IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 21, 2023

STATE OF TENNESSEE v. ANTONIO J. HURT

Appeal from the Circuit Court for Rutherford County
No. 82753 Barry R. Tidwell, Judge

No. M2021-01139-CCA-R3-CD

Antonio J. Hurt, Defendant, was indicted by a Rutherford County Grand Jury for attempted first degree murder, employing a firearm during a dangerous felony, aggravated assault, and reckless endangerment after a shooting at a barber shop. After a jury trial, Defendant was convicted of the lesser included offense of attempted voluntary manslaughter and employing a firearm during a dangerous felony. The trial court entered a nolle prosequi on the aggravated assault charge, and the State withdrew the reckless endangerment charge. Defendant was sentenced to an effective sentence of 8 years. Defendant filed a motion for judgment of acquittal. Defendant filed a pro se premature notice of appeal in the trial court. The trial court denied the motion for judgment of acquittal. Defendant filed an untimely notice of appeal in this Court. This Court waived the timely filing of the notice of appeal. On appeal, Defendant complains about the sufficiency of the evidence, the admissibility of certain testimony of two witnesses, and statements made by the prosecutor during closing argument. After a review, we determine the evidence was sufficient to support the convictions and that Defendant is not entitled to plain error review of the remaining issues. Accordingly, the judgments of the trial court are affirmed. However, the matter is remanded to the trial court for entry of a judgment form dismissing the count of the indictment for reckless endangerment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which JOHN W. CAMPBELL, SR., and TOM GREENHOLTZ, JJ., joined.

Joshua T. Crain (at trial), and Cody F. Fox (on appeal), Murfreesboro, Tennessee, for the appellant, Antonio Jerrell Hurt, II.
Jonathan Skrmetti, Attorney General and Reporter; Brooke A. Huppenthal, Assistant Attorney General; Jennings H. Jones, District Attorney General; and John C. Zimmerman, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In June of 2019, Defendant was indicted by the Rutherford County Grand Jury for one count of attempted first degree murder, one count of employing a firearm during a dangerous felony, one count of aggravated assault, and one count of reckless endangerment for his role in the shooting of Eric Ortiz, co-owner of Eclips Barber Shop.

Mr. Ortiz was 46 years old at the time of trial. He explained that he and his wife Alicia owned the Eclips Barber Shop on Northwest Broad Street in Rutherford County in November of 2018. The shop had been in the same location for about five years at that time.

Defendant also testified at trial. He explained that he was originally from Memphis and moved to Murfreesboro in about 2013 to attend Middle Tennessee State University. Defendant had a barber's license before moving to Murfreesboro. In the early part of 2018, Defendant went to the shop owned by Mr. and Mrs. Ortiz looking for work as a barber. Defendant entered into an arrangement with Mr. and Mrs. Ortiz to rent one of the barber chairs, a common practice in the industry. Mr. and Mrs. Ortiz allowed Defendant to rent the chair at a weekly rate of $150. In September of 2018, Defendant announced to Mr. and Mrs. Ortiz that he wanted to cut back his barber hours and work part-time in the shop because he wanted to "pursue [his] interests in real estate and school." Defendant asked if his weekly rate would remain the same despite his shortened hours. Mr. Ortiz told him that the price to rent the chair would remain the same. Defendant gathered his belongings and left the shop the next day without communicating with either Mr. or Mrs. Ortiz. Defendant eventually returned his shop keys and told Mr. Ortiz that he would be "moving on." After leaving Eclips, Defendant started working at Varsity Barber Shop. Mr. and Mrs. Ortiz did not see or speak to Defendant for the next several months.

On November 2, 2018, a client who saw both Mr. Ortiz and Defendant for haircuts went to see Defendant at Varsity Barber Shop. The client asked Defendant what was "going on between [him] and [Mr. Ortiz]. He's saying some things about you. And they are not good." Defendant expressed his confusion while he listened to the client talking. Later that day, Defendant was on his way to "get some lunch" and thought he "needed to go speak with [Mr. Ortiz] about [the] situation."

Defendant explained that he was armed that day with a gun he purchased at Middle Tennessee Pawn and Loan but admitted that he did not have a permit for the gun. Defendant explained that he had the firearm for "protection" because he was working at the barber shop by himself that day.

At around 2:00 p.m., Mr. and Mrs. Ortiz were working at the shop when Defendant entered the shop. Defendant had a handgun visible in his waistband. The hammer of the gun was cocked. Despite the loaded weapon in his waistband, Defendant testified that he had no intent to engage in violence when he entered the shop.

