FILED
04/24/2020
Clerk of the
Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs March 3, 2020

STATE OF TENNESSEE v. VINTARIO TATE

Appeal from the Criminal Court for Shelby County
No. 17-02007 James M. Lammey, Jr., Judge

No. W2019-01072-CCA-R3-CD

The defendant, Vintario Tate, appeals his Shelby County Criminal Court jury convictions of attempted second degree murder, aggravated assault, and employing a firearm during the commission of a dangerous felony, arguing that the evidence was insufficient to support his convictions and that his convictions violate principles of double jeopardy. Discerning no error, we affirm the judgments of the trial court and remand for entry of a corrected judgment in count 3.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed and Remanded

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER, and J. ROSS DYER, JJ., joined.

Phyllis L. Aluko, District Public Defender, and Barry W. Kuhn (on appeal) and J.T. Harris (at trial), Assistant District Public Defenders, for the appellant, Vintario Tate.

Herbert H. Slatery III, Attorney General and Reporter; Jonathan H. Wardle, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Jamie Kidd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Shelby County Grand Jury charged the defendant and Quintavious Hill with attempted second degree murder, aggravated assault, and employing a firearm during the commission of a dangerous felony related to the October 23, 2016 shooting of the victim, Keith Harris.

At the 2018 joint trial, Victoria Richardson testified that she was a friend of the victim and that she was with him on October 23, 2016. Ms. Richardson claimed that

she could not really recall the events of that day because "a lot had happened" in her life between that day and the day of trial. Nevertheless, she maintained that, on the day of the offenses, the victim contacted her, and the two agreed to go out. She said that the victim picked her up and that they "went to some apartments." She said that she "was outside of the car" when she saw two men outside the victim's car; one was "tugging on" the door handle of the driver's side door, and one of the men was "[s]hooting at the car." She said that the victim then "took off and left."

Ms. Richardson said that she was a friend on social media with one of the men and that she had previously identified a man she knew as "Billy" from a photographic array as the same man she had seen shooting at the driver's side of the victim's car before she ran for cover. Ms. Richardson said that she also identified the man she had seen pulling at the door of the victim's car from a second photographic array.

During cross-examination, Ms. Richardson said that the co-defendant was a Facebook friend of hers prior to the shooting but that she did not actually know him. She said that she had "been on dates" with the victim before and that she thought they "were about to go on a date" on the day of the offenses but it "never got that far." She said that she and the victim went to an apartment complex located on Pendleton and Lamar "[t]o chill." Ms. Richardson reiterated that she saw the defendant "tugging on the car" and said that she "did not see a gun on him." Ms. Richardson said that, after the victim drove away, she tried to call him, but he did not answer. She also sent the victim several text messages, but he did not respond. She said that she did not telephone the police to report the shooting.

Ms. Richardson described the apartment complex as "like the slums, like a project" and admitted that, despite this, she got out of the car when they arrived. She said that she did not recall why she had gotten out of the car but insisted that she did not talk to anyone after she got out of the car. Ms. Richardson admitted that, in her original written statement to the police, she stated that she had seen both the defendant and the co-defendant "with guns in their hands" but only the co-defendant shooting at the victim's car while the defendant "was pulling on the driver's side door." Ms. Richardson could not recall telling the police that she had gone to the apartments "to get money from Paco." She similarly did not recall telling the sergeant that she had asked a group of people to help her find Paco. Ms. Richardson did recall being asked "to pull up the social media page" of certain people, including "Billy," who was also known as "Paco." She did not recall saying that she was worried that it looked as though she had set the victim up.

During redirect examination, Ms. Richardson testified that she recognized

the person who shot at the victim and that she pulled up that person's Facebook page for Sergeant Jason Tynkala. She identified the co-defendant in court as the person she knew as "Billy" and the defendant as the person she knew as "Tario." She said that she did not have a relationship with either man before or after the shooting.

The victim, Keith Harris, testified that he was out with Ms. Richardson, whom he described as his ex-girlfriend, on the day of the offenses and that he "tried to take her out to eat, but she didn't want to do that" and had instead insisted that he "take her to her brother's house" in Orange Mound. He recalled that when they arrived at the apartment complex, Ms. Richardson "got out of the car and . . . two dudes had approached my car" only "a couple of seconds" after she exited the car. He said that the men "had hoods and pistols." The men told him not to move and then "tried to open the car door, but it was locked." At that point, the victim, who had backed into the parking space, "pulled off and they started shooting." He said that when he heard the gunshots, he "started ducking." He said that bullets struck his car "[a]bout ten times, busted out the windows." A bullet also grazed his shoulder. The victim testified that he feared for his life.

The victim testified that he drove toward the police station but was pulled over by the police before he got there for "something about my tags." He said that the officer who pulled him over asked him "what was going on" because of the damage to his car. He told the officer what had happened, and the officer called an ambulance. He said that he declined medical treatment for his shoulder wound because he did not believe it necessary.

