

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER SESSION, 1996

STATE OF TENNESSEE,)	C.C.A. NO. 02C01-9508-CR-00220
)	
Appellee,)	
)	
VS.)	SHELBY COUNTY
)	
JEROME MASON,)	HON. CHRIS CRAFT
)	JUDGE
)	
Appellant.)	(First Degree Murder, Aggravated
)	Assault & Aggravated Robbery)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF SHELBY COUNTY

FOR THE APPELLANT:

JAMES E. BROCKMAN
203 Tennessee Avenue, South
Parsons, TN 38363

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

ROBIN L. HARRIS
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

JOHN W. PIEROTTI
District Attorney General

JAMES BEASLEY
Assistant District Attorney General
Third Floor, Criminal Justice Complex
201 Poplar
Memphis, TN 38103

OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant, Jerome Mason, appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. He was convicted by a Shelby County jury of aggravated robbery, aggravated assault, and first degree premeditated murder. The trial court sentenced him as a Range I standard offender to ten years for aggravated robbery, five years for aggravated assault, and life in prison for first degree murder, with all sentences to run consecutively. In this appeal, the Defendant argues that the trial court erred in denying his motion for a continuance, that the trial court erred in conducting the trial without the presence of the indicted co-defendant, that the evidence is insufficient to support his convictions, and that the trial court erred in denying his motion for a preliminary hearing. We conclude that the Defendant's issues lack merit and affirm the judgment of the trial court.

We begin with a summary of the pertinent facts. On the night of September 13, 1993, Leo Marshall and his girlfriend, Elice Rivers, were at their home at 914 Kney Street in Memphis, Tennessee. Marshall's nephew, Lamont Thornton, came over to the house that night to watch television. It is undisputed that Marshall used and sold drugs in the neighborhood.

On the night of September 13, Curtis Jones was standing on the porch of an abandoned house near Marshall's home on Kney Street. Jones testified that he was attempting to sell drugs so that he could earn enough money to buy drugs for personal use that night. Jones witnessed a brown or rust-colored Bonneville

drive down Kney and park on the curb. Three men exited the vehicle and walked down Kney toward Marshall's home, but on the opposite side of the street from Marshall's home. When they reached the point across from Marshall's home, they crossed the street and walked to Marshall's front porch.

Several witnesses, including Curtis Jones, Elice Rivers and Lamont Thornton, testified that Leo Marshall walked out of his house and met the three individuals on the porch. At that point, Marshall waved to a car a short distance away. The car approached Marshall's home and parked at the curb near the house. Dorian Woods exited the vehicle, retrieved something from the trunk, and followed Marshall to the front porch. Marshall then entered his home, with Woods and the three individuals following him. According to the testimony of Rivers and Thornton, Dorian Woods sold drugs and was, in fact, a principal supplier of drugs for the entire neighborhood.

Once inside the house, Marshall sat down on the couch in the front room with his 30-30 rifle beside him. His girlfriend, Elice Rivers, was sitting in a chair beside the couch working a jigsaw puzzle. Lamont Thornton was sitting in a chair opposite Marshall watching the television. Dorian Woods and the three individuals were standing in front of the couch. Elice Rivers stood up and turned to exit the room. As she was turning, Dorian Woods pulled a plastic bag appearing to contain drugs from his pocket.

At that point, the three individuals brandished guns and several shots were fired. The first shot was fired directly at Leo Marshall as he sat on the couch. As Elice Rivers was fleeing the front room, she was shot in the leg from behind. She

continued fleeing, ran into the children's bedroom, and got into bed with her two daughters. Shortly thereafter, Elice Rivers saw Dorian Woods run through the bedroom toward the back door of the house. One of the individuals followed closely after Woods, carrying a long barrel gun and asking, "Where'd my nigger go, where'd my nigger go." In the meantime, one of the individuals who had remained in the front room pointed a gun at Lamont Thornton and took some money, a cassette tape and his car keys from his pockets. The armed individuals then exited the house.

Once outside the home, one of the individuals began shooting at Dorian Woods' car, which was still parked at the curb near Marshall's house. Derek Lewis, one of the occupants of Woods' car, testified that the individual who was shooting had a long barrel gun, which he believed to be Leo Marshall's 30-30 rifle. Lewis moved over to the driver's side of Woods' car and sped away as the individual fired the gun at the car.

