

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY SESSION, 1999

FILED
May 17, 1999
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

V.

TEDDY ECHOLS, a.k.a.
TEDDY LEE ECHOLS,

Appellant.

) C.C.A. NO. 03C01-9708-CR-00342

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HAMILTON COUNTY

HON. GARY D. GERBITZ, JUDGE

(AGGRAVATED ROBBERY)

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

The Defendant, Teddy Echols (a.k.a. Teddy Lee Echols), appeals as of right his conviction in the Knox County Criminal Court for aggravated robbery. The trial court sentenced Defendant as a Range I Standard Offender to eight (8) years and one (1) month in the Tennessee Department of Correction. In this appeal, Defendant raises the following two issues: (1) whether the evidence was sufficient to establish that Defendant was the perpetrator of the crime; and (2) whether the jury instruction regarding parole eligibility release dates violated Defendant's right to due process. After a careful review of the record, we affirm the judgment of the trial court.

The facts at trial revealed that on June 7, 1996, Shirley Mangum was working at the Golden Gallon Market on Amnicola Highway in Chattanooga. Ms. Mangum testified that at approximately 1:30 a.m. she had just stocked the cooler and was back in the office area breaking down boxes when someone jerked her up, pointed a black gun to her head, and told her to open the safe. She explained to the robber that she had no way of opening the safe, so the robber began pushing the buttons on the safe but could not get it to open. The robber then told Ms. Mangum to open the cash drawer, which she did, and he took out the money. She opened up another register for him, but it contained no money. He then had Ms. Mangum hand him a large number of Newport cigarette packs. Ms. Mangum testified that as the robber exited, he proceeded in the direction of Appling Street. After the robber ran, Ms.

Mangum pushed the silent alarm. The robbery was captured on video surveillance equipment at the Golden Gallon and the videotape was shown to the jury.

When the police arrived, Ms. Mangum told Detective Patrick Hubbard that the robber was a black male and was wearing a light-colored shirt and dark trousers. She did not see his face because he was wearing a beige ski mask. She described the robber further by stating that he was approximately five feet 10 inches tall, and weighed between 150 and 160 pounds. She said that the gun he held to her head was a black automatic, and that he had taken \$91.00, mostly in one-dollar bills. She also told the detective that he had asked her for Newport cigarettes, and that she gave him what she had from behind the counter.

Officer Ervin Morgan testified that he was on Wilcox Avenue when he heard a call relating to the robbery. He proceeded to an area about four blocks from the Golden Gallon because he knew of a vacant building under construction, the Snapple Building, that might make a good hiding place for the robber. Officer Morgan turned his lights off as he pulled into the parking lot of the Snapple Building at 2501 Riverside. He turned the car off, and as he stepped out of the car, Defendant was unknowingly headed right towards him. Officer Morgan testified that Defendant was sweating, had leaves on him from running through bushes, "and was real nervous." He said that he told Defendant to put his hands in the air and that he then made Defendant lay down on the ground. At that point, Defendant started saying, "I didn't do it. I didn't do it." The officer said he recovered four to five packs of Newport cigarettes in Defendant's pants pocket, along with 34 one-dollar bills.

Defendant was wearing a dark colored shirt. When questioned by Officer Morgan about where he had been, Defendant said he was coming from his grandmother's house. A few minutes later when asked again, he said he was coming from his cousin's house. Defendant was taken to the police station and later shown a photograph of the gun recovered with the name "Teddy" etched on it, to which he snickered and giggled and claimed that it was not his.

Officer David Roddy testified that while he and Officer Carlos Woodruff were cruising with their lights off to see if they saw anyone fitting the description of the robber, they came upon Officer Morgan handcuffing Defendant. Officer Roddy testified that he then walked around the corner of the Snapple Building and noticed a pack of Newport cigarettes laying on the ground. Also behind the building, Officer Roddy observed a trail leading through a wooded area. The trail ended at a gravel parking lot adjacent to a vacant warehouse located at 1100 Appling Street. In the gravel lot, Officer Roddy discovered another pack of Newport cigarettes. Inside the large bay door of the vacant warehouse, Officer Roddy discovered a beige ski mask and a black BB pistol. The pistol had the name "Teddy" etched on the barrel. Also recovered from the warehouse was an unopened pack of Newport cigarettes. Officer Roddy never saw a shirt or any money laying on the ground or in the warehouse. The vacant warehouse was located less than fifty yards from the location of Defendant's arrest. Other Newport cigarette packs were discovered at 1002 Appling Street and on the ground at the 1000 block of Appling Street, two blocks from the Golden Gallon. Although these and other officers discovered the items, they waited on the identifications unit of the police department to actually

collect the items. Identification Officer Kevin Smith collected the aforementioned evidence and also found a pair of black gloves in the vacant building on Appling Street.

Sergeant Brian Bergenback testified that he removed one latent fingerprint from a carton of Newports he found at the crime scene and that it did not match that of Defendant's. He was unable to get any fingerprints off the other items, including the pistol.