Mr. Harris said that he did not know either of the men involved in the offenses. He testified that he identified the defendant and co-defendant as the perpetrators when shown two photographic arrays. On a photograph of the defendant, he wrote, "I think this is the guy."

During cross-examination, the victim said that Ms. Richardson contacted him via Facebook Messenger on the day of the offenses and told him that she was bored and wanted to go out. He said that he agreed to take her out to eat, but when he picked her up, "she didn't want to do that" and instead asked the victim to drop her off at her brother's house. He identified one of the perpetrators as "Wick," saying that he knew the person and the name from having seen him on Ms. Richardson's Facebook page. He said that Ms. Richardson tried to communicate with him after the shooting but that he did not respond to her at all. He said that he did not call 9-1-1 because his cellular telephone was dead.

During redirect examination, the victim clarified that, following the

shooting, he looked at Ms. Richardson's Facebook page to see "the people that she be with" because he believed that "she is the one that did this, set this whole thing up." As he looked at the photographs, he recognized one of the men that shot him; the man was identified as "Wick." Mr. Harris identified the defendant and the co-defendant in court as the two men who attempted to enter his car before shooting at him on October 23, 2016.

Memphis Police Department ("MPD") Sergeant Jason Tynkala testified that he was assigned to investigate a shooting at the Kimball Cabana Apartments. As part of his investigation, he spoke with the victim via telephone and in person and, based upon those conversations, identified the defendant and co-defendant as suspects. Sergeant Tynkala prepared two photographic lineups for the victim to view. The victim identified the defendant and co-defendant as the men who shot at him and wrote on the array that contained the co-defendant's photograph, "This was Wick."

Sergeant Tynkala also spoke with Ms. Richardson via telephone and in person and, based upon those conversations, confirmed the defendant and co-defendant as suspects. Sergeant Tynkala prepared two photographic lineups and showed them to Ms. Richardson. She identified the co-defendant from one array and the defendant from another. On the array from which she identified the defendant, Ms. Richardson wrote, "I seen him pulling on Keith's car door."

During cross-examination, Sergeant Tynkala reiterated that Ms. Richardson showed him "the actual Facebook page of each one of them," explaining that, "in the beginning," she identified the defendant "as Tario," and the police "were able to investigate and use our data bases to look up and match the pictures with Vintario Tate's Facebook page and that is how we narrowed the identification and developed the information to create the photo lineup." He acknowledged that Ms. Richardson told him that she feared that the victim believed she had set him up because she had asked him to take her to the Kimball Cabana apartments to get some money. He agreed that in her first statement, Ms. Richardson said that she heard the gunshots from the other side of the building before she saw the victim driving away. In her second statement, she told Sergeant Tynkala that she heard the shots as she was walking away and then turned around to see the defendant and co-defendant at the victim's car. She said that the co-defendant was shooting at the car and that the defendant was pulling at the door handle.

During redirect examination, Sergeant Tynkala described the Kimball Cabana Apartments as "kind of run down, kind of an older complex" in an "[e]xtremely high crime" area. He said that it would not be unusual to find bullet fragments in the parking lot. He also said that it was not unusual for people who frequented the area to be known only by their nicknames. Sergeant Tynkala said that he continued to believe that Ms. Richardson had some involvement in the offenses. He recalled that when he visited

the apartment complex after the offenses, he spoke to some "bystanders sitting in the breezeway who said they heard shots, but that is about the extent of it." He added, "I will say that that's not uncommon for there to be shots fired."

Following a full *Momon* colloquy, the defendant elected not to testify and chose to present no proof.

Based upon this proof, the jury convicted the defendant as charged of attempted second degree murder, aggravated assault, and employing a firearm during the commission of a dangerous felony.

Following a sentencing hearing, the trial court merged the defendant's conviction of aggravated assault into the conviction of attempted second degree murder and imposed a Range II sentence of 16 years' incarceration for that offense. The trial court imposed a Range II sentence of six years for the firearm conviction and ordered, pursuant to Code section 39-17-1324, that the sentence be served consecutively to the sentence imposed for the defendant's conviction of attempted second degree murder.

The defendant filed a timely but unsuccessful motion for new trial followed by a timely notice of appeal. In this appeal, the defendant challenges the sufficiency of the convicting evidence and complains that "the judgment on count three of the indictment violates double jeopardy." We consider each claim in turn.

I. Sufficiency

The defendant first asserts that the evidence was insufficient to support each of his convictions. He argues, generally, that the State failed to establish his identity as the perpetrator. Additionally, he argues that the State failed to establish that he had a gun during the commission of the offenses and that, as a result, the evidence was insufficient to establish that he used or displayed a deadly weapon or that he employed a firearm during the commission of a dangerous felony. The State contends that the evidence was sufficient.

