IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs November 5, 2019

STATE OF TENNESSEE v. TYRAN ROLLINS

Appeal from the Criminal Court for Shelby County
No. 17-04986 James M. Lammey, Judge

No. W2019-00192-CCA-R3-CD

A jury convicted the Defendant, Tyran Rollins, of aggravated robbery, and he was sentenced to serve eight and a half years in prison. The Defendant appeals his conviction, asserting that the evidence is insufficient to support the verdict and that the composition of the jury violated his constitutional rights. We conclude that the evidence is sufficient to support the verdict and that the issue regarding the composition of the jury has been waived. The judgment of the trial court is affirmed.

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

JOHN EVERETT WILLIAMS, P.J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and ROBERT L. HOLLOWAY, JR., JJ., joined.

Eric Mogy (on appeal) and Charles Waldman (at trial), Memphis, Tennessee, for the appellant, Tyran Rollins.

Herbert H. Slatery III, Attorney General and Reporter; Katharine K. Decker, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Jamie Kidd and Gavin Smith, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTUAL AND PROCEDURAL HISTORY

The Defendant was charged with aggravated robbery after he robbed a convenience store by putting his hand in his jacket to resemble a firearm. The Defendant was apprehended shortly thereafter, in possession of incriminating evidence, and he gave law enforcement an inculpatory statement. At trial, the defense emphasized the lack of a

firearm and argued that the store clerk was not in fear. At the motion for a new trial, the defense also asserted that the dismissal of two alternate jurors by random lottery resulted in a jury whose racial composition violated his constitutional rights.

During voir dire, the Defendant did not object to the racial composition of the venire. The trial court informed the prospective jurors that fourteen jurors would be selected to hear the trial and that subsequently two numbers, corresponding to chair numbers assigned to the jurors, would be chosen from a "bingo box" to select alternates who would not deliberate or decide the case. After the exercise of several challenges, the jury was chosen.

At trial, the victim, Mr. Marcus Strickland, testified that he was working as a cashier at a convenience store on April 18, 2017, when the store was robbed around 2:00 a.m. The victim was alone in the store when the robber entered wearing a "red bandana do-rag" and a jacket. The perpetrator stood about an arm's length away from the victim. The perpetrator made a gesture to "show the imprint of the weapon" and demanded money. The victim testified that after the perpetrator implied he had a weapon, the victim "knew he meant business" and "didn't take [any] chances." The victim identified a surveillance video, not included in the record on appeal, which showed him holding up his hands after the robber demanded money.

The victim opened the cash drawer, but the perpetrator demanded to access the safe. The victim told the perpetrator he had no access to the safe, and the man responded, "[I]f you hold out, I'm going to have to blow your ass off." The victim gave the robber money that was stored under the cash drawer. He testified that there was "about $168" in the drawer but later agreed that it might have been "around $200." The victim in particular recalled that a customer earlier in the night had paid with a $2 bill and that the bill was taken during the robbery. The perpetrator left in a candy-apple red Camaro with black rims. The victim was not harmed, and he contacted the police after the robber left. The victim acknowledged that he never saw a gun and that he saw both of the robber's hands during the robbery. He also agreed that his training in handling store robberies may have caused him to see the gesture and think it might be a gun.

Shortly after the robbery, Officer Michael Huff was alerted that an African American man driving a red Camaro with black rims was suspected in a robbery. Officer Huff saw a vehicle matching the description and followed it while requesting backup. The car stopped abruptly in the middle of the street, and Officer Huff took the Defendant into custody, believing from the police report that he might have a weapon. The Defendant was cooperative, and no weapon was found.

Officer Huff looked through the vehicle and found clothing matching the description of the suspect's clothing, including a black hooded jacket and a red bandana. A subsequent search of the vehicle pursuant to a warrant by Crime Scene Officer Newton Morgan revealed a red skull cap, tied red bandana, and gray hooded jacket in the trunk and a black stocking cap and black hooded jacket behind the driver's seat, as well as two cell phones.

