IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs June 3, 2014

STATE OF TENNESSEE v. DAVARIUS DATRON SMITH

Appeal from the Circuit Court for Lauderdale County
No. 9190 Joe H. Walker, Judge

No. W2013-01735-CCA-R3-CD - Filed July 28, 2014

The defendant, Davarius Datron Smith, was convicted of two counts of attempted second degree murder, a Class B felony; employment of a firearm during the commission of a dangerous felony, a Class C felony; and reckless endangerment, a Class E felony. He was sentenced by the trial court to an effective eighteen-year sentence. On appeal, the defendant argues that he was entitled to a mistrial because the State failed to produce notes taken by an investigator, made improper closing arguments, and asked leading questions of its witnesses; the trial court failed to instruct the jury regarding the State's duty to preserve evidence and of a lesser-included offense of the indicted charges; and the evidence was insufficient to sustain his convictions. After review, we affirm the judgments of the trial court.

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

ALAN E. GLENN, J., delivered the opinion of the Court, in which CAMILLE R. MCMULLEN, J., and JEFFREY S. BIVINS, SP.J., joined.

Lyle Jones, Covington, Tennessee (on appeal); and Robert M. Brannon, Jr., Memphis, Tennessee (at trial), for the appellant, Davarius Datron Smith.

Robert E. Cooper, Jr., Attorney General and Reporter; Michelle L. Consiglio-Young, Assistant Attorney General; D. Michael Dunavant, District Attorney General; and James Walter Freeland, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

This case results from the defendant's convictions for shooting the two victims in a public park in Ripley. The victims, as well as other witnesses at the scene, professed at the time of trial to have little memory of the shootings, which had occurred a year earlier.

Steven Whitelow, a victim of the shooting, testified that, on July 10, 2011, he was driving in his Suburban with his cousin, Javone Tatum. Around 6:00 p.m., they arrived at Rice Park in Ripley, where there was a crowd of over 100 people at the basketball court. After Whitelow claimed to have an almost total lack of recall as to the evening of the shooting, the State tendered to him a statement which he had written on July 10, 2011, regarding that evening, and which he said was "the truth." He said that the statement did not refresh his recollection, even though it was in his own handwriting, because he had a "bad memory." At the request of the State, Whitelow read the following: "I pulled up on the park. We got out to walk towards the Center and some guys in a white car said something to [Tatum]. A guy in the back seat on the passenger side hopped out and started shooting." Whitelow did not remember being shot at or where the shots came from, but did remember hearing gunshots and seeing that Tatum had been shot. He took Tatum to the emergency room at Lauderdale Hospital across the street because he had been shot in the side. After his Suburban was returned to him from the police department, Whitelow noticed that his back window had been "shot out" and that there were several bullet holes in the vehicle. Whitelow denied knowing the defendant or why the defendant would shoot at him or Tatum.

Kevin McNeal, a co-defendant, testified that he pled guilty to facilitation of attempted second degree murder of Whitelow and Tatum and to reckless endangerment. He said that he did so to go home to his child and that he and the defendant "did not commit the crimes." McNeal testified that, on July 10, 2011, he and the defendant were in Rice Park watching the basketball game. When they heard gunshots, he and the defendant jumped in their white Pontiac G6 and left because he believed they were in danger. However, McNeal did not know of any reason why they were being shot at. They then drove to Covington. McNeal denied having "dumped" the car; rather, he explained that he dropped the car off for his pregnant girlfriend, Ashley Foxworth, to come pick it up because it was her car and he wanted her to have a car if she went into labor.

Ashley Foxworth, the mother of McNeal's child, said she owned a white Pontiac G6, which she loaned to McNeal on July 10, 2011. He told her that he was going to visit a friend from Ripley. When she received a call from him later that day, she became concerned and went to get her car in Covington. She admitted that she noticed bullet holes in her car, which she reported to the Ripley Police Department. The police department later impounded her car.

Willie Rouser Qualls testified that on July 10, 2011, he was in Rice Park near the basketball court where he organized the referees for the basketball game. He estimated that there were about fifty to seventy-five spectators, including children, around the basketball court. In the early evening, he recalled hearing ten to twelve gunshots near the pavilion at the park. When he turned around to look in the direction of the gunshots, he saw a white car and a Suburban parked near the pavilion. After the shooting had stopped, he began walking in the direction of the gunshots while calling the Ripley Police Department. He saw the shooter, describing him as an African-American, slender male who was firing a weapon. He then observed the shooter get into the white car and leave the scene. The Suburban left shortly after and crossed the railroad tracks at a high rate of speed.

