

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs December 6, 2022

FILED

01/12/2023

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. CADARIUS HEAD

**Appeal from the Criminal Court for Shelby County
No. 18-06981 Chris Craft, Judge**

No. W2021-01500-CCA-R3-CD

A Shelby County jury convicted the Defendant, Cadarius Head, of first degree premeditated murder and attempted first degree murder, and the trial court imposed an effective life sentence. On appeal, the Defendant argues that the evidence was insufficient to support his convictions. Specifically, the Defendant contends that the State's primary witness was not credible and that his convictions were otherwise based on circumstantial evidence. He further contends that the State failed to convincingly prove the element of premeditation as to his first degree murder conviction. Finally, he argues that the evidence supporting his conviction for attempted first degree murder was insufficient because the victim did not testify at trial. Following our review, we affirm the judgments of the trial court.

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

KYLE A. HIXSON, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and JOHN W. CAMPBELL, SR., JJ., joined.

Ernest J. Beasley (at trial and on appeal), and Paul K. Guibao (at trial), Memphis, Tennessee, for the appellant, Cadarius Head.

Jonathan Skrmetti, Attorney General and Reporter; Andrew C. Coulam, Senior Assistant Attorney General; Amy P. Weirich, District Attorney General; Jamie Kidd and Ashley Finch, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

This case involves an October 4, 2018 shooting in Clearbrook Village Apartments ("Clearbrook") in Memphis, during which Terry Kelley died and Dominic Rice was

wounded. In relation to this shooting, a Shelby County grand jury charged the Defendant with the first degree premeditated murder of Mr. Kelley and the attempted premeditated first degree murder of Mr. Rice and Lakeva Banks. Prior to trial, the State dismissed the attempted murder count pertaining to Ms. Banks and proceeded to trial on the counts pertaining to Mr. Kelley and Mr. Rice.

At trial, Lakeva Banks testified that she was driving around Memphis on October 4, 2018, with her son, C.B.,¹ who was about six-months old at the time, and her friends, Mr. Kelley and Mr. Rice. She referred to Mr. Kelley as her nephew, but he was actually the nephew of the father of Ms. Banks' older child. The Defendant is C.B.'s father.

At some point that day, Ms. Banks received a call from the Defendant's mother, who asked Ms. Banks to stop by her Clearbrook residence to pick up diapers for C.B. While they did not establish a specific time for her to visit, Ms. Banks called the Defendant's mother later that evening to let her know that they were on their way. When Ms. Banks arrived at Clearbrook with C.B., Mr. Kelley, and Mr. Rice, the Defendant's mother invited them inside. The two men stayed outside by the car and smoked cigarettes, however, because Ms. Banks indicated that the Defendant's mother really just wanted to see C.B.

As Ms. Banks was carrying C.B. up the apartment steps, she noticed a red Tahoe drive past the apartment complex with the Defendant and his brother, Deangelo Head, inside. This alarmed Ms. Banks. She indicated that she would not have come to the apartment complex if she had known that the Defendant and Deangelo² would be present.

After a few minutes of visiting with the Defendant's mother inside the apartment, Ms. Banks heard an argument in the parking lot. She went outside and saw that the Defendant and Deangelo had pulled into the parking lot and that Deangelo was outside of the Tahoe engaged in an "intense" argument with Mr. Kelley. The Defendant remained inside the Tahoe and did not engage in the argument. She heard Deangelo ask Mr. Kelley and Mr. Rice, "Why y'all b****-a** n***** over—over my momma house?" Mr. Rice and Mr. Kelley tried to explain that they were only there for Ms. Banks to pick up diapers and further stated that they were not there "for trouble." According to Ms. Banks, the argument between Deangelo and Mr. Kelley was heated, and though Mr. Rice was involved in the argument, he attempted to deescalate the situation. Ms. Banks stated that Mr. Kelley and Mr. Rice were both unarmed and that neither of them engaged in any threatening behavior towards Deangelo or the Defendant. As Ms. Banks walked down the steps to the parking lot, she also tried to explain that they were only there to get diapers. Ms. Banks

¹ Because C.B. is a minor, we will refer to him by his initials.

