

Cite as 2009 Ark. App. 631

**ARKANSAS COURT OF APPEALS**DIVISION III  
No. CACR09-62

NAEEM HASSAN RASUL

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

**Opinion Delivered** SEPTEMBER 30, 2009APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT,  
[NO. CR07-4870]HONORABLE WILLARD PROCTOR  
JR., JUDGE

AFFIRMED

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**RITA W. GRUBER, Judge**

Naeem Hassan Rasul was charged by felony information with first-degree murder and using a firearm while committing the felony, crimes which occurred against Henry Onukwube the night of October 20, 2007, near Pettaway Park in Little Rock. At trial the jury was instructed on first-degree murder, lesser-included offenses, and sentence enhancement. Rasul was found guilty of second-degree murder, for which he was sentenced to twenty years' imprisonment and a \$15,000 fine. His sentence was enhanced with an additional term of fifteen years for using the firearm, with the sentences to run concurrently. Rasul now appeals his conviction, contending that the evidence was insufficient to negate his defense of justification. We affirm because the point is not preserved for our review.

Rasul moved for a directed verdict at the conclusion of the State's case and again at the close of all the evidence. In his first motion, made "for a directed verdict as it relates to

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Count One in the felony information, Murder in the First Degree,” Rasul asserted that the State had not proven beyond a reasonable doubt that he “had the purpose of causing the death” of Henry Onukwube. The court denied the motion.

The defense then put on its own case, presenting testimony by Rasul and other witnesses. At the conclusion of all the evidence, defense counsel stated:

Your Honor, at this time we would renew our motion for a directed verdict. Again, first I don’t believe that the State has met its burden of proof in showing . . . the purpose of causing the death of another person.

I believe the evidence that has been introduced to this point as well as our defense of justification would establish that the State has failed to meet its burden of proof and that we would ask that the charges be dismissed at this time.

The trial court denied this second motion for a directed verdict.

Rasul contends on appeal that the State failed to provide sufficient evidence of second-degree murder because he was justified in defending himself and the State failed to negate this defense. He argues that he feared for his safety and that of his brother, who was with him in a truck they drove to the park where they saw Onukwube. Rasul points to his testimony that he acted under a belief that as “a sitting duck” in the vehicle, he could not safely retreat or change direction and that he reasonably did the right thing by getting out and shooting to avoid impending danger, as was evidenced by acts of aggression at his mother’s house that morning and by a physical fight the previous night at a gas station, in which he had hit the aggressive Onukwube with a gun. Rasul also notes the cross-examination of Arlin Cheeter, a witness for the State, that in the park Onukwube “dropped back like he had

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something under his shirt when he saw the vehicle. . . . like he had a gun or whatever. I didn't see a gun but it was my impression that he had a gun.”

We do not address these arguments. Rasul cannot raise his justification defense on appeal of his second-degree-murder conviction because he did not include this lesser-included offense, either by name or elements, in his motions to the trial court.<sup>1</sup>

We reject Rasul's argument that the issue was properly addressed at trial, particularly in a colloquy at the bench discussing a jury instruction for second-degree murder as well as Rasul's defense of justification. Our supreme court has long held that a defendant making motions for directed verdict must anticipate an instruction on any lesser-included offenses and must specifically address the elements of the lesser-included offense on which he or she wishes to challenge the State's proof. *Grillot v. State*, 353 Ark. 294, 303, 107 S.W.3d 136, 141 (2003).

In *Mainard v. State*, 102 Ark. App. 210, 283 S.W.3d 627 (2008), we explained that the appellant had not preserved for appellate review his argument that the State had failed to provide sufficient evidence of second-degree murder because the State had not negated appellant's defense that he was justified in defending himself. We explained that, because his directed-verdict motion was based on first-degree murder rather than second-degree murder, any argument as to the sufficiency of the evidence on the lesser-included offense had been

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<sup>1</sup>Rasul was convicted under Ark. Code Ann. § 5-10-1039(a)(1) (Repl. 2006), which states that a person commits second-degree murder if he “knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life.”

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waived:

[I]n order to preserve challenges to the sufficiency of the evidence supporting convictions for lesser-included offenses, defendants must address the lesser-included offenses either by name or by apprising the trial court of the elements of the lesser-included offenses questioned by their motions for directed verdict. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). Appellant's directed verdict motion did not include the lesser-included offense of second-degree murder, either in name or in elements; accordingly, we find that appellant's argument is not preserved for appellate review.

102 Ark. App. at 214, 283 S.W.3d at 630. Like the appellant in *Mainard*, Rasul waived his sufficiency challenge to his conviction of a lesser-included offense, and his point is not preserved for appellate review.

Affirmed.

VAUGHT, C.J., agrees.

HART, J., concurs.

HART, J., concurring. I disagree with the majority's conclusion that Rasul's argument was not preserved for appellate review. Rasul moved for a directed verdict, claiming that he was justified in using deadly physical force. *See* Ark. Code Ann. § 5-2-607 (Supp. 2009). If the evidence established that Rasul's conduct fell within the ambit of the statute,<sup>2</sup> then Rasul

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<sup>2</sup>The statute provides, in pertinent part, as follows:

- (a) A person is justified in using deadly physical force upon another person if the person reasonably believes that the other person is:
- (1) Committing or about to commit a felony involving force or violence;
  - (2) Using or about to use unlawful deadly physical force; or
  - (3) Imminently endangering the person's life or imminently about to victimize the person as described in § 9-15-103 from the continuation of a pattern of domestic abuse.

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would have a defense to either first-degree murder or second-degree murder. Thus, this is not akin to a defendant failing to move for a directed verdict on a lesser-included offense. Rather, the trial court was apprised of his defense. To the extent that *Mainard v. State*, 102 Ark. App. 210, 283 S.W.3d 627 (2008), holds differently, it should be overruled. Nevertheless, after considering the merits of Rasul's argument on appeal, I agree to affirm.

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(b) A person may not use deadly physical force in self-defense if the person knows that he or she can avoid the necessity of using deadly physical force with complete safety:  
(1)(A) By retreating.