

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1994 SESSION

FILED

September 25, 1995

Cecil Crowson, Jr.

Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

BURNETTE MIZE,

Appellant.

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C.C.A. # O3C01-9405-CR-00163

CLAIBORNE COUNTY

Honorable Lee Ashby, Judge

(Resisting Arrest)

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Burnette Mize, charged with two counts of assault, one count of disorderly conduct, and resisting arrest, was convicted only of the latter offense. The trial court imposed a sentence of 6 months at 75% in the county jail, all of which was suspended.

In addition to her challenge to the sufficiency of the evidence, the defendant has appealed claiming that the trial court erred in limiting the defendant's cross-examination of Trooper Rodney McCarty and improperly charged the jury.

We affirm the judgment of the trial court.

On May 14, 1992, the defendant learned that her brother, Elvis Bussell, had wrecked his motorcycle near her home in Hamilton Estates. When she went to the scene to determine whether her brother was hurt, an argument ensued which resulted in her arrest on these charges.

Tennessee Highway Patrolman Rodney McCarty testified that he was traveling northbound on State Route 25 when a southbound motorcycle passed him in the opposite direction traveling between 75 and 80 miles per hour. The trooper turned his vehicle around and took pursuit. During the chase, Bussell wrecked the motorcycle and was injured.

Officer McCarty testified that he called for traffic

control assistance and an ambulance and then attempted to immobilize Bussell. Within a short period of time, the defendant arrived, yelling and screaming that the officer "had no right to chase [her brother]" and claiming that the officer had "made him wreck." At trial, Officer McCarty stated that he explained to the defendant that Bussell was in his custody and would be taken to the hospital; he directed her to stand near the patrol car where she could see everything but would not be in the way. Initially, the defendant followed these instructions for a few seconds but soon returned to her brother's side. Again, the officer asked her to stand back. He testified that she refused to comply. The defendant continued to cause a disturbance as a crowd gathered around the accident. At one point, the defendant said, "You son-of-a-bitch, you don't have any reason to arrest him. He's my brother. I'm going to take his motorcycle." When the defendant attempted to move her brother's motorcycle before any measurements were taken, McCarty explained that she should not move the vehicle and that the police would do so.

Thereafter, the officer said, "Ma'am, I'm going to place you under arrest for disorderly conduct, for causing this scene here. I can't carry on what I'm doing with this accident investigation because of you." Officer McCarty took the defendant by the arm in an "escort position" and started towards his vehicle. The defendant, saying she was not going to jail and the officer was not going to get her into the patrol car, tried to jerk away. Eventually, Officer, McCarty was able to lead her "slowly but surely" toward the car; when

they were near the car, however, the defendant slapped at the officer in his chest area and kicked him in the shins.

The officer described the behavior of the defendant as "fighting, struggling, and screaming the whole time." Once he got her in the car, the defendant extended her legs out of the car in an effort to free herself. Officer Dave Ely then arrived to assist. Officer McCarty pulled the defendant from behind while Officer Ely placed her legs inside the backseat area of the vehicle. The officers then finished the accident investigation and called a wrecker to tow the motorcycle. Officer McCarty testified that he was not injured by the defendant. He did, however, take the defendant to the hospital because she complained of being hurt. The defendant was treated, released, and then taken to the jail.

At trial, Deborah Daniels, who resided in the area near the accident scene, observed Officer McCarty try to provide emergency care to the accident victim. She stated that the defendant refused to comply with the officer's instructions and was generally "out of control." Ms. Daniels related that when Officer McCarty tried to arrest her, the defendant tried to get away and falsely accused him of touching her breasts. She said the defendant yelled as she stuck her legs out in an effort to prevent the officer from closing the door.

Jan Latrelle, another neighborhood resident, testified that he heard the defendant call the officer a "son-

of-a-bitch" and threaten civil litigation. He also heard a child tell the officer that his daddy would get him for this. Latrelle and other witnesses stated that Bussell tried to get up and start toward the officer, but that the officer kicked Bussell to the ground and told him to stay there.

A third neighborhood resident, Lisa Brown, testified that the defendant did not want the trooper to help her brother. She said the officer warned the defendant more than once not to interfere and confirmed that the defendant failed to heed the instructions. She stated that the defendant continued to resist even after the trooper attempted to take her into custody. Ms. Brown testified that the defendant claimed her shoulder had been hurt as she was being placed into the trooper's vehicle. She also acknowledged that the victim's brother tried to come towards Officer McCarty.