As Woods' car drove away, the three individuals began to walk down the street in the direction of the brown or rust-colored Bonneville. They approached a yellow van and said something threatening to its occupants. They then walked away from the van. At this point, Curtis Jones, who had been watching events unfold from the front porch of the abandoned house near Marshall's home, fled the scene.

Police officers soon arrived and began collecting evidence. They found several bullet fragments and empty casings both inside Marshall's house and outside in front of the house. Among the evidence found were three .45 caliber

casings and two 30-30 casings. They also found a hubcap outside in front of the house, presumably left by Dorian Woods' fleeing car. Efforts were made to save Leo Marshall, who was suffering from gunshot wounds, but they were unsuccessful.

Dr. O.C. Smith, a pathologist with the State Medical Examiner's Office, conducted the autopsy of Leo Marshall. Dr. Smith testified that Marshall had one gunshot wound to the chest and one to the left flank. Marshall died from the wound to his chest, which had caused major damage to his heart and liver. Dr. Smith stated that the path of the bullet in his chest had been from front to back, from up to down, and from left to right. Dr. Smith testified further that the bullet path was consistent with Marshall having been seated and the gun fired from above and in front of him.

Sergeant Timothy Cook of the Memphis Police Department testified that shortly after the shooting, police began to investigate the identity of the three individuals seen in Marshall's home. Cook put together three photo spreads and showed them to the various witnesses he had interviewed. The only person identified from these three photo spreads was Dorian Woods. Cook located Dorian Woods and brought him in for questioning. Woods did not know the identity of the three individuals and did not recognize any of them from the pictures in the three photo spreads. As Cook was questioning Dorian Woods, another officer brought Cook two additional photo spreads to aid in the investigation. The two additional photo spreads were acquired from the Federal Gang Task Force and contained pictures of individuals suspected of being members of the Traveling Vice Lords, a gang allegedly responsible for

transporting drugs from Chicago to Memphis. Upon looking at the two additional photo spreads, Dorian Woods immediately identified one of the pictures as the individual who had fired the first shot at Leo Marshall. This individual was Charles Thompson.

Sergeant Cook then took the two additional photo spreads to show to the witnesses he had previously interviewed. Elice Rivers identified Charles Thompson as the man who had fired the first shot at Leo Marshall. Curtis Jones, who had watched the incident from the front porch of the abandoned house, identified Charles Thompson and the Defendant, Jerome Mason, as two of the three individuals he had seen on the night of September 13. Carolyn Lowery, an occupant of the yellow van which the men had approached outside Marshall's house, identified Charles Thompson and the Defendant from the photo spreads. Lamont Thornton identified Charles Thompson and told Sergeant Cook that one of the men pictured had similar features to the individual who had pursued Elice Rivers and Dorian Woods, but his skin tone in the photo was lighter than Thornton remembered. Unbeknownst to Lamont Thornton, that individual was the Defendant.

Although Sergeant Cook knew the identities of two the three individuals allegedly involved in the shooting from the Federal Gang Task Force photo spreads, he did not know of a residence for either suspect in Memphis. As a result, he took his information to the grand jury on September 23, 1993, and sought indictments prior to having the suspects in custody. On September 28, 1993, the grand jury returned three indictments, one for the aggravated assault of Elice Rivers, one for the aggravated robbery of Lamont Thornton, and one for

the murder of Leo Marshall. Each indictment named both Charles Thompson and Jerome Mason as defendants. On September 30, 1993, a traffic officer recognized the Defendant and brought him to Sergeant Cook for questioning.

The Defendant agreed to give a statement to Sergeant Cook, which was subsequently admitted into evidence at trial. Although the Defendant did not recount specific details concerning the shooting of Leo Marshall, he did give more general information. The Defendant stated that he was a member of the Traveling Vice Lords, a gang whose primary purpose, according to Mason, was to transport drugs from Chicago to Memphis. Mason explained that the Traveling Vice Lords attempt to persuade drug dealers in Memphis to purchase Traveling Vice Lord drugs, using threats and violence if necessary. He identified Charles Thompson as the head of the Traveling Vice Lords. Mason also stated that he owned a brown/burgundy Oldsmobile '98, which Charles Thompson had purchased in Mason's name. As far as his whereabouts for the month of September, Mason stated that he went to Chicago on August 30, came back to Memphis on September 9 for a court date the next day, and returned to Chicago on September 24. With regard to Charles Thompson, Mason stated that Thompson came to Memphis on September 12, and that he saw Thompson in Memphis on September 15 and 17. Mason also stated that Thompson returned to Chicago on September 23.

