

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY SESSION, 1995

FILED
March 13, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

v.)

JAMES ALAN MORGAN,)

Appellant.)

No. 03C01-9408-CR-00305

Greene County

Hon. James E. Beckner, Judge

(Voluntary Manslaughter)

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OPINION FILED: _____

AFFIRMED

Joseph M. Tipton
Judge

OPINION

The defendant, James Alan Morgan, appeals as of right from his conviction by a jury in the Greene County Criminal Court for voluntary manslaughter, a Class C felony. He received a four-year sentence in the Tennessee Department of Correction as a Range I, standard offender and was fined \$10,000. The defendant challenges the sufficiency of the evidence and contends that the trial court erred by refusing to redact portions of the defendant's statements.

The defendant was charged with second degree murder after he shot and killed Randy Hurd on October 10, 1992. At trial, John Huffine, a chief deputy with the Greene County Sheriff's Department, testified that he learned about the shooting when he responded to a call at the defendant's mother's residence. When he arrived at the residence, the defendant's mother came out and pointed down toward the defendant's house which was about one hundred yards away. The victim was lying in the defendant's driveway with a lady, who was later identified as Joyce Paxton, bent over him. When Chief Deputy Huffine arrived at the scene, he had a difficult time trying to check the victim for signs of life because Paxton was hysterical and would not get off the victim. He recalled that Emergency Medical Service (EMS) personnel arrived within a few minutes and were able to restrain her and attend to the victim. Chief Deputy Huffine returned to the defendant's mother's residence and got the gun that was used in the shooting.

Chief Deputy Huffine said that he observed the defendant briefly when he first responded to the call because the defendant came out of the house shortly after his mother did. He said that the defendant appeared calm at that time. He recalled that he had the opportunity to observe the defendant for between five and ten minutes when he returned to the residence for the second time, fifteen or twenty minutes after

he had received the initial call. Chief Deputy Huffine also testified that the defendant made the call to the EMS that initiated the rescue efforts.

On October 16, 1992, Chief Deputy Huffine returned to the defendant's house with a metal detector and searched his gravel driveway for signs of any bullets that may have been shot into the ground. He did not find any bullets in the driveway and admitted that a bullet fired into a gravel driveway could travel hundreds of yards away from the driveway. Chief Deputy Huffine also testified that the victim had been in the Greene County jail on numerous occasions but that he did not know whether the victim had a general reputation for violence.

An EMS paramedic supervisor testified that he received a call from the defendant at 3:53 p.m. on the day of the incident and that the defendant told him that he needed an ambulance because he had shot a man. The defendant was excited during the phone call and had trouble giving directions to the scene. A paramedic testified that when she arrived on the scene at 4:10 p.m. the victim was lying on his right side and did not have a pulse. The cardiac monitor showed that there was no electrical activity.

Joyce Paxton testified that she met the defendant in the Spring of 1988 and lived with him from November 1988 until September 1992. She said that she left the defendant in May 1992, moved back in with him during the first week of August, and moved back out of his house near the end of September. Before Paxton reconciled with the defendant in August, the defendant told her that he had been romantically involved with Debbie Gilland.

Paxton met the victim at the end of August 1992 and was planning to marry him at the time of his death. She recalled that the victim unloaded the

defendant's gun while he was helping her move out of the defendant's house. She said that the victim was concerned that the defendant might "start trouble" with the gun if he came home while the victim was helping her gather her belongings.

Paxton testified that she and the victim began moving into a house together on the day of the shooting. They went to her father's house to get some of her belongings and received a message that the defendant was trying to contact her because some of her mail was at his house. She said that the defendant knew she had a post office box and that she had told him to forward her mail to the box. After she received the message, she had a conversation with the victim and then called the defendant. The defendant told her that he had not forwarded the mail, and she asked him to put it in his mailbox. The defendant responded by telling her that he did not have time for that. Paxton told the defendant that she would come to his house to get the mail but that he would have to meet her outside because she refused to enter the house. The defendant told her to come alone.

