

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
May 6, 2014 Session

**STATE OF TENNESSEE v. ANTONIO JACKSON
and JOLETTA SUMMERS**

**Appeal from the Criminal Court for Shelby County
No. 11-01531 Carolyn Wade Blackett, Judge**

No. W2013-00185-CCA-R3-CD - Filed November 10, 2014

The husband-wife defendants, Antonio Jackson and Joletta Summers, were convicted of voluntary manslaughter, a Class C felony, and attempted voluntary manslaughter, a Class D felony. Defendant Summers was also convicted of employing a firearm during the commission of a dangerous felony, a Class C felony. Defendant Jackson was sentenced as a Range II, multiple offender to concurrent terms of eight years for the voluntary manslaughter conviction and four years for the attempted voluntary manslaughter conviction. Defendant Summers was sentenced as a Range I, standard offender to concurrent terms of three years for each of the manslaughter convictions and to six years for the firearm conviction, to be served consecutively to the three-year sentence. The defendants now appeal, challenging the sufficiency of the evidence, the denial of their motion to sever, and certain evidentiary rulings made by the court. Following our review, we affirm the judgments of trial court.

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

ALAN E. GLENN, J., delivered the opinion of the Court, in which CAMILLE R. MCMULLEN, J., joined. JOSEPH M. TIPTON, J., Not Participating.

Paul J. Springer, Memphis, Tennessee, for the appellant, Antonio Jackson; Larry E. Fitzgerald, Memphis, Tennessee, for the appellant, Joletta Summers.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Senior Counsel; Amy P. Weirich, District Attorney General; and Greg Gilbert, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The defendants were indicted for second degree murder, attempted second degree murder, and employing a firearm during a dangerous felony as the result of their shooting two young men, Marion Withers and Nico White, on August 5, 2009, in Memphis, following a neighborhood altercation involving their son, Antonio “Little Tony” Jackson.¹ The defendants were convicted of the lesser-included offenses of voluntary manslaughter and attempted voluntary manslaughter. Defendant Summers was also convicted on the firearm charge, but Defendant Jackson was acquitted of that charge.

Fifteen-year-old Kardell Itson testified that he was twelve years old at the time of the shooting and that he was playing basketball in his neighborhood with his sister, Mary, a friend named Dedrick, Little Tony, and the victims. Dedrick confronted Little Tony about whether he had stolen a BB gun from one of Itson’s friends. Itson overheard the verbal argument between Little Tony and Dedrick but had gone inside his house before the physical fight occurred. When Itson came back outside, “everybody” told him that Little Tony and Dedrick had “just got to fighting” and that Little Tony had run down the street to the home of his aunt, Paula Killebrew. Itson, Withers, White, and Mary then walked down the street to Withers’ house. The defendants and another woman suddenly pulled up in their vehicle, and all three of them jumped out of the car “yelling loud like they was mad,” wanting to know who had “jumped [their] son.” Itson, Withers, and White tried to tell the defendants that the person who had fought with Little Tony had left.

Itson said that Defendant Jackson then approached White, who had an injured knee, and swung at him. White dodged the blow and hit Defendant Jackson. Withers came to White’s aid and hit Defendant Jackson in the back of the head, which ended the fight. Itson saw Defendant Summers go to the passenger side of the vehicle and return to Defendant Jackson’s side. Itson could not see if she removed anything from the vehicle. Defendant Jackson then pulled out a silver revolver from the right pocket of his shorts and began firing at White, while Withers was standing behind White. Itson heard two gunshots and saw White fall in the middle of the street. Itson then started running and saw the defendants run back to their vehicle and flee the scene. On cross-examination, Itson acknowledged that Withers was a member of the Bloods gang and identified a photograph of Withers holding a gun.

¹Because Defendant Jackson and his son share the same first and last names, we will refer to the son as “Little Tony.” We intend no disrespect in doing so.

