

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1996 SESSION

**FILED**

May 2, 1996

Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE, )  
 )  
 Appellee, )  
 )  
 VS. )  
 )  
 LUCIUS MACINEO MOSS, )  
 )  
 Appellant. )

C.C.A. NO. ~~03C01-9501-CR-00002~~

HAMILTON COUNTY

HON. STEPHEN M. BEVIL,  
JUDGE

(Second degree murder; aggravated robbery; reckless endangerment)

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OPINION FILED: \_\_\_\_\_

**AFFIRMED IN PART; REVERSED  
AND REMANDED IN PART**

**JOHN H. PEAY,**  
Judge

## OPINION

The defendant was indicted separately for reckless endangerment, aggravated robbery, and first-degree murder. The defendant was sixteen years old at the time of the offenses, and after a hearing in juvenile court, was transferred to criminal court. After a single jury trial of all three offenses, the defendant was convicted of reckless endangerment, aggravated robbery, and second-degree murder. In this appeal as of right, the defendant raises four issues:

1. The trial court erred when it denied the defendant's motion to sever the offenses;
2. The trial court erred in its response to questions by the jury during deliberations seeking clarification of its instructions;
3. The trial court erred when it refused to consider juror affidavits filed in support of the defendant's motion for new trial; and
4. The evidence is insufficient to support the verdicts and/or the weight of the evidence preponderates against the verdicts of guilt.

Because we find merit in the first two of the defendant's issues, we reverse the murder conviction and remand this matter for a new trial. We affirm the defendant's convictions of reckless endangerment and aggravated robbery.

On February 15, 1993, Derrick Lamar Jackson, Georgia Woods, and the murder victim, Robert Spence, had spent several hours together drinking alcohol and smoking crack cocaine.<sup>1</sup> At one point, Woods went to Gilbert Trimble's house to buy some more cocaine. The defendant was at Trimble's house when she arrived. Spence and Jackson joined Woods while she was there.

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<sup>1</sup>Although Jackson denied that he and the others had smoked cocaine, Woods testified that all three of them had been "geeked" (high) on cocaine and Spence tested positive for both alcohol and cocaine when he was admitted into the hospital after he had been shot.

After Woods, Jackson and Spence left Trimble's house, heading toward Jackson's house, the defendant became convinced that Woods had taken twenty dollars (\$20) she owed him for a crack rock he had sold her. Accordingly, he went to Jackson's house to try and retrieve his money. Upon entering the house, he started arguing with Woods about the money. She denied having it and, at some point, the defendant withdrew a 22 pistol he had been carrying and started waving it around in an attempt to scare Woods into giving him the money. While he and Woods "scuffled," the gun went off, perhaps because Woods had slapped it. No one was hurt by the gunfire; Woods testified that she had not been frightened by the gun. Eventually, the defendant got two dollars (\$2.00) from Woods and, sometime after midnight, left the house.

According to Jackson, Spence left the house three to five minutes later. He was unarmed at the time he left. Jackson testified that about five minutes after that, he had gone outside to take Spence's jacket to him because it was raining. He saw the defendant and Spence "tussling with each other," and a few seconds later, he saw and heard a gun go off. He testified that he could not tell who shot the gun. At trial, Jackson testified that he had heard three more shots after the first one. On cross-examination, the defendant's lawyer referred to a prior statement made during the juvenile court hearing in which Jackson had apparently stated "three or four more shots."

Woods testified that, at the time the defendant had come to Jackson's house, Spence had been "geeked and mad and high, drunk," and that, before he left Jackson's house, Spence had said, "I'm going to rob this young punk." According to Woods, Spence "like[d] to pick a fight" and was "mean sometimes." She also testified that, after he left the house, Spence had walked over to a car parked nearby and got a gun. Her vantage point was outside, "like on the side of the house, like back of the

house." Shortly thereafter, she testified, "I heard a loud shot first, then I heard four smaller shots, not as loud as the first one." After the shots had been fired, she stated, she saw the defendant start to run off, then reach down to pick something up, and then run off. Woods also testified that, after the shooting, Jackson had told her not to say anything to the police about the cocaine or about the driver of the car from which Spence had gotten the gun.

The defendant testified that, after he had left Jackson's house, he started to walk home. He saw Spence walk up to a car and reach in. He then heard Spence call him, so he "turned around and started back towards [Spence], and then when he got up on me, he pulled the gun out." According to the defendant, Spence had then tried to rob him, pointing a gun at his temple. The defendant testified that he had kept trying to push the gun away, that Spence had eventually shot the gun, missing him, and that he, the defendant, had then shot his own gun at Spence. When Spence fell, he (the defendant) reached down and grabbed Spence's gun to avoid being shot as he ran away.

