IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

APRIL 1996 SESSION

FILED

September 30, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)
	) C.C.A. No. 02C01-9509-CC-00281
Appellee,	)
	) Madison County
V.	)
	) Honorable Franklin Murchison, Judge
	)
MICHAEL RALPH ALFORD,	) (Aggravated Assault)
	)
Appellant.	)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

O P I N I O N

The appellant, Michael Ralph Alford, was convicted by a jury of aggravated assault by reckless conduct. Sentenced as a Range I offender, the appellant received a four-year sentence with all but sixty days suspended. In addition, he was ordered to perform two hundred hours of community service and to pay restitution of $4,791.01 to the victim and $68,589.09 to the victim's health insurance provider.

In this appeal, the appellant raises two issues for review. First, he argues that the jury erred by not accepting his self-defense claim and that the evidence was insufficient to support the verdict. Secondly, he asserts that the restitution ordered is contrary to the provisions of Tenn. Code Ann. § 40-35-304. Following our review, we affirm the trial court's judgment.

The testimony at trial revealed that the victim was pulling into the parking lot of a convenient market when he spotted the appellant exiting the parking lot. The victim said that he sat in his vehicle until he was sure the appellant was gone. The two had known each other for some time but tensions had arisen seven months earlier when the appellant threatened the victim over the telephone. The threat was based on appellant's discovery of old greeting cards the victim had given the appellant's girlfriend when they dated previously. The appellant told the victim that he was going to "stomp [the victim's] butt" when he saw him in public.

After the victim made his purchase, he exited the store where he encountered the appellant. The victim said that the appellant just stared at him and did not say anything. The victim told the appellant, "you know I can't fight you. I've got a bad back and can't fight you." According to the victim, the appellant responded that "you [the victim] ain't going to have no choice." The appellant hit the victim in the shoulder then assumed a bear hug position behind the victim. Next, the appellant continually threw the victim against the victim's

truck. The victim repeatedly asked the appellant what he was doing but received no response.

The victim attempted to reach into his pocket to retrieve his pocket knife. When the appellant realized what the victim was doing, he told the victim that "if you pull it out, I'm going to stick you with it." The victim responded, "maybe so, but I'm going to make you turn me loose." When the appellant released the victim, the victim pulled out his pocket knife and took a couple of steps towards the appellant. The victim said he was trying to back the appellant far enough away so that he could get into his truck. The appellant ran a few feet away from the victim. The victim told the appellant to stay away from him and leave him alone. After he saw that the appellant was some feet away, the victim put the knife back into his pocket.

As the victim reached into his pocket for his truck keys, he spotted the appellant running towards him. An eyewitness said that when the appellant neared the truck, it appeared he was preparing to fight again. The appellant grabbed a four-way lug wrench from the victim's truck bed and hit the victim in the side with the sharp end of the wrench. The sharp point went into the victim's abdomen puncturing his left lung. The victim attempted to drive himself away but the appellant physically pushed him across the seat and told him he was driving him to the hospital.

The victim was initially hospitalized for approximately nineteen days after having had surgery for a ruptured colon and receiving a temporary colostomy. Due to complications the victim returned to the hospital on a number of occasions for further surgeries and treatment.

The appellant's girlfriend, Gloria Evans, testified that she and the appellant saw the victim pulling into the parking lot of the market. The appellant

told her that he was going to go back and talk to the victim to “patch things up.” However, Ms. Evans tried to discourage the appellant because she was afraid there would be trouble. From the car she could see they were talking but did not witness the precise events. She did see the appellant run back to the gas pumps. She described him as looking "scared."

The appellant testified in his own behalf. He said that when he saw the victim pulling into the market, he thought it would be a good opportunity to talk. The appellant said the victim exited the store and as he approached the appellant asked him what he was going to do. He next testified that the victim reached into his pocket and pulled out the knife. He grabbed the victim to prevent him from opening the knife. The appellant told the victim to drop the knife and nothing would happen. The appellant said he was scared as the victim twisted out of appellant’s grip.