The victim then drove Paxton to the defendant's house. When they pulled into the driveway, the defendant got down off a scaffold and entered the garage through an open garage door. Paxton testified that she got out of the car and was walking toward the garage when the defendant came out of the garage pointing a gun at her. She said that she told the defendant that she was there to get her mail and to put the gun down and that the defendant replied, "I told you not to bring him here." She said that she assured the defendant that they were leaving and again told him to put the gun down. She recalled that she tried to push the defendant back when he started toward the car. She said that the defendant shoved her back and then the victim got out of the car and told the defendant to leave her out of it. Paxton said that she kept trying to stop the defendant as he proceeded toward the car with the gun in his right hand but that the defendant continued to push her with his left arm.

Paxton testified that the victim stepped around the front of the car door and told the defendant that he was not afraid of him and to leave her out of it. Paxton said that the defendant remarked that he had warned the victim not to come around, and then, the defendant fired a shot and said, "I'm telling you to go." Paxton said that she kept assuring the defendant that she and the victim would leave and urging him to put down the gun. She said that the defendant fired a second shot and said, "I told you," and then, the defendant shot the victim. Paxton said that she could not see the position of the gun during the first two shots but that she knew that the defendant had his right arm extended in front of him. Paxton also testified that when she lived with the defendant, the defendant kept his guns in his bedroom.

During cross-examination, Paxton recalled that she gave police statements concerning the shooting on October 10, 13, and 26. She admitted that she first told police that the defendant fired two warning shots but later told them that the second shot was not a warning shot because when she heard it she turned toward the victim and saw the bullet part his hair. She said that the victim was within two feet of her and that she was right next to the defendant when he fired the second shot. She also testified that she did not know what the victim was doing after the first shot was fired because she was watching the defendant. She said that she did not tell the defendant that the victim was coming with her to pick up the mail and that in the back of her mind, she knew that there would be a confrontation when the victim accompanied her to the defendant's house.

Dr. William McCormick, the state medical examiner, testified that the bullet removed from the victim caused his death. He also explained that the victim had two holes in his chest and that one was caused by the bullet and the other was caused by a fragment of metal from the bullet jacket. He opined that the victim's death

occurred rapidly and explained that his findings were consistent with the gun being fired no greater than eighteen inches away from the victim.

Detective Ralph Roderick of the Greene County Sheriff's Department identified several pictures of the crime scene. He acknowledged that the victim had a reputation for violence and testified that he recorded an interview with the defendant on the day of the shooting.

The tape of the interview was played for the jury. During the interview, the defendant admitted shooting the victim and described the events that led to the shooting. He explained that he met the victim around the time he started dating the victim's ex-girlfriend, Debbie Gilland. The defendant told Roderick that he and Gilland were riding in her truck one night when the victim waived for them to pull off the road. He said that they pulled over, and Gilland and the victim had a disagreement. He said that the victim threatened to kill him if he did not leave Gilland alone.

The defendant recalled that on the day of the shooting, he specifically told Paxton not to bring the victim with her when she picked up her mail. He recalled that he was up on a scaffold working when he heard a car turn into the driveway. He got down off the scaffold, and as he was walking toward the garage, he noticed that the victim was with Paxton in the car. He said that he went into the garage, where he usually leaves his pistol, and then stepped back out to the edge of the garage. He said that he told Paxton to leave two or three times before the victim jumped out of the car. The defendant stated that he stepped down out of the garage when the victim started toward him. The defendant said that he kept telling Paxton and the victim to leave. According to the defendant, the victim asked the defendant if he recognized him and the defendant responded that he did. The defendant said that the victim then swung at him but did not hit him because he was around six feet away from him. The defendant

said that he then stepped back and fired a shot into the ground. The defendant explained that he fired another warning shot into the ground after the victim swung again forcing him to duck to avoid getting hit. The defendant recalled that the victim told him that he was not scared after the second warning shot. The defendant warned the victim that he would shoot him if he drew back one more time. The defendant said that he shot the victim when the victim drew back again. The defendant said that he then walked into his house and called an ambulance.

