



IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEVEN KELLAM,)	
)	
Defendant-Below,)	
Appellant/ Cross Appellee,)	Case No. 224, 2024
)	
v.)	
)	
STATE OF DELAWARE,)	
)	
Plaintiff-Below,)	
Appellee/ Cross Appellant.)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S REPLY BRIEF ON CROSS-APPEAL

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS.....	ii
ARGUMENT	
III. THE SUPERIOR COURT ABUSED ITS DISCRETION IN FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO OUTDATED LANGUAGE IN THE FELONY MURDER JURY INSTRUCTION.....	1
CONCLUSION.....	7

TABLE OF CITATIONS

	<u>Page(s)</u>
Cases	
<i>Allen v. State</i> , 970 A.2d 203 (2009).....	3
<i>Chance v. State</i> , 685 A.2d 351 (1996).....	3, 4
<i>Claudio v. State</i> , 585 A.2d 1278 (Del. 1991)	6
<i>Collins v. State</i> , 1995 WL 120655 (Del. Mar. 10, 1995).....	6
<i>Erskine v. State</i> , 4 A.3d 391 (Del. 2010)	2
<i>Hassan-El v. State</i> , 911 A.2d 385 (Del. 2006)	2, 4
<i>Hooks v. State</i> , 416 A.2d 189 (Del. 1980)	4, 5
<i>McCoy v. State</i> , 112 A.3d 239 (Del. 2015).....	6
<i>Williams v. State</i> , 818 A.2d 906 (Del. 2003)	7
Statutes	
11 <i>Del. C.</i> § 271	2, 3
11 <i>Del. C.</i> § 274	2, 3, 4
Other Authorities	
Model Penal Code s 2.04(3), Comment at 26, n.28 (Tent. Draft No. 1, 1953)	4

III. THE SUPERIOR COURT ABUSED ITS DISCRETION IN FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO OUTDATED LANGUAGE IN THE FELONY MURDER JURY INSTRUCTION.

Kellam claims he has an unqualified right to a correct statement of the law. Corr. Reply Br. on Appeal and Ans. Br. on Cross-Appeal (“Reply Br.”) at 36. While that may be true, as discussed in more detail in the State’s Answering Brief, an incorrect statement of the law in a jury instruction does not automatically result in reversal. *See* State’s Ans. Br. on Appeal and Opening Br. on Cross-Appeal (“Ans. Br.”) at 52-54. That is certainly true in this context where the standard of review is whether there is a reasonable probability that the result of the trial would have been different had the correct language been used. Kellam cannot meet that standard.

Kellam further claims that the error in his felony murder instruction changed an essential element of the offense because “[t]he ‘in furtherance’ language introduced a new mens rea element to the charge” and “asked the jury to consider the purpose for which the murder was being committed and if that purpose was the underlying felony.” Reply Br. at 38. He asserts the instruction “incorrectly directed [the jury’s] focus from [Kellam’s] individual mens rea, to that of the co-defendant.” *Id.* at 40. Kellam argues, “[t]he erroneous instructions reaffirmed that the jurors could find [] Kellam guilty solely by looking at his relationship to his co-defendants and their guilt, without the need to consider his own individual mindset.” *Id.* at 41. Kellam asserts that the problem was compounded because the “mandated” Section

274 instruction was not given. *Id.* at 39-40.

Kellam's reasoning is flawed for several reasons. As discussed in the State's Answering Brief, the facts did not support a Section 274 instruction for felony murder. *See* Ans. Br. at 39-41. Moreover, the *mens rea* applicable to Kellam's codefendants—the principals who committed the felony murders—was never directly applicable to Kellam except to the extent the result of their conduct was reasonably foreseeable.¹ Nothing in the flawed language of the felony murder instruction affected how the jury considered Kellam's *mens rea*.

