

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JULY SESSION, 1997

FILED
September 9, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

VS.)

MALCOMB WAMPLER,)

Appellant.)

C.C.A. NO. 03001-9608-CR-00325

SULLIVAN COUNTY

HON. JERRY R. BECK
JUDGE

(Aggravated Assault)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF SULLIVAN COUNTY

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant appeals as of right from his conviction entered on a jury verdict finding him guilty of aggravated assault.¹ In this appeal, he argues that the evidence presented at trial was insufficient to support a finding that he (1) caused the victims to reasonably fear imminent bodily injury, or (2) that he used or displayed a deadly weapon. We disagree and affirm the judgment of the trial court.

Shortly before midnight on February 16, 1995, the Bristol, Tennessee Police Department received a telephone call from a woman reporting a disturbance at a residence located in Bristol. The caller reported that there was an intoxicated person, later identified as the Defendant, who was on the premises and would not leave. Two police officers were dispatched to the home and were told that the Defendant was in a garage apartment or work shed located behind the house. The Defendant's uncle, who was the caller's boyfriend, was in the shed with him. As the officers approached the work shed, the Defendant came out the door waving a pistol which appeared to be a .45 caliber semi-automatic. As the lead officer "hit the ground," the Defendant, who was standing about twenty feet from the officers, pointed the pistol at the head of the second officer. As both officers were in the process of drawing their weapons, one of the occupants of the residence, the same woman who called the police, intervened and began to "wrestle" with the Defendant. Both officers were yelling for the

¹Tenn. Code Ann. § 39-13-102.

Defendant to drop the gun. The Defendant did drop the gun shortly thereafter. The Defendant was taken into custody at that time.

The Sullivan County grand jury indicted the Defendant for aggravated assault in that he intentionally and knowingly caused the police officers to reasonably fear imminent bodily injury by the use or display of a deadly weapon, same being one Marksman .177 caliber air pistol. A jury found the Defendant guilty. In this appeal, the Defendant challenges the sufficiency of the convicting evidence to support a finding that the victims reasonably feared the infliction of imminent bodily injury or that the weapon displayed by the Defendant was a “deadly weapon.”

When an accused challenges the sufficiency of the convicting evidence, the standard is whether, after reviewing 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 (1979). Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). Nor may this court reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

A jury verdict approved by the trial judge accredits the State’s witnesses and resolves all conflicts in favor of the State. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. Cabbage, 571 S.W.2d at 835.

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Grace, 493 S.W.2d at 476.

A person is guilty of aggravated assault who commits an assault as defined in Tennessee Code Annotated section 39-13-101 and causes serious bodily injury to another or uses or displays a deadly weapon. Tenn. Code Ann. § 39-13-102(a). Tennessee Code Annotated section 39-13-101 defines assault, in pertinent part, as intentionally or knowingly causing another to reasonably fear imminent bodily injury. Tenn. Code Ann. § 39-13-101(a)(2).

The Defendant first argues that the proof does not show that he caused the victims to reasonably fear imminent bodily injury because the pistol he “confronted” the officers with was a spring-operated dart pistol which was not loaded with a dart or any other projectile at the time of the confrontation. He argues that at the time of the confrontation he (the Defendant) was depressed and confronted the officers so that they would take his life. He also argues that at the time he went through the door to confront the officers, his uncle, who was in the shed, hollered and told the officers that it was not a real gun but was a pellet gun. He thus argues that under these circumstances, the officers were not reasonably placed in fear of imminent bodily injury, as is required under Tennessee Code Annotated sections 39-13-102(a) and 39-13-101(a)(2).

The officer at whose head the pistol was pointed described the confrontation somewhat differently. He said that he first saw the Defendant standing approximately twenty feet in front of him holding a large, black, semi-automatic looking weapon, which he perceived to be possibly a .45 caliber gun, pointed at his head. When the officer was asked what he did at that point, he responded, "I prayed. I froze, I froze for a split second because I thought I was dead. I was looking at a man who I knew was intoxicated, who was shouting obscenities at us, pointing a gun at my head, and I was expecting to see a flash." The other officer also testified that he thought the Defendant was going to shoot. Both officers testified that they did not hear anyone say the pistol was not a real gun until after the Defendant was arrested. The Defendant's own witness, his uncle, who was the owner of the gun, testified that the gun looked like a .45 caliber automatic.

We have no hesitancy in concluding that the evidence presented at trial sufficiently supports the jury's finding that the Defendant intentionally caused these officers to reasonably fear imminent bodily injury.

The Defendant also argues that the proof does not support a finding that the pistol which he used during the confrontation qualified as a "deadly weapon." Tennessee Code Annotated section 39-11-106(a)(5) defines a deadly weapon as either (A) a firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury; or (B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

A “firearm” is defined as any weapon designed, made or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use. Tenn. Code Ann. § 39-11-106(a)(11). Under this definition of a firearm, we agree that the proof in the case sub judice did not establish that the pellet pistol or dart pistol used or displayed by the Defendant was a “firearm.”

We agree, however, with the argument of the State that the proof established that the pistol used by the Defendant was a device “that in the manner of its use or intended use is capable of causing death or serious bodily injury.” Tenn. Code Ann. § 39-11-106(a)(5)(B). Serious bodily injury is defined as bodily injury which involves a substantial risk of death, protracted unconsciousness, extreme physical pain, protracted or obvious disfigurement, or protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty. Tenn. Code Ann. § 39-11-106(a)(33).

Although the proof showed that the pistol was not loaded, it was functional. The Defendant’s uncle, who was in the work shed with the Defendant that night, described the gun as a .177 caliber spring-loaded pellet gun which would also shoot darts. He said the darts the gun fired were about two inches long. They had been shooting darts at a dart board in the work shed that night at a range of about sixteen feet. He testified that if that pistol was loaded with either pellets or a dart, he would not hold it to his head and pull the trigger. The officer at whose head the pistol was pointed testified that even knowing that it was a dart or pellet gun, he would not want it fired at him because, “it can put out an eye, . . .” We believe that the evidence is sufficient to support a finding that this pistol, in the manner of its use or intended use, was capable of causing serious bodily injury.

We therefore conclude that the evidence is sufficient to support the finding by the jury of guilt beyond a reasonable doubt. The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

THOMAS T. WOODALL, JUDGE

JOHN K. BYERS, SENIOR JUDGE