At trial, Lamont Thornton positively identified the Defendant as the individual he had seen pursue Elice Rivers and Dorian Woods through Marshall's home. Thornton explained that he had not positively identified the Defendant from the photo spread because his skin tone was darker in person than in the

picture. Curtis Jones and Carolyn Lowery both identified the Defendant at trial. In addition, Derek Lewis, one of the occupants of Dorian Woods' car, identified the Defendant as the individual who had shot at the car as Lewis drove away.

Sandra Mason, the aunt of the Defendant, testified for the defense at trial. Sandra Mason stated that she was living in Chicago on September 13, 1993. She testified that on that day, she was in Chicago at a birthday party for Marcus Thompson, a son of Charles Thompson. According to her, both Charles Thompson and the Defendant attended the party. In fact, Sandra Mason produced a Polaroid photograph of an individual who she claimed was the Defendant allegedly taken at the party. On cross-examination, however, Sandra Mason admitted that the Defendant's face was not visible in the photograph. She also admitted that although she saw Charles Thompson at the party, she has not seen him since September 13, 1993. Furthermore, she stated that she did not inform any law enforcement authorities about the Defendant's presence in Chicago on the night of the shooting even though she was aware of the charges as early as October of 1993.

In his first issue, the Defendant argues that the trial court erred in denying his motion for a continuance. With a trial date set for January 9, 1995, the Defendant's attorney requested a continuance on January 5, 1995, citing the health problems of his co-counsel, Phil Shanks. Co-counsel Shanks had handled aspects of the case other than the Defendant's alibi defense. Shanks experienced heart troubles shortly before the request for a continuance, and the Defendant's attorney did not believe he was familiar enough with the aspects of the case handled by Shanks to proceed to trial. The trial court denied the motion

for a continuance, focusing on the previous delays in the case and the fact that the Defendant's attorney was prepared to present his principal defense in the case, namely an alibi.

We first note that the decision to grant or to deny a continuance rests within the discretion of the trial court. See State v. Melson, 638 S.W.2d 342, 359 (Tenn. 1982). On appeal, this Court must affirm the judgment of the trial court absent "a clear showing of abuse of that discretion and prejudice inuring to the accused as a direct result of the court's ruling." State v. Cazes, 875 S.W.2d 253, 261 (Tenn. 1994) (citations omitted). The burden rests upon the appealing party to demonstrate that he or she "did not have a fair trial and that a different result would or might reasonably have been reached had there been a different disposition of the application for a continuance." Baxter v. State, 503 S.W.2d 226, 230 (Tenn. Crim. App. 1973).

In the case sub judice, the record indicates that the offenses were committed on September 13, 1993. The Defendant was indicted on September 28, 1993, and was arrested two days later, on September 30. The trial was originally set for July 11, 1994, but was continued at the request of the Defendant. The trial was reset for August 8, 1994, but was continued again. The trial was then reset for January 9, 1995. The Defendant's attorney requested his second continuance, due to the health problems of his co-counsel, only four days prior to trial. At this point, fifteen months had passed since the Defendant's indictment and arrest. Moreover, the Defendant's attorney had himself handled the investigation of the alibi defense, and stated to the trial court that he was prepared to proceed with the presentation of that defense.

From a review of the circumstances set forth in the record, we conclude that the trial court did not abuse its discretion by denying the Defendant's request for a continuance on January 5, 1995. Furthermore, we fail to see how the Defendant was prejudiced by the denial of the continuance. The proof supporting the Defendant's guilt, including identifications by several witnesses, is convincing. The Defendant's attorney cross-examined these witnesses at length and, at the hearing on the motion for a new trial, the trial court commented that the Defendant's attorney had conducted the trial in an excellent fashion. Thus, we do not believe that a different result might reasonably have been reached had the continuance been granted. The Defendant's first issue is therefore without merit.

