

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs June 5, 2018

FILED
07/31/2018
Clerk of the
Appellate Courts

STATE OF TENNESSEE v. QUARTEZ GARY

Appeal from the Criminal Court for Shelby County
No. 16-02521 Chris Craft, Judge

No. W2017-01495-CCA-R3-CD

A Shelby County jury convicted the Defendant, Quartez Gary, of attempted first degree premeditated murder and employment of a firearm during the commission of a dangerous felony. The trial court sentenced the Defendant to an effective twenty-three-year sentence. On appeal, the Defendant claims that the evidence was insufficient as to the element of premeditation and that the trial court's instructions to the jury were unclear. After a thorough review of the record and applicable law, we affirm the trial court's judgments.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the Court, in which THOMAS T. WOODALL and NORMA MCGEE OGLE, JJ., joined.

Robert Golder (on appeal) and Jeff Woods (at trial), Memphis, Tennessee for the appellant, Quartez Gary.

Herbert H. Slattery III, Attorney General and Reporter; Brent C. Cherry, Senior Counsel; Amy P. Weirich, District Attorney General; and Christopher J. Lareau, Assistant District Attorney General for the appellee, State of Tennessee.

OPINION

This case arises from the Defendant shooting the victim, DeAndre Graham, thirteen times. For this offense, a Shelby County grand jury indicted the Defendant for attempted first degree premeditated murder and employment of a firearm during the commission of a dangerous felony.

I. Facts

At the Defendant's trial on these charges, the parties presented the following evidence: The victim testified that he was twenty-eight years old and a native of Memphis. He testified that he knew the Defendant and that the Defendant had shot him thirteen times in June 2015. He had known the Defendant for approximately two years, through another mutual friend, and called the Defendant "Sleepy." On the night of the incident, the victim finished work and called the Defendant to go out drinking. The victim told the Defendant that his pay check had "hit" his account, so the victim would pay for everything. The two men were drinking together and, at some point during the evening, the victim passed out and woke up in the passenger seat of the Defendant's car, a blue Impala. The vehicle was parked in the driveway of someone's home, and the victim believed the Defendant was inside the home. The victim knocked on the door of the home, and the Defendant answered the door "in a real rage." The victim assumed that he and the Defendant were "fixing to have a regular little argument and walk back to the car," but the Defendant got in the car, locked it, and drove away without allowing the victim to get in.

The victim walked to a friend's, Terrance's, house, and as he walked up the driveway, the Defendant pulled up in the car. An argument between the Defendant and the victim ensued, and the victim declined a ride home from the Defendant. The victim turned away from the Defendant, and when he did he "heard a pistol cock." The victim "tried to turn around" to defend himself and when he did the Defendant shot him in the back of the leg, breaking his femur bone. The victim fell to the ground. He tried to get up but kept falling, so he attempted to crawl away. The victim crawled around the car, where he was met by the Defendant who "just got to shooting." The victim remembered hearing four or five shots. He was shot in the head and could not see because of blood in his eye. The Defendant was "trying his best" to "unjam the pistol" at that point and the victim began "pleading" with him to stop shooting. He told the Defendant that he would not identify the Defendant as the shooter but would say it was a drive by shooting if the Defendant stopped. The Defendant replied by saying that the victim "had to die," all while the Defendant continued to attempt to unjam the gun, which the victim described as the Defendant "clicking it." While the Defendant was "clicking" the gun, he "got to beating the victim over the top of [his] head with the joint." The Defendant started "panicking," "stomping" the victim and telling him to be quiet.

The Defendant shot the victim "a couple more times" until the gun jammed again. At this point, the victim decided to play dead, so the Defendant would stop shooting. The Defendant then walked away briefly before returning to where the victim was lying and shot him two more times in the leg. The victim heard the Defendant drive away, at which point he threw acorns at the door of his friend's home until his friend's mother came out. His friend's mother asked him who had shot him and the victim replied, "Sleepy." The victim assumed he was going to die, and he wanted someone to know who had shot him.

The victim agreed that he had prior convictions for attempted aggravated robbery and attempted aggravated burglary. The victim testified that, as a result of the shooting, he suffered permanent injuries to his hands and was injured in other areas of his body, including his neck. At the time of trial the victim remained in physical therapy for his injuries. He also stated that he was paranoid and suffered from post-traumatic stress disorder. The victim testified that in September of 2015, three months after the incident, he went to the police station to identify the Defendant in a photographic lineup and to give a statement. In the statement, he wrote that the Defendant had shot him thirteen times, including three times in the head.