² Because the brothers share a surname, we will refer to Deangelo by his first name to avoid confusion. We intend no disrespect in so doing.

heard the Defendant's mother tell the brothers the same and that "these boys [were] not bothering" her.

As Ms. Banks reached the parking lot, Deangelo "walked off." She then saw the Defendant, who had exited the car at this point, approach Mr. Kelley from behind and shoot him in the back of the head. The Defendant had not engaged in the argument or otherwise spoken prior to shooting Mr. Kelley. The Defendant continued to shoot Mr. Kelley multiple times. Ms. Banks stated that he "shot him and shot him and shot him." Ms. Banks said that she was so close to the shooting that she feared the bullets would hit her. Ms. Banks stated that the Defendant then pointed the gun at her but could not shoot her because he was out of bullets.

At this point, Ms. Banks and Mr. Rice ran in opposite directions, with Mr. Rice running towards the street in the middle of the parking lot. She could not see the Defendant at this point because her view was blocked by a vehicle. She saw Deangelo standing in the middle of the street shooting at Mr. Rice. Ms. Banks testified that she heard Deangelo fire at Mr. Rice eight to ten times, although she acknowledged that she was not "counting" the shots.

Ms. Banks stated that she saw Mr. Rice collapse after being hit by the gunfire. Following the shooting, the brothers sped off together in the Tahoe. Ms. Banks returned to the scene to check on Mr. Rice. He was on the ground bleeding, and she saw that he had gunshot wounds to his arms and to his leg. Another man had arrived on the scene to help stop Mr. Rice's bleeding, and Mr. Rice told Ms. Banks to check on Mr. Kelley. When this man and Ms. Banks checked on Mr. Kelley, Ms. Banks realized that Mr. Kelley was deceased. Ms. Banks stayed with Mr. Kelley until the police arrived.

Ms. Banks confirmed that her initial conversation with police was captured on Memphis Police Department ("MPD") Officer Charles Morrow's bodycam. She further confirmed that she later identified a picture of the Defendant provided to her by the police.

On cross-examination, Ms. Banks agreed that she gave a statement to the police at the station in the hours after shooting, but she disputed many of the points in the statement. She testified that, at the time she gave this statement, she was "scared[,] " "wasn't in [her] right mind[,] " and was "in shock." She further noted that she did not write the statement and that the statement set forth "somewhat how it happened, but it's missing some pointers." Ms. Banks acknowledged that in her statement to the police, she said that she heard Deangelo fire six shots, as opposed to eight to ten. Ms. Banks also acknowledged that in the statement, she said that only the Defendant had a gun but maintained at trial that both Deangelo and the Defendant had a gun. Ms. Banks attempted to contact the police to clarify some points in her statement, but no one answered or returned her calls.

Ms. Banks indicated that she had not seen either the Defendant or Deangelo earlier that day while driving around with Mr. Kelley and Mr. Rice and that she was unaware of any animosity between these men prior to this incident. According to Ms. Banks, Mr. Rice knew the Defendant, but Mr. Kelley knew neither of the brothers.

Several people called 911 in relation to the shooting, and the State entered recordings of seven of those calls into evidence. In one of the recordings, a man—who did not provide his name when asked—told the operator that he was shot in the leg and in both arms. The caller stated that he did not know who shot him.

Officer Morrow was one of the first officers to arrive on the scene of the shooting. Officer Morrow saw the two victims and commenced to secure the scene and obtain information from witnesses. Officer Morrow's bodycam recorded his interactions at the scene, and the recording was entered as an exhibit. The bodycam video showed that Officer Morrow initially spoke with Mr. Rice, who was lying in the parking lot in a pool of blood with a bandage on his forearm. Mr. Rice told Officer Morrow that he did not know who shot him. Officer Morrow then spoke with Ms. Banks, who was standing next to Mr. Kelley. She identified Mr. Kelley as her nephew and provided his name to the officer. Ms. Banks-identified the Defendant as the shooter and informed Officer Morrow that he was the father of her baby.

