offense that he requests when, regardless of what other evidence might indicate, he himself provides self-serving testimony that expressly refutes an element of that offense. As I see it, a defendant cannot take such inconsistent positions in an attempt to "game the system" and then rightfully complain when the trial court refuses to instruct the jury on the lesser-included offense. Thus, I would hold that the trial court did not

abuse its discretion by denying Varnado's requested instruction on heat-of-passion manslaughter, and I would affirm each of Varnado's convictions. Therefore, I respectfully dissent from that part of the main opinion reversing Varnado's capital-murder convictions.