Circuit Court for Baltimore County
Case No. 03-K-16-005628

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2016

September Term, 2018

MICHAEL EARL AMICK

v.

STATE OF MARYLAND

Wright,
Arthur,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: June 25, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On September 14, 2006, Michael Amick, appellant, reported that his wife, Roxanne Amick,[1] was missing. The next day, her body was found in a heavily wooded area near the couple's home in Baltimore County, Maryland. The police did not initially file charges against appellant, but in late 2015, the police retested evidence from the scene and ultimately charged appellant in October 2016. After a five-day jury trial in April 2018, a Baltimore County jury convicted appellant of second-degree murder. Appellant was then sentenced to thirty years' imprisonment. Appellant filed this timely appeal and presents one question for our review, which we have modified slightly: "Did the trial court err in refusing to give appellant's requested jury instructions on second-degree depraved heart murder and involuntary manslaughter?" We perceive no error and affirm.

FACTS AND PROCEEDINGS

Roxanne was last seen alive on September 13, 2006. That day, she attended a church event while appellant was at Home Depot purchasing landscaping supplies for one of his rental properties. When Roxanne returned home, she argued with appellant over who would go to the grocery store. Apparently, Roxanne convinced appellant to purchase the groceries, and when he returned home, Roxanne left to go shopping. She took appellant's van at his request so that he could check the oil in her car. When Roxanne did not return for dinner that night, appellant "didn't think anything about it . . . it wasn't unusual." When Roxanne had not returned by the time he went to bed, appellant was still not concerned

[1] Because the victim and appellant share a last name, we will refer to the victim by her first name. We mean no disrespect in doing so.

because "she'd been out late before . . . she's been out [ ] a couple times at least when I had gone to bed already and, you know, she comes back in."

When appellant woke up at 5:45 a.m. on September 14, he noticed Roxanne had not returned and that the van was not in the driveway. Appellant attempted to call Roxanne's best friend, Marguerite Stiemly, but could not reach her. At about 6:00 a.m., he called Teresa Stitz, Roxanne's sister-in-law, and 9-1-1.[2] Officer Jason Lentz responded to appellant's call and spent about forty-five minutes talking to appellant at his home. Following his conversation with appellant, Officer Lentz entered information on Roxanne and the van into NCIC.[3]

Later that day, Ms. Stiemly went "to places that [they had] been together and started looking for [Roxanne]." Eventually, after receiving the van's license plate number from appellant, Ms. Stiemly found the van at a shopping center less than a mile from the Amicks' home. She noted that "the two things that stood out were that the back was incredibly clean [and]. . . that [it] looked like somebody was sitting in the driver's seat, took [a pair of] gloves off and just sat them on the edge of the passenger seat." Appellant provided the police with the van's key, and the police towed the vehicle to Baltimore County Police headquarters.

[2] At trial, appellant could not recall whom he called first.

[3] NCIC is the National Crime Information Center, a law enforcement database that contains records for stolen property and some individuals. *National Crime Information Center (NCIC)*, FBI, https://www.fbi.gov/services/cjis/ncic (last visited Jun. 20, 2019). One of the person databases contains missing persons. *Id.*

The following day, September 15, 2006, Detectives Carroll Bollinger and Kevin Klimko of the Missing Persons Unit took over the investigation. On their way to appellant's home, "[a] call [came] out for a found body . . . a short distance from where [they] were at." The detectives decided to drive to the location where the body was found, and "stayed there for maybe 15, 20 minutes, enough to get an idea of where the body was located." The detectives learned that the body "was a female, a white female, that had been placed in a wooded area. It was not too far off the road. It was wrapped in what appeared to be blankets[.]"

The body was found in a "highly vegetative" area near a home about two and a half miles from the Amicks' home. At the scene, crime scene technicians collected multiple items, but were unable to recover latent fingerprints from any of them. There were no signs of a struggle, of an object being dragged, or signs of a vehicle being driven into the area. Ultimately, there was expert testimony that "the area was 50% covered" with poison ivy.

The detectives then left the scene and drove to appellant's home to interview him. During the interview, appellant gave the officers a physical description of Roxanne, as well as a list of items that would be found in the van. Appellant reported to the police that Roxanne weighed "about 200 pounds" and was wearing "blue jeans [ ], a striped shirt, and black slip-on shoes." He also "specifically mentioned that there should have been some blankets, animal print blankets . . . one being orange and white, and the other being like a brown blanket" in the back of the van. The detectives, with appellant's permission, walked through the entire house. The house was cluttered, but the detectives found nothing suspicious. The detectives did not tell appellant about the body that had been found.