During the interview, the defendant insisted that he just wanted the victim and Paxton to leave him alone and that he knew that the victim would have killed him if he had the opportunity. When asked whether stepping into the garage and closing the door would have been sufficient protection for the defendant, the defendant responded that his property would not necessarily have been protected because Paxton had a set of keys to his doors. Although the defendant did not claim to see the victim with a weapon on the day of the shooting, he said that he knew that the victim always carried a knife. The defendant also recalled that he was wearing a nail pouch at the time of the shooting with a bar and a hammer in it.

The defendant told Detective Roderick that Paxton never touched him during the incident. He explained that Paxton saw that he had a gun but denied that she ever tried to take the gun away from him. He said that she was standing to his left, a step away from the hood of his car where he had thrown her mail. The defendant explained that he and Paxton were planning to get married until she moved out in September. He admitted that, at first, he was angry that Paxton was seeing the victim, but said that he had decided that he was better off without her.

Detective Jim Ellison of the Greene County Sheriff's Department testified that he arrived at the defendant's residence at 4:20 p.m. on October 10. He prepared a

sketch and took pictures of the scene. He said that the defendant's car was parked next to the garage door and that he found three pieces of mail that were addressed to Paxton on the hood of the car. He recalled that Chief Deputy Huffine gave him a revolver at the scene. He said that the revolver contained three live rounds and three spent casings. He said that he interviewed the defendant's mother, step-father, and Joyce Paxton at the sheriff's office later that day. He also recalled that he sent the T-shirt the victim was wearing at the time of the shooting and a gunshot residue test that he had performed on the defendant to the Tennessee Bureau of Investigation (T.B.I.). On October 13, Detective Ellison interviewed Joyce Paxton for the second time and interviewed Debbie Gilland. Three days later, he accompanied Chief Deputy Huffine to the defendant's house to look for the bullets from the alleged warning shots, and he interviewed the defendant.

The jury heard a tape of the defendant's second interview. In it, the defendant described the first time he met the victim. He explained that on the day he met Gilland, he accompanied Gilland, her sister, and her brother-in-law to Gilland's trailer. The four had left Gilland's trailer and were riding in her truck when the victim drove around the truck and stopped in the middle of the road in front of them. The defendant said that the victim exchanged words with Gilland and her brother-in-law. He said that there was "a little pushing" between the victim and Gilland's brother-in-law and that the victim said that he was not afraid of anyone, not even Gilland's boyfriend.

The defendant also recounted other instances when he had contact with the victim. He recalled that while he was dating Gilland, the victim harassed him by calling his house at one or two o'clock in the morning. He said that the victim also called him on the day the defendant learned that Paxton had moved out of his house. On that day, the victim asked the defendant whether Paxton had already moved out. When the defendant confirmed that she had, the victim said, "Well, ain't life a bitch."

The defendant replied, "Yeah, and you've got one," and hung up the phone. The defendant told Detective Ellison that the victim called to harass him three more times after Paxton had moved out. In addition, he talked to the victim a week before the shooting when Paxton called and informed him that she planned to marry the victim.

The defendant said that he changed the locks to his house after Paxton moved out. He noticed that Paxton had unloaded his guns and taken all of his shells when she moved out. He recalled that he reloaded his gun with shells he received from his step-father. He also explained that he started keeping the revolver in the garage after Paxton stopped living with him. He told Detective Ellison that he had some problems with coon dogs in the middle of the night and used the gun to make the dogs scatter.

With respect to what occurred on the day of the shooting, the defendant reiterated much of what he said in his earlier statement. He said that he did not know that Paxton was bringing the victim with her and admitted that he did not see anything in the victim's hands when he shot him. The defendant explained that, although he was wearing a nail pouch with a hammer and a flat bar in it when he shot the victim, he uses those tools to make a living and has never considered using them in a fight. When Detective Ellison asked the defendant why he did not enter the house and lock the door to get away from the victim, the defendant replied, "I guess we'd just come so close to this confrontation so many times it was time to settle it."

During cross-examination, Detective Ellison testified that three spent casings that were in the revolver when he received it were not in consecutive order. He admitted that he failed to ask the defendant why the casings were not in order and said that he did not know that the defendant had emptied the gun when he got to his mother's house and then put the shells back in it before he gave it to Chief Deputy

Huffine. He said that he did not take a picture of the inside of the garage, but that he thought he remembered a box near the doorway leading into the house from which the defendant claimed to have retrieved the gun.