Demetrice Jones also remembered little of the shooting. She testified that, on July 10, 2011, she was watching the basketball game at Rice Park when she heard "probably" more than five gunshots. She agreed that she testified at a preliminary hearing, identifying the defendant, also known as "Nudy B," as the shooter. She said the police showed her a photograph, telling her that it was "Nudy B," and she identified him as the shooter. She described the shooter as being African-American and having "dreads" but explained that there were several people with "dreads" near the pavilion, close to Whitelow's Suburban. However, she could not recall testifying at the preliminary hearing that she saw Foxworth's white Pontiac at the park.

Javone Tatum had scant memory of the shootings and testified that he did not remember being with Whitelow on July 10, 2011. He said he remembered being shot but did not remember what had happened. He recalled meeting with the police and the prosecutor at the Ripley Police Department on June 11, 2012, where he was shown several photographs of the defendant, but denied having identified the defendant as the shooter. He also denied having asked the prosecutor what would happen if he "[took] the Fifth after [he] identified [the defendant] as the shooter."

Investigator Louis Ruff with the Ripley Police Department testified that he responded to a call at Rice Park at about 6:30 p.m. on July 10, 2011, to investigate a shooting at the pavilion. He found nine shell casings from a nine-millimeter semiautomatic handgun at the scene. On the night of the shooting, the Ripley Police Department came into possession of Foxworth's white Pontiac after receiving a call from her. Searching the car, he found two nine-millimeter shell casings and noticed a bullet hole in the passenger side of the trunk. Examining Whitelow's Suburban, he found nine bullet holes in it, two holes on the driver's side, five in the tailgate area, and two on the passenger side. Investigator Ruff recovered numerous bullet fragments from the tailgate area, but they were so badly fragmented that they could not be tested. He did not recover a handgun from the scene, vehicle, or suspects. He confirmed that, at the preliminary hearing on November 4, 2011, Jones and Tatum identified the defendant as the shooter.

Investigator Ruff also confirmed that, at the meeting at the Ripley Police Department on June 11, 2012, Tatum was shown a photograph of the defendant whom he identified as the shooter.

The defendant did not present any proof.

ANALYSIS

I. Nonproduction of Investigator Ruff's Reports

The defendant argues that he was entitled to certain documents regarding Investigator Ruff's testimony under Tennessee Rule of Criminal Procedure 16 and that the trial court should have granted his motion for a mistrial because of nonproduction of the documents. The State responds, however, that the defendant knew that Investigator Ruff would testify at the trial and that the documents sought by the defendant were not subject to disclosure.

Initially, we note that the defendant did not request a mistrial as his desired remedy when he offered his objection during the trial but only during the State's closing argument and in response to that argument.

Whether to declare a mistrial lies within the sound discretion of the trial court, and its decision in this regard will not be overturned on appeal absent a showing of an abuse of discretion. State v. Land, 34 S.W.3d 516, 527 (Tenn. Crim. App. 2000). Here, the defendant has failed to prove a manifest necessity for a mistrial such that we could determine that the defendant was prejudiced. The defendant has not met his burden showing the "degree to which the impediments to discovery hindered trial preparation and defense at trial." State v. Brown, 836 S.W.2d 530, 548 (Tenn. 1992). The defendant has not offered any argument or proof showing how any action on the part of the State or the trial court prejudiced his case. The defendant's contentions are, therefore, without merit, and he is not entitled to relief as to this issue.[1]

II. State's Questioning of Its Own Witnesses

The defendant argues that the trial court erred in overruling his objections to the State's leading and impeaching its own witnesses, whom had not been declared hostile witnesses by the trial court.

[1]As we will discuss, subsequently the trial court concluded that Investigator Ruff's notes were not discoverable.

Initially, we note that the defendant's appellate brief does not include references to the record regarding examples of the objected-to questioning. As to the examination of witnesses, "[T]he propriety, scope, manner and control of the examination of witnesses is a matter within the discretion of the trial judge." State v. Caughron, 855 S.W.2d 526, 540 (Tenn. 1993). Tennessee Rule of Evidence 611(c) provides that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop testimony. . . . When a party calls a witness determined by the court to be a hostile witness, interrogation may be by leading questions." The trial court, within its discretion, may decide whether to allow the use of leading questions on direct examination, and its decision will not be reversed absent an abuse of that discretion. Kong C. Bounnam v. State, No. W2001-02603-CCA-R3-PC, 2002 WL 31852865, at *9 (Tenn. Crim. App. Dec. 20, 2002), perm. app. denied (Tenn. May 27, 2003) (citing Mothershed v. State, 578 S.W.2d 96, 99 (Tenn. Crim. App. 1978)).

Even if the defendant has not waived this issue by failing to provide citations and references to the record to support his objections, the trial court did not abuse its discretion in allowing the State's questions after the defendant's objections. As we have set out, the lay witnesses exhibited remarkable losses of memory when asked about what normally would be a very traumatic event. Accordingly, we conclude that the trial court properly overruled defense counsel's objections to the State's questions and was justified in allowing the leading questions on direct examination of the witnesses as they were necessary to develop testimony. Therefore, this issue is without merit, and the defendant is not entitled to relief on this issue.