Mr. Ortiz also carried a gun in his back pocket. Mr. Ortiz explained that "just that morning[,] there was another incident, which I think was related to [Defendant]." Counsel for Defendant objected to the statement by Mr. Ortiz and the trial court held a jury out hearing. During the hearing, counsel for the State explained that Mr. Ortiz would likely testify that on the morning of the incident, a "suspect came into the barber shop in a threatening manner" and that is why Mr. Ortiz was armed. Counsel for Defendant requested a mistrial. The trial court denied the motion, instead issuing a curative instruction in which he admonished the jury to disregard Mr. Ortiz's testimony about the other incident.

Once Defendant entered the shop, Defendant told Mr. Ortiz, "I'm only going to tell you this once. Stop talking about me." Two customers, Christopher Cantrell and Paul Wisdom, confirmed that Defendant asked Mr. Ortiz to stop talking about him. Mr. Ortiz informed Defendant that he had not been "talking" about him. Mr. Ortiz testified that both he and Defendant repeated themselves, Defendant demanding that the Ortizes stop talking about him and Mr. Ortiz insisting that he was not talking about Defendant. Ms. Ortiz interjected, asking Defendant what he was talking about. Defendant repeated himself for a third time, again demanding that they stop talking about him. Defendant testified that after both Mr. and Mrs. Ortiz denied talking about him, he realized that "there was no reason to keep on going back and forth" so he "turned to try to leave" when he saw Mr. Ortiz running toward him with his hand "toward his back like reaching for his back."

Mr. Ortiz, on the other hand, stated that he saw Defendant's gun, put his hands up in the air while holding clippers in one hand and a brush in the other hand, and moved toward Defendant.

Defendant testified that he was concerned when Mr. Ortiz moved toward him because he was "coming towards" him "fast." Defendant knew Mr. Ortiz "kept guns in the shop" and claimed he saw Mr. Ortiz reaching behind himself as if he were trying to grab something. Defendant remembered Mr. Ortiz's head butting him in the chest before Defendant "fell backward[], [and he] pulled [his] firearm."

Another customer, John Leija, could not identify Defendant as the shooter at trial. Mr. Leija testified that he saw the shooter enter the front door and "start[] yelling." Mr. Leija recalled that someone yelled that the shooter had a gun and "[e]verybody stood up and ran out to the front." Mr. Leija thought he saw the shooter pointing a gun at Mr. Ortiz.

Mr. Leija knew he could not go out the front of the shop to get to safety because Mr. Ortiz and the shooter were "right there in front" of him.

Mrs. Ortiz testified that Mr. Ortiz was concerned about the safety of the other customers and "immediately charged" Defendant and tried to take the gun from him by grabbing Defendant's arms and wrists. Mr. Leija saw Mr. Ortiz try to get the gun away from the shooter. Mr. Ortiz got his hands on the gun and tried to cock the gun to jam it. Both Mr. Cantrell and Mr. Wisdom described the men's actions as wrestling. Mr. Ortiz was on his knees, facing away from Defendant.

Defendant testified that they wrestled over the gun and that he managed to get away from Mr. Ortiz when the "firearm discharged," shooting Mr. Ortiz in the abdomen. Mr. Leija was able to exit the shop through the back door. He heard the gunshot and called 911.

The bullet went through Mr. Ortiz's liver, diaphragm, gallbladder, and kidney. As a result of the shot, Mr. Ortiz fell to the ground. Defendant testified that he did not fire a second shot but Mr. Ortiz testified that Defendant tried to shoot him again but the gun jammed.

Mr. Ortiz managed to get up, but Defendant was already outside on the way to his car, which was parked in the middle of the shopping center in front of the shop. Mrs. Ortiz yelled at Defendant, "Did you really just F'ing shoot my husband?" Defendant told Mrs. Ortiz that they "shouldn't have been talking about [him]" before he "messed with the gun for a minute." Then, Defendant left in his car.

When Mrs. Ortiz got back inside, she could tell Mr. Ortiz was struggling to breathe from his injuries. Mrs. Ortiz removed the handgun from her husband's pocket and placed it in a lockbox along with another handgun.

When officers arrived, they started treating Mr. Ortiz's injuries before EMS could get to the location of the shooting. Mr. Ortiz was transported to the local hospital but eventually transported via life-flight to Vanderbilt for surgery to remove his gallbladder, repair his diaphragm, and stop his liver from bleeding. Doctors were unable to remove a bullet lodged in Mr. Ortiz's back. After three months, Mr. Ortiz was mostly recovered by the time of trial, although he still felt pain from the shooting.