Because of appellant's description of the blankets and Roxanne, the detectives returned to the crime scene. Detective Bollinger took "a more detailed look" at the body and noticed that the blankets matched the description appellant provided, as did the victim's physical description and clothing. Using her driver's license and a credit card found on her person, a forensic investigator identified Roxanne as the victim.

That afternoon, the police transported appellant to headquarters for questioning, but did not arrest him. At the end of the interview, Detective Bollinger requested that crime scene technicians collect appellant's clothing and photograph him. When appellant took off his long-sleeved shirt, Detective Bollinger noticed a rash on appellant's arms. The detectives took appellant to Greater Baltimore Medical Center and a doctor diagnosed the rash as poison ivy. Four days later, on September 19, 2015, Detective Bollinger, pursuant to a warrant, took appellant to Dr. Stanford Lamberg, then the head of the Department of Dermatology at Johns Hopkins Bayview Medical Center. After examining appellant and reviewing the photos taken on September 15, Dr. Lambert determined that appellant was exposed to poison ivy one to three days before the pictures were taken.

The police then obtained search warrants for appellant's person, items in the van, and items in and around the Amicks' home. The crime lab performed DNA testing on the following seized items: two pieces of rebar; four swabs of possible blood recovered from the van; the jeans seized from appellant at the interview; two t-shirts; a sock; a washcloth found in the trashcan in front of appellant's house; a "swab of possible biological fluid recovered from the basement steps"; and a piece of cardboard with potential biological fluid recovered near appellant's washer. The crime laboratory found no blood or sufficient

materials to gather DNA from any of these items. The crime lab also tested a pair of work gloves and a blue towel recovered from the van, the green shirt seized from appellant at the interview, and two pairs of shoes seized from appellant. The crime lab found saliva on the back of the green shirt[4] and blood on a pair of sneakers.[5] The test on the glove was inconclusive, but the technician made a cutting for DNA testing. The lab later tested a towel found in the van, but test results for biological material were negative.

During the autopsy, the medical examiner noted

> blunt force injuries, specifically contusions or bruises . . . on the right and the left side of [Roxanne's] upper back, on the right and the left side of her lower back, on her right buttock, on her left buttock, on the backs in the insides of each arm, on . . . the outer lateral aspect of her left thigh, and on . . . the back of her left leg in the calf area.

The medical examiner's internal examination revealed "an area of hemorrhage indicating fracture and maybe partial dislocation of the cervical spine at the level of the C-3 and C-4[,]" an area that "houses the roots of the phrenic nerve, a large nerve that controls the diaphragm and helps us breathe." The autopsy did not reveal any defensive wounds and concluded that all bruises occurred before Roxanne's death. The medical examiner characterized Roxanne's death as a homicide due to multiple injuries. At trial, the medical examiner testified that death in this manner could occur by being struck, or by being "propelled into [an] object."

The State did not file charges against appellant in 2006 and the case apparently

[4] The saliva on the shirt belonged to neither appellant nor Roxanne.

[5] The crime lab found appellant's DNA on the left sneaker.

remained dormant for approximately six years. Nevertheless, Detective Bollinger requested that the gloves and both pairs of shoes "continue to be retested" based on developing technology. At the end of 2015, Detective Bollinger contacted Jennifer Russell, a forensic biologist with the Baltimore County Police Department, "to look over the case and see if there was any additional testing . . . that we [could] do with new advances in DNA technology." Apparently, the testing process had changed since the last testing in 2008 and was "better apt to deal with low level types of DNA[.]" Ms. Russell obtained DNA from the work glove cutting and a swab from the sneaker. These new tests confirmed appellant's DNA on the interior of the right glove, and further concluded that the DNA found at 6 of the 15 tested locations on the left glove was consistent with Roxanne's DNA profile. Ms. Russell testified that the statistical "frequency" of finding DNA matching Roxanne's DNA profile at 6 of the 15 tested locations was 1 in 14 million in the Caucasian population.[6] When Ms. Russell tested the shoes, she found that appellant was the major DNA contributor, but she found DNA consistent with Roxanne's DNA profile at 12 of the 15 tested locations. In Ms. Russell's opinion, the likelihood of finding DNA matching Roxanne's profile at 12 of the 15 locations was 1 in 470 million in the Caucasian population. Based on this new information, the police arrested appellant when he was visiting family in Maryland on October 13, 2016.[7]

At his trial in April 2018, appellant requested jury instructions on "homicide second-

[6] Both Roxanne and appellant are Caucasian.