The defendant went home and went to bed. Neither he nor his mother called the police. However, when Officer Phillips arrived at the defendant's house early in the morning of February 16, 1993, the defendant's mother admitted him and permitted a search. While there, the officer recovered the defendant's 22 pistol and a 38 pistol. Both weapons had been hidden in the defendant's bed. After being taken into custody and transported to the Police Service Center with his mother, the defendant signed a waiver of his Miranda rights and a tape recorded statement was made. This statement was played for the jury.

Spence died of gunshot wounds ten days after he was shot. He had been

shot four times with 22 caliber bullets from a distance of at least two feet. He was approximately twenty-five years old at his death.

Five or six empty bullet casings were recovered from the 22 pistol. The 38 pistol contained one spent round and five live rounds when it was recovered. No gun residue test was done on the victim's hands.

With respect to the defendant's first issue, we find that the trial court erred in trying these cases together. The defendant was indicted in three separate "True Bills." Although the court apparently consolidated these cases sua sponte, the record contains no such order. Under Rule 13 of the Tennessee Rules of Criminal Procedure, consolidation would have been proper if the trial court had found either

that "the offenses are based upon the same conduct or arise from the same criminal episode,"

or

that "the offenses constitute parts of a common scheme or plan or . . . they are of the same or similar character."

Tenn. R. Crim. Proc. 8(a),(b).

On the defendant's motion to sever, the trial court found the three separate charges to be "continuing criminal episode and that proof of one would be part of the proof of the other." The trial court's use of the term "a continuing criminal episode" implies that it considered these cases to have been joined pursuant to Rule 8(a): that is, that their joinder was mandatory.<sup>2</sup> The initial issue for this Court to determine, then, is whether the trial court properly consolidated these cases under Rule 8(a).

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<sup>2</sup>While the Advisory Commission Comments to Rule 13 indicate that a court ordered consolidation puts the joinder in the "permissive" status of Rule 8(b), Rule 8(a) specifically states that mandatory joinder is available under Rule 13.

Mandatory joinder under Rule 8(a) occurs where the offenses are "based upon the same conduct or arise from the same criminal episode." In this case, we agree that the reckless endangerment offense and the aggravated robbery offense are based upon the same conduct and arise from the same criminal episode. Both of these crimes occurred when the defendant entered Jackson's house and waved his pistol around in an attempt to frighten Woods into giving him money. However, this particular conduct and episode ended when the defendant left Jackson's house. There is no proof that he was continuing to threaten anyone in the house or that he had threatened to return. Rather, the proof was that the defendant was simply walking away from the house, headed, according to him, toward home. Moreover, the testimony of the State's chief witness at trial established that it was three to five minutes before Spence left the house to go after the defendant. While this is not a long time in absolute terms, it is sufficient time to indicate that the defendant had concluded his attack on Woods and decided to go on about his business. That Spence decided, for whatever reason, to go after the defendant does not lead to a finding that the defendant was still engaged in a criminal episode.

This case is clearly distinguishable from one in which a robbed victim gives immediate chase as the perpetrator tries to flee with the bounty and turns to shoot his pursuer as she catches up. The proof did not establish that any such immediate pursuit occurred here.

The trial court abused its discretion in consolidating under Rules 13 and 8(a) the murder case with the other two offenses. We would also find an abuse of discretion had the trial court joined all three offenses pursuant to Rule 8(b), which states that offenses may be joined if they "constitute parts of a common scheme or plan or if

they are of the same or similar character." Obviously, the murder charge is not of the same or similar character as the endangerment and robbery charges. Nor was there any proof at trial tending to show that the homicide was part of a common scheme or plan in which the robbery and endangerment also figured.

Moreover, the trial court's error in consolidating these cases was not harmless. As set forth below, it is clear that the jury was unable to conclude that the incident in Jackson's house was distinct from the later incident in the street. We find, therefore, that the erroneous consolidation affected the result of the trial on the merits and was harmful error as to the murder charge. Accordingly, because consolidation of the murder offense with the other two offenses was not proper under either Rule 8(a) or 8(b), and because the defendant was prejudiced thereby, we reverse the murder conviction and remand it for a separate trial.<sup>3</sup>

We do not, however, reverse and remand for retrial the aggravated robbery and reckless endangerment convictions. The defendant suffered no prejudice on these charges as a result of the erroneous consolidation. Obviously, no issue of self-defense was raised on these offenses; indeed, no significant defense was made to these charges at all. Accordingly, the trial court's error in consolidating the murder charge with these charges was harmless as to these offenses.