“A person may be convicted of an offense as a principal, based on his own conduct, or as an accomplice to another person.”² A person is liable for the conduct of another when “intending to promote or facilitate the commission of the offense the person . . . aids, counsels or agrees or attempts to aid the other person in planning or committing it.”³ Section 274 of Title 11 provides that “[w]hen . . . 2 or more persons are criminally liable for an offense which is divided into degrees, each

¹ *Cf. Hassan-El v. State*, 911 A.2d 385, 393 (Del. 2006) (affirming Superior Court's rejection of defense's request for jury instruction that “Hassan-El could only be found guilty of felony murder if his intent as an accomplice was equivalent to the state of mind required for conviction of felony murder,” *i.e.*, recklessness or criminal negligence); *see id.* at 394 (“The concept of criminal liability . . . is that if the ‘accomplice’ intended to commit the underlying felony, *i.e.*, armed robbery, then he . . . is also guilty of any ‘consequential crime’ that is committed, *i.e.*, murder, as long as the consequential crime was a ‘foreseeable consequence’ of the armed robbery.”).

² *Erskine v. State*, 4 A.3d 391, 394 (Del. 2010).

³ 11 *Del. C.* § 271.

person is guilty of an offense of such degree as is compatible with that person's own culpable mental state and with that person's own accountability for an aggravating fact or circumstance."

In *Chance v. State*,⁴ the Delaware Supreme Court held that when an individual faces liability as an accomplice for a crime that resulted in a consequential offense, in *Chance*'s case an assault that resulted in a homicide, the jury is also required to distinguish between the defendant-accomplice's liability for the consequential offense and his culpability for the degree of that offense.⁵ Later, in *Allen v. State*,⁶ the court clarified that when a crime is divided into degrees based on (1) differing mental states or (2) a "person's own accountability for an aggravating fact or circumstance," and the State proceeds under an accomplice liability theory under section 271, section 274 requires the jury to decide the requisite mental state of the accomplice, if it may differ from the principal, and/or, where appropriate to the charge, his accountability for the aggravating fact or circumstance.⁷

In the case of felony murder, the *mens rea* inquiry relevant to Kellam is not whether he had the specific intent to commit the murder, but whether he intended to

⁴ 685 A.2d 351 (1996).

⁵ *Id.* at 359-60.

⁶ 970 A.2d 203 (2009).

⁷ *Id.* at 214 (citing 11 *Del. C.* § 274).

promote or facilitate the principal's conduct constituting the underlying offense,⁸ in this case, robbery or home invasion.⁹ Thus, Kellam need not have intended that a killing result. "As long as the result was a foreseeable consequence of the underlying felonious conduct [his] intent as [an] accomplice includes the intent to facilitate the happening of this result."¹⁰ This Court has quoted the Commentary to the Model Penal Code's accomplice liability provision in noting "one may . . . be an accomplice in crimes of recklessness or negligence if, with the requisite knowledge, he commands or assists in performing the behavior that is reckless or negligent"¹¹

Chance (or a Section 274 instruction) would apply to a lesser-included second degree felony murder instruction only if the evidence supported an argument that Kellam knew about and commanded or assisted in negligent, instead of reckless, conduct that resulted in the murders. The evidence in this case does not support such a finding. Kellam directed and assisted his codefendants in planning to rob Nelson and Hopkins. The principals took guns that Kellam supplied and knew about to the home invasion/robbery. That they used those guns to kill Nelson and Hopkins

⁸ *Hooks v. State*, 416 A.2d 189, 197 (Del. 1980).

⁹ *See Hassan-El*, 911 A.2d at 394 (noting that as applied to felony murder, the "offense" referred to in section 271 that the accomplice intends to "promote or facilitate" is not the murder, but the underlying felony, in that case, robbery).

¹⁰ *Hooks*, 416 A.2d at 197.