Nineteen-year-old Mary Itson testified that she saw Little Tony and Dedrick fighting. After the fight, Little Tony walked down the street toward Killebrew's house. She and Kardell then walked to Withers' house and were outside talking to Withers and White when the defendants' vehicle pulled up "real fast" and the defendants "jumped out." She and the others tried to tell the defendants that they had the wrong people. She then heard two or three gunshots and saw the defendants leave. She saw White crawling up Withers' driveway. The only people she saw in the immediate area of the gunfire were Defendant Jackson and White.

Gloria Withers, Marion Withers' mother, testified that her son was eighteen years old when he was killed. On the evening of the shooting, she looked out her front door and saw Defendant Jackson fighting with her son. Several people had gathered outside, and when Ms. Withers went outside to investigate, she asked Defendant Summers what was going on, but Summers ignored her. Defendant Summers went to her vehicle and then returned to Defendant Jackson's side. Ms. Withers then heard gunshots and saw gunfire. Both defendants were close to where she saw the gunfire. Defendant Summers turned to Ms. Withers and said, "[Y]ou don't f*** with my motherf***ing family." Ms. Withers could not identify which defendant fired the weapon but said, "[I]t was one of them."

After the shooting, Ms. Withers did not see her son and when she went back inside her house, she found White, who was bleeding, on the floor leaning on the couch. Ms. Withers helped care for him until the police and emergency personnel arrived. She said that White had been shot in the chest and in his side. Shortly thereafter, Ms. Withers learned that her son had been shot and killed.

Nico White testified that on August 5, 2009, he and Withers, who was his cousin, were watching Little Tony and others play basketball when Dedrick confronted Little Tony about a BB gun. Although no one encouraged him to fight, Little Tony suddenly "popped off" on Dedrick and started beating up Dedrick who instead "beat him down."

After the fight, White and Withers walked down to Withers' house. The defendants' car suddenly pulled up, followed by a second car with four occupants. The defendants, Little Tony, and Killebrew "jumped out full speed" and charged angrily toward the group. Defendant Jackson took off his shirt and ran toward them. Defendant Summers told White, "[B]aby, nothing going to happen. Just tell me what's going on." White explained to Defendant Summers that Little Tony had gotten into a fight with Dedrick. White then saw Defendant Jackson trying to attack Withers. White walked toward the crowd, causing Defendant Jackson to turn toward him. Because White had a brace on his injured leg, he started backing up to avoid a fight, but Defendant Jackson continued coming toward him. Defendant Jackson swung at White's face and missed, and White swung back and grazed Defendant Jackson's face. White then was shot in his chest and looked down to see blood

squirting from his chest. As White was attempting to run away, he was shot again in the back. He said that he did not see who shot him and that he heard a total of three gunshots. He was hospitalized for one and a half weeks and continued to receive medical treatment for ongoing chest problems as a result of being shot.

On cross-examination, White admitted that he and Withers were members of the Bloods gang. He identified the photograph of Withers holding a gun but said that was the first time he had ever seen Withers with a gun.

Officer Paul Woods of the Memphis Police Department testified that, around 8:30 p.m. on the evening of the shooting, he and his field training officer responded to the scene of the shooting. They saw a young, African-American male lying in the street unconscious and gasping for air. Officer Vornell Montgomery of the Memphis Police Department testified that he went to the defendants' residence and was told that the vehicle in question, a burgundy SUV, was in the shop, but it was later discovered behind a fence at the home of a family member down the street.

Tennessee Bureau of Investigation ("TBI") Special Agent James Davis testified that, about six hours after the shootings, he administered gunshot residue tests for Marion Withers, both defendants, and the defendants' vehicle. He said that, eight hours after a gun-related incident, the elements required for such testing dissipate. He found low levels of certain elements associated with gunshot residue on both Withers and Defendant Jackson but did not find any of the elements on Defendant Summers.