Officer Huff and Officer Shaun Tucker, who arrived on the scene as Officer Huff was stopping the Defendant, took a brief look into the Defendant's wallet and found no money. A subsequent search of the Defendant's wallet conducted by Officer Tucker revealed a large sum of cash in the wallet. The wallet contained $246 in the following increments: one $2 bill; one $20 bill; six $10 bills; twenty-seven $5 bills; and twenty-nine $1 bills. Officer Tucker acknowledged that he did not know the origin of the money in the wallet.

Detective Jesus Perea responded to the scene of the crime at around 4:00 a.m., and the victim gave a statement consistent with his trial testimony. Detective Perea interviewed the Defendant around 8:30 a.m., after advising him of his constitutional rights. The Defendant did not appear to be under the influence of drugs or medication, was a high school graduate, and was able to read the advice of rights form aloud.

The Defendant appeared nervous and "upset" and acknowledged robbing the store. He stated that he had been gambling at a friend's house and needed money. As he drove by the business, he observed that it was vacant save for the clerk, and he put on the skull cap and bandana and demanded money. The Defendant recounted that he told the clerk, "[G]ive me the money or I will blow your ass off!" The Defendant denied being armed but stated, "I had my hand in my hoody to look [like] I had a gun." He said that he had taken less than $300 and that the money he took was in his wallet. The Defendant described the clothing he wore during the robbery as black jogging pants, a black "hoody," a red bandana, and a red skull cap. The Defendant fled in his Camaro, changed clothing nearby, and put the clothing used in the robbery into the trunk. He was stopped by police within the next ten minutes. The Defendant explained that he committed the robbery to help his grandmother, who suffered from lupus. The Defendant was permitted to review his written statement and make any changes, and he then signed it.

Detective Perea later obtained the video surveillance tape from the convenience store. He acknowledged that the video did not show the Defendant making a gesture indicating that he had a weapon. He agreed that the Defendant was not armed and that using a candy-apple red Camaro as a getaway vehicle was unusual.

The defense did not offer any evidence. The courtroom deputy was asked to choose two numbers, and the jurors in the corresponding seats were excused. The remaining twelve jurors found the Defendant guilty of aggravated robbery, and the trial court sentenced him to serve eight and a half years in confinement.

At the hearing on the motion for a new trial, the Defendant argued that the racial composition of the jurors who actually deliberated violated his constitutional rights. He asserted that the two alternates whose numbers were chosen were both African American and that the jury which ultimately decided the case was composed of eleven Caucasians and only one African American. The Defendant's motion observed that the selection of the alternates was "random" and "accomplished by standard procedure" and he acknowledged in argument at the hearing that the jury empaneled prior to the selecting of the alternates "would meet any standard." Defense counsel agreed that he had not exhausted his peremptory challenges but explained that he did not believe the issue arose until the alternates were excused. The trial court found that the alternates were selected by lottery and at random, and it denied the motion for a new trial. The Defendant appeals, challenging the sufficiency of the evidence and the composition of the jury.

ANALYSIS

I. Sufficiency of the Evidence

The Defendant argues that the evidence is insufficient to sustain the conviction, asserting that the State failed to show that the victim was put into fear or that the Defendant displayed an article fashioned to lead the victim to reasonably believe it to be a deadly weapon. We conclude that the evidence was sufficient to support the verdict.

This court must set aside a finding of guilt if the evidence is insufficient to support the finding of guilt by the trier of fact beyond a reasonable doubt. Tenn. R. App. P. 13(e). The question before the appellate court is whether, viewing 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. *State v. Pope*, 427 S.W.3d 363, 368 (Tenn. 2013). This court will not reweigh or reevaluate the evidence, and it may not substitute its inferences drawn from circumstantial evidence for those drawn by the trier of fact. *State v. Smith*, 436 S.W.3d 751, 764 (Tenn. 2014). The jury's guilty verdict, approved by the trial judge, accredits the State's witnesses and resolves all conflicts in favor of the prosecution. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). The trier of fact is entrusted with determinations concerning witness credibility, factual findings, and the weight and value of evidence. *Smith*, 436 S.W.3d at 764. In reviewing the sufficiency of the evidence, we afford the State the strongest legitimate view of the evidence and all reasonable inferences that can be drawn from the evidence. *State v.*

Hawkins, 406 S.W.3d 121, 131 (Tenn. 2013). "A verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient to support the verdict rendered by the jury." *Reid*, 91 S.W.3d at 277. "Circumstantial evidence alone is sufficient to support a conviction, and the circumstantial evidence need not exclude every reasonable hypothesis except that of guilt." *State v. Wagner*, 382 S.W.3d 289, 297 (Tenn. 2012).