¹¹ *Id.* (quoting Model Penal Code s 2.04(3), Comment at 26, n.28 (Tent. Draft No. 1, 1953)).

during the robbery was a reasonably foreseeable result, and also, the result of reckless, not merely negligent, conduct.¹²

Here, the court properly instructed the jury that Kellam could be guilty of felony murder committed by another person “when, intending to promote or facilitate the commission of the offense, the person aids, counsels, or agrees to aid the other person in planning or committing it.” A390-91, 1431-33. The jury was required to find three elements:

- (1) A codefendant committed the elements of the offenses charged; or the codefendant did so together with the defendant;
- (2) “[T]he defendant intended to promote or facilitate the commission of the offenses and conduct, which resulted in the robberies, the attempted robberies, the home invasions, assaults;” and
- (3) “[T]he defendant aided, counseled, or agreed to aid the other person in planning or committing the offenses leading up to and resulting in the aforementioned offenses, and that the murders and assaults were reasonably foreseeable crimes.”

A390-91, 1432.

¹² *Cf. Hooks*, 416 A.2d at 197 (finding that appellants could be found guilty as accomplices to first degree felony murder committed by the act of another person when the evidence showed that all defendants knew that guns were to be carried and used if necessary in the course of a robbery).

In order for the jury to have found Kellam guilty of felony murder, they had to find that he aided, counseled, or agreed to aid his codefendants in planning or committing a felony—either home invasion or robbery—and that Nelson’s and Hopkins’ deaths were a foreseeable consequence of the codefendants’ wrongful conduct. The jury would also have had to have found that one of Kellam’s codefendants committed the elements of felony murder (in addition to the elements of home invasion or robbery). Thus, Kellam is mistaken in arguing that the incorrect “in furtherance of” language in the felony murder instruction improperly created a new *mens rea* element or “incorrectly directed [the jury’s] focus from [Kellam’s] individual mens rea, to that of the co-defendant.” It was entirely appropriate in this case for the jurors to focus on the codefendants’ *mens rea* with respect to felony murder instead of Kellam’s.¹³

Moreover, the “in furtherance of” language does not create an additional *mens rea* requirement. It simply adds to the element of when the killing must occur within the context of the underlying felony. The *mens rea* element for first degree felony

¹³ See *Collins v. State*, 1995 WL 120655, at *2 (Del. Mar. 10, 1995) (noting that a jury need only unanimously find the existence of a principal-accomplice relationship with respect to a charge, but “the jury is not required thereafter to find that the defendants specifically intended the result of a consequential crime which occurs” (quoting *Claudio v. State*, 585 A.2d 1278, 1282 (Del. 1991)); accord *McCoy v. State*, 112 A.3d 239, 268-69 (Del. 2015) (“An accomplice need not have specifically intended the crime, so long as the result was a ‘foreseeable consequence’ of the wrongful conduct.”)).

murder was and is recklessness. This Court interpreted the “in furtherance of” language to require that the killing must occur to facilitate the felony.¹⁴ To the extent that language might require the jury to find that the purpose of the killing was to facilitate the underlying felony (home invasion or robbery)—a requirement that does not exist under the current iteration of the felony-murder statute—it created a greater burden than was necessary for conviction.¹⁵ And in any case, the evidence in Kellam’s case easily met that or the lesser standard of proof. The Nelson and Hopkins murders were committed both “in furtherance of” the home invasion and robbery and “while engaged in” the commission of those felonies. Kellam cannot show prejudice from the use of the outdated felony murder language in his jury instructions.

¹⁴ *Williams v. State*, 818 A.2d 906, 913 (Del. 2003).

¹⁵ *Cf. Travis v. State*, 1993 WL 541923, at *1-2 (Del. Dec. 22, 1993) (finding trial court’s incorrect affirmative answer to jury question, “[d]oes being an accomplice require the Defendant to have conscious [sic] intent to commit the crime committed by the principal?” caused Travis no prejudice because it placed a higher burden on the State).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court that trial counsel was ineffective for failing to object to the outdated language in the felony murder jury instruction should be reversed.¹⁶

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¹⁶ The State mistakenly failed to include a sentence in the Conclusion of its Answering Brief on Appeal and Opening Brief on Cross-Appeal requesting that this claim be reversed. The State is, of course, requesting that the Superior Court's decision be affirmed only as to Claims I and II (raised by Kellam in his Opening Brief), but that it be reversed as to Claim III (raised by the State on cross-appeal).

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