Officer David Smith responded to the scene as part of MPD's Crime Scene Investigations Unit. He collected seven spent nine-millimeter shell casings from the ground around Mr. Kelley's body, along with two t-shirts. He composed a diagram showing the location of the shell casings and other items, and this diagram was entered into evidence. He found no guns at the scene.

MPD Lieutenant³ Steven Foglesong testified that on October 4, 2018, he responded to the hospital to investigate the shooting. He first spoke with Mr. Rice, who was lethargic and possibly under the influence of medication. According to Lt. Foglesong, Mr. Rice was in and out of consciousness two or three times during their conversation. Lt. Foglesong presented a photographic lineup to Mr. Rice, but Mr. Rice was unable to identify the shooter. Lt. Foglesong did not speak with Mr. Rice again after this conversation. After Lt. Foglesong left the hospital, he met with Ms. Banks at the police station. Ms. Banks gave a written statement to Lt. Foglesong, wherein she stated that there was only one shooter. In addition, Ms. Banks was presented with a photographic lineup, and she identified the Defendant for Lt. Foglesong.

Dr. Marco Ross, the Chief Medical Examiner for the Shelby County Medical Examiner's Office and the West Tennessee Regional Forensic Center, testified as an expert in forensic pathology. Following an autopsy, Dr. Ross determined that Mr. Kelley's death

³ At the time of the October 2018 shooting, Lt. Foglesong held the rank of sergeant.

was caused by multiple gunshot wounds. Dr. Ross located four gunshot entrance wounds on Mr. Kelley's body: two in the upper-right side of his back, one in his abdomen, and one on the right side of his torso. Mr. Kelley was not shot in the head, but Dr. Ross acknowledged that the blood on Mr. Kelley's face might cause one to believe that he had been. Dr. Ross located gunpowder stippling around the wounds on Mr. Kelley's back and explained that stippling is caused by small abrasions or scrape marks made by gunpowder particles on the surface of the skin. Based upon the presence of stippling around the wounds on Mr. Kelley's back, Dr. Ross determined that the muzzle of the weapon was within three to four feet when these shots were fired.

Sergeant Michael Chapman of MPD's Homicide Unit coordinated the search for the Defendant following the shooting. He allotted 10 days for his team to locate the Defendant. During this time, officers canvassed neighborhoods, displayed posters, and talked with members of the Defendant's family. The officers received unconfirmed reports that the Defendant had fled to Texas. When initial efforts to locate the Defendant were unsuccessful, Sgt. Chapman obtained a warrant for his arrest. The Defendant was subsequently apprehended in Houston, Texas on November 21, 2018.

Following the State's case, the defense rested without presenting proof. The jury then convicted the Defendant as charged. The trial court sentenced the Defendant to life imprisonment for the first degree murder conviction and to a concurrent 19-year term as a Range II, multiple offender for the attempted first degree murder conviction. This appeal followed.

II. ANALYSIS

The Defendant argues that the evidence was insufficient to support his convictions because the testimony of Ms. Banks was not credible and because the convictions were otherwise based on circumstantial evidence. Further, as it relates to his first degree murder conviction, the Defendant argues that the record contains insufficient proof that he killed Mr. Kelley with premeditation. The Defendant also argues that the evidence supporting his conviction for attempted first degree murder was insufficient because Mr. Rice did not testify at trial. The State counters that any credibility issues with Ms. Banks were resolved by the jury in the State's favor, that the record sufficiently demonstrates the Defendant killed Mr. Kelley with premeditation, and that the State was not required to call Mr. Rice as a witness in order to sustain the Defendant's conviction for attempted first degree murder. The State further argues that the proof sufficiently supports the jury's finding that the Defendant was criminally responsible for the attempted first degree murder of Mr. Rice. We agree with the State.