Aggravated robbery, as charged here, is "the intentional or knowing theft of property from the person of another by violence or putting the person in fear" when the theft is accomplished "with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon." T.C.A. § 39-13-401(a); T.C.A. § 39-13-402(a)(1). Theft is committed when the perpetrator, "with intent to deprive the owner of property, … knowingly obtains or exercises control over the property without the owner's effective consent." T.C.A. § 39-14-103(a).

The State presented evidence that the Defendant entered the convenience store and demanded money. The Defendant gestured to his pocket in a way that led the victim to believe he was armed, and he told the victim, "[I]f you hold out, I'm going to have to blow your ass off." The victim testified that he "didn't take [any] chances" because he knew the Defendant "meant business." He identified himself holding up his hands in the surveillance video. The victim testified that the cash taken was around $168 to $200 and that the register contained a $2 bill. The Defendant was stopped by police soon after the robbery, in possession of a vehicle and clothing matching those used in the crime, and also holding $246 in an array of small bills, including a $2 bill. The Defendant confessed to the robbery, noting he put his hand in his jacket "to look [like he] had a gun."

The Defendant asserts that the victim's testimony regarding the gesture which led him to believe that the Defendant was armed did not establish that the Defendant used or displayed an item fashioned to lead the victim to reasonably believe it to be a deadly weapon. However, as the State notes, this court has on numerous prior occasions upheld convictions where the defendant used his hand to give the impression that he was armed. *State v. Eric Lebron Hale*, No. M2011-02138-CCA-R3-CD, 2012 WL 3776673, at *5 (Tenn. Crim. App. Aug. 31, 2012) (upholding deadly weapon element when defendant did not put his hand in his pocket or make an explicit threat but demanded money and patted his pocket to imply a weapon); *see State v. Charles Clevenger*, No. E2013-00770-CCA-R3-CD, 2014 WL 107984, at *4 (Tenn. Crim. App. Jan. 13, 2014) (citing cases); *State v. Joseph L. Johnson, Jr.*, No. M2007-01644-CCA-R3-CD, 2009 WL 2567729, at *7 (Tenn. Crim. App. Aug. 18, 2009) (noting that there was no requirement that the prosecution prove that the defendant made any particular gesture or shaped his hand in any particular way and that a generalized threat of harm rather than a particular threat to

shoot was sufficient to establish the element); *State v. Michael V. Morris*, No. M2006-02738-CCA-R3-CD, 2008 WL 544567, at *5 (Tenn. Crim. App. Feb. 25, 2008) (citing cases); *State v. Monoleto D. Green*, No. M2003-02774-CCA-R3-CD, 2005 WL 1046800, at *10 (Tenn. Crim. App. May 5, 2005) (observing that a common thread of such aggravated robberies was the concealment of the hand in an article of clothing and an express or implied threat leading the victim to reasonably believe the defendant was armed). The Defendant's own statement acknowledged, "I had my hand in my hoody to look [like] I had a gun." The victim likewise testified that the Defendant made a gesture to indicate he had a gun. The Defendant also made a verbal threat to "blow [the victim's] ass off." We conclude that, pursuant to the cases cited above, the evidence was sufficient to support the conclusion that the Defendant used or displayed an article fashioned to lead the victim to reasonably believe it to be a deadly weapon. We note that any evidence that the Defendant's hand did not remain in his pocket the entire time does not affect this analysis. *Eric Lebron Hale*, 2012 WL 3776673, at *5 (evidence was sufficient to support the deadly weapon element when the defendant did not put his hand in his pocket but patted his pocket to imply he had a weapon).