There were several defense witnesses. Many claimed that the trooper had been too rough with the defendant who had identified herself as the sister of the accident victim. Several defense witnesses said Officer McCarty told the defendant to get away or go to jail. They testified that the trooper "roughed her up," during the arrest, shut the door on her legs four or five times, and pushed the defendant's head into the exterior of the patrol car. Some witnesses heard her complain that the trooper had hurt her breasts; they described the actions of the defendant's brother as an attempt to calm things down. Defense witnesses testified Officer McCarty kicked him in the chest and knocked him down. After the

arrests, officers apparently did not take any measurements or photographs of the accident scene.

The defendant testified that she was married with five children and had never been previously arrested. She explained that her brother was not mentally retarded but was slow and very nervous, with only a third or fourth grade education. The defendant related that just prior to the accident she heard a siren and caught a glimpse of a fast-moving motorcycle. When the siren stopped, her children came in and told her that her brother had broken his leg. She then accompanied her children to the scene to see how badly her brother had been injured.

The defendant testified that she approached her brother, observed that he was in a lot of pain, and told him to lie still. When her brother asked her to pick up his motorcycle, Officer McCarty told her to step away. She claimed to have complied. At that point the defendant overheard the officer tell her brother to lie still or "I'll knock you back down." She claimed the officer would not accept her explanation that the accident victim was her brother and told her to get away or go to jail.

The defendant claimed that the officer took her by the arm and slung her, hurting her breasts. She said the officer held her by the wrist and jerked her purse off of her shoulder. She claimed that when she asked Officer McCarty not to take her away from her children, the officer said welfare

would get them. The defendant testified that the officer then shoved her head into the car and slammed the car door on her legs.

She testified that after she was taken to the hospital, Officer McCarty made her husband leave the room during the examination. The officer stayed with her. The defendant said she had a number of bruises as a result of this incident.

An emergency room nurse testified that she remembered the defendant complaining about elbow pain and right ankle pain. She said the defendant had the odor of alcohol on her breath, a claim the defendant denied.

I

The defendant argues that the state failed to prove criminal intent and, therefore, the evidence was insufficient to support her conviction. The defendant stated in her brief that "[e]ven though there is evidence to support the fact that she did resist arrest, there is not sufficient evidence to show that she had an evil intent or bad purpose in so doing." She argues that her only intention was to help her brother. Although the defendant failed to make the claim in her motion for new trial, she now asserts that this court should hold the jury was not properly instructed on intent as an element of the offense.

Tenn. Code Ann. § 39-16-602(a) defines the offense

of resisting arrest:

It is an offense for a person to intentionally prevent or obstruct anyone known to the person to be a law enforcement officer, or anyone acting in a law enforcement officer's presence and at such officer's direction, from effecting a stop, frisk, halt, arrest or search of any person, including the defendant, by using force against the law enforcement officer or another.

On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073 (1984); Tenn. R. App. P. 13(e).

Here, the jury chose to accredit the testimony of the prosecution witnesses. The state presented proof that when Officer McCarty attempted to arrest the defendant, she struggled and fought the officer. Whether or not the defendant's conduct was justified as self-defense is governed by Tenn. Code Ann. § 39-11-611 and is a question for the jury. State v. Alfred Kemp, No. 02C01-9401-CC-00012 (Tenn. Crim.

App., at Jackson, Oct. 19, 1994), perm. to appeal denied, (Tenn. 1995). While the defendant argues that she had no "evil intent" and therefore was not guilty of resisting arrest, the jury rejected the evidence presented on behalf of the defendant's theory. In our opinion, it was entitled to do so. Thus, we find that the evidence was sufficient for a rational trier of fact to have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979).

II

Next, the defendant complains that the trial court committed reversible error in failing to instruct the jury on the statutory definition of "intentional." The failure to present a possible ground for relief at the motion for new trial hearing results in a waiver of this issue. Tenn. R. App. P. 3(e).

The trial judge does, of course, have the duty to give a complete charge of the law applicable to the facts of every case. State v. Brown, 836 S.W.2d 530 (Tenn. 1992); State v. Harbison, 704 S.W.2d 314 (Tenn.), cert. denied, 476 U.S. 1153 (1986); see also Tenn. Code Ann. § 40-18-110. The jury instructions should describe and define all elements of each offense unless those terms are of common use and understanding. State v. Cravens, 764 S.W.2d 754, 757 (Tenn. 1989); see also State v. Martin, 702 S.W.2d 560 (Tenn. 1985) (inadequate explanation of "malice"); State v. Black, 745 S.W.2d 302 (Tenn. Crim. App. 1987) ("open" and "rebellion" need

not be defined).