Lieutenant Anthony Mullins of the Memphis Police Department testified that there was blood evidence on one side of the street where the fight occurred, on the other side of the street where Marion Withers fell, and inside the house where Nico White went for help. The defendants' vehicle, a burgundy SUV, was found at another location, parked in the driveway behind a large wooden privacy gate.

Defendant Jackson testified that on August 5, 2009, Little Tony came home from playing basketball and immediately went to his room. When Defendant Summers arrived home, Little Tony told her that his eye was swollen and he had a knot on his head because he had been elbowed while playing basketball. However, Paula Killebrew called Defendant Summers and told her that she thought Little Tony had been "jumped." The defendants, their daughter, and Little Tony decided to drive to the area where the fight had occurred. Upon their arrival, they saw Killebrew standing by the street and a group of young men sitting on a car. Defendant Summers and Little Tony went over to the group of young men and started talking to them. One of the young men said, "I don't know why in the f*** y'all coming around here. . . . We don't know what the f*** happened to your son." Defendant Jackson

heard someone say, “Y’all going to get murked around here,” meaning they could be killed. An argument ensued, with White hitting him in the back of his head. Defendant Jackson denied taking the first swing at White or throwing a punch at anyone. He heard two gunshots and fled in his vehicle with Defendant Summers and his children. Defendant Jackson denied having a gun, shooting White, or knowing where the gunshots came from.

Defendant Jackson said that he then hid his car at the home of his wife’s grandmother because he feared retribution and that his house “did eventually get shot up.” He said he told the police where his vehicle was located, gave them the keys, and walked with them to its location.

Defendant Jackson admitted that he initially told the police that Defendant Summers was responsible for Withers’ death because it appeared that she had a gun when they arrived at her grandmother’s home. However, he said that he did not know who fired the gun and that he never saw his wife with a gun during the shooting.

The defendants’ nineteen-year-old son, Antonio Dewayne Jackson, “Little Tony,” testified that he was playing basketball when Dedrick confronted him about a BB gun and began kicking and punching him. Little Tony ran back to his house and later told Defendant Summers that he had been elbowed in the eye while playing basketball. She then told everyone to get in the car, and they drove to the area where he had played basketball. When Little Tony saw the group of men on the street, he told Defendant Summers those were the same people hanging around at the time but never told anyone what actually happened or who beat him because “[he] was afraid something might happen.”

Little Tony said that Defendant Summers started asking the group questions about what had happened. Defendant Jackson took a step toward Withers, who reacted by swinging at him, followed by another swing from White. After being punched by White, Defendant Jackson threw a punch at Withers and then turned toward White. Defendant Summers suddenly came out from Little Tony’s blind side, and he heard two gunshots. He did not see who fired the gunshots or either of his parents armed with a pistol. After the gunshots, he and his family got back in the car, parked their vehicle at Defendant Summers’ grandmother’s house, and returned to their home.

Dr. Lisa Funte testified that she performed the autopsy on Marion Withers on August 6, 2009. She said that Withers had a gunshot entrance wound on the right side of the chest and an exit wound on the right side of his back. Stippling was present on the skin surrounding the entrance wound, indicating that the gun was between six inches and three feet from the victim when it was fired. No bullet was recovered from the victim’s body. There were no injuries on the victim’s body indicating that he had been involved in a

physical fight.

ANALYSIS

I. Sufficiency of the Evidence

Both defendants challenge the sufficiency of the evidence, arguing there was insufficient proof as to who fired the pistol or that either was criminally responsible for the shooting.

When the sufficiency of the evidence is challenged, our standard of review 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). “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).

A person is criminally responsible for 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). Criminal responsibility is not a separate crime but “is solely a theory by which the State may prove the defendant’s guilt of the alleged offense . . . based upon the conduct of another person.” State v. Lemacks, 996 S.W.2d 166, 170 (Tenn. 1999).

Both defendants were convicted of voluntary manslaughter, which is defined as “the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.” Tenn. Code Ann. § 39-13-211(a).