In his second issue, the Defendant argues that the trial court erred in conducting the trial without the presence of the indicted co-defendant, Charles Thompson. More specifically, the Defendant contends that he was prejudiced by the absence of co-defendant Thompson because the jury could not compare their relative sizes and physical characteristics. In initial reports to police officers, witnesses described one of the three individuals at the crime scene as being stocky with short, curly hair, and another of the individuals as being taller, with a thin face and longer curls in his hair. It appears from the evidence in the record that the stocky individual is alleged to have been Charles Thompson and the taller, thinner individual is alleged to have been the Defendant. The Defendant seems to argue that an in-court comparison of the physical attributes of the two defendants would have refuted the specific identification of the Defendant made by multiple witnesses after they had given the general descriptions to law enforcement authorities.

The record reveals that Charles Thompson and the Defendant were both named as defendants on all three indictments. The Defendant was apprehended two days after the return of the indictments. It appears, however, that Charles Thompson remained at large even through the Defendant's trial. The record contains neither a request for nor an order of severance pursuant to Rule 14 of the Tennessee Rules of Criminal Procedure. Instead, the trial of the Defendant proceeded without the presence of Charles Thompson simply because Thompson had not been apprehended.

Although the Defendant argues it was error to conduct the trial without the presence of Charles Thompson, we conclude that the trial court proceeded properly. To accept the Defendant's argument would, we believe, lead to untenable results. For instance, if Charles Thompson had remained at large, the Defendant could never have been tried. Moreover, the Defendant does not appear to have suffered any unfair prejudice stemming from the absence of the co-defendant. The Defendant thoroughly cross-examined the various witnesses concerning their descriptions of the individuals involved in the shooting of Leo Marshall. The jury, however, chose to accredit the witnesses' identification of the Defendant as one of the perpetrators. From a review of the entire record, we can only conclude that the trial court did not err in conducting the trial without the presence of the at large co-defendant. The Defendant's second issue is therefore without merit.

In his third issue, the Defendant argues that the evidence supporting his convictions is legally insufficient. The Defendant's argument has two prongs. First, he contends that there is insufficient evidence to support his convictions

under the principles of criminal responsibility for the conduct of another individual. Second, he contends that there is insufficient evidence of premeditation to support his conviction for first degree murder.

When an accused challenges the sufficiency of the convicting evidence, the standard is whether, after reviewing 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). Questions concerning the credibility of the 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, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1987). Nor may this court reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. Cabbage, 571 S.W.2d at 835. Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Grace, 493 S.W.2d at 476.

With regard to the Defendant's contention concerning criminal responsibility for the conduct of another individual, we initially note that the Defendant does not challenge the proof as to any of the substantive elements of the offenses through this argument. Instead, he contends that there is insufficient proof to support finding him criminally responsible for the alleged conduct of other individuals, as charged in the jury instructions. An individual is criminally responsible for an offense committed by the conduct of another if, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]" Tenn. Code Ann. § 39-11-402(2) (1991).

In the present case, the proof shows that the Defendant accompanied Charles Thompson and another individual to the home of Leo Marshall. Once the men had arrived, Leo Marshall was shot and killed, Elice Rivers was shot and wounded, and Lamont Thornton was robbed at gunpoint. The record reveals that Charles Thompson fired the first shot at Leo Marshall and the third, unknown individual physically removed the personal property of Lamont Thornton from his pockets. The Defendant, however, wielded a gun during the commission of these offenses and, according to the testimony of Lamont Thornton, was the individual who pursued Elice Rivers as she fled the living room. Upon leaving the house, the Defendant was seen with Leo Marshall's 30-30 rifle and fired shots at Dorian Woods' car as it sped away from the scene. The Defendant was also identified as the individual who threatened the occupants of the yellow van parked on Kney Street after he had exited Marshall's home. After the commission of the offenses, the three individuals walked away from the crime scene together. From a review

of these circumstances, we conclude that there is sufficient evidence to support the jury's finding of guilt under the principles of criminal responsibility for the conduct of another individual.