[7] Appellant had moved to Hawaii in 2009.

degree, depraved heart murder, involuntary manslaughter [and] reckless endangerment." The trial court, determining that "under these facts" the crime would be "either first-degree or second-degree murder," refused to give instructions on depraved heart murder, involuntary manslaughter, and reckless endangerment.[8] As stated above, following a five-day trial, a jury acquitted appellant of first-degree murder, but found him guilty of second-degree murder. On June 22, 2018, the court sentenced appellant to thirty years' imprisonment. Appellant filed this timely appeal.

STANDARD OF REVIEW

"The 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). This Court "reviews a trial court's decision not to grant a jury instruction under an abuse of discretion standard." *Hajireen v. State*, 203 Md. App. 537, 559 (2012) (citing *Gimble v. State*, 198 Md. App. 610, 627 (2011)). A trial court abuses its discretion when "no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *Id*. at 552 (internal quotations omitted) (quoting *Brass Metal Prods. v. E-J Enters.*, 189 Md. App. 310, 364 (2009)).

DISCUSSION

Appellant argues that the circuit court erred when it "determined that there was no evidence generated to support the defense request for the jury to be instructed on depraved

[8] On appeal, appellant does not challenge the trial court's refusal to give a reckless endangerment instruction.

heart murder and involuntary manslaughter" and consequently did not give the requested instructions. Because we agree with the State that the failure to give a depraved heart second-degree murder instruction would be harmless under the circumstances of this case,[9] our analysis will focus on the court's refusal to give an involuntary manslaughter instruction.

Appellant argues that the Court of Appeals's decision in *Dishman v. State*, 352 Md. 279 (1998) required the trial court to give his requested involuntary manslaughter instruction. We disagree.

In *Dishman*, a passerby discovered a small fire by the side of the road, which turned out to be the victim's burning body. *Id*. at 284. The medical examiner determined that the victim died of asphyxiation, that the victim's body was burned after she died, and that her "ankles and arms had been bound with tape while she was still alive and that a two-inch piece of silver tape had 'partially cover[ed] the [victim's] nose and mouth.'" *Id*. Dishman was arrested on bench warrants for unrelated charges, but at the police station, he gave two written statements to police about the victim's death. *Id.* After the police interview, Dishman "took police officers to a pawn shop where the victim's jewelry was located, and

[9] The State correctly points out that because the jury convicted appellant of second-degree murder, "an instruction on depraved heart murder, if followed, would have led only to a conviction for a different type of second-degree murder." In any event, the difference between depraved heart murder and involuntary manslaughter "is one of degree." *Dishman v. State*, 352 Md. 279, 299 (1998) (stating that depraved heart murder requires "'extreme disregard of the life-endangering consequences' and with a '*very* high degree of risk to . . . life'" while involuntary manslaughter involves gross negligence and a high degree of risk to human life).

to the victim's car[.]" *Id*. The State elected to submit only murder and robbery counts to the jury. *Id.* at 284-85. At his trial, the trial court refused Dishman's request for jury instructions concerning depraved heart murder, manslaughter, reckless endangerment, and assault and battery. *Id*. at 285. The jury convicted Dishman of first-degree murder and robbery. *Id.*

In addressing Dishman's primary appellate argument that the trial court erred by refusing to give jury instructions on manslaughter, the Court began its analysis by defining involuntary manslaughter as an "unintentional death occurring in one of three fashions: '(1) by doing some unlawful act endangering life but which does not amount to a felony, or (2) in negligently doing some act lawful in itself, or (3) by the negligent omission to perform a legal duty.'" *Id.* at 291 (quoting *State v. Albrecht*, 336 Md. 475, 499 (1994)). The Court noted that "[t]he determination of whether an instruction must be given turns on whether there is any evidence in the case that supports the instruction." *Id.* at 292. In making that determination, a reviewing court must apply the well-recognized "some evidence" test:

> *Some evidence* is not structured by the test of a specific standard. It calls for no more than what it says — 'some,' as that word is understood in common, everyday usage. It need not rise to the level of 'beyond reasonable doubt' or 'clear and convincing' or 'preponderance.' The source of the evidence is immaterial; it may emanate solely from the defendant.