Detective Ellison also testified that Paxton told him on October 13, 1992, that after she heard the second shot the defendant fired she turned and saw the bullet part the victim's hair. He recalled that he told Paxton that the story about seeing a bullet part hair was an untruth that would only upset the victim's family. Detective Ellison admitted that he was concerned that Paxton had made material changes in her version of what happened between the first and second statements. He said that Paxton gave a third statement on October 26, 1992, in which she said that the victim was in the car when the defendant fired the first shot.

Mike Gregg, an officer with the Greene County Sheriff's Department, testified that he sent a gun, gunshot residue kit, three shells, and three spent casings that he received from Detective Ellison to the T.B.I. He also said that he was aware of the victim's reputation for violence. He recalled that in September 1991 an inmate had to be placed in a different cell for safety purposes after the victim threatened him.

Steve Scott, an agent who works in the T.B.I. crime lab, testified that the defendant's gun was in proper working condition. He said that the spent casings had been fired from the gun and that the gun had been fired between contact and eighteen inches from the victim.

Debra Gilland testified that she met the defendant a couple of months before he shot the victim. She recalled that on the day she met the defendant, she, her sister, her brother-in-law, her nephew, and the defendant were riding in her truck on a winding road in a no-passing zone when they saw the victim travelling in the opposite

direction. She said that the victim turned around, got behind them, passed them and then stopped sideways in front of them. She said that she told the victim to leave her alone and that the victim pointed at the defendant and remarked that he was not afraid of her boyfriend. Gilland said that the defendant did not make any violent gestures toward the victim during the incident.

Gilland testified that she lived with the defendant for approximately three weeks or a month and that she dated the defendant from June 18, 1992, until the end of July when he announced that Paxton was moving back in with him. She said that she started staying at the defendant's house because she was afraid of the victim. Gilland said that the victim told her that he would have "black-out spells" where he would hurt people and then not remember what he had done. The victim had come to her house one night after he had been drinking and had suggested to some of his friends that they go with him to rape her. She told the defendant about the victim coming to her house at night and told the defendant about an incident when the victim grabbed her by the ankle and pulled her off her porch. She also recalled telling the defendant about harrasing phone calls she had received from the victim and about how the victim would follow her to work and spy on her. Because of her fear of the victim, she had her cousin, a police officer, escort her to the defendant's house on several occasions when the defendant was out of town.

Gilland said that the defendant was aware that the victim could cause trouble for him. She testified that she told the defendant to be careful and not to be surprised if he received threatening phone calls from the victim. She recalled that the defendant told her that he would shoot the victim if the victim "came up there messing around."

Gilland testified that she did not have any contact with the defendant during the time Paxton was living with him. She recalled that the victim contacted her in late August and requested that she do him a favor by going out with the defendant. She recalled that she and the defendant renewed their friendship in late September and had planned to go to a movie together on the night of the shooting.

With respect to the events on the day of the shooting, Gilland recalled that she called the defendant around 3:00 p.m. to verify their movie plans and told him that she was going home to take a nap. She said that she then went home and made a phone call. As she was rolling over to take a nap she heard Chief Deputy Huffine on the scanner discussing something that had happened in the community where the defendant lives. A short time later, the defendant called her and told her that she would have to testify that the victim threatened his life. The defendant related to her that the victim accompanied Paxton to get her mail and that he told them to leave. The defendant told her that the victim got out of the car and started toward him and that he fired two shots and then shot the victim.

The T.B.I. agent who processed the gunshot residue tests that were performed on the defendant and the victim also testified. He said that the results of the victim's gunshot residue test were inconclusive and that the defendant's test indicated that he could have fired, handled, or was near a gun when it fired.

