

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

JOE REANER STRONG, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 Appellee. )

NOT FOR PUBLICATION

Case No. F-2009-1181

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

SEP 02 2011

**SUMMARY OPINION**

MICHAEL S. RICHIE  
CLERK

**A. JOHNSON, PRESIDING JUDGE:**

Appellant Joe Reaner Strong was tried by jury and convicted in the District Court of Okmulgee County, Case No. CF-2009-63, of Second Degree Felony Murder, in violation of 21 O.S.2001, § 701.8(2). The jury set punishment at ten years imprisonment.<sup>1</sup> The Honorable John Maley, who presided at trial, sentenced Strong accordingly. From this Judgment and Sentence Strong appeals.

Strong's claim in his second proposition—that the district court's refusal to instruct on his requested defense theory denied him a fair trial—requires discussion and relief. Because we find reversal is required on that claim, we do not address his remaining claims.<sup>2</sup>

On March 20, 2009, Strong drove from his home in Okmulgee to pick up his wife from work in Tulsa. He left his two-year-old grandson asleep at home.

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<sup>1</sup> Strong must serve 85% of his sentence before becoming eligible for parole. 21 O.S.Supp.2007, § 13.1.

<sup>2</sup> Strong filed a motion to reconsider this Court's order allowing the filing of the State's supplemental brief. The resolution of this appeal renders this motion to reconsider moot.

The child awoke, found some matches and started a fire. When the firefighters found the child, he was unresponsive and was later pronounced dead at the local hospital. The medical examiner determined that the child died from smoke inhalation. There was no evidence the child was mistreated.

Strong argues that the district court erred in declining to give the jury his requested instruction on the lesser offense of second degree manslaughter under 21 O.S.2001, § 716. We review a district court's decision on the submission of lesser-included offense instructions for an abuse of discretion. *See Simpson v. State*, 2010 OK CR 6, ¶ 16, 230 P.3d 888, 897.

The evidence at trial supported the prosecution's theory of the case. The problem here is that the evidence also supported the defense theory of the case, but the court did not instruct the jury on that theory. The prosecution maintained that Strong's actions in leaving the sleeping child unsupervised amounted to child neglect while the defense maintained that Strong was negligent and failed to exercise proper care under the circumstances. It is not uncommon for a defendant to defend against a greater charge by arguing that he is guilty of a lesser offense and request instructions on that lesser offense as his theory of defense. Under our case law, the district court has a duty to instruct on all requested lesser-included or lesser-related offenses serving as the defendant's theory of defense when there is evidence to support it. *Ball v. State*, 2007 OK CR 42, ¶ 31, 173 P.3d 81, 90, *Glossip v. State*, 2001 OK CR 21, ¶ 28, 29 P.3d 597, 604. The question for the district court is whether *prima facie* evidence of the "lesser offense" defense theory has been introduced

warranting the submission of an instruction. *Ball*, 2007 OK CR 42, ¶ 32, 173 P.3d at 90, *Glossip*, 2001 OK CR 21, ¶ 28, 29 P.3d at 604. The focus both at trial and on appeal is not on whether the trial evidence supports the charged crime, but whether evidence would allow jurors to rationally find the defendant guilty of the lesser offense and acquit him of the greater.

Second degree felony murder based on child neglect under 21 O.S.2001, § 701.8(2) consists of the death of a human caused by the defendant during the commission of child neglect, namely in this case the willful failure to provide supervision of a child under 18. Under these circumstances, second degree felony murder under section 701.8 and second degree manslaughter include the inherently related elements of (1) the death of a human being that was (2) caused by the act of another. See 21 O.S.2001, § 716 (killing of one human being by culpable negligence of another, which is not murder, nor manslaughter in the first degree, nor excusable nor justifiable homicide, is manslaughter in the second degree). These offenses differ only in whether the act causing the death was willful<sup>3</sup> or culpably negligent.<sup>4</sup> *Ball*, 2007 OK CR 42, ¶ 31, 173 P.3d at 90. Second degree manslaughter is therefore a lesser-included offense of second degree felony murder predicated on child neglect

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<sup>3</sup> Willful - Purposeful. "Willful" is a willingness to commit the act or omission referred to, but does not require any intent to violate the law or to acquire any advantage. OUJI-CR(2d) 4-40D.

<sup>4</sup> The term "culpable negligence" refers to the omission to do something which a reasonably careful person would do, or the lack of the usual ordinary care and caution in the performance of an act usually and ordinarily exercised by a person under similar circumstances and conditions. OUJI-CR(2d) 4-104.

under section 701.8(2) and can serve as an appropriate defense theory under some circumstances. See *Ball*, 2007 OK CR 42, ¶ 31, 173 P.3d at 90.

To support an instruction on second degree manslaughter based upon culpable negligence, there must be evidence from which the jury may find that the defendant was guilty of a “degree of carelessness amounting to a culpable disregard for the rights and safety of others.” *Revilla v. State*, 1994 OK CR 24, ¶ 17, 877 P.2d 1143, 1149-50. Here, Strong left his two-year-old grandson asleep in the home unsupervised for approximately two hours while he went to pick up his wife. He left a box of matches in the living room, apparently within the child’s reach. There was evidence that Strong was not thinking clearly the morning of the incident because of his diabetic condition. He was in a hurry because he was late to pick up his wife from work and may or may not have realized he left the child behind. Strong made an error in judgment by leaving the toddler alone without supervision but whether that decision amounted to willful neglect resulting in murder or negligence amounting to manslaughter was a debatable question presented by the circumstances and evidence. The jury could have concluded in this case that Strong’s failure to supervise involved only acts of omission that exhibited a lack of the ordinary care and caution that a person under similar circumstances would usually exercise rather than willful neglect. Instructing the jury on second degree manslaughter would have allowed the jury to give effect to the defense theory without acquittal.

It was the District Court's duty "to instruct on every degree of homicide which the evidence in every reasonable view suggested." *Ball*, 2007 OK CR 42, ¶ 36, 173 P.3d at 91 *quoting Jackson*, 1947 OK CR 47, 84 Okl.Cr. 138, 152, 179 P.2d 924, 931. Because a jury might have reasonably believed Strong's evidence that he did not leave the child behind on purpose, and yet conclude that he was culpably negligent in causing the child's death, the District Court's refusal to give Strong's requested instruction on his theory of defense under these circumstances was an abuse of discretion that requires reversal.

**DECISION**

The Judgment and Sentence of the District Court is **REVERSED** and **REMANDED** for a new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKMULGEE COUNTY  
THE HONORABLE JOHN MALEY, DISTRICT JUDGE

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**OPINION BY: A. JOHNSON, P.J.**

LEWIS, V.P.J.: Concur

LUMPKIN, J.: Concur in Results

C. JOHNSON, J.: Concur

SMITH, J.: Concur

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