On cross-examination, the victim clarified that the Defendant was “a friend through a friend” and that they were just acquaintances. The victim agreed that on the night of the incident, he got drunk and smoked marijuana. He stated that he might have taken a pain pill. The victim testified that he fell asleep in the vehicle because he was tired and high.

Helen Streeter testified that the victim was shot outside her house in June of 2015. She recalled that the shooting occurred around 5:45 a.m. She was folding clothes inside her house when she heard several gunshots outside her door. She looked out her door and saw the victim standing up against her garage; she had known the victim a long time as a friend of her son. Ms. Streeter also saw the individual who shot the victim. As she watched, the victim was shot again, and he fell to the ground. He was then pistol-whipped on his head before he was shot again and then pistol-whipped some more. She said that there was enough daylight for her to see clearly. She could not hear anything the victim or the shooter said during the incident. After the Defendant drove away, Ms. Streeter went outside into her driveway to speak to the victim, and she called an ambulance for him. The victim said to her, “please help me, don’t let me die like this.” Ms. Streeter asked the victim who had shot him and he replied, “Sleepy.” She identified the Defendant in the courtroom as the man who shot the victim. She had seen him around the neighborhood a few times. Ms. Streeter stated that she heard at least ten gunshots. She later gave a written statement to police and identified the Defendant in a photographic lineup.

On cross-examination, Ms. Streeter testified that she knew who the Defendant was from the neighborhood but that she asked the victim who had shot him because that was the question the paramedics were asking him.

Officer Elizabeth Kirby testified that she responded to the scene and found the victim lying in the driveway. He advised that he had been shot by “Sleepy.” The victim was going in and out of consciousness. He was very bloody and had gunshot wounds to his head. She stated that he gave no description of the shooter.

Officer David Galloway testified that he was the crime scene officer who responded to the scene of the shooting, meaning he sketched a diagram of the scene as well as photographed it, and collected evidence from the scene to be logged. The victim had been transported to the hospital by the time he arrived. From the scene he recovered 9 millimeter shell casings.

On cross-examination, Officer Galloway listed the other items of evidence he recovered from the scene: a beer can, one dice, a necklace, a watch, a receipt, \$118 cash, a rag, an envelope, a debit card, some items of clothing, eight 9 millimeter spent shell casings, three metal “fragments,” and two 9 millimeter unspent casings. He also recovered approximately ten grams of marijuana and a pistol grip.

The Defendant testified that he had known the victim for six years and that, on the day of the incident, he got a call from the victim around 8:00 p.m. asking the Defendant to “hang out.” They drove to a mutual friend’s home in the Defendant’s vehicle, where the group smoked marijuana and drank alcohol. They stayed for approximately twenty minutes before leaving for “Terrance’s” house, who the Defendant said lived with Ms. Streeter. The men stayed at Terrance’s house for most of the night, during which time the victim left in the Defendant’s vehicle on multiple occasions to purchase drugs while the Defendant stayed at Terrance’s house. At one point, the group traveled to the Drury Inn to purchase more drugs, cocaine, and marijuana, after which the Defendant took the victim home. The victim wanted the Defendant to drive him around in circles, and the Defendant wanted to charge him for gas money, which angered the victim. The Defendant then drove to Ms. Streeter’s house, also Terrance’s house, and stopped in her driveway where both men got out of the vehicle. An argument over the money ensued, and the victim pulled a gun on the Defendant. A “tussle” began with both men fighting for the gun and then the gun “started going off.” The Defendant stated that he was “fight[ing] for [his] life” and panicking. The Defendant eventually took the gun from the victim and removed the clip and the remaining bullets. He did this so the victim would not shoot him as he left the driveway. He walked to his vehicle to call the police but his phone was dead and then, still panicking, he drove away. The victim was fully conscious when the Defendant drove away. The Defendant stated that “sometime” during the wrestling the victim probably got shot but he could not say for certain. He said the “tussle” lasted for ten minutes.

On cross-examination, the Defendant testified that Ms. Streeter’s testimony was a lie as was the victim’s. He stated that during the struggle, the gun was firing very quickly and that both men were standing. After the Defendant emptied the bullets from the gun, he left the weapon at the scene and drove away.