With regard to the Defendant's contention concerning premeditation, we also conclude that the evidence is sufficient for a rational trier of fact to have found the Defendant guilty beyond a reasonable doubt. First degree premeditated murder is defined as the "intentional, premeditated and deliberate killing of another[.]" Tenn. Code Ann. § 39-13-202(a)(1) (1991). A premeditated act "means one done after the exercise of reflection and judgment." Tenn. Code Ann. § 39-13-201(b)(2) (1991). Premeditation requires a previously formed design or intent to kill. See, e.g., State v. West, 844 S.W.2d 144, 147 (Tenn. 1992).

In the case at bar, the record indicates that the Defendant, Charles Thompson and another individual parked their car on Kney Street a short distance away from Leo Marshall's home. They walked down the street until they came to Marshall's home and approached his front porch. Along with Dorian Woods, they followed Marshall into his home. When Dorian Woods took what appeared to be drugs from his pocket, the three individuals brandished weapons in near unison and several shots were fired. Leo Marshall was sitting on the couch and, although his 30-30 rifle was by his side, there is no evidence that Marshall threatened the three individuals in any way. In fact, there is no indication that there was any type of disagreement whatsoever. Marshall was shot twice, with the fatal bullet striking him in the chest and damaging his heart and liver. Shortly after the killing, the three individuals exited the home and

walked back up the street in the direction of their car. Although Lamont Thornton was robbed at gunpoint, the robbery took place after the shooting of Marshall. There is no evidence that the shooting of Marshall resulted from a botched robbery or drug deal. The three individuals did not ransack the house looking for valuables or drugs. Instead, they drew guns in near unison, shot Leo Marshall, pursued Dorian Woods as he fled, and then left the scene. Furthermore, the Defendant's own statement reveals that he was a member of the Traveling Vice Lords, a gang headed by Charles Thompson. The Defendant indicated that the Traveling Vice Lords attempted to persuade Memphis drug dealers to purchase drugs from them and used threats and violence to accomplish this purpose. From a review of these circumstances, we conclude that the jury could reasonably have found that the three individuals sought Leo Marshall on the night of September 13, 1993 for the purpose of killing him. There is sufficient evidence of premeditation to support the jury's verdict. The Defendant's third issue lacks merit.

In his fourth issue, the Defendant argues that the trial court erred in denying his motion for a preliminary hearing. The Defendant asserts that the denial was error because the preliminary hearing would have afforded him "the opportunity to have obtained a review by the Trial Judge of the existence of probable cause."

The Defendant's argument ignores the fact that he was indicted by the Shelby County Grand Jury before he was arrested. The record reveals that law enforcement authorities learned the identities of two of the three perpetrators but did not know their whereabouts. As a result, indictments were sought prior to

having custody of the Defendant. The grand jury determined that there was probable cause to believe that criminal offenses had been committed and that the Defendant was involved in their commission. Accordingly, the grand jury returned three indictments charging the Defendant and Charles Thompson with those offenses. By chance, the Defendant was located and arrested two days after the return of the indictments.

When a prosecution is commenced through an indictment and *capias* returned by a grand jury, a defendant has no right to a preliminary hearing under Rules 5 and 5.1 of the Tennessee Rules of Criminal Procedure. See *Waugh v. State*, 564 S.W.2d 654, 660 (Tenn. 1978); *Vaughn v. State*, 557 S.W.2d 64, 65 (Tenn. 1977); see also, Raybin, Tennessee Criminal Practice and Procedure, § 7.23. There is no right to a preliminary hearing in such cases because the central purpose of the preliminary hearing, a determination of probable cause, has already been achieved through the grand jury proceeding.

In the case sub judice, the prosecution of the Defendant was commenced through the return of an indictment and *capias* by the Shelby County Grand Jury. As a result, he was not entitled to a preliminary hearing upon his subsequent arrest. We therefore conclude that the trial court did not err in denying the motion for a preliminary hearing. The Defendant's fourth issue lacks merit.

For the reasons set forth in the discussion above, we conclude that the Defendant's issues on appeal are meritless. Thus, we affirm the judgment of the trial court.

DAVID H. WELLES, JUDGE

CONCUR:

JOE B. JONES, PRESIDING JUDGE

JERRY L. SMITH, JUDGE