Here, the trial court provided the appropriate statutory definition of resisting arrest but failed to give definitions of any of the terms used in the statute. That statute requires that a person acts "intentionally" in obstructing or preventing the arrest. See Tenn. Code Ann. § 39-16-602. The legislature has defined "intentional" in the criminal law context to mean that "a person ... acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result." Tenn. Code Ann. § 39-11-302(a). More commonly, the term intentional means that a person purposefully acted in a certain way or did a certain thing. Webster's Encyclopedic Unabridged Dictionary of the English Language 739 (1989). The statutory definition is very similar. Thus, the trial court had no duty to provide a special instruction where none was requested. State v. Cravens, 764 S.W.2d at 757. Moreover, the error was not so plain as to require reversal. See State v. Ogle, 666 S.W.2d 58 (Tenn. 1984).

III

Next, the defendant argues that the trial court improperly limited her cross-examination of Officer McCarty on the events leading up to her brother's accident. The state's response is that the trial court acted within its discretionary authority.

We acknowledge that the right to cross-examination is fundamental. The denial of this right deprives the accused of a fair trial and is "constitutional error of the first magnitude." State v. Hill, 598 S.W.2d 815, 819 (Tenn. Crim. App. 1980). Yet the propriety, scope, manner and control of the cross-examination of witnesses is subject to the reasonable discretion of the trial court. Tenn. R. Evid. 611(a); Coffee v. State, 188 Tenn. 1, 4, 216 S.W.2d 702, 703 (1948); Davis v. State, 186 Tenn. 545, 212 S.W.2d 374, 375 (1948). Appellate courts may not disturb discretionary limits on cross-examination absent clear and plain abuse. State v. Fowler, 213 Tenn. 239, 253, 373 S.W.2d 460, 466 (1963); State v. Johnson, 670 S.W.2d 634 (Tenn. Crim. App. 1984). The materiality of the issues raised by cross-examination is the paramount consideration in the determination of prejudicial error. Matters pertaining to guilt, innocence, or credibility are always material. See Tenn. R. Evid. 611(b); Hayes v. State, 130 Tenn. 661, 666, 172 S.W. 296, 297 (1914).

The defendant argues that she should have been allowed to cross-examine Officer McCarty about the high speed chase of her brother so as to attack his credibility. On direct examination, the officer testified to the circumstances of the chase; at one point, however, the trial court made the following observation:

What is the purpose of this exhaustive examination regarding this motorcycle? I, I assume at some point that, that we're going to get to the point, but let's do so. It's been established that the officer is in pursuit of a motorcycle. Let's move along please.

Later, the trial court prodded the state to "stick to what

[the trooper] did in this case." At another point, the court observed that "both parties want to try a lot of things that are not material to this matter, but the court is going to confine the issues to the question of resisting arrest."¹

In our view, the trial court acted within its discretion in limiting the direct examination of the trooper in this manner. See Tenn. R. Evid. 611(a). The chase, once established, placed the charges against the defendant in proper context. Its details bore no relevancy to the guilt or innocence of the defendant and very little on the credibility of the officer.

When defense counsel attempted to cross-examine the trooper on some of the same events that the state had presented on direct examination, the trial court sustained the state's objection on the following basis:

The Court has already stated and will state again that what happened at the

¹The trial court allowed the resisting arrest charge to go to the jury.

scene of this accident is material to this case, and all these events leading up to it is not....

Later, defense counsel was able to state for the record that the basis for his attempt to cross-examine related to the credibility of the officer.² The defendant contested the officer's assertion that he was able to catch up with Elvis Bussell even after Bussell had sped by in the opposite direction at seventy-five miles per hour.

In our view, what occurred during the chase prior to the defendant's involvement at the accident scene was collateral to the issue at trial. Because, however, the state chose to place the testimony into evidence on direct examination, the defendant should have been permitted to cross-examine the officer about any inaccuracies in his recall as a means of impeaching his credibility. See Cohen, Paine, and Sheppard, Tennessee Law of Evidence, § 607.3 (2d ed. 1990 and Supp. 1994).

