

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MAY 1995 SESSION

FILED
September 20, 1995
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee)
)
 V.)
)
 RONALD D. MOORE,)
)
 Appellant)

NO. 02C01-9412-CR-00296

SHELBY COUNTY

Hon. Arthur T. Bennett
Judge

(First-Degree Murder)

FOR THE APPELLANT:

Paul E. Lewis
4905 Navy Road
Millington, Tennessee 38053

FOR THE APPELLEE:

Charles W. Burson
Attorney General and Reporter
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

William David Bridgers
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

John W. Pierotti
District Attorney General

Thomas D. Henderson
Assistant District Attorney General
201 Poplar Avenue
Third Floor
Memphis, Tennessee 38103

OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Ronald D. Moore, appeals as of right pursuant to Rule 3 (b) of the Tennessee Rules of Appellate Procedure from a Shelby County Criminal Court jury's finding him guilty of murder in the first degree.

The appellant presents the following three issues for our review on appeal.

- (1) The evidence was insufficient to support the conviction of guilt and the trial court erroneously denied appellant's motion to dismiss at the close of the state's proof.
- (2) The trial court erred in not allowing the appellant to impeach a state's witness with the testimony of another witness.
- (3) The trial court erred when it allowed the state to use evidence of the appellant's prior convictions to impeach his credibility.

We find that all of the issues raised by the appellant on appeal are without merit and therefore affirm the judgment of the trial court.

I

The appellant first contends that the evidence was insufficient for the jury to conclude that he was guilty of first-degree murder. Tennessee Code Annotated defines first-degree murder, in part, as "an intentional, premeditated, and deliberate killing of another." Tennessee Code Annotated section 39-13-201 defines a deliberate act as one performed with a cool purpose and a premeditated act as one done as "after the exercise of reflection and judgment."

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 reevaluate 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).

The appellant does not deny that on March 10, 1992, he shot the victim, Daniel Miller, in the back outside of Cox's Grocery Store. The state called Johnnie Miller, the mother of the victim, to the stand, who testified that on the evening that her son was killed the appellant came to her home looking for her son. She stated that the appellant insisted that the victim has stolen a gun from him earlier in the day, and that if he did not return it to the appellant, the appellant would kill Daniel Miller.

Kimberly Dobey, the sister of the victim, also testified that on the evening prior to the murder, the appellant and two others showed up at the home which she shared with her mother and two brothers brandishing weapons and threatening to kill the victim if he did not return the appellant's property to him that evening.

Dr. Jerry Francisco, medical examiner for Shelby County, testified that the appellant was shot in the back to the left of his spine, and that the bullet penetrated his lung, and that the appellant died from complications resulting from the gunshot wound approximately ten days after the appellant shot the victim.

Morris Cox, the owner of the grocery store where the shooting occurred, testified that although he did not see the shooting, he was there the evening of the shooting and heard one gunshot. He testified that the victim was attempting to come into the grocery store when he was shot in the back. The shot to the victim's back caused the victim to fall halfway inside the grocery store and halfway out.

The brother of the victim, Bernard Miller, testified that he was at home with his mother and his sister when the appellant and two others came to his home brandishing weapons and threatening to kill the victim if he did not return the appellant's property that evening.

The jury heard from Keith Mosby, a close friend of the victim, who was at the scene of the shooting. Mr. Mosby testified that he saw the victim arguing with

someone, and that he saw the appellant turn around, grab the doorknob of the grocery store, and then Mr. Mosby testified that he heard one gunshot.

James Albert Jones testified that he saw the defendant hit the victim in the face with the gun, which the appellant later admitted to during the appellant's direct testimony.

Finally, the state called Ricky Davison to the stand. Mr. Davison was an officer on patrol on the evening of the shooting. He testified that he responded to a call from the victim's sister in which she complained that the defendant and two others had shown up brandishing weapons.

The defendant called two witnesses and testified himself as to the events of the evening of the shooting. The jury first heard from Johnny Elzey, a friend of the defendant, who testified that he was at the scene of the shooting and witnessed the argument between the victim and the defendant, and that he heard two distinct gunshots. Mr. Elzey also testified that after the appellant shot the victim, the appellant got back into Mr. Elzey's car, and the two of them drove away.

The next witness to testify on behalf of the defense was Terrance Flemmons, who subsequently revealed his true name as Willie Cooper. This witness testified that he was near the scene of the shooting when it occurred, and that he heard two gunshots as well. Further, he testified that he actually saw the defendant shoot the victim. He testified that he did not know the defendant prior to being jailed in the same area of the Memphis County Jail in February of 1994.

Finally, the jury heard from the appellant. The appellant testified that earlier in the day the victim had been in a home where he frequented, and that he believed that the victim had stolen a gun from his home. The appellant admitted that he did go to the home of the victim earlier in the day, but testified that he was not threatening and did not display a weapon. The appellant testified that he and Mr. Elzey were driving past Cox's Grocery Store when he saw the victim and asked Mr. Elzey to stop the car. Whereupon, he proceeded to engage in an argument with the victim over the missing

gun. He admitted that he hit the victim in the face with the weapon, but that shortly after that both he and the victim decided to walk away from the argument. The appellant testified that as he turned his back on the victim and began to walk away he heard a gunshot and "instinctively turned and shot."

The state called one rebuttal witness. Michael Bynum testified that his nickname was "Hardface," and he denied being at the shooting. This was important because the defendant's earlier witness, Terrance Flemmons, had testified that he had been standing on the street with several other men, including one with the nickname "Hardface."

