

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs August 1, 2023

FILED

09/28/2023

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. ERIC MARTELL SMALL

**Appeal from the Circuit Court for Tipton County
No. 10644 A. Blake Neill, Judge**

No. W2022-01349-CCA-R3-CD

The Defendant, Eric Martell Small, was convicted by a Tipton County jury of evading arrest in a motor vehicle endangering others, a Class D felony; driving while license revoked, a Class A misdemeanor; violation of the financial responsibility law, a Class C misdemeanor; and violation of the open container law, a Class C misdemeanor. On appeal, the Defendant argues that the trial court erred in admitting hearsay testimony and that the evidence is insufficient to sustain his convictions. Based on our review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

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

Bryan R. Huffman, Covington, Tennessee (on appeal), and David Stowers, Covington, Tennessee (at trial), for the appellant, Eric Martell Small.

Jonathan Skrmetti, Attorney General and Reporter; Jonathan H. Wardle, Senior Assistant Attorney General; Mark. E. Davidson, District Attorney General; and Jason Poyner, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

This case arises out of a high-speed automobile police chase that originated in Tipton County and culminated with the Defendant's arrest in Shelby County. On May 24, 2020, a Munford police officer clocked a vehicle traveling 108 miles per hour in a 55 miles per hour zone, activated his lights and siren, and attempted to pull the driver over, with a second Munford police officer eventually joining the pursuit immediately behind the fleeing vehicle. After reaching speeds in excess of 120 miles per hour and watching the vehicle travel through two red lights on the outskirts of Millington, the officers ceased their pursuit. A short time later, a Millington police officer discovered the vehicle pulled behind a residence with the Defendant in the driver's seat. The Defendant's driver's license was revoked, he had no automobile insurance, and an open cup of beer was in the cupholder of the vehicle. The Defendant was subsequently indicted by the Tipton County Grand Jury for driving under the influence ("DUI"), evading arrest in a motor vehicle endangering others, driving while license cancelled/suspended/revoked, violation of the open container law, and violation of the financial responsibility law. The DUI count, however, was nolle prosequed prior to trial.

At the April 12, 2022 jury trial, Officer Patrick Blackwood of the Munford Police Department testified that on May 24, 2020, he was on routine patrol on Highway 51 when he clocked a vehicle approaching him at 108 miles per hour in a 55 miles per hour zone. He said he executed a U-turn, activated his lights and siren, which automatically started his dashboard camera, and attempted a traffic stop of the vehicle. He identified the grainy video recorded by his dashboard camera, admitted as an exhibit and published to the jury, which showed that he reached a top speed of 131 miles per hour in his unsuccessful attempt to catch up with the vehicle to conduct a traffic stop.

Officer Blackwood testified that he could see the vehicle in the distance as he attempted to catch up with it. At the intersection of Highway 51 and Joe Joyner Road, Officer Lucas Young joined the pursuit in front of Officer Blackwood with his lights and siren activated. Officer Young was "right behind the fleeing vehicle," and Officer Blackwood observed Officer Young pursuing the vehicle as it traveled southbound on Highway 51 toward Millington, going through the red lights at two intersections. When the vehicle reached the intersection of Highway 51 and Veterans Parkway in Millington, the officers made the decision to discontinue their pursuit due to traffic conditions. Officer Blackwood testified that he last saw the vehicle as it turned left at Wilkinsville Road, narrowly avoiding a collision with another vehicle. He stated that a vehicle turning left at that intersection could continue straight and dead-end at a field, or turn right and continue on Wilkinsville Road until the road ended at Easley Street.

Officer Blackwood testified that he and Officer Young were outside the city limits talking to each other when dispatch notified him that Millington police officers had located the vehicle. Within five minutes, he arrived at the location near Easley Street, where he found that the vehicle he had been pursuing was parked behind a residence on B Street. The vehicle was unoccupied, but the Defendant was in custody in the back seat of a Millington police officer's patrol car. Officer Blackwood testified that officers found a cup with a small amount of beer in the center console of the vehicle and two unopened beer containers. The vehicle, a maroon or dark red Chevrolet Impala, had an Indiana license plate and was registered to the Defendant, but the Defendant had no proof of insurance and his driver's license was revoked. Officer Blackwood testified that the Defendant's driving record reflected a residence on Brenda Drive; the residence on B Street was not linked to the Defendant.

On cross-examination, Officer Blackwood acknowledged that his dashboard camera video did not show the fleeing vehicle or Officer Young's patrol vehicle. He testified, however, that he was able to see both the Defendant's vehicle and the blue lights of Officer Young's vehicle ahead of him during his pursuit. He acknowledged that he never saw the Defendant driving the vehicle or drinking anything.