We also find merit in the defendant's complaint about the jury instructions in this matter. First, the record is unclear as to precisely what instructions the jury received. Although the "technical record" contains a typed document titled "Judges' [sic] charge to the jury," the actual reading of the charge to the jury was not transcribed. It is

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<sup>3</sup>Because we find the consolidation to have been improper, no motion to sever was necessary and we need not consider whether the trial court erred in denying that motion.

therefore impossible for this Court to determine if the instructions contained in the technical record are, in fact, what were read to the jury. Moreover, the jury in this case twice asked the court for clarification on the self-defense charge. The first time, it passed a note to the court asking, "When Moss provoked Spence in the house, does that give up the defendant's right to self-defense when he was in the street? When is the defendant considered to leave the situation?" The lower court refused to give a supplemental instruction, responding in writing, "You are the judges of the facts as they apply to the law. Re-read the Court's instruction on self-defense." When the jury then sought verbal guidance from the court to the same questions through its foreman, the court read aloud its written response. Seventeen minutes later, the jury returned with its verdict.

The relevant portion of the written jury charge which is included in the technical record states:

The use of force against another is not justified if the defendant provoked the alleged victim's use or attempted use of unlawful force, unless the defendant abandoned the encounter or clearly communicated to the alleged victim the intent to do so, and the alleged victim nevertheless continued to use unlawful force against the defendant.

This is in accordance with the Tennessee pattern jury instruction on self-defense. However, this jury was obviously having difficulty understanding this instruction. While the trial court could certainly not have answered the first of the jury's questions with either a "yes" or a "no," nor specifically answered the second question, we think that the trial court could and should have told the jury that it was up to them to decide whether or not the defendant had "abandoned the encounter or clearly communicated to the alleged victim the intent to do so" as of the time the shooting occurred, and that if they determined he had, then they were not precluded from determining that the defendant



had acted in self-defense.

"A trial judge has the authority to give supplemental instructions when the jury poses a question that indicates the jurors are confused regarding a question of law." State v. Dulsworth, 781 S.W.2d 277, 288 n.6 (Tenn. Crim. App. 1989). Accord State v. Moore, 751 S.W.2d 464, 467 (Tenn. Crim. App. 1988); State v. McAfee, 737 S.W.2d 304, 307 n.2 (Tenn. Crim. App. 1987). See also U.S. v. Duncan, 850 F.2d 1104, 1115 (6th Cir. 1988) ("A question from a deliberating jury often represents a pivotal moment in a criminal trial. Particularly in a close case like this, a trial judge has a 'duty of special care' when responding to a request for 'further light on a vital issue' from the foreperson of a confused jury. . . . 'When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.' ") (citation omitted). The lower court erred, to the defendant's obvious prejudice, when it did not supplement its instructions to this confused jury.

We disagree with the defendant that the trial court erred when it refused to consider the juror affidavits offered in support of his motion for new trial. When the validity of a verdict is questioned, no juror affidavits may be considered except "on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion." Tenn. R. Evid. 606(b). The juror affidavits submitted by the defendant do not address any of these limited issues. Therefore, the trial court was correct in refusing to consider them.

The defendant's final issue addresses the sufficiency and weight of the

proof in this matter. When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "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, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

Under these standards of review, we think the evidence was sufficient to convict the defendant of reckless endangerment and aggravated robbery. Although the defendant argues that the aggravated robbery conviction cannot stand because the victim testified that she had not been in fear, the crime of aggravated robbery does not require that the victim experience fear. "Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear." T.C.A. § 39-13-401(a) (emphasis added). Aggravated robbery is robbery (as just defined) "[a]ccomplished 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. § 39-13-402(a)(1). The defendant's own testimony established that he was struggling

with Woods and waving his pistol around in order to make her give him money. She did eventually give him two dollars (\$2.00). We think this evidence is sufficient for the jury to have properly found that the defendant committed both offenses.

With respect to the defendant's claim that the evidence does not support his murder conviction, we find this issue to be moot because of our ruling that the murder case was incorrectly consolidated with the other two offenses.

For the reasons set forth above, we affirm the defendant's convictions of reckless endangerment and aggravated robbery. We reverse his conviction of second-degree murder and remand that cause for a new trial.

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JOHN H. PEAY, Judge

CONCUR:

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JOE B. JONES, Judge

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DAVID H. WELLES, Judge