The appellant said the victim told him he would show him what he was going to do with the knife. The appellant said he fled to the gas pumps but returned to the back of the victim’s truck. He said he looked for anything he could get his hands on because the victim was coming after him. Appellant said he swung the tire tool to knock the knife out of the victim’s hand. Instead the point of the tool hit the victim in the side. At that point, the appellant told the victim to drop the knife. He said the victim closed the knife and put it away.

One eyewitness saw the appellant put the victim in a bear hug. He explained that when the appellant released the victim, the appellant fled to the other side of the victim’s truck. He did not, however, see the victim chase the appellant nor did he see the victim with a weapon. Another witness saw the appellant strike the victim with his fist then place the victim in a bear hug. He saw an object in the appellant’s hand but could not identify it. Neither witness saw how the injury actually occurred.

I. SUFFICIENCY OF THE EVIDENCE

The appellant's first issue is twofold. First, he contends that the jury should have believed his self-defense claim. Secondly, he argues that the verdict was contrary to the weight of the evidence. More specifically, the appellant claims that the evidence supports intentional, rather than reckless, aggravated assault.

In a sufficiency of the evidence challenge, the relevant question on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or crimes beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); State v. Duncan, 698 S.W.2d 63 (Tenn. 1985); T.R.A.P. 13(e).

In Tennessee, great weight is given to the result reached by the jury in a criminal trial. A jury verdict accredits the testimony of the state's witnesses and resolves all conflicts in favor of the state. State v. Williams, 657 S.W.2d 405 (Tenn. 1983). Moreover, a guilty verdict replaces the presumption of innocence enjoyed at trial with the presumption of guilt on appeal. State v. Grace, 493 S.W.2d 474 (Tenn. 1973). The appellant has the burden of overcoming the presumption of guilt. Id. On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832 (Tenn. 1978).

A. Self-Defense

The appellant argues that based on the proof the jury should have found that he acted in self-defense. Tenn. Code Ann. § 39-11-611 provides that:

> [a] person is justified in threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force.

Tenn. Code Ann. § 39-11-611(a) (1991). The test is threefold: (1) the defendant must reasonably believe he or she is threatened with imminent loss of life or serious bodily injury; (2) the danger creating the belief must be real or honestly believed to be real at the time of the action; and (3) the belief must be founded on reasonable grounds. Sentencing Commission Comments to Tenn. Code Ann. § 39-11-611(1991).

The testimony indicated that the appellant initially approached the victim as he was exiting the market. The victim and two witnesses testified that after being placed in a bear hug by the appellant, the victim reached into his pocket for a small pocket knife. One witness heard the victim "scream" for the appellant to "keep [his] hands off of [him]." When the appellant released the victim, the victim moved towards the appellant a couple of steps to "run him far enough ... so [he] could get back in [his] truck." The victim told the appellant to stay away from him and leave him alone.

Although the testimony at this juncture was somewhat conflicting, it is clear that the appellant fled some distance away from the victim's truck. One version of the facts placed the appellant at the gas pumps some twenty feet away. Another rendition indicated that the appellant was merely at the back of the victim's truck. Neither eyewitness saw the victim pursue the appellant. Nonetheless, the victim said he put his knife back into his pocket and attempted to get into his truck. In the corner of his eye, the victim saw the appellant running towards him. Within seconds, the appellant reached into the back of the victim's truck, retrieved a tire tool and swung it toward the appellant. The stipulated serious bodily injury resulted from that swing.

The appellant admits that he was the initial aggressor but insists that when he released the victim from the bear hug, he effectively withdrew. At that point, he claims, the victim became the aggressor and he simply responded in self-defense. However, because the appellant was the initial aggressor, self-

defense was not justified unless he "abandon[ed] the encounter or clearly communicate[d] to the other the intent to do so." Tenn. Code Ann. § 39-11-611(d)(1) (1991). Gann v. State, 214 Tenn. 711, 383 S.W.2d 32 (1964). Whether the appellant retreated so as to justify a self-defense claim is a factual determination for the jury. Obviously, it did not find sufficient credible evidence to support this threshold issue.

The weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury as the triers of fact. State v. Sheffield, 676 S.W.2d 542 (Tenn. 1984); Byrge v. State, 575 S.W.2d 292 (Tenn. Crim. App. 1978). The jury, clearly within its purview, heard the appellant's proof and rejected the self-defense claim. This issue has no merit.