Id. at 293 (quoting *Dykes v. State*, 319 Md. 206, 216-17 (1990)). The converse is also true: "where the evidence would not logically support a finding that the defendant committed the offense covered by the instruction, the trial court should not instruct the jury on that offense." *Id.*

Turning to whether a defendant is entitled to an instruction for a lesser-included offense, the *Dishman* Court relied on the Eighth Circuit's analysis in *United States v. Elk*:

> [I]t is beyond dispute that a defendant is not entitled to a lesser-included offense instruction unless the evidence adduced at the trial provides a rational basis upon which the jury could find him not guilty of the greater but guilty of the lesser offense.
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> * * *
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> [A] lesser offense instruction [should] be given only when the elements differentiating the two crimes are in sufficient dispute that the jury can rationally find the defendant innocent of the greater but guilty of the lesser offense. This requirement is intended to prevent the jury from capriciously convicting on the lesser offense when the evidence requires either conviction on the greater offense or outright acquittal.

Id. at 293-94 (quoting *United States v. Elk*, 658 F.2d 644, 648 & n.6 (8th Cir. 1981)).

The Court of Appeals then turned to the facts of Dishman's case. *Id*. at 294. The Court noted that the State produced no eyewitnesses and that the medical examiner could not determine the exact cause of asphyxiation. *Id.* at 294-95. The State's only direct evidence placing Dishman at the scene and concerning his state of mind was his own statement describing the incident as a "mutual fracas" in which Dishman grabbed the victim's collar and used the tape "[b]ecause [the victim] was still breathing and [Dishman] did not want her to get up and go no where [sic]." *Id*. at 295, 300. Dishman requested an instruction for involuntary manslaughter based on the evidence that

> putting tape over someone's mouth . . . he had to be conscious of that risk. He acted in a grossly negligent manner[.] . . . On the other hand, the State also offered a theory that the grabbing of the collar sufficiently damaged the strap muscles as to cause the asphyxiation, and it also fits in, how he grabbed her, how he negligently grabbed her and pulled her, which damaged the muscles.

Id. at 296. Significantly, the State used this same evidence to request an instruction on second-degree depraved heart murder. *Id*. Despite counsel for both sides believing "that the evidence indicated that [Dishman] may have acted without a specific intent to kill or to cause serious bodily harm, but that he still caused [victim's] death[,]" the trial court ultimately denied both instructions. *Id*. at 297-98.

In concluding that the trial court erred by refusing to give an instruction for involuntary manslaughter, the Court of Appeals held,

> the evidence would have allowed the jury to conclude that [Dishman] caused [victim's] death unintentionally but with gross negligence or with extreme disregard of the life-endangering consequences of his actions. Whether the victim's death resulted from Dishman's conduct in choking the victim during a mutual fracas . . . or whether she died as a result of tape being placed over her mouth, there was ample evidence upon which the jury could have rationally concluded that [Dishman] caused the victim's death without intending to kill her or cause her serious bodily injury.

Id. at 300.

Critical to the Court's decision was that the jury had two options: it could convict Dishman "of a specific intent crime causing the victim's death (either first or second degree specific intent murder)," or, second, it could acquit [Dishman] of any homicide crime." *Id.* The Court was concerned that a jury could see the "violent nature of the events" and have difficulty acquitting him. *Id.* at 300-01. This difficulty could cause the jury to "resolve its doubts in favor of conviction." *Id.* at 301 (quoting *Keeble v. United States*, 412 U.S. 205, 212-13 (1973)). In reaching this conclusion, the Court adopted the Supreme Court's reasoning in *Beck v. Alabama*, 447 U.S. 625, 637 (1980) and held that

> when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element

> that would justify conviction of a capital offense—the failure to give the jury a "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Id. at 301 (quoting *Beck*, 447 U.S. at 637) (citing *State v. Bowers*, 349 Md. 710, 727 n.6 (1998) (applying *Beck* in a non-capital context)).