The Defendant also contests that the State established the victim was in fear.[1] Fear is "'fear of present personal peril from violence offered or impending,'" which "intimidates and promotes submission to the theft of the property." *Bowles*, 52 S.W.3d at 80 (quoting *Britt v. State*, 26 Tenn. (7 Hum.) 45, 46 (1846)). When there is no direct testimony regarding fear, it may be inferred from circumstantial evidence. *State v. Dotson*, 254 S.W.3d 378, 395 (Tenn. 2008). A witness's testimony denying fear is a matter of witness credibility, and the presence of fear is an objective rather than subjective determination. *Id.* "[T]he jury's task is to determine from all of the evidence whether the victim was placed in fear by the conduct of a defendant or should have been under the circumstances." *Id.* at 396. Fear may be established "'if the transaction is attended with such circumstances of terror as in common experience are likely to create an apprehension of danger and induce a man to part with his property for the sake of his person.'" *State v. Holly Fisk, Jr.*, No. M2015-01552-CCA-R3-CD, 2016 WL 4133417, at *6 (Tenn. Crim. App. Aug. 2, 2016) (quoting *Sloan v. State*, 491 S.W.2d 858, 861 (Tenn.

[1] Robbery requires the perpetrator to accomplish the taking by violence or putting the person in fear. T.C.A. § 39-13-401. Violence, as used in the statute, means "'physical force unlawfully exercised so as to injure, damage or abuse.'" *State v. Bowles*, 52 S.W.3d 69, 80 (Tenn. 2001) (quoting *State v. Fitz*, 19 S.W.3d 213, 217 (Tenn. 2000)). The parties have not addressed whether the evidence was sufficient to support the element of violence, and because we conclude that the evidence is sufficient to support the jury's conclusion that the Defendant put the victim in fear, we likewise do not address the element. *Compare State v. Allen*, 69 S.W.3d 181, 185 (Tenn. 2002) (concluding that pointing a deadly weapon constitutes violence); *with Eric Lebron Hale*, 2012 WL 3776673, at *6 (concluding that when the crime was charged by violence but not fear and the defendant used no physical force, did not brandish a weapon, and did not make a verbal threat, the evidence was insufficient to establish violence).

Crim. App. 1972)). In *Dotson*, the Tennessee Supreme Court determined that a rational juror could have inferred the victim's fear when the defendant's threat to shoot and motion reaching toward his pocket or belt was coupled with the victim's testimony that he was concerned his children would be without a father. *Dotson*, 254 S.W.3d at 395-96; *see State v. Darrell Ray Beene*, No. M2013-02098-CCA-R3-CD, 2014 WL 2841072, at *4 (Tenn. Crim. App. June 20, 2014) (upholding a robbery conviction and concluding that a reasonable person would have been placed in fear when trapped against her car at night by two men who demanded her property, even though she had not yet seen the gun when the property was taken); *Charles Clevenger*, 2013 WL 2566191, at *8 (although the victim remained calm, the evidence that the victim received a note threatening to hurt him and then hurried to deliver pharmaceuticals to the defendant was sufficient to establish fear without direct testimony); *Joseph L. Johnson, Jr.*, 2009 WL 2567729, at *8 (concluding that fear could be inferred from testimony that the victim was crying and asking for help). Here, the victim testified that after the Defendant threatened to shoot him, he "didn't take [any] chances" because he knew the Defendant "meant business." He accordingly surrendered the cash in the register. He also put his hands up to indicate compliance. From this evidence, the jury could properly have inferred that the victim was afraid.

We conclude that the State presented sufficient evidence from which a rational trier of fact could have found that the Defendant used or displayed an article fashioned to lead the victim to reasonably believe it to be a deadly weapon and that the victim was in fear. The evidence is sufficient to sustain the verdict.

II. Jury Composition

The Defendant also asserts that his Sixth Amendment right to an impartial jury was violated because of the racial composition of the jury that actually deliberated on his case. He contends that the fact that only one person on the jury that deliberated shared the Defendant's race was itself a constitutional violation. The State asserts that the issue is waived because it was not raised until the motion for a new trial and that in any event, there is no constitutional right for the Defendant to be tried by a jury composed in whole or part of members his own race. *See State v. Hester*, 324 S.W.3d 1, 39 (Tenn. 2010); *Harvey v. State*, 749 S.W.2d 478, 481 (Tenn. Crim. App. 1987). The Defendant has not filed a reply brief responding to the State's waiver argument.