I

The defendant contends that the evidence is insufficient to support his conviction for voluntary manslaughter because the proof established that he acted in self-defense. Our standard of review when the sufficiency of the evidence is questioned on appeal 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 beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

The defendant correctly asserts that the state has the burden of negating any defense raised by supporting evidence. See T.C.A. § 39-11-201. However, the evidence at trial showed that although the defendant was wearing a nail pouch with a hammer and a bar in it, he entered the garage and got his gun before the victim even got out of the car. The defendant was indicted for second degree murder, but the jury convicted him of the lesser offense of voluntary manslaughter. In this respect, the evidence justifies the jury concluding that the victim adequately provoked the defendant but that the severity of the defendant's response went beyond that necessary to defend himself. We hold that the evidence was sufficient to convict the defendant of voluntary manslaughter and that the state sufficiently overcame the defendant's self-defense claim.

II

The defendant contends that the trial court erred by refusing to redact certain excerpts from his interviews with police that improperly suggest that the defendant had a duty to retreat. The defendant challenges the following colloquy from his first interview with police:

Q: I need to ask you a question and I want you to think about the answer before you answer it, okay? Was your garage door open when they got there?

A: Yes.

Q: Would it have been easier to just step inside the garage and shut the garage door? Would that have protected you from him?

A: That wouldn't have protected my property and my car. Not necessarily. She had a set of keys to them doors when she moved out.

The defendant challenges the admission of a similar exchange that took place during his second interview:

Q: Okay, when you seen Randy, he was standing six to eight feet from you, swingin'. At that point why didn't you just go in the house and lock the door and call the Sheriff's Office.

A: I guess we'd just come so close to this confrontation so many times it was time to settle it.

Q: Did that ever enter your mind? Just goin' in the house and closing the door and locking it?

A: No.

We agree with the defendant that he did not have a duty to retreat. T.C.A. § 39-11-611(a). However, based on our supreme court's analysis in State v. Renner, 912 S.W.2d 701 (Tenn. 1995), we conclude that the trial court properly admitted the excerpts from the interviews because they were relevant to whether the defendant acted in self-defense when he shot the victim.

In Renner, the defendant allegedly feared the victim because he heard the victim loading a firearm in another room and knew that the victim was on drugs. He claimed that he shot the victim as he was trying to leave the apartment where they both were. The state questioned Renner at trial about a door he could have used to exit the apartment without confronting the victim. Like the defendant in this case, the defendant in Renner argued that the line of questioning was improper because it suggested to the jury that he had a duty to retreat if he could do so safely. The supreme court acknowledged that there was no duty to retreat but held that the questioning was admissible because it was relevant to whether the defendant acted in self-defense.

The court reasoned that the legislature adopted the “true man” doctrine when it enacted the portion of T.C.A. § 39-11-611(a) that provides that “[t]here is no duty to retreat before a person threatens or uses force.” Renner, 912 S.W.2d at 704. “Under the ‘true man’ doctrine, one need not retreat from threatened attack of another even though one may safely do so. Neither must one pause and consider whether a reasonable person might think it possible to safely flee rather than to attack and disable or kill the assailant.” Id.

Although the court recognized that a person is not required even to consider the possibility of safely retreating before acting in self-defense under the “true man” doctrine, it held that questions concerning an available method of retreat were nevertheless admissible. The court reached its conclusion by identifying requirements for application of the “true man” doctrine and by explaining that the jury must ultimately determine whether the doctrine applies. Id. Under the court’s rationale, the “true man” doctrine only applies when (1) “the defendant is without fault in provoking the confrontation,” and (2) “the defendant is in a place where he has a lawful right to be and is there placed in reasonably apparent danger of imminent bodily harm or death.” Id. (citations omitted). Because the jury had the obligation of determining whether the defendant acted in self-defense, including the applicability of the “true man” doctrine, the court concluded that questions regarding the available method of retreat were admissible because they were relevant to the circumstances surrounding the confrontation, the reasonableness of the defendant’s actions, and the reasonableness of the defendant’s perception of imminent danger. Id.

The excerpts of the interviews in this case are likewise relevant to whether the defendant acted in self-defense and thus were properly admitted. Under Renner, the jury was entitled to consider the fact that the defendant could have retreated even though he did not have the duty to do so.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

Joseph M. Tipton, Judge

CONCUR:

Joe B. Jones, Presiding Judge

Walter C. Kurtz, Special Judge