III. Prosecutorial Misconduct

First, the defendant contends that the prosecutor committed prosecutorial misconduct during closing by referring to the defendant as a "thug," making references to the Bible and to the civic duty of the jury to convict, and by impermissible vouching.

Tennessee courts "have traditionally provided counsel with a wide latitude of discretion in the content of their final argument" and trial judges with "wide discretion in control of the argument." State v. Zirkle, 910 S.W.2d 874, 888 (Tenn. Crim. App. 1995). A party's closing argument "must be temperate, predicated on evidence introduced during the trial, relevant to the issues being tried, and not otherwise improper under the facts or law." State v. Middlebrooks, 995 S.W.2d 550, 557 (Tenn. 1999). The five generally recognized areas of prosecutorial misconduct in closing argument occur when the prosecutor intentionally misstates the evidence or misleads the jury on the inferences it may draw from the evidence; expresses his or her personal opinion on the evidence or the defendant's guilt; uses arguments calculated to inflame the passions or prejudices of the jury; diverts the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making

predictions on the consequences of the jury's verdict; and intentionally refers to or argues facts outside the record, other than those which are matters of common public knowledge. State v. Goltz, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003).

We have carefully reviewed the closing and rebuttal arguments of the State and cannot share the defendant's view that they were so intemperate as to entitle him to a fair trial. While the State exhibited somewhat of a flair for the dramatic, the arguments were well within the permissible bounds and, certainly, neither entitled the defendant to a new trial nor violated his right to a fair trial. This claim also is without merit.

IV. Duty to Preserve Evidence

The defendant next argues that the trial court erred in not instructing the jury with Pattern Jury Instruction 42.23, regarding the duty to preserve certain evidence, consisting of Investigator Ruff's handwritten notes, including diagrams, he made during his interview with Tatum. The State responds that the trial court correctly denied the defendant's request to charge the jury in this regard because the handwritten notes and memoranda were not evidence and therefore were not discoverable.

In considering this issue, we must first determine whether the State had a duty to preserve the evidence. State v. Ferguson, 2 S.W.3d 912, 917-18 (Tenn. 1999). In general, the State has a duty to preserve all evidence subject to discovery and inspection under Tennessee Rule of Criminal Procedure 16. Id. The trial court found that Investigator Ruff's interview notes were not evidence and therefore that the State did not have a duty to preserve this evidence. The trial court explained, "[T]he officer can write down his impressions, but that wouldn't be evidence in the case anyway. The Court doesn't feel that would apply to the officer's notes . . . made during an interview." The trial court also noted that the State properly turned over a copy of the recorded interview to the defendant. Furthermore, the State did not reference or use Investigator Ruff's handwritten notes as evidence in the case. Therefore, we conclude that the trial court properly denied the defendant's request to charge the jury with Pattern Jury Instruction 42.23.

V. Aggravated Assault as a Lesser-Included Offense

The defendant's fifth argument is that the trial court should have instructed the jury as to aggravated assault as a lesser-included offense of attempted second degree murder. While the defendant acknowledges that this court has concluded on numerous occasions that aggravated assault is not a lesser-included offense of attempted second degree murder, he asserts that those previous decisions were in error.

Previously, this court has concluded that aggravated assault is not a lesser-included offense of attempted second degree murder under the Burns test. State v. Albert James Saavedra, No. M2004-02889-CCA-R3-CD, 2006 WL 618299, at *28 (Tenn. Crim. App. Mar. 13, 2006) (holding that aggravated assault is not a lesser-included offense of attempted second degree murder), perm. app. denied (Tenn. Aug. 21, 2006); State v. Bobby J. Hughes, No. W1999-00360-CCA-R3-CD, 2001 WL 91736, at *14 (Tenn. Crim. App. Jan. 26, 2001) (holding that assault and aggravated assault are not lesser-included offenses of attempted first degree murder under the Burns analysis because the statutory elements of assault and aggravated assault are not included in the statutory elements of attempted first degree murder). In Hughes, this court noted that, pursuant to the statutory elements analysis mandated in Burns, "descriptive language in a charging instrument will not create a lesser-included offense if the statutory elements of the greater offense do not include all of the elements of the lesser offense or otherwise indicate inclusion via parts (b) or (c) of Burns." Id. at *14. Further, our supreme court has held that reckless aggravated assault is not a lesser-included offense of attempted second degree murder under Burns. State v. Rush, 50 S.W.3d 424, 430-31 (Tenn. 2001).