The Defendant cites almost exclusively to legal authority relevant to the racial composition of the venire. *See Hester*, 324 S.W.3d at 39 (observing that the Sixth Amendment entitles the accused to a jury drawn from a fair cross-section of the community and that a venire may not systematically exclude distinctive groups of the community). To the extent that the Defendant challenges the racial composition of the

venire, this issue is waived. *See* Tenn. R. App. P. 36(a); Tenn. R. Crim. P. 12(b). The Defendant did not raise any issue regarding the composition of the venire either before trial or in the motion for a new trial, and no evidence regarding either the racial composition of the community or the venire was introduced into the record. The Defendant's argument in the trial court explicitly conceded that the jury, prior to the selection of alternates, would "meet any standard." Insofar as it is raised on appeal, any issue regarding the racial composition of the venire is waived. *State v. Dobbins*, 754 S.W.2d 637, 640 (Tenn. Crim. App. 1988) (concluding that the issue of the racial composition of the venire was waived when counsel did not raise it until after he had exhausted his peremptory challenges and the jury was empaneled and when no evidence save the statements of counsel was introduced).

The Defendant's argument is primarily that his right to an impartial jury under the Sixth Amendment to the United States Constitution was violated because the two randomly selected alternates were African American, leaving eleven Caucasians jurors and one African American juror to deliberate. The Defendant cites no authority for the proposition that a random selection of alternate jurors which results in the removal of jurors of his own racial group constitutes a violation of his rights under the Sixth Amendment. *See Hester*, 324 S.W.3d at 39 (observing that "defendants are not entitled to a jury of any particular composition because the fair cross-section requirement does not impose a requirement that the jury actually chosen mirror the community or reflect the various distinctive groups in the population"); *see also United States v. Delgado*, 350 F.3d 520, 526 (6th Cir. 2003) (observing that a random selection of alternates was "a neutral procedure that in no way advantaged the government" despite the defense's claim that the drawn alternates "'were the best defense jurors'").

The State contends that the issue is waived because it was not timely asserted, citing to *State v. Johnson*, 970 S.W.2d 500, 507-08 (Tenn. Crim. App. 1996) (concluding that the issue was waived for numerous reasons, including failure to designate the issue as ground for relief in the brief, failure to cite legal authority or present an argument, and failure to timely raise the issue, but addressing the issue briefly and concluding that "[i]n any event, the fact that a defendant is tried by a jury which has no African-American on it is not, *per se*, proof of the violation of any right"). At the time the trial court requested the courtroom deputy to choose two numbers in a random lottery in order to select the alternate jurors, the Defendant lodged no objection. The Defendant first raised the issue regarding the racial composition of the jury in his motion for a new trial. Furthermore, the hearing on motion for a new trial consisted only of oral argument, and no proof, including proof regarding the racial composition of the community or jury, was introduced. We conclude that this issue is waived. *See State v. Robert Earl Borner*, No. W2012-00473-CCA-R3-CD, 2013 WL 1644335, at *7 (Tenn. Crim. App. Apr. 16, 2013) (concluding that the defendant's claim that he was denied a trial by a jury of his peers

when the jury was composed of eleven Caucasians and one African American was waived because it was not raised until the motion for a new trial); *Johnson*, 970 S.W.2d 507-08 (concluding that an issue regarding the racial composition of the jury was waived when there was no contemporaneous objection); *State v. Freddie Lenon*, No. 5, 1991 WL 44218, at *2 (Tenn. Crim. App. Apr. 3, 1991) (concluding that a challenge to the composition of the jury was waived because it was not raised until the motion for a new trial); 6 Crim. Proc. § 22.2(f) (4th ed.) (noting that rules generally require a challenge to the venire to be made in a "timely fashion," typically before trial or voir dire). Accordingly, the Defendant is not entitled to relief on this issue.

CONCLUSION

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

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JOHN EVERETT WILLIAMS, PRESIDING JUDGE