

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY SESSION, 1999

FILED
July 9, 1999
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

KELVIN D. BURKE,

Appellant.

C.C.A. NO. 01C01-9806 CR 00276

DAVIDSON COUNTY

HON. SETH NORMAN
JUDGE

(Direct Appeal - Especially
Aggravated Robbery)

FOR THE APPELLANT:

TERRY J. CANADY
211 Printer's Alley Building
Suite 400
Nashville, TN 37201

FOR THE APPELLEE:

PAUL G. SUMMERS
Attorney General and Reporter

CLINTON J. MORGAN
Counsel for the State
425 Fifth Avenue North
Nashville, TN 37243

VICTOR S. JOHNSON
District Attorney General

MARY HAUSMAN
CHRIS BUFORD
Assistant District Attorneys
Washington Square Building
222 Second Avenue North
Nashville, TN 37201-1649

OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

The appellant, Kelvin D. Burke, was convicted by a Davidson County jury of one (1) count of especially aggravated robbery, a Class A felony. The trial court sentenced him to twenty-two (22) years incarceration. On appeal, the appellant claims that the evidence is insufficient to support the jury's finding of guilt. After a thorough review of the record before this Court, we affirm the judgment of the trial court.

I

On January 4, 1995, Bobby Lee, Kenneth Lee and Larry Estes drove to Nashville from their home in Milan, Tennessee, for the purpose of purchasing cocaine. Bobby Lee had previously purchased cocaine from a woman named Latonya Clift at her apartment in Nashville. Lee contacted Latonya the previous day and set up a purchase of three (3) ounces of cocaine for \$2,700. When Bobby Lee, Kenneth Lee and Estes arrived at Latonya's apartment, Latonya and her sister, Glenda, were not there, but the appellant and Larry Sims were present. Shortly thereafter, Latonya and Glenda returned, and the group waited on Latonya's drug supplier to return her telephone call.

While they were waiting, Bobby Lee walked upstairs in the apartment to use the restroom. As he was returning downstairs, he was informed that he had a telephone call. As he picked up the telephone, he heard a gunshot coming from the kitchen.¹ He heard another shot, and as he turned around, he observed

¹ Lee testified that after Glenda handed him the phone, she and Latonya left the apartment.

Sims shooting towards his brother, Kenneth. Kenneth ran out of the apartment, holding himself as if he had been shot.

At the same time, Bobby felt bullets hitting him in the back. When he turned around, he saw the appellant shooting him. Bobby Lee attempted to flee, but fell on top of Estes, who had also been shot. Sims jumped on top of Lee and demanded the \$2,700, while the appellant snatched a ring from Lee's finger. In an attempt to save their own lives, both Lee and Estes "played dead." The appellant and Sims then left the apartment. Lee and Estes crawled outside, and Lee observed his car pulling off.

As a result of their injuries sustained from the shooting, Bobby Lee was hospitalized for over a month and Estes was hospitalized for approximately three (3) days. Kenneth Lee died as a result of a single gunshot wound to the chest.

Lee's car was recovered later that evening after a Metro police officer observed two (2) men pushing the car on a roadway. The officer traveled up the roadway and then turned around to investigate. When he returned, the vehicle was on fire. The vehicle was completely destroyed by the fire.

The appellant was subsequently developed as a suspect in the shooting, and law enforcement authorities began looking for the appellant. On January 5, officers located the appellant at the home of his aunt and uncle, but the appellant told the officers that his name was Tony Jones. The next day, the officers were again able to locate the appellant, and again, the appellant stated that his name was Tony Jones. However, the officers were aware of the appellant's true identity and took him into custody at that time. The appellant had in his possession a bus ticket under the name of Tony Jones which was scheduled to leave for Dallas, Texas, on January 6 at 2:00 p.m.

While in custody, the appellant gave two taped statements to the detectives. In his first statement, the appellant claimed that Larry Sims was the sole shooter at the apartment on the day in question. He stated to the police that he was present at the apartment because he was helping Latonya move. Once the shooting began, the appellant left the building.

