

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JUNE 1996 SESSION

FILED
July 5, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

V.

JAMES ROBERT LITTLETON,

Appellant.

)
) C.C.A. No. 03C01-9507-CC-00201
)
) Washington County
)
) Hon. Lynn W. Brown, Judge
)
) (Retaliation for Past Action)
)
)

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(Sentencing & On Appeal)

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

OPINION

The appellant, James Robert Littleton, was convicted following a jury trial of retaliation for past action. He brings this appeal claiming that: (1) the evidence was insufficient to support the verdict, and (2) the trial court erred by allowing into evidence information provided by a "Star 69" telephone device. Following our review, we affirm the trial court's judgment.

The proof at trial indicated that the appellant had worked for the victim on his dairy farm for two and one-half years. When the victim's milk supply was contaminated by antibiotics, he took out warrants against the appellant. The victim was present at the appellant's preliminary hearing in the late fall or early winter season.

On December 19, 1993, the victim received a telephone call from the appellant around 4:30 p.m. The appellant told the victim that he knew he [the victim] was the person who had caused him "all of the trouble" and that "[he] was going to pay." The appellant also said that he knew where the victim bought cigarettes in Sulphur Springs. He told the victim that he would be waiting on him some day to "whip [his] ass." The appellant also added that the victim would not want to cross his path in the community or he would kill him "graveyard dead." The victim said the appellant told him that after he "took care of [him]" he was going to "take care" of the victim's brother.

During the conversation the appellant told the victim he should check a particular gate on his farm which kept the cattle from getting into the road. The victim's subsequent investigation revealed that the gate had been opened. The appellant claimed responsibility for the open gate. The victim grew tired of the phone conversation and hung up the telephone. He told his daughter not to answer the phone if it rang again. About five minutes later, the telephone rang again. The victim asked his daughter to punch the "Star 69" feature to determine

the origin of the call. This inquiry revealed that the call was being made from the appellant's parents' home. The victim knew the number from having called it when the appellant worked for him.

Roy Whitaker, the appellant's friend, worked with the appellant on the day in question. Whitaker indicated that he, the appellant, and the appellant's brother had eaten supper together and later purchased beer which they consumed. The three stopped near a gate across from the victim's farm to use the restroom. Although Whitaker did not see the appellant open the gate, he saw that it was opened when he turned around. When they arrived at the home of the appellant's parents, the appellant said that he was going to phone the victim to tell him he opened the gate. Whitaker heard part of the conversation in which the appellant called the victim "a bald headed son of a b _ _ _ _." He also heard the appellant tell the party to meet him at the grocery where he would "whop [sic] his ass." Whitaker said that when the conversation was over, the appellant got into a physical fight with his father. The fight apparently started because appellant's father told him not to be calling the victim.

The appellant's father testified. He denied that the appellant phoned anyone that evening. He further denied that he and the appellant had fought that evening or that they had purchased beer.

I. "Star 69" Testimony

The state initially argues that the appellant has waived his right to challenge the "Star 69" testimony by failing to file his notice of appeal until 46 days after the final judgment of the court was entered. Technically, this issue is waived; however in the interest of justice we waive the timely filing requirement and review the appellant's claims. T.R.A.P. 4(a).

The appellant argues that the "Star 69" testimony should not have been

permitted at trial. The victim testified that after the initial telephone conversation with the appellant, he told his daughter not to answer the telephone. Moments later the telephone rang again. When the ringing stopped, the victim instructed his daughter to use the "Star 69" feature to determine the origin of the call. The victim testified that his daughter determined that the call originated from the appellant's parents' telephone. However, the victim's daughter did not testify.

The victim's recitation of what his daughter determined from the "Star 69" inquiry constitutes hearsay. The appellant did not object to this testimony at trial. Failure to contemporaneously object to hearsay testimony constitutes waiver of the issue. T.R.A.P. 36(a). Notwithstanding waiver, we find that the "Star 69" testimony did not significantly add to the victim's damning testimony. Thus, based on the strength of the remaining evidence, we find that error, if any, was harmless. T.R.A.P. 36(b); Tenn. R. Crim. P. 52(a).

II. Sufficiency of the Evidence

In his final challenge, the appellant contends that the evidence was insufficient to support his conviction. In a sufficiency of the evidence challenge, the relevant question for 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).

Reviewing the evidence absent the "Star 69" testimony, we find sufficient evidence to support the appellant's conviction. Tennessee Code Annotated section 39-16-510 provides that "[a] person commits the offense of retaliation for past action who harms or threatens to harm a witness at an official proceeding ... by any unlawful act in retaliation for anything the witness ... did in an official capacity as witness...." Tenn. Code Ann. § 39-16-510(a) (1991). We find that the elements of the offense were established by the proof.

The appellant concludes that because the testimony of the witnesses conflicted, the "Star 69" testimony was likely the deciding factor in the minds of the jurors. We disagree. As discussed above, we found that any error in the admission of the testimony was harmless. Therefore, the jury was left with a credibility determination and chose to believe the state's witnesses. The weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury. State v. Sheffield, 676 S.W.2d 542 (Tenn. 1984). We will not usurp this function. This issue is without merit.

The judgment of the trial court is, in all respects, affirmed.

PAUL G. SUMMERS, Judge

CONCUR:

JOE B. JONES, Presiding Judge

GARY R. WADE, Judge