We contrast *Dishman* with *Elk*, a case cited in *Dishman*. There, a jury found Elk guilty of second-degree murder when Elk and his accomplice went to the house where the man whom they believed killed Elk's mother was staying with Elk's sister. *Elk*, 658 F.2d at 645. Elk testified that when he and his accomplice entered the house, he "was carrying a shotgun and the other individual was carrying a rifle." *Id*. at 646. Because it was undisputed that the victim was killed by a bullet from a rifle, Elk asserted that he could not have been the shooter because he was only carrying a shotgun. *Id.* at 648. On appeal, Elk claimed that the trial court erred by denying his request for a jury instruction on voluntary and involuntary manslaughter.[10] *Id.* Characterizing Elk's testimony as "entirely exculpatory," the Eighth Circuit Court of Appeals affirmed the trial court's denial of the requested instruction because "if the jury were to accept the defendant's version of the events, it would have to conclude that the defendant did not kill [victim][.]" *Id*. at 648. In short, because Elk claimed that he did not kill the victim, he was not entitled to an

[10] In the Eighth Circuit, "[t]he lesser-included offense of voluntary manslaughter requires evidence of a killing upon sudden quarrel or heat of passion in contradistinction to evidence of malice required for second degree murder." *Id*. at 648 (citing *Beardslee v. United States*, 387 F.2d 280, 292 (8th Cir. 1967)). Involuntary manslaughter is a killing "without malice 'in the commission of an unlawful act not amounting to a felony, or in the commission of an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.'" *Id.* at 650 (quoting 18 U.S.C. § 1112(a)).

instruction for a crime (manslaughter) that required him to be the killer.

Similar to the defendant in *Elk*, appellant's testimony was "entirely exculpatory." According to appellant, he did not kill Roxanne because he remained home the entire time after she left to go shopping. In light of appellant's version of the events, no rational jury could conclude that appellant unintentionally caused her death "by doing some unlawful act endangering life but which does not amount to a felony," or negligently performing a lawful act, or a "negligent omission to perform[ing] a legal duty." *Dishman,* 352 Md. at 291 (quoting *State v. Albrecht,* 336 Md. at 499). As in *Elk*, appellant was not entitled to an instruction for a crime (involuntary manslaughter) that required him to be the killer.[11]

Despite appellant's exculpatory testimony, his counsel attempted to persuade the trial court to give an involuntary manslaughter instruction:

> [B]ased on the . . . information that was presented through Detective Bollinger, there's no evidence of statements. And the only thing the State's relied upon to just say premeditated, willful and deliberate is the nature of the injuries. The nature of the injuries could be completely consistent with a depraved heart second-degree murder theory or involuntary manslaughter theory.
>
> I think there's an absence of anything that shows specific intent. I'm sure the State will argue otherwise. But solely for the purpose of allowing the fact finders to make a determination based on information that is before them, I think there is a sufficient factual basis to make that request Your Honor.
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> * * *
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> [T]here are a couple scenarios that are offered by Detective Bollinger that

[11] We note that the *Elk* facts are more favorable for a manslaughter instruction than the facts here because the defendant in *Elk* admitted to being at the scene of the crime with a firearm.

> actually are the basis for an involuntary manslaughter instruction. We know you didn't mean it, it could have been an accident. I mean, those are the things. At that point, they're reaching conclusions based on the investigation that are as applicable today as they would have been on September the 15th of 2006, Your Honor.

On appeal, appellant points us to the following as "some evidence" sufficient to generate an involuntary manslaughter instruction: (1) Detective Bollinger's suggestion during his interview of appellant that "[a]ppellant and Roxanne may have argued and that this could have been an accident"; (2) the State's representation that "this is a first degree or second degree murder case where the victim has no defensive wounds"; and (3) testimony that "[t]he blunt force injuries occurred from some form of an object that either came into contact with Roxanne or she came into contact with an object."

We reject appellant's argument. First, Detective Bollinger's interview questions to appellant are not evidence. Detective Bollinger employed recognized interview techniques in an attempt to get appellant to admit that he was involved in Roxanne's death, but appellant never made any such admission. Second, that Roxanne had no defensive wounds and died as a result of "blunt force injuries" does not constitute "some evidence" that appellant *unintentionally* tried to kill her. The evidence here "would not logically support a finding that [appellant] committed the offense [manslaughter]." *Dishman*, 319 Md. at 293. Accordingly, the trial court did not err in refusing to give an involuntary manslaughter instruction.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.