Mr. Ortiz returned to work after he was discharged from the hospital. He recalled that there were occasionally strangers "showing up" at the shop. The instances made Mr. and Mrs. Ortiz feel uncomfortable because the strangers spoke to clients, asked a lot of questions, and asked about Defendant. Mr. Ortiz developed several "conspiracy theories"

which he reported to the police. None of these theories were ever substantiated by authorities.

About a month after the shooting, Mr. and Mrs. Ortiz saw two strangers trying to open the lock on a gated fence outside their home. Mr. and Mrs. Ortiz turned on their home's exterior lights and saw the strangers take off in a car, leaving skid marks on their driveway. Mr. and Mrs. Ortiz closed Eclips after the incident and moved to Gatlinburg. Defendant turned himself in to the police after the incident.

At the conclusion of the jury trial, Defendant was convicted of the lesser included offense of attempted voluntary manslaughter and employing a firearm during the commission of a dangerous felony. The trial court entered a nolle prosequi on the charge of aggravated assault. There is no judgment form in the record for count 4, reckless endangerment, but the special conditions box for the judgment form in count 3 indicates that count 4 was "dismissed."[1] After a sentencing hearing, the trial court sentenced Defendant to two years as a Range I, standard offender for attempted voluntary manslaughter, and a mandatory consecutive six years at 100% for employing a firearm during the commission of a dangerous felony, for an effective sentence of 8 years.

Rather than a motion for new trial, Defendant filed a motion for judgment of acquittal in which he argued that the evidence was insufficient to sustain his conviction for attempted voluntary manslaughter. Defendant also filed a waiver of motion for new trial. Defendant filed a pro se notice of appeal in the trial court. The trial court denied the motion for judgment of acquittal on June 23, 2021. After an untimely notice of appeal was filed in this Court, this Court waived the timely filing of the notice of appeal.

Analysis

On appeal, Defendant first challenges the sufficiency of the evidence. Specifically, Defendant argues that he did not have the "intent necessary to sustain his conviction for attempted voluntary manslaughter" as evidenced by his actions in response to "disparaging statements" of Mr. Ortiz and being "rushed, knocked down, and engaged in a struggle" with Mr. Ortiz before pulling the trigger. Concerning his conviction for employing a firearm during a dangerous felony, Defendant argues that his possession of a firearm "did not arise to a criminal act to sustain his conviction." Defendant insists that he did not "brandish a firearm until he felt threatened" so the proof established that he used the firearm in self-defense. The State disagrees, arguing that the evidence is sufficient.

[1] On remand, the trial court should enter a judgment form dismissing count 4 as directed by our supreme court in *State v. Berry*, 503 S.W.3d. 360, 364 (Tenn. 2015) ("For charges resulting in a not guilty verdict or a dismissal, the trial court should 'enter judgment accordingly' as to the respective count.") (citing Tenn. R. Crim. P. 32(e)(3)).

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The jury's verdict replaces the presumption of innocence with one of guilt; therefore, the burden is shifted onto the defendant to show that the evidence introduced at trial was insufficient to support such a verdict. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). The prosecution is entitled to the "strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom." *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (quoting *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). It is not the role of this Court to reweigh or reevaluate the evidence, nor to substitute our own inferences for those drawn from the evidence by the trier of fact. *Reid*, 91 S.W.3d at 277. Questions concerning the "credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact." *State v. Wagner*, 382 S.W.3d 289, 297 (Tenn. 2012) (quoting *State v. Campbell*, 245 S.W.3d 331, 335 (Tenn. 2008)). "A guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory." *Reid*, 91 S.W.3d at 277 (quoting *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997)). The standard of review is the same whether the conviction is based upon direct evidence, circumstantial evidence, or a combination of the two. *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011); *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009).

Defendant was charged with attempted first degree murder. However, the jury found Defendant guilty of the lesser-included offense of attempted voluntary manslaughter. "Voluntary manslaughter is the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." T.C.A. § 39-13-211(a). One is guilty of attempted voluntary manslaughter when he acts "with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part." T.C.A. § 39-12-101(a)(2). Voluntary manslaughter is considered a result-of-conduct offense. *State v. Page*, 81 S.W.3d 781, 788 (Tenn. Crim. App. 2002). "If an offense is defined in terms of causing a certain result, an individual commits an attempt at the point when the individual had done everything believed necessary to accomplish the intended criminal result." T.C.A. § 39-12-101, Sent. Comm'n Cmts. A person acts intentionally "when it is the person's conscious objective or desire to engage in the conduct or cause the result." T.C.A. § 39-11-302(a). The question of whether a killing or attempted killing is committed under adequate provocation is a question of fact for the jury. *State v. Johnson*, 909 S.W. 2d 461, 464 (Tenn. Crim. App. 1995).