The United States Constitution prohibits the states from depriving "any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. A state shall not deprive a criminal defendant of his liberty "except upon proof beyond a

reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970). In determining whether a state has met this burden following a finding of guilt, “the relevant question 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) (emphasis in original). Because a guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, the defendant has the burden on appeal of illustrating why the evidence is insufficient to support the jury’s verdict. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). If a convicted defendant makes this showing, the finding of guilt shall be set aside. Tenn. R. App. P. 13(e).

“Questions concerning the credibility of 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.” *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Appellate courts do not “reweigh or reevaluate the evidence.” *Id.* (citing *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978)). “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). The law provides this deference to the jury’s verdict because

[t]he jury and the Trial Judge saw the witnesses face to face, heard them testify, and observed their demeanor on the stand, and were in much better position than we are, to determine the weight to be given their testimony. The human atmosphere of the trial and the totality of the evidence before the court below cannot be reproduced in an appellate court, which sees only the written record.

Carroll v. State, 370 S.W.2d 523, 527 (Tenn. 1963) (internal quotations and citations omitted). Therefore, on appellate review, “the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom.” *Cabbage*, 571 S.W.2d at 835.

A. First Degree Premeditated Murder of Mr. Kelley

Premeditated first degree murder is defined as “[a] premeditated and intentional killing of another.” Tenn. Code Ann. § 39-13-202(a)(1). A person acts intentionally “when it is the person’s conscious objective or desire to engage in the conduct or cause the result.” *Id.* § 39-11-106(a)(21).

Premeditation is an act done after the exercise of reflection and judgment. Premeditation means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. The mental state of the accused

at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Id. § 39-13-202(d) (internal quotations omitted).⁴

“Premeditation may be inferred from the manner and circumstances of the killing.” *Finch v. State*, 226 S.W.3d 307, 318 (Tenn. 2007) (citation omitted). Several circumstances may bear on the existence of premeditation, including but not limited to:

- (1) The use of a deadly weapon on an unarmed victim;
- (2) The particular cruelty of the killing;
- (3) Threats or declarations of intent to kill;
- (4) The procurement of a weapon;
- (5) Any preparations to conceal the crime undertaken before the crime was committed;
- (6) The destruction or sequestration of evidence of the killing;
- (7) Calmness after the killing;
- (8) Evidence of motive;
- (9) The use of multiple weapons in succession;
- (10) The infliction of multiple wounds or repeated blows;
- (11) Evidence that the victim was retreating or attempting to escape when killed;
- (12) The lack of provocation on the part of the victim; and
- (13) The failure to render aid to the victim.

State v. Reynolds, 635 S.W.3d 893, 916-17 (Tenn. 2021) (citing cases). The list of specific circumstances developed through cases is not exhaustive, however, and the trier of fact “is not limited to any specific evidence when determining whether a defendant intentionally

⁴ This subsection was redesignated in 2021 and is now located at Tennessee Code Annotated section 39-13-202(e). See 2021 Tenn. Pub. Acts, ch. 394, § 1.

killed the victim ‘after the exercise of reflection and judgment.’” *State v. Davidson*, 121 S.W.3d 600, 615 (Tenn. 2003) (citation omitted).

We begin by addressing the Defendant’s argument that Ms. Banks’ testimony was not credible because of her prior relationship with the Defendant and because she testified that she was “in shock” and not “in her right mind” immediately following the shooting. The jury was fully aware of these circumstances and resolved the issue of Ms. Banks’ credibility in favor of the State. Because the State on appeal is entitled to the strongest legitimate view of her testimony and to all reasonable and legitimate inferences that may be drawn therefrom, *see Cabbage*, 571 S.W.2d at 835, we must decline the Defendant’s invitation to reevaluate Ms. Banks’ testimony, as well-settled law dictates that this function is entirely the prerogative of the jury.⁵

We now turn to the Defendant’s argument that the proof was insufficient to support the jury’s finding that he killed Mr. Kelley with premeditation. Viewing the evidence in the light most favorable to the State, the proof establishes that the Defendant and his brother arrived at their mother’