B. Mental Element

Within his sufficiency argument, the appellant contends that the jury could not have found him guilty of reckless aggravated assault. "A person commits aggravated assault who ... [i]ntentionally, knowingly or recklessly causes ... serious bodily injury to another." Tenn. Code Ann. §§ 39-13-101(a)(1) and -102(a)(1)(A) (1991). The appellant argues that the jury should have found him guilty of intentional aggravated assault. However, this argument is misguided. In the hierarchy of mental elements, a person who acts intentionally also acts knowingly and recklessly. See Tenn. Code Ann. § 39-11-301 and Sentencing Commission Comments. Thus, if the appellant concedes that he acted intentionally, he also necessarily acted recklessly.

Regardless, we find that sufficient evidence exists to support the appellant's conviction for aggravated assault. This issue is without merit.

II. RESTITUTION

In his last issue, the appellant claims that the restitution ordered is contrary to Tenn. Code Ann. § 40-35-304. His argument is that the trial court failed to consider the appellant's lack of financial resources and failed to establish a payment schedule. Section 40-35-304 provides that:

> [t]he court shall specify at the time of the sentencing hearing the amount and time of payment or other restitution to the victim and may permit payment or performance in installments. The court may not establish a payment or performance schedule extending beyond the statutory maximum term of probation supervision that could have been imposed for the offense.

Tenn. Code Ann. § 40-35-304(c) (1990).

At the sentencing hearing, the proof indicated that the victim incurred medical expenses not covered by insurance totaling $4,791.01. The victim's insurance company paid the additional $68,589.09. The appellant testified that he had purchased a pool supply store, which would also encompass video rental and tanning beds. Although he hoped to make it a success, he had put everything he had into the business. However, the appellant did indicate that he did not have the money to pay the victim in a lump sum but could "probably take care of it this summer." The appellant testified that he had $7,500 in accounts receivable and an automobile and backhoe each worth $12,000. No figure was given as to expected future earnings of the business.

The trial judge ordered the appellant to pay restitution totaling $73,380.10 with the first $4,791 going to the victim. The appellant was given ninety days to pay the $4,791. However, when asked about the payment schedule for the balance of the restitution, the trial judge said that "the balance ... is going to have to be set up by schedule the best they can with the probation office."

The appellant argues that the trial judge failed to follow the mandates of Tenn. Code Ann. § 40-35-304(c) set out above. The mandatory language of this

section requires the trial judge to specify at the hearing the amount and time of payment. Here, the trial judge specifically set out the amount to be paid in restitution. In addition, the judge stated that the probation period would be four years and that the probation officer would establish the restitution schedule as to the insurance carrier. The restitution owed to the victim would be paid first and within ninety days.

We find that this determination substantially complied with the statutory requirements. Due to the nature of the appellant's business, flexibility in the amounts to be paid was justified. This finding allows the appellant to make lower payments during the off-season and larger payments when the business profits. The only boundary was that the amount be paid within the four years.

The appellant argues that the statute also requires the trial judge to establish a payment schedule. We disagree. Instead, the statute contains the discretionary language "may permit payment or performance in installments." This cannot be interpreted to require the trial judge to specifically establish such payments. In light of the fact that the trial judge directed the probation officer to establish a payment plan, we find no error in this claim.[1]

Within this issue the appellant argues that the statutory provision provides for repayment of restitution to "victims." From this language the appellant concludes that an insurance company is not a "victim" contemplated by the legislature. In this issue of first impression, we look to the language of the statute and the intended purpose behind it.

Our restitution statute provides that "[a] sentencing court may direct a

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[1]The appellant's argument would be more appropriately directed to a later hearing near the end of his probation period on the ability or inability to pay. If the appellant discovers at the end of the four years that he cannot make full restitution, he may petition the court for a review. Tenn. Code Ann. § 40-35-304(f) (1990). Alternatively, if the appellant faces a future probation revocation hearing for failing to pay, he may present his proof to the trial court at that time.

defendant to make restitution to the victim of the offense as a condition of probation." Tenn. Code Ann. § 40-35-304(a) (1990). Victim is not defined within this section. However, the Sentencing Commission "believes restitution to victims is an important part of public policy and these sections are intended to enhance that policy." Sentencing Commission Comments to Tenn. Code Ann. § 40-35-304. With this policy in mind, we analyze the policies adopted by other jurisdictions.