The appellant's claim is that each of the three witnesses who testified that the appellant had earlier in the evening threatened to kill the victim were impeached in some fashion by the defense on cross-examination. Therefore, the appellant concludes that their testimony cannot support a finding of premeditation and deliberation. We disagree.

Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as the factual issues raised by the evidence, are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. The jury obviously found that the fairly minor inconsistencies in the testimony of the three members of the victim's family, who all testified that the appellant had advised them that he would kill the victim if he did not get his gun back, did not make those witnesses incredible. If the jury believed the testimony of any one of those three witnesses concerning the appellant's statement that he would kill the victim, the finding of premeditation and deliberation was proper.

Accordingly, we find that the evidence was more than sufficient to support the conviction of murder in the first degree.

Because we find that the evidence was sufficient to support the conviction, we obviously further hold that the trial court did not err by refusing to grant the appellant's motion to dismiss at the close of the state's proof based on the appellant's assertion

that the state had not met its burden of proof. Additionally, we note that the record reveals that the appellant did not renew his motion to dismiss after the close of all proof; therefore, this issue has been waived on appeal. State v. Carter, 681 S.W.2d 587, 588 (Tenn. Crim. App. 1984).

II

The appellant next complains that the trial court abused its discretion when it prohibited a defense witness from testifying about a prior out-of-court statement made by a state's witness. The appellant attempted to put Memphis police officer, R. D. Cummings, on the stand in order to impeach the testimony of Mr. Morris Cox. The defendant made an offer of proof in which Officer Cummings' testimony would have been that Mr. Cox told him on the night of the shooting that he did not see or hear the shooting but did see the victim fall in his doorway. The state objected to this testimony on grounds that the appellant had failed to lay the proper foundation pursuant to Tennessee Rule of Evidence 613, which deals with the admissibility of extrinsic evidence used to impeach a witness. During the state's case Mr. Cox testified that he heard one gunshot.

Rule 613 of the Tennessee Rules of Evidence provides that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same, and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interest of justice otherwise require." The appellant failed to confront the witness with the substance of his prior inconsistent statement. Therefore, the trial court correctly found that the proper foundation had not been laid. That is, the witness had not had an opportunity to explain or deny the statement which the officer attributed to him.

The appellant contends that the interests of justice require that the trial court allow this testimony apparently because the affect of having the officer testify to the statement would have been to impeach Mr. Cox and would have enhanced the

appellant's position of self-defense. We cannot agree. Because the appellant failed to ask the witness about the statement, this Court cannot know whether or not the statement would have contradicted Mr. Cox's testimony on the stand. The rule presupposes that it is possible for a witness to explain an apparent contradiction in a way which makes clear that there is no contradiction. This Court cannot tell whether or not the witness would have been able to do so, and the appellant has provided no proof that the witness would not have been able to explain the apparent contradiction in his prior statement to the police officer and his statement on the witness stand at trial. Additionally, we find that even if the jury had heard that Mr. Cox told the police officer that he did not hear any gunshots would not have enhanced the appellant's position of self-defense. Only a statement attributed to a state's witness in which it was said that a witness heard two shots would the appellant's position of self-defense be enhanced. Accordingly, we find that the appellant failed to comply with the requirements of Rule 613, and the interests of justice do not require a waiver of these requirements. Accordingly, this issue is without merit.

III

Finally, appellant contends that the trial court erred by allowing the state to introduce evidence of the appellant's prior convictions in order to impeach the appellant's credibility. As a preliminary matter we note that the appellant waived this issue on appeal by testifying to the prior convictions during his direct examination.

State v. Barker, 642 S.W.2d 735, 738 (Tenn. Crim. App. 1982).

However, even if this were not the case, we find that the trial court properly allowed the state to use evidence of the appellant's prior convictions in order to impeach his credibility. Rule 609 of the Tennessee Rules of Evidence states that "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime may be admitted" under certain circumstances. Rule 609 places procedural and substantive limitations on the state's ability to impeach a

defendant's credibility with prior convictions. Specifically, the rule provides that in order to impeach the accused's testimony with prior convictions the following three requirements must be met.

- (1) The state must give the accused reasonable written notice prior to the trial of its intention to use the impeaching convictions;
- (2) The court must rule on the admissibility of the convictions prior to the defendant's testimony; and
- (3) Pursuant to a request by the defendant, the court "must determine that the convictions probative value on credibility outweighs its unfair prejudicial effect on the substantive issues."

Additionally, the rule requires that the convictions must be for crimes that are punishable by death or more than one (1) year of imprisonment or for crimes involving dishonesty or false statement. Tenn. R. Evid. 609 (a) (2). The rule also requires that the convictions must not be more than ten (10) years old. Tenn. R. Evid. 609 (b).

The appellant's only argument is that the prejudicial effect of the convictions far outweighed any value they had on his credibility. The prior convictions at issue in this case were one conviction for attempted burglary, one conviction for burglary, and three convictions for receiving stolen property. All convictions occurred within ten years of the commencement of the prosecution in this case. In State v. Ratcliff, 673 S.W.2d 884, 885 (Tenn. Crim. App. 1984), this Court held that where the prior offenses are substantially different from the crime charged, the prejudicial effect is minimal. See also Long v. State, 607 S.W.2d 482, 486 (Tenn. Crim. App. 1980). The appellant stood accused of the crime of murder in the first degree. The prior convictions were all the result of crimes involving theft, which is substantially different from the crime charged. Additionally, the trial court admonished the jury that the convictions were not to be used as evidence of his guilt. We therefore conclude that the trial court's determination on the admissibility of the appellant's prior convictions was correct. Accordingly, the judgment of the trial court is affirmed in all respects.

William M. Barker, Judge

Concur by:

Judge

Judge