On redirect examination, Officer Blackwood testified that there was a strong smell of beer on the Defendant. He said that Officer Young was standing by at Highway 51 and Joe Joyner Road and that he joined the pursuit by turning onto Highway 51 as the Defendant was passing him. He stated that there was no driveway in the back yard of the residence on B Street and that the Defendant had to drive through the yard to reach the rear of the residence.

Sergeant Michael Blair of the Millington Police Department testified that on May 24, 2020, he received a dispatch about the Munford police officers' pursuit of a vehicle southbound on Highway 51. Shortly after he was notified that the officers had ceased their pursuit at Highway 51 and Veterans Parkway, he received a report that a resident on B Street had seen a vehicle entering the neighborhood at a high rate of speed and driving behind a residence. When he and Officer Dakota Wilkerson arrived at that location, they found a maroon or dark red Chevrolet Impala with out-of-state plates and the Defendant sitting in the driver's seat of the vehicle. No one else was in the vehicle, and he did not see anyone running from the scene. He said he determined that the Defendant did not live at the residence and did not have permission to be there. With this testimony, the State rested its case in chief.

The Defendant elected not to testify or present any proof.

Following deliberations, the jury convicted the Defendant of all four counts as charged in the indictment. The trial court sentenced the Defendant as a Range IV, career offender to twelve years for the felony evading arrest conviction, to be served concurrently to a six-month sentence for the Class A misdemeanor of driving while license revoked, for a total effective sentence of twelve years at 60% in the Tennessee Department of Correction. After the trial court overruled his motion for new trial, the Defendant filed a notice of appeal to this court in which he argues that the evidence is insufficient to sustain his convictions and the trial court committed reversible error by allowing hearsay testimony by Sergeant Blair.

ANALYSIS

I. Hearsay Statements by Police Officer

The Defendant first contends that the trial court committed reversible error by allowing Sergeant Blair to offer hearsay-based testimony that the Defendant did not live at the residence on B Street. Specifically, he argues that the trial court, after correctly ruling that the homeowner's shake of his head "no" to Sergeant Blair's query of whether the Defendant lived at the residence was inadmissible hearsay, committed reversible error by allowing Sergeant Blair to then testify that he determined that the Defendant did not live at the residence. The State argues that the Defendant has waived consideration of the issue by his failure to object to the specific testimony he now complains of on appeal. The State further argues that any error in allowing the testimony was harmless in light of the other evidence at trial, including Officer Blackwood's essentially identical testimony on the topic, which was offered without objection.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Generally, hearsay is not admissible during a trial, unless the statement falls under one of the exceptions to the rule against hearsay. Tenn. R. Evid. 802. Whether a statement fits under one of the exceptions to the hearsay rule is a question of law subject to *de novo* review by this court:

The standard of review for rulings on hearsay evidence has multiple layers. Initially, the trial court must determine whether the statement is hearsay. If the statement is hearsay, then the trial court must then determine whether the hearsay statement fits within one of the exceptions. To answer these questions, the trial court may need to receive evidence and hear testimony. When the trial court makes factual findings and credibility determinations in the course of ruling on an evidentiary motion, these factual and credibility findings are binding on a reviewing court unless the evidence

in the record preponderates against them. Once the trial court has made its factual findings, the next questions - - whether the facts prove that the statement (1) was hearsay and (2) fits under one the exceptions to the hearsay rule - - are questions of law subject to *de novo* review.

Kendrick v. State, 454 S.W.3d 450, 479 (Tenn. 2015) (citations omitted).

The record reflects the following exchange during Sergeant Blair's direct examination testimony:

Q. All right. Did you make a determination of whether or not [the Defendant] lived there?

A. While we were detaining him or just after we had detained him (chiming) - - pardon me I'm sorry - - and just after we had detained him, a gentleman came out of the back of the house; I looked up and noticed he was standing there, a Hispanic gentleman and I asked him - -

[DEFENSE COUNSEL]: I object to the hearsay, Your Honor.

[PROSECUTOR]: Well, let's wait for him to get the question out - - get the answer out.

A. I asked him, "Do you know that gentleman, does he live here?"

[DEFENSE COUNSEL]: Object to the hearsay.

BY [PROSECUTOR]:

Q. And how did the gentleman respond?

[DEFENSE COUNSEL]: Object.

[PROSECUTOR]: Can we approach?

THE COURT: Yes.

(At sidebar.)

[PROSECUTOR]: He didn't say anything. It's not hearsay, 'cause it's unspoken.

THE COURT: It's a statement.