The appellant cites Commonwealth v. Galloway, 448 A.2d 568 (Pa. Super. 1982) in support of his argument that an insurance company cannot be a victim. In Galloway, the Pennsylvania court stated that an insurance company did not suffer injury as set forth in the Pennsylvania statute.[2] Further, the court reasoned that the insurance company merely fulfilled its contractual obligation to the victim. Such a payment does not constitute "injury" as required by statute. Id. at 577. Thus, it refused to place an insurance company within the statutory definition of "victim."[3]

On the other hand, the state cites LeFleur v. State, 848 S.W.2d 266 (Tex. App. -- Beaumont 1993), in support of its opposing position that an insurance company can be a victim for restitution purposes. In LeFleur, the appellant argued that the code definition of victim did not encompass insurance companies. Id. at 271. The court held that the victim's insurer was subrogated and substituted in place of the victim with reference to crimes and could receive restitution payments. Id. at 272.

The state also cites Harrison v. State, 713 S.W.2d 760 (Tex. App. --

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[2]The Pennsylvania statute defines "victim" as "'[a]ny person, except an offender, who suffered injuries to his person or property as a direct result of the crime.'" Galloway, 448 A.2d at 576 quoting 18 Pa. C.S.A. §1106(h).

[3]We note that the dissent in Galloway concluded that the general language of the statute did not expressly or impliedly preclude restitution payments to insurance companies. Galloway, 448 A.2d at 578. It added that "[w]hether the restitution is paid to the insurer directly or ... to the insured victim, the sentence of restitution will serve its rehabilitative purpose of impressing upon the offender the loss he has caused and his responsibility to repair that loss." Id. at 579.

Houston 1986) which similarly found that the insurance company was a victim in such circumstances. Other jurisdictions have made similar findings.[4]

It is useful to read the statutory language of Tenn. Code Ann. § 40-35-304 in conjunction with the purposes of that section. We cannot conclude that the legislature intended to so narrowly define "victim" as to reward an offender who happens to strike a victim with insurance. Had the victim not been covered by insurance, he would have borne the full brunt of his medical expenses. Without question restitution for the full loss would have been proper.

The insurer is damaged when it is required to pay such an enormous claim due solely to a criminal act. It can be said that it then suffered a loss under the principle of subrogation. In effect, the insurer stands in the shoes of the victim as to financial and economic loss. We adopt the reasoning of LeFleur and hold that the appellant cannot take advantage of the victim's foresight in carrying insurance. An insurance company can be a victim for the purposes of restitution established in Tenn. Code Ann. § 40-35-304. This finding is in line with the purposes of restitution in this state.

The conviction and order of restitution are, in all respects, affirmed.

PAUL G. SUMMERS, Judge

[4] State v. Martinez, 899 P.2d 1302 (Wash. App. Div. 2 1995) (finding that the insurance company stands in the shoes of the victim); Alger v. Commonwealth, 450 S.E.2d 765 (Va. App. 1994) (finding insurance company is victim for restitution purposes); State v. Sanchez, 869 P.2d 1133 (Wash. App. Div. 3 1994) (stating that although not listed in the indictment, insurance companies are "secondary victims" which suffer a loss through the principle of subrogation); Martin v. State, 874 S.W.2d 674 (Tex. Crim. App. 1994) (named victim in the indictment is not always the only victim); State v. Brooks, 862 P.2d 57 (N.M. App. 1993) (appellant's argument that remedy should be sought in civil action does not preclude a finding that an insurance company is victim for restitution purposes); Hagler v. State, 625 So.2d 1190 (Ala. Cr. App. 1993) (insurance company is a victim); Rogers v. State, 435 S.E.2d 457 (Ga. App. 1993) (insurance company is a victim); L.S. v. State, 593 So.2d 296 (Fla. App. 5th Dist. 1992) (the thought that a perpetrator should escape penalty for his criminal acts because he chose a victim with insurance is without logic).

CONCUR:

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JOSEPH M. TIPTON, Judge

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JERRY L. SMITH, Judge