Defendant testified at trial that he was walking from his cousin's home to his grandmother's home at the time of his arrest. He said that he had been walking for about 30 to 45 minutes because his cousin lives three or four miles from his grandmother's house. He also stated that he had in his possession only one pack of Newport cigarettes and that the police must have scratched his name on the pistol. He said he laughed when the officers showed him the picture of the gun because it would be crazy to run in and rob a store with his name on the gun. He also said that Officer Morgan was confused and incorrect when he testified that Defendant had told him he was leaving his grandmother's at one point and leaving his cousin's house at another point. Defendant testified that he got dirty because Detective Hubbard took him around the back of the building and hit him in the stomach causing him to fall down on the ground, getting dirty and ripping his shirt. Defendant further said that he never told the officer, "I didn't do it." He said that he actually hollered, "What you arresting me for?"

I. Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence as to his aggravated robbery conviction. Specifically, he asserts that the evidence is insufficient to establish him as the perpetrator of the crime.

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). This standard is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). 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); State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

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.), perm. to appeal denied, id. (Tenn. 1987). Nor may this court reweigh or reevaluate the evidence. Cabbage, 571 S.W.2d at 835. A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. Grace, 493 S.W.2d at 476.

Moreover, a criminal offense may be established exclusively by circumstantial evidence. Duchac v. State, 505 S.W.2d 237 (Tenn. 1973); State v. Jones, 901 S.W.2d 393, 396 (Tenn. Crim. App. 1995); State v. Lequire, 634 S.W.2d 608 (Tenn. Crim. App. 1981). However, before an accused may be convicted of a criminal offense based upon circumstantial evidence alone, the facts and circumstances "must be so strong and cogent as to exclude beyond a reasonable doubt every other reasonable hypothesis save guilt of the defendant." State v. Crawford, 225 Tenn. 478, 470 S.W.2d 610 (1971); Jones, 901 S.W.2d at 396. In other words, "[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." Crawford, 470 S.W.2d at 613; State v. McAfee, 737 S.W.2d 304, 306 (Tenn. Crim. App. 1987).

After a careful review of the aforementioned facts presented at trial, we find the evidence sufficient to establish Defendant as the perpetrator of the crime. Ms. Mangum testified that the perpetrator had demanded all of the Newport cigarettes, and that she handed him as many packs and cartons as she could from behind the counter. The robber left and headed toward Appling Street. At the 1000 block of

Appling Street, two blocks from the location of the robbery, an open carton of Newport cigarettes containing one pack inside was discovered on the side of the street. Another pack of Newport cigarettes was found at 1002 Appling Street. A vacant warehouse located at 1100 Appling Street had an empty carton of Newport cigarettes inside, along with an unopened pack of Newport cigarettes. In the gravel parking lot adjacent to the vacant warehouse, another pack of Newport cigarettes was found. A pack of Newport cigarettes was also found in the grass behind the abandoned building which connected to the warehouse by means of a wooded trail.

Officer Morgan was in the parking lot of the abandoned building when he observed Defendant run out from behind the building. At that time, Defendant had leaves in his hair, mud on his pants, and appeared "very nervous." Officer Morgan recovered four packs of Newport cigarettes from Defendant's front pockets, as well as 34 one-dollar bills from his pants pocket. Ms. Mangum, the store clerk, had testified that approximately \$91.00 had been stolen and that the majority of the money consisted of one-dollar bills.

Ms. Mangum had indentified the robber as wearing a beige ski mask and using a black pistol. Inside the vacant warehouse at 1100 Appling Street, a beige ski mask and a black Marksman BB pistol were discovered. Defendant's name, "Teddy," was etched on the side of the gun recovered. However, Ms. Mangum did not recall seeing the name on the side of the gun during the robbery.

Defendant was apprehended between ten and twenty minutes after Officer Morgan received the robbery call on his radio. He was apprehended approximately four blocks from the location of the robbery. Further, Defendant was apprehended less than 50 yards from the vacant warehouse in which the ski mask, pistol, and Newport cigarettes were recovered. Furthermore, upon his apprehension, Defendant began telling Officer Morgan that he “didn’t do it.”

Defendant argues that facts given by the store clerk to the police proved to be wrong and this provides reasonable doubt as to Defendant committing the offense. Specifically, Defendant first mentions Ms. Mangum reporting that the robber was wearing a light beige colored shirt at the time of the robbery but that Defendant was apprehended wearing a dark shirt. A light colored shirt was never recovered. Second, the store clerk said the robber weighed between 150-160 pounds but that he really weighed in excess of 200 pounds. Third, Ms. Mangum told the police that \$91.00 cash was taken from the store, but only \$34.00 was discovered on Defendant. Finally, Defendant’s fingerprints were not on any pieces of evidence, including the pistol and cigarettes. However, it is well-settled that the identity of an accused as the perpetrator of an offense is a question of fact for the determination of the jury. State v. Shelley, 628 S.W.2d 436, 438 (Tenn. Crim. App. 1981); State v. Livingston, 607 S.W.2d 489, 491 (Tenn. Crim. App. 1980). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury as trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). The circumstantial evidence in this

case establishes Defendant's identity as the robber beyond a reasonable doubt, and this is enough to support the conviction.