B. Jury Instructions

The trial court reviewed with both parties the proposed jury instructions for first degree premeditated murder, attempt, and employing a firearm during the commission of a dangerous felony, as well as any lesser-included offenses. The Defendant declined an instruction for a lesser-included offense for employing a firearm during the commission of a dangerous felony. Both parties agreed to the omission of several pattern jury instructions, and, following the conference, both parties indicated that they were satisfied with the trial court's proposed instructions for each charge. During deliberations, the jury asked a question about the attempted first degree premeditated murder charge, prompting the trial court to reiterate its instructions.

The jury convicted the Defendant of attempted first degree premeditated murder and employing a firearm during the commission of a dangerous felony. The trial court imposed a sentence of seventeen years for the attempted first degree premeditated murder conviction and a consecutive sentence of six years for the employing a weapon during the commission of a dangerous felony conviction for an effective twenty-three year sentence. It is from these judgments that the Defendant appeals.

II. Analysis

On appeal, the Defendant contends that the evidence is insufficient to support his conviction for attempted first degree premeditated murder because the State did not prove premeditation and that the trial court's instructions to the jury were confusing and misleading. The State responds that the evidence was sufficient to support the element of premeditation and that the Defendant has waived his argument with regard to the jury instructions because he failed to object to the instructions at trial and did not raise the issue in his motion for new trial.

A. Sufficiency of the Evidence

The Defendant specifically contends that the State did not prove beyond a reasonable doubt the element of premeditation on the basis that the "shooting was provoked by a verbal altercation" and that the jury heard "no evidence of preparation for the shooting, prior acquisition of the weapon, or declarations of intent to kill." The State responds that the evidence was sufficient to prove premeditation, specifically the testimony that the Defendant walked away from the victim before returning to shoot him again. We agree with the State.

When an accused challenges the sufficiency of the evidence, this court's standard of review is whether, after considering the evidence in the light most favorable to the State, "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) (emphasis in original);

see Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999) (citing *State v. Dykes*, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990)). In the absence of direct evidence, a criminal offense may be established exclusively by circumstantial evidence. *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1973). “The jury decides the weight to be given to circumstantial evidence, and ‘[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.’” *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (quoting *Marable v. State*, 313 S.W.2d 451, 457 (Tenn. 1958)). “The standard of review [for sufficiency of the evidence] ‘is the same whether the conviction is based upon direct or circumstantial evidence.’” *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

In determining the sufficiency of the evidence, this Court should not re-weigh or reevaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999) (citing *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956)). “Questions concerning the credibility of 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.” *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978) (quoting *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973)). The Tennessee Supreme Court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523, 527 (Tenn. 1963)). This court must afford the State the “strongest legitimate view of the evidence” contained in the record, as well as “all reasonable and legitimate inferences” that may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (quoting *State v.*

Smith, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

First degree murder is the premeditated and intentional killing of another person. T.C.A. § 39-13-202(a)(1) (2014). A premeditated killing is one “done after the exercise of reflection and judgment.” T.C.A. § 39-13-202(d) (2014). “A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense . . . [a]cts 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) (2014). Restated, a conviction for attempted first degree murder requires proof that the defendant intended to kill the victim “after the exercise of reflection and judgment” and either intentionally engaged in the conduct constituting the offense, believed the conduct would cause the intended result without further conduct, or the conduct constitutes a substantial step toward the commission of the offense. T.C.A. § 39-13-202(d); *See* T.C.A. § 39-12-202(a)(1) and § 39-12-101.

The element of premeditation is a question of fact for the jury. *State v. Davidson*, 121 S.W.3d 600, 614 (Tenn. 2003). Although the jury may not engage in speculation, it may infer premeditation from the manner and circumstances surrounding the killing. *State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997). In *State v. Nichols*, 24 S.W.3d 297, 302 (Tenn. 2000), our supreme court delineated the following circumstances from which a jury may infer premeditation:

Declarations by the defendant of an intent to kill, evidence of procurement of a weapon, the use of a deadly weapon upon an unarmed victim, the particular cruelty of the killing, infliction of multiple wounds, preparation before the killing for concealment of the crime, destruction or secretion of evidence of the murder, and calmness immediately after the killing.

The jury may also infer premeditation from the establishment of a motive for the killing and the use of multiple weapons in succession. *State v. Leach*, 148 S.W.3d 42, 54 (Tenn. 2004). The firing of multiple shots can allow a jury to infer premeditation. *State v. Halake*, 102 S.W.3d 661, 669 (Tenn. Crim. App. 2001) (“Additionally, in the instant case the victim was shot multiple times, which although not indicative of premeditation when considered by itself, can be considered as evidence of premeditation in addition to other proof of premeditation.”)