Viewed in a light most favorable to the State, the proof in this case established that Defendant rented a chair at the shop owned by Mr. and Mrs. Ortiz for several months and left after they refused to lower his weekly rental. After he left, Defendant started working at a new barber shop and heard from a client that the Ortizes were saying bad things about him. Defendant entered the barber shop owned by Mr. Ortiz and his wife with a cocked handgun in the waistband of his pants and began immediately to accuse Mr. Ortiz of talking about him. Defendant repeated himself several times despite Mr. and Mrs. Ortiz's insistence that they were not talking about him. Mr. Ortiz approached Defendant and the men wrestled over Defendant's gun. Defendant then shot Mr. Ortiz. Mr. Ortiz claimed Defendant tried to shoot Mr. Ortiz a second time but the gun did not fire. Defendant did not render aid to Mr. Ortiz, instead exiting through the front door. On his way out, Defendant told Ms. Ortiz that they "shouldn't have been talking about [him]." Then, Defendant got into his car parked just outside the door and drove away. In our view, the evidence is amply sufficient for the jury to find Defendant guilty of attempted voluntary manslaughter.

Likewise, we find the proof adequate to support the conviction for employing a firearm during a dangerous felony in violation of Tennessee Code Annotated section 39-17-1324(b). To sustain a conviction, the jury was required to determine that Defendant employed a firearm during the commission of or attempt to commit a dangerous felony and that Defendant acted knowingly, intentionally, or recklessly. To employ a firearm means to "make use of." *State v. Fayne*, 451 S.W.3d 362, 370 (Tenn. 2014). Attempted voluntary manslaughter is a dangerous felony. T.C.A. §§ 39-17-1324(i)(1)(C); (i)(1)(M). The proof at trial showed that Defendant admitted that he possessed the firearm and that he shot Mr. Ortiz.

On appeal, Defendant insists that he acted in self-defense even though he admitted that he never saw Mr. Ortiz with a gun. Self-defense is available when a defendant has a fear of imminent danger of death or serious bodily injury, believing that the force used was immediately necessary to protect against the other person's use or attempted use of unlawful force. T.C.A. § 39-11-611(b). A defendant is not required to retreat unless engaged in an unlawful activity. *Id.*; *see State v. Perrier*, 536 S.W.3d 388, 399 (Tenn. 2017). If a defendant is engaged in an unlawful activity, a defendant must retreat, even if justified in using the weapon. *Id.* Here, the trial court determined that Defendant was engaged in an unlawful activity, carrying a handgun without a permit, but the trial court still gave the jury the self-defense instruction. The jury, by its verdict, found Defendant did not act in self-defense. There was sufficient evidence to find Defendant guilty of employing a firearm during the commission of a dangerous felony. Defendant is not entitled to relief on this issue.

Evidentiary Issues and Prosecutorial Misconduct

Defendant next argues that there were several statements made by witnesses at trial that should have been excluded and that counsel for the State made several inappropriate comments during closing argument. Defendant concedes that his failure to file a motion for new trial waived "numerous issues" for his appeal. Notably, Defendant did not object to any statements made by the State during closing argument and failed to raise any of these issues in his motion for judgment of acquittal or in a properly filed motion for new trial. The State argues Defendant has waived the issues by failing to present them to the trial court and he did not "satisfy the criteria of plain error review." We agree with the State.

Testimony from Mr. and Mr. Ortiz

First, Defendant complains that Mr. Ortiz was permitted to testify that he was armed on the day of the incident because of another incident that he thought was "related to" Defendant. Counsel for Defendant objected to this testimony and moved for a mistrial. The trial court denied the mistrial but instructed the jury to disregard the testimony. Defendant also complains that Mrs. Ortiz was allowed to testify that people were approaching and/or harassing her and Mr. Ortiz.