Kardell Itson testified that both defendants were angry about their son having been beaten up earlier in the evening. Defendant Jackson first approached White, who started backing up when Jackson swung at him. White ducked the blow and hit Defendant Jackson,

and Withers then came to White's aid and hit Defendant Jackson. Itson saw Defendant Summers go to the passenger side of her vehicle and then return to Defendant Jackson's side. Defendant Jackson removed a pistol from his pocket and began firing at White.

Mary Itson testified that the flash of gunfire came from Defendant Jackson's direction and that Jackson and White were the only people in the vicinity of the gunfire.

Gloria Withers saw the defendants and her son engaged in a confrontation in front of her home. Ms. Withers asked Defendant Summers what was going on, but Summers ignored her. Ms. Withers watched Defendant Summers go back to her vehicle and return to Defendant Jackson's side when Ms. Withers heard a gunshot and saw gunfire. Both defendants were close to where she saw the gunfire. After shots were fired, Defendant Summers turned to Ms. Withers and said, "[Y]ou don't f*** with my motherf***ing family." Ms. Withers could not identify which defendant fired the weapon but testified, "[I]t was one of them." She did not recall telling the police that she saw Defendant Summers firing the shots.

Nico White likewise testified that the defendants were angry about their son being beaten up and that Defendant Jackson tried to hit both him and Withers. Afterwards, White heard two gunshots, realized he had been shot twice, and attempted to run away. White did not see who shot him but could see that Withers was not armed.

Additional proof included the fact that, according to TBI Agent James Davis, low levels of gunshot residue were on the hands of Defendant Jackson six hours after the shooting; the defendants' vehicle was parked not at their own home but hidden behind a fence at the home of a relative; and the defendants did not make a complaint to police that their son had been assaulted. As for Defendant Summers' argument that the evidence showed she acted in the self-defense of her husband, the jury was not bound to accept her version of the facts; and it is evident from the verdicts that it did not. See State v. Goode, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997). Further, it was not necessary that the jury decide whether the defendants were either directly or criminally responsible for the offenses. See State v. Lemacks, 996 S.W.2d 166, 170 (Tenn. 1999).

Thus, in summary, the State's proof was that Kardell Itson testified that he saw Defendant Jackson firing upon the victims and that both defendants were angry about their son having been beaten up and sought to confront those they thought responsible. Furthermore, based upon the testimony of Itson and Gloria Withers, Defendant Summers retrieved a gun from the vehicle prior to the shooting and gunshots came from the direction of the defendants. The proof also established that Defendant Jackson hid his vehicle after the shooting and admitted he thought he saw his wife with a gun directly after the shooting.

Therefore, based upon this evidence, a reasonable jury could have concluded that either Defendant Jackson fired the shots or was criminally responsible for Defendant Summers' actions.²

II. Denial of Motion to Sever

Both defendants argue that the trial court erred in not severing their cases for trial. The State responds that review of this issue has been waived because the record does not show that Defendant Summers filed a pretrial motion or made an oral motion for severance and she filed her motion for new trial one day late. Although Defendant Jackson did file a pretrial motion for severance, the State argues that the record appears incomplete regarding a transcript of that motion, and, therefore, Defendant Jackson cannot show any prejudice resulted from the denial of his motion to sever.

According to Tennessee Rule of Criminal Procedure 14, the trial court must grant a severance pretrial if necessary to ensure a fair trial. The “clear prejudice” test applies to this determination. Defendant Summers’ argument for pretrial severance was that, because Defendant Jackson, her husband, made an out-of-court statement that he believed she was the shooter, there could be no fair determination of guilt or innocence as to her. Defendant Jackson’s argument was that Defendant Summers had already given a statement to the police admitting she fired the gun; the case had been rescheduled seven times; he was having trouble keeping his witnesses available; he could not find a job given the pending charges; there was no “just cause for delay;” and, severance was necessary to “promote a fair determination of guilt or innocence.”