Sufficient evidence exists to support a conviction if, after considering the evidence—both direct and circumstantial—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. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011). This court will neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Dorantes*, 331 S.W.3d at 379. The verdict of the jury resolves any questions concerning the credibility of the witnesses, the weight and value of the evidence, and the factual issues

raised by the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, 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 which may be drawn from the evidence. *Id.*

Identity

"The identity of the perpetrator is an essential element of any crime." *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citing *State v. Thompson*, 519 S.W.2d 789, 793 (Tenn. 1975)). Whether the State has established the defendant as the perpetrator of the charged offenses beyond a reasonable doubt is "a question of fact for the jury upon its consideration of all competent proof." *State v. Bell*, 512 S.W.3d 167, 198 (Tenn. 2015) (citing *State v. Thomas*, 158 S.W.3d 361 app. at 388 (Tenn. 2005)); *accord State v. Crawford*, 635 S.W.2d 704, 705 (Tenn. Crim. App. 1982) (citing *Stubbs v. State*, 393 S.W.2d 150, 153 (Tenn. 1965)).

In this case, both the victim and Ms. Richardson identified the defendant from a photographic array as one of the perpetrators of the offenses against the victim. Ms. Richardson said that she knew the defendant from Facebook and that she recognized him when she saw him pulling at the door handle on the victim's car. The victim said that he recognized the defendant as one of the men who had shot at him when he saw his photograph on Ms. Richardson's Facebook page. Both the victim and Ms. Richardson also identified the defendant in court as one of the perpetrators. This evidence was sufficient to establish the defendant's identity as one of the perpetrators.

Firearm

As indicated, the defendant asserts that the State failed to establish that he actually had a gun during the commission of the offenses, thereby undercutting the evidence that he used or displayed a deadly weapon or that he employed a firearm during the commission of a dangerous felony.

As charged in this case, "[a] person commits aggravated assault who . . . [i]ntentionally or knowingly commits an assault as defined in § 39-13-101, and the assault . . . [i]nvolved the use or display of a deadly weapon." T.C.A. § 39-13-102(a)(1)(A)(iv). A deadly weapon is "[a] firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury; or . . . [a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury." *Id.* § 39-11-106(a)(6).

Code section 39-17-1324 provides that "[i]t is an offense to employ a firearm during the . . . [c]ommission of a dangerous felony" or the "[a]ttempt to commit a dangerous felony." *Id.* § 39-17-1324(b)(1)-(2). "Firearm" is defined as:

> (i) Any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive;
> (ii) The frame or receiver of any such weapon;
> (iii) Any firearm muffler or firearm silencer; or
> (iv) Any destructive device; and

Id. § 39-11-106(a)(13)(A).

The victim testified that, as he sat in his car outside the Kimball Cabana Apartments, the defendant and co-defendant approached his car; both men "had hoods and pistols." Additionally, photographs of the victim's car showed bullet holes on both sides of the car. Although Ms. Richardson equivocated on the issue of the defendant's actually possessing a handgun, she consistently maintained that the co-defendant possessed a handgun, which would support the defendant's convictions of both employing a firearm during the commission of a dangerous felony and aggravated assault under a theory of criminal responsibility. *See generally State v. Cortney R. Logan*, No. M2014-01687-CCA-R3-CD (Tenn. Crim. App., Nashville, Oct. 8, 2016); *State v. Ricco R. Williams*, No. W2011-02365-CCA-R3-CD (Tenn. Crim. App., Jackson, Jan. 14, 2013), *aff'd on other grounds*, 468 S.W.3d 510 (Tenn. 2015). Under these circumstances, we conclude that the evidence was sufficient to support the defendant's convictions.

II. Double Jeopardy

Finally, the defendant argues that the trial court erroneously imposed two sentences for his conviction of attempted second degree murder in violation of double jeopardy principles. We need not tarry long over this claim, however, because the record is clear that the trial court did not impose two sentences for the same offense. Instead, the errors in the judgment for Count 3, which are myriad, can be classified as clerical errors that must be corrected by the trial court upon remand. The jury convicted the defendant of employing a firearm during the commission of a dangerous felony as charged in Count 3 of the indictment. At the sentencing hearing, the trial court imposed a sentence of six years for this conviction, to be aligned consecutively to the second degree murder sentence and served at 100 percent by operation of law. The judgment form for that count, however, lists a charged offense of "criminal attempt-second degree murder" and lists no conviction offense at all. Additionally, the class of the offense is not noted for either the indicted offense or the conviction offense. The judgment form contains no

date for the entry of the judgment and no sentence imposed date. The judgment also contains no information at all in the area for the imposition of fines and costs. Importantly, however, the judgment does list the appropriate count of the indictment and memorializes the sentence imposed by the trial court at the sentencing hearing. Consequently, we remand the case for the entry of a corrected judgment form for Count 3.

Conclusion

Accordingly, we affirm the judgments of the trial court but remand the case for the entry of a corrected judgment form in Count 3.

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JAMES CURWOOD WITT, JR., JUDGE