II. Jury Instruction

In this issue Defendant challenges the trial court's instruction to the jury on parole eligibility. The trial court instructed the jury in pertinent part as follows:

Although you will not be concerned with fixing any sentence, for your information only, the Court will set out ranges of sentences applicable to each of the criminal offenses described in these instructions. However, *you may weigh and consider the meaning of a sentence of imprisonment.*

The ranges of punishment as set forth in the Sentencing Act for the crime of aggravated robbery is as follows: aggravated robbery, 8 to 12 years. You are further informed that the minimum number of years a person sentenced to imprisonment for the offense must serve before reaching the earliest release eligibility date, aggravated robbery is .95 years.

The ranges of punishment as set forth in the Sentencing Act for the crime of simple robbery is as follows: simple robbery, 3 to 6 years. You are further informed that the minimum number of years a person sentenced to imprisonment for the offense must serve before reaching the earliest release eligibility date is, simple robbery, .36 years. (Emphasis added).

In State v. King, 973 S.W.2d 586 (Tenn. 1998), the defendant challenged the constitutionality of Tenn. Code Ann. § 40-35-201(b)(2) (parole eligibility statute),

claiming the statute violated separation of powers and due process. The supreme court stated the following in upholding the statute:

We conclude that Tenn. Code Ann. § 40-35-201(b)(2) does not violate the Separation of Powers Clauses of the Tennessee Constitution. Neither is the statute impermissibly vague, nor does it require a misleading jury instruction. Additionally, we are satisfied that the jury based its verdict upon the law and evidence, in accordance with the instructions of the trial court. Thus, we find that neither the Due Process Clause of the United States nor the Tennessee Constitution was violated by the jury instruction given pursuant to the statute.

Id. at 592. The court in King was careful to limit its holding to the circumstances of that case by stating the following:

Significantly, [the jury members] were additionally instructed that they were not to attempt to fix punishment for the offense and that the sentencing information was ‘for your information only.’ When the trial court explains, as it did here, that the sentencing, parole, and early release information is not to be considered in the determination of guilt or innocence, then certainly no due process violation has occurred.

Id.; but see State v. Jason M. Weiskopf, No. 02C01-9611-CR-00381, Shelby County (Tenn. Crim. App., Jackson, Feb. 4, 1998).

In Weiskopf, this Court found plain error in a jury charge almost identical to the one in this case because the jury was instructed they could “weigh and consider the meaning of a sentence of imprisonment.” Id. at 8. Under our law, the jury determines the guilt or innocence of the accused but does not determine the length of imprisonment. Id.; see also Tenn. Code Ann. § 40-35-201(a). Such an instruction as offered in Weiskopf is constitutionally infirm because the jury is permitted to base

its decision on information other than that adduced at trial. Id. at 9. The defendant in Weiskopf appealed this Court's decision and the supreme court remanded the case back to this Court in light of its more recent opinion in State v. King. However, this Court again found the jury charge given in King significantly different from the one in Weiskopf and again declared a due process violation. State v. Jason M. Weiskopf, No. 02C01-9611-CR-00381, Shelby County (Tenn. Crim. App., Jackson, Dec. 4, 1998) (Rule 11 application filed by the State on Feb. 3, 1999).

Erroneous jury instructions do not constitute reversible error in every instance, however. See State v. Bush, 942 S.W.2d 489, 505 (Tenn. 1997). In Weiskopf, the primary issue was the degree of homicide. The court found harmful error because it could not conclude that the "ridiculously low release eligibility dates for second degree murder and voluntary manslaughter [1.06 years and 0.21 years] as compared to the much higher release eligibility date for first degree murder [twenty-five (25) years] . . . had no impact upon the jury since the primary issue was the degree of the homicide." No. 02C01-9611-CR-00381, slip op. at 4 (Dec. 4, 1998 opinion).

Here, the trial court charged the jury with the instruction provided in Weiskopf, i.e., that the jury may "weigh and consider the meaning of a sentence of imprisonment." The primary issue for the jury in the case sub judice was identity, not the degree of the crime of robbery. The State presented a strong case of aggravated robbery, as discussed in the previous issue. In our view, this was not a case in which the jury may have imposed a guilty verdict for aggravated robbery

in order to ensure that Defendant serve a greater sentence (.95 years as opposed to .36 years). Thus, the trial court's error in offering the parole eligibility instruction in this case was harmless beyond a reasonable doubt. See State v. Adrian Wilkerson and Steven Murphy, No. 01C01-9610-CR-00419, Davidson County (Tenn. Crim. App., Nashville, Aug. 26, 1998) (Rule 11 application filed on behalf of Steven Murphy on Oct. 16, 1998) (pro se application filed by Adrian Wilkerson on Oct. 27, 1998).

Based on all the foregoing, we affirm the judgment of the trial court.

THOMAS T. WOODALL, Judge

CONCUR:

JERRY L. SMITH, Judge

L. T. LAFFERTY, Senior Judge