Defendant also complains about statements made during closing argument at trial by counsel for the State. Counsel for the State mentioned Defendant's handgun purchase, calling into question the legitimacy of the purchase because the defense did not verify how Defendant purchased the weapon. Counsel for the State exclaimed, "Whatever that place was that he claims he legally bought the gun, instead of from some thug on the street." The State also challenged Defendant's inability to provide witnesses that corroborated his allegation that Mr. and Mrs. Ortiz were gossiping about him. Counsel for the State commented that Defendant, "has a constitutional right to get on that witness stand and tell you anything he wants to tell you . . . [but] Mr. Ortiz didn't have any reason to cast [Defendant] in a bad light. Counsel for the State also questioned whether Varsity Barber Shop, Defendant's subsequent employer, would laud Defendant's employment or comment that he needed to "settle a score with the Ortizes" for "talking trash about him." Counsel for the State also pointed out that Mr. Ortiz thought Defendant "tried to shoot him a second time" but could not. Finally, counsel for the State pointed out that Defendant told Ms. Ortiz that Mr. Ortiz "got what he deserved" because he "shouldn't have been talking about me."

Defendant failed to file a motion for new trial and has thus waived review of his issues aside from the sufficiency of the evidence for his conviction. *See* Tenn. Rule App. P. 3(e) ("[I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused,

misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived."); *see also Wallace v. State*, 121 S.W.3d 652, 655 n.4 (Tenn. 2003) ("Pursuant to Tennessee Rule of Appellate Procedure 3(e), issues not specifically raised in a timely motion for a new trial, other than sufficiency of the evidence, are not reviewed on appeal."). Moreover, it is Defendant's "burden to persuade an appellate court that the trial court committed plain error." *State v. Bledsoe*, 226 S.W.3d 349, 355 (Tenn. 2007) (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)).

Rule 36(a) of the Tennessee Rules of Appellate Procedure states that "[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." "The failure to make a contemporaneous objection constitutes a waiver of the issue on appeal." *State v. Gilley*, 297 S.W.3d 739, 762 (Tenn. Crim. App. 2008). However, "when necessary to do substantial justice," this Court may "consider an error that has affected the substantial rights of a party" even if the issue was waived. Tenn. R. App. P. 36(b). Such issues are reviewed under plain error analysis. *State v. Hatcher*, 310 S.W.3d 788, 808 (Tenn. 2010).

Plain error relief is "limited to errors that had an unfair prejudicial impact which undermined the fundamental fairness of the trial." *State v. Adkisson*, 899 S.W.2d 626, 642 (Tenn. Crim. App. 1994). To be granted relief under plain error relief, five criteria must be met: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the accused must have been adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is "necessary to do substantial justice." *Id.*, 899 S.W.2d at 640-42; *see also State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000). When it is clear from the record that at least one of the factors cannot be established, this Court need not consider the remaining factors. *Smith*, 24 S.W.3d at 283.

Here, concerning the admission of Mr. Ortiz's testimony, Defendant does not specify how the plain error factors entitle him to review or relief. Moreover, there is no breach of a clear and unequivocal rule of law. The trial court sustained the objection and issued a limiting instruction. The jury is presumed to follow the instructions of the trial court. *State v. Rimmer*, 623 S.W.3d 235, 263 (Tenn. 2021); *State v. Harbison*, 539 S.W.3d 149, 163 (Tenn. 2018). Defendant is not entitled to plain error review.

With regard to the testimony of Mrs. Ortiz that strangers approached her and harassed her, Defendant fails to address which, if any, of the five factors would entitle him to relief. There was no objection to the testimony at trial. Defendant has not established

that he is entitled to plain error relief, specifically, he failed to show whether the issue was waived for tactical reasons.

Lastly, with regard to the statements of the prosecutor during closing argument, Defendant has failed to show that a clear and unequivocal rule of law was breached. The statements made by the prosecutor were connected to the evidence presented at trial. Defendant seems to argue that the jury's struggle to reach a decision, as evidenced by a hung jury after deliberation followed by a quick decision the next time the jury met indicates that the statements made during closing argument impacted the trial's outcome, but he fails to offer any clear evidence to support his argument. Moreover, a prosecutor is permitted to draw inferences from the evidence and make "colorful and forceful" argument, "as long as they do not stray from the evidence and the reasonable inferences to be drawn from the evidence or make derogatory remarks or appeal to the jurors' prejudices." *State v. Enix*, 653 S.W.3d 692, 701 (Tenn. 2022) (quoting *State v. Banks*, 271 S.W.3d 90, 131 (Tenn. 2008)). In our assessment, there was no breach of a clear and unequivocal rule of law where the prosecutor questioned Defendant's handgun purchase, the failure of the defense to present any witnesses to support his claim that the Ortizes were gossiping about him, and the failure to prove that he was working at another barber shop. Defendant is not entitled to plain error review.

Conclusion

For the foregoing reasons, the judgments of the trial court are affirmed. However, the matter is remanded to the trial court for entry of a judgment form dismissing count 4, reckless endangerment.

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TIMOTHY L. EASTER, JUDGE