However, after the officers noted various inconsistencies in the appellant's statement, the appellant gave a second statement. In this statement, the appellant claimed that Larry Sims and one of the men from Milan were in the kitchen talking when someone fired a gun in the kitchen. The other two men began running towards the kitchen, and because one of the men had a weapon in his possession, the appellant tried to grab his arm. The gun discharged once, and the bullet hit the floor. The appellant then gained control of the gun and shot twice, one shot hitting one man, and the other shot directed at the other man² In the meantime, Sims walked into the room and shot at one of the men as well. According to the appellant, he then ran out of the apartment.

The officers photographed the appellant, and Lee and Estes were asked to view a photographic lineup of possible suspects. Both victims positively identified the appellant as one of the perpetrators in the shooting.

The appellant, Sims, Latonya Clift and Glenda Clift were indicted on the charges of conspiracy to commit first degree murder and aggravated robbery in Count One, premeditated first degree murder of Kenneth Lee in Count Two, first degree felony murder of Kenneth Lee in Count Three, especially aggravated robbery of Bobby Lee in Count Four and attempted first degree murder of Larry Estes in Count Five. The appellant's trial was subsequently severed from that of

² The appellant stated that he definitely shot one man, but could not be sure whether he hit the other one.

his co-defendants.³ The state dismissed Count Three of the indictment on its own motion, and the jury was unable to reach a verdict as to Counts One, Two and Five of the indictment. However, the jury found the appellant guilty of especially aggravated robbery as alleged in Count Four of the indictment. From his conviction, the appellant now brings this appeal.

II

In his sole issue on appeal, the appellant challenges the sufficiency of the convicting evidence. He asserts that he was convicted based upon the testimony of Lee and Estes, and their testimony was inconsistent and conflicting. Therefore, he contends that no rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.

A.

When an accused challenges the sufficiency of the evidence, this Court must review the record to determine if the evidence adduced during the trial was sufficient “to support the findings by the trier of fact of guilt beyond a reasonable doubt.” Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence or a combination of direct and circumstantial evidence. State v. Brewer, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996).

In determining the sufficiency of the evidence, this Court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this Court substitute its inferences for those drawn by the trier

³ After reviewing this record on appeal, this Court is unaware of the disposition of the charges against the appellant’s co-defendants.

of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). To the contrary, this Court is required to 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. State v. Tuttle, 914 S.W.2d 926, 932 (Tenn. Crim. App. 1995). “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). 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 jury as the trier of fact. State v. Tuttle, 914 S.W.2d at 932.

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); State v. Grace, 493 S.W.2d at 476.

B.

Especially aggravated robbery is “the intentional or knowing theft of property from the person of another by violence or putting the person in fear” that is “[a]ccomplished with a deadly weapon” and “where the victim suffers serious bodily injury.” Tenn. Code Ann. §§ 39-13-401(a). -403(a) (1991).

The proof at trial revealed that, after he heard gunshots in the kitchen, Bobby Lee felt bullets hitting him in the back. Lee turned around and observed the appellant pointing a gun and shooting at him. Lee attempted to escape, but fell on top of Larry Estes. Sims jumped on top of him and demanded the money, and the appellant took a ring from Lee’s finger. When they had obtained the

money and jewelry, the appellant and Sims fled the scene in Lee's vehicle. As a result of his injuries sustained in the shooting, Lee was hospitalized for over a month. Furthermore, both Lee and Estes positively identified the appellant from a photographic lineup as one of the shooters.

Moreover, an eyewitness testified that she observed the appellant, Sims, Latonya and Glenda enter Latonya's apartment with three (3) other men. Shortly thereafter, she heard gunfire and saw the appellant and Sims get into a vehicle and drive away.

We conclude that a rational trier of fact could have found that the state proved the essential elements of the offense of especially aggravated robbery. Although the appellant claims that the testimony of Lee and Estes was inconsistent, conflicting and essentially incredible, it is the province of the jury, as the trier of fact, to reconcile conflicts in proof as well as to determine the credibility of the witnesses. State v. Grace, 493 S.W.2d at 476; State v. Tuttle, 914 S.W.2d at 932. This Court is not at liberty to second-guess the jury's determination in this regard. The evidence is, therefore, sufficient to sustain the appellant's conviction for especially aggravated robbery.

This issue has no merit.

III

The evidence is sufficient for a rational trier of fact to find the appellant guilty of especially aggravated robbery. Accordingly, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

DAVID G. HAYES, JUDGE

NORMA MCGEE OGLE, JUDGE