“The decision to sever criminal defendants is wholly within the discretion of the trial court,” State v. Mickens, 123 S.W.3d 355, 383 (Tenn. Crim. App. 2003) (citing State v. Maddox, 957 S.W.2d 547, 556 (Tenn. Crim. App. 1997), “and cannot be interfered with absent ‘clear abuse.’” Mickens, 123 S.W.3d at 383 (quoting State v. Howell, 34 S.W.3d 484, 491 (Tenn. Crim. App. 2000)). This court has held, “[w]here a motion for severance has been denied, the test to be applied in determining whether the trial court abused its discretion is whether the defendant was ‘clearly prejudiced’ in his defense as a result of being tried with his codefendant[s].” State v. Price, 46 S.W.3d 785, 803 (Tenn. Crim. App. 2000). Therefore, we must determine whether the defendants were clearly prejudiced by the trial court’s denial of their motion to sever.

²On appeal, Defendant Jackson also argues that the trial court erred in its instructions as to criminal responsibility. As we understand his argument, it is based upon the claim that the evidence was insufficient to sustain a determination by the jury of his criminal responsibility. As we have set out, we conclude that the evidence was sufficient in this regard.

A review of the evidence against each defendant makes clear that neither was prejudiced by the fact they were tried together. At a separate trial for Defendant Jackson, Kardell Itson could have testified that Jackson fired the shots. Testimony of other witnesses at the scene, as we previously have set out, would have bolstered his testimony. Accordingly, as to Defendant Summers, we conclude that the severance claim is procedurally waived for not being timely pursued at trial. Even if not waived, it would be without merit given the abundant proof which the State could have presented in a separate trial against Summers. As to Defendant Jackson, his motion to sever was based upon the fact he had originally been released without being charged and that he wished to proceed with the trial. These reasons do not constitute a basis for severance. Further, at the separate trial for Jackson, he, likewise would have faced substantial evidence. Accordingly, his severance claims are without merit.

III. Evidentiary Rulings

Defendant Jackson contends that the trial court erred by not admitting Lieutenant Mullins' testimony regarding his reason for initially releasing Jackson without charging him and in refusing to allow him to introduce testimonial or physical evidence relating to the victims' gang activity. Defendant Summers similarly contends that the trial court erred by not admitting photographs of Withers, which would have demonstrated Withers' propensity for violence.

In considering this issue, we apply the rule that "admission of evidence is entrusted to the sound discretion of the trial court, and a trial court's ruling on evidence will be disturbed only upon a clear showing of abuse of discretion." State v. Robinson, 146 S.W.3d 469, 490 (Tenn. 2004). See State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997). A trial court's exercise of discretion will only be reversed on appeal if the court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." Robinson, 146 S.W.3d at 490 (quoting State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997)). When determining admissibility, a trial court must first decide if the evidence is relevant. Tenn. R. Evid. 402 ("All relevant evidence is admissible except as provided by the Constitution of the United States, the Constitution of Tennessee, these rules or other rules or laws of general application in the courts of Tennessee. Evidence which is not relevant is not admissible."); Robinson, 146 S.W.3d at 490.

As to questioning Lieutenant Mullins regarding the reason for his initial release of Defendant Jackson, he provides no references to the very lengthy record as to his seeking to introduce this testimony or a proffer as to what Lieutenant Mullins' testimony would have been. Accordingly, we conclude that this issue is waived. Even if not waived, we could not conclude that testimony as to this gap would have been relevant.

As to the issue of the photographs pertaining to the victims' gang activity and propensity for violence, the defendants did not offer such photographs as proof for the record. Accordingly, the issue is waived. Even if not waived, we note that the trial court allowed the jury to hear proof of the victims' gang affiliations, including at least one photograph of Withers holding a gun and White's admission that both he and Withers were members of the Bloods gang.

CONCLUSION

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

ALAN E. GLENN, JUDGE