Moreover, Tennessee Code Annotated section 40-18-110 governs jury charges as to lesser-included offenses. In relevant part, it states that "[a]bsent a written request, the failure of a trial judge to instruct the jury on any lesser included offense may not be presented as a ground for relief either in a motion for a new trial or on appeal." Tenn Code Ann. § 40-18-110(c).

While the defendant orally requested an aggravated assault instruction as a lesser-included offense of attempted second degree murder at the end of the trial, the record does not contain any written request of the same by the defendant. This issue is without merit because this court has ruled on the issue, in previous cases, contrary to the defendant's argument in this regard and those decisions provide persuasive authority. Therefore, the trial court properly refused to instruct the jury on aggravated assault as a lesser-included offense of attempted second degree murder, and the defendant is not entitled to relief on this issue.

VI. Jury Instruction Pursuant to Tenn. R. Evid. 803

The defendant argues that the trial court erred in granting the State's request for a specific jury instruction on Tennessee Rule of Evidence 803. Specifically, the defendant claims that, because the trial court charged Pattern Jury Instruction 42.05, it "had no need to charge a supplemental instruction drafted by the [S]tate regarding Rule 803" because it was duplicative of the instruction regarding identity. However, the State responds that the defendant waived consideration of whether the trial court properly included a jury instruction as to Rule 803. Specifically, the State argues that the defendant waived this

issue because, as required by Tennessee Rule of Appellate Procedure 24(a), the defendant failed to include the transcript or a copy of the jury charge in the record.

"When an accused seeks appellate review of an issue in this court, it is the duty of the accused to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues which form the basis of the appeal." Tenn. R. App. 24(b); see State v. Taylor, 992 S.W.2d 941, 944 (Tenn. 1999); State v. Bennett, 798 S.W.2d 783 (Tenn. Crim. App. 1990). Therefore, "a defendant is effectively denied appellate review of an issue when the record transmitted to the appellate court does not contain a transcription of the relevant proceedings in the trial court." State v. Draper, 800 S.W.2d 489, 493 (Tenn. Crim. App. 1990).

Following our review, we agree with the State that the defendant has waived this issue. The defendant has not provided any way for the State or this Court to assess his claim because he has not provided a copy of the actual jury instructions given by the trial court. Therefore, the trial court's jury instructions were presumably proper, and the defendant is not entitled to relief on this issue.

VII. Sufficiency of the Evidence

The defendant asserts that the proof was insufficient to sustain either of his convictions.

In considering this issue, we apply the rule that where sufficiency of the convicting evidence is challenged, 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 findings 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). The same standard applies whether the finding of guilt is predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

A criminal offense may be established entirely by circumstantial evidence. State v. Majors, 318 S.W.3d 850, 857 (Tenn. 2010). It is for the jury to determine the weight to be given the circumstantial evidence and the extent to which the circumstances are consistent with the guilt of the defendant and inconsistent with his innocence. State v. James, 315 S.W.3d 440, 456 (Tenn. 2010). In addition, the State does not have the duty to exclude every other reasonable hypothesis except that of the defendant's guilt in order

to obtain a conviction based solely on circumstantial evidence. See State v. Dorantes, 331 S.W.3d 370, 380-81 (Tenn. 2011) (adopting the federal standard of review for cases in which the evidence is entirely circumstantial).

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. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "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. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Our 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, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (1963)). "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).

A person commits criminal attempt who, acting with the culpability otherwise required for the offense:

> (1) Intentionally engages in action or causes a result that would constitute an offense, if the circumstances surrounding the conduct were as the person believes them to be;
>
> (2) 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; or
>
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

Tenn. Code Ann. § 39-12-101(a).

Second degree murder is a knowing killing of another. Id. § 39-13-210(a)(1). A person acts knowingly with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result. Id. § 39-11-106(a)(20).

Taken in the light most favorable to the State, the evidence showed that Demetrice Jones testified that she saw the defendant, whom she knew as "Nudy B," fire shots at the victims, Javone Tatum and Steven Whitelow. Investigator Louis Ruff, with the Ripley Police Department, testified that both Tatum and Whitelow, at the preliminary hearing, identified the defendant as the shooter. Additionally, he searched the vehicle being used by the defendant at the time of the shooting and recovered two nine-millimeter shell casings. As to the conviction for reckless endangerment, Willie Rouser Qualls testified that, on the day of the shooting, he had organized the referees for the basketball game, and, as the shots were fired, there were fifty to seventy-five spectators near the scene of the shooting. From all of this evidence, we conclude that a reasonable jury could have determined that the defendant fired shots at the victims, Tatum and Whitelow, that a number of other persons were present at the scene and endangered by the shots, and that the defendant utilized a handgun in committing these crimes. Accordingly, the evidence is sufficient to sustain the convictions.

CONCLUSION

Based upon the foregoing authorities and reasoning, we affirm the judgments of the trial court.

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ALAN E. GLENN, JUDGE