[PROSECUTOR]: It's not a statement, it's a gesture. I think it counts as hearsay.

(Inaudible.)

(End of sidebar discussion.)

BY [PROSECUTOR]:

Q. All right, officer, did you determine that someone else lived at that address?

A. Yes, sir.

Q. And did you receive any information that [the Defendant] was allowed to be there?

A. The individual that came out shook his head when I asked him - -

THE COURT: (Interrupting)

[PROSECUTOR]: I didn't mean for him to answer that way, but - - it may be a jury instruction?

THE COURT: Yeah. Ladies and gentlemen, you'll ignore the officer's last statement about any statement that was made out of court or his references to anything or anybody that's not in the courtroom said or did.

BY [PROSECUTOR]:

Q. Could you corroborate that [the Defendant] lived there or had permission to live there in a one-word answer?

A. Yes.

Q. Did he have permission to live there?

A. No.

The Defendant cites *Kendrick* to argue that the trial court did not conduct an appropriate analysis of whether Sergeant Blair's statement that he determined that the Defendant did not live at the residence should have been excluded as inadmissible hearsay. However, as the State points out, and as the Defendant apparently concedes, the trial court appropriately instructed the jury to disregard Sergeant Blair's spontaneous hearsay testimony regarding the homeowner's non-verbal indication that the Defendant did not live at the residence. The Defendant made no complaints about the adequacy of the curative instruction, did not object to the officer's continued testimony, and did not move for a mistrial. As such, we agree with the State that the issue is waived. *See* Tenn. R. App. P. 36(b) ("Nothing 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."); *State v. Smith*, 24 S.W.3d 274, 279-80 (Tenn. 2000) ("A trial court, however, generally has no duty to exclude evidence or to provide a limiting instruction to the jury in the absence of a timely objection"); *State v. Houston*, 328 S.W. 3d 867, 881 (Tenn. Crim. App. 2010) ("[A] defendant who stands silent at a time when he could have objected to the action taken by the trial court may often be considered to have acquiesced in that particular court of action[.]").

II. Sufficiency of the Evidence

The Defendant next contends that the evidence is insufficient to sustain the convictions. Specifically, he argues that there was insufficient evidence that he was driving the vehicle or, if driving, that he had notice of the officers' lights and sirens. In support, he cites, among other things, the fact that neither Officer Blackwood nor Sergeant Blair saw him driving the vehicle. The Defendant asserts that since the misdemeanor charges were based on his driving the vehicle, if there was insufficient evidence that he was driving the vehicle, "the other charges are not supported by sufficient evidence as well." The State responds that the evidence is sufficient to sustain the convictions. We agree with the State.

When the sufficiency of the evidence is challenged on appeal, the relevant question of the reviewing court 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 (1979); *see also* Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt."); *State v. Evans*, 838 S.W.2d 185, 190-92 (Tenn. 1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992).

Therefore, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from it. *See State v. Williams*,

657 S.W.2d 405, 410 (Tenn. 1983). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). “A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient.” *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

The guilt of a defendant, including any fact required to be proven, may be predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *See State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). The standard of review for the sufficiency of the evidence is the same whether the conviction is based on direct or circumstantial evidence or a combination of the two. *See State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011).

To sustain the felony evading arrest conviction, the State had to prove beyond a reasonable doubt that the Defendant, while driving a motor vehicle, intentionally fled or attempted to elude a police officer after having received a signal from the officer to bring his vehicle to a stop and that his actions created a risk of death or serious injury to innocent bystanders, pursuing officers, or other third parties. Tenn. Code Ann. §39-16-603(b)(1); (d)(2)(B).

Viewed in the light most favorable to the State, the evidence established that the Defendant was driving 108 miles per hour when Officer Blackwood activated his lights and siren and began following the Defendant in an attempt to conduct a traffic stop. The evidence further established that Officer Young, with the blue lights on his patrol vehicle flashing, joined in the pursuit by pulling onto the highway directly behind the Defendant’s vehicle. Rather than stopping, the Defendant sped into Millington, running the red lights at two intersections and narrowly avoiding a collision with another motorist, before driving into a residential neighborhood and into the back yard of a residence. It was there that Millington police officers discovered him a short time later, still in the driver’s seat of the vehicle and with no signs of anyone else having been in the vehicle. A records check conducted by the officers revealed that the Defendant had no insurance and that his driver’s license was revoked. We, therefore, conclude that the evidence is sufficient to sustain the Defendant’s convictions.

CONCLUSION

Based on our review, we affirm the judgments of the trial court.

JOHN W. CAMPBELL, SR., JUDGE