On the other hand, the jury was fully informed of the events that led to the confrontation between the defendant and Officer McCarty. Defense counsel had the opportunity to argue that the officer's testimony about the speed of Bussell's motorcycle stretches the limits of credibility. And, that his lack of credibility on those events had a bearing on his entitlement to be believed on the primary facts

²The defendant's brief argues that the charges against the defendant's brother were dismissed at a preliminary hearing based upon the fact that the officer was found to be unbelievable. Our review, of course, is limited to the contents of the record. See Tenn. R. App. P. 13(c). Nothing in this record confirms the allegations made in the defendant's brief.

at issue. The trial court hinted during cross-examination that the details of the chase had little bearing on the issue. We agree with that. While cross-examination on the speed of the motorcycle bore marginally on the credibility of the officer, the limitations clearly did not prejudice the verdict. In the context of the entire trial record, we could not hold that the limitation on cross-examination "more probably than not" affected the results of the trial. Tenn. R. App. P. 36()b). It appears that the trial court was attempting to guide the direction of the testimony to the central issue.

IV

Lastly, the defendant argues that the trial court erred by denying her request for special instructions to the jury.

A defendant may threaten or use force against an officer to resist arrest made by a law enforcement officer if that law enforcement officer uses or attempts to use greater force than necessary to make the arrest and the person reasonably believes that the force is immediately necessary to protect against a law enforcement officer's use or attempted use of greater force than necessary.

See Tenn. Code Ann. § 39-11-611(e)(1)(2). The trial court denied the request because it was "covered by [the] original charge."

The trial court, of course, has a duty to give a complete charge of the law applicable to the facts of the case. State v. Brown, 836 S.W.2d 530 (Tenn. 1992); State v. Harbison, 704 S.W.2d 314 (Tenn.), cert. denied, 476 U.S. 1153

(1986); see also Tenn. Code Ann. § 40-18-110. While the defendant may request special instructions, jury instructions are sufficient where they adequately state the law. See e.g., State v. Tyson, 603 S.W.2d 748 (Tenn. Crim. App. 1980).

Here, the defendant more specifically argues that the trial court improperly charged the jury that a person could not resist an illegal arrest unless they had a belief of imminent death or bodily injury. The actual charge was as follows:

It is further the law in this State at this time, under the provisions of Tennessee Code Annotated, Section 39-11-611, regarding the subject of self-defense, as follows:

"A person is justified in threatening or using any force against another when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force."

"The person must have a reasonable belief of imminent death or serious bodily injury."

"The danger must be real or honestly believed to be real at the time and must be founded upon reasonable grounds."

"The threat or use of force against another is not justified to resist an arrest that the person knows is being made by a law enforcement officer, unless the law enforcement officer uses or attempts to use greater force than necessary to make the arrest."

"If a defendant knows it is a law enforcement officer who is arresting or attempting to arrest him or her, respect for the rule of law requires the defendant to submit to apparent authority."

"Justification to exercise necessary self-defense is restored if the law enforcement officer uses greater force than necessary, under the circumstances, and the defendant acts under reasonable belief that his or her acts are necessary for self protection."

This same language was charged to the jury a second time when they requested a recharge on the definition of resisting arrest.

The quoted charge contains language from both subsection (a) and subsection (e) of Tenn. Code Ann. § 39-11-611, as well as some of the sentencing comments to subsection (e). The sentencing comments to § 39-11-611 state that subsection (a) allows the justification of self-defense of a person who is imminently threatened with force or is actually attacked and who reacts with force reasonably necessary to protect himself. Subsection (b) creates a presumption that a person using force against an intruder in his home held a reasonable fear of imminent death or serious injury. The comments, however, continue by stating that subsections (c), (d), and (e) are restrictions to the defense.

Subsection (e) represents a policy decision by the commission that the street is not the proper forum for determining the legality of an arrest. To a large extent, the rule is designed to protect citizens from being harmed by law enforcement officers. Research has shown that citizens who resist arrest frequently are injured by trained officers who use their skills and weapons to protect themselves and effectuate the arrest. If the defendant knows it is a law enforcement officer who has stopped or arrested him or her, respect for the rule of law requires the defendant to submit to apparent authority. The justification is restored if the law enforcement officer uses greater force than necessary under the circumstances and the defendant acts under reasonable belief that his or her acts are necessary for self-protection.

The defendant argues that these provisions should have been separated and that subsection (a) should not have

been charged. The comments, however, state that subsection (e) is a restriction on the use of self-defense. In our opinion, this indicates a legislative intent that the statute be read as a whole in considering whether the defense applies.

The judgment is affirmed.

Gary R. Wade, Judge

CONCUR:

John H. Peay, Judge

David G. Hayes, Judge