We conclude that the evidence, viewed in the light most favorable to the State, was

sufficient for a rational trier of fact to find the Defendant's conduct constituted a substantial step towards the killing of the victim, as evidenced by his using a gun to shoot the victim multiple times while the victim lay unarmed on the ground and attempting to crawl away. The evidence of premeditation was that the Defendant made multiple attempts to unjam the gun after having already shot the victim and walked away from the victim lying on the ground before returning to shoot him at least two more times. The Defendant also stated that the victim "had to die." This is evidence from which a jury could find beyond a reasonable doubt that the Defendant was guilty of attempted first degree premeditated murder. The Defendant is not entitled to relief on this issue.

B. Jury Instructions

The Defendant next contends that the trial court's instructions to the jury were confusing to the jurors. He contends that the instructions led them to "erroneous and prejudicial conclusions" that the Defendant was charged with first degree premeditated murder. He acknowledges that the jury instructions for this charge "generally" followed the pattern jury instructions but claims they failed to adequately define the legal terms relevant to this instruction. The State responds that the Defendant failed to object to the jury instructions during trial and thus he has waived this argument. The State contends that, even so, the trial court's instructions were not misleading and that its subsequent explanation was sufficient to clarify any misunderstanding the jurors may have had regarding the instructions.

We begin by noting that we agree with the State that the Defendant has waived this argument by failing to object to the jury instructions at trial, particularly when the trial court asked for the input of each party during the conference regarding the proposed instructions and regarding the supplemental instructions. *See* Tenn. R. App. P. 36(a). The Defendant also failed to raise this argument in his motion for new trial. We conclude, however, that the trial court's instructions were proper.

A trial court has the duty to fully instruct the jury on the general principles of law relevant to the issues raised by the evidence. *See State v. Burns*, 6 S.W.3d 453, 464 (Tenn. 1999); *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn. 1986); *State v. Elder*, 982 S.W.2d 871, 876 (Tenn. Crim. App. 1998). Nothing short of a "clear and distinct exposition of the law" satisfies a defendant's constitutional right to trial by jury. *State v. Phipps*, 883 S.W.2d 138, 150 (Tenn. Crim. App. 1994) (quoting *State v. McAfee*, 737 S.W.2d 304 (Tenn. Crim. App. 1987)). In other words, the trial court must instruct the jury on those principles closely and openly connected with the facts before the court, which are necessary for the jury's understanding of the case. *Elder*, 982 S.W.2d at 876. A jury instruction is considered "prejudicially erroneous," only "if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law." *State v. Hodges*, 944

S.W.2d 346, 352 (Tenn. 1997) (citing *State v. Stephenson*, 878 S.W.2d 530, 555 (Tenn. 1994)). Because questions regarding the propriety of jury instructions are mixed questions of law and fact, our standard of review here is *de novo*, with no presumption of correctness. *State v. Rush*, 50 S.W.3d 424, 427 (Tenn. 2001); *State v. Smiley*, 38 S.W.3d 521, 524 (Tenn. 2001). Even if a trial court errs when instructing the jury, such instructional error may be found harmless. *State v. Williams*, 977 S.W.2d 101, 104 (Tenn. 1998).

In this case, the trial court instructed the jury as to the charged offenses, criminal attempt, and all lesser-included offenses. It defined knowingly and intentionally. Significantly, as noted above, the Defendant agreed to the proposed instructions. The trial court's supplemental instructions mirrored its initial instructions and this supplemental response was also agreed to by the parties. We have reviewed the entire instruction and conclude that it was a proper statement of the law. The trial court's instructions track the language of the relevant statutes for first degree premeditated murder, criminal attempt, and employing a firearm during the commission of a dangerous felony, and they follow the Tennessee Pattern Jury Instructions. *See* T.P.I. Crim. 4.01, 7.01(b), 36.06 (18th ed. 2014). In our view, the instructions, both the initial and supplemental, fairly submit the legal issues and were not misleading. *See Hodges*, 944 S.W.2d at 352. Accordingly, we find no error in the trial court's instruction. This issue is without merit.

III. Conclusion

In accordance with the foregoing reasoning and authorities, we affirm the judgments of the trial court.

ROBERT W. WEDEMEYER, JUDGE