IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 28, 2023 Session

STATE OF TENNESSEE v. LUTHER RAY MABE, JR.

Appeal from the Criminal Court for Hawkins County
No. 20CR152   Alex E. Pearson, Judge

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No. E2022-00149-CCA-R3-CD
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KYLE A. HIXSON, J., concurring in results only.

I fully concur with my respected colleagues' reasoning and judgment as it relates to the Defendant's sentencing issue. Regarding the Defendant's sufficiency challenge, however, I respectfully disagree with the majority's contention that the facts at trial do not support the State's theory on appeal regarding when the shotgun was taken. Specifically, I believe that the facts at trial, when viewed in the light most favorable to the State, demonstrate that the Defendant had not completed the taking of the shotgun at the time that the Defendant and the victim struggled over control of the rifle.

The victim unequivocally testified that he saw the Defendant in possession of the rifle first. Admittedly, the victim's testimony is less than clear as to when the Defendant took the shotgun. The victim testified that, at one point, he saw the shotgun in the Defendant's right hand but conceded that he did not remember "how" the Defendant obtained the weapon. Despite his lack of memory on this point, however, the victim clearly stated that the Defendant had both of his hands on the rifle when the victim attempted to take it from him. These facts, when viewed in the light most favorable to the State, allow a reasonable inference that the Defendant had not fully completed the taking of the shotgun when the struggle over the rifle ensued. I believe that the State is entitled to this reasonable inference on sufficiency review. *See State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). This inference is strengthened by the Defendant's own testimony, wherein he stated that he obtained the rifle before he took the shotgun, albeit under different circumstances than those described by the victim.

Viewed either way, the facts fully support the ultimate conclusion reached by the majority. For this narrow reason, I respectfully concur only in the judgment of the majority's opinion pertaining to the sufficiency analysis.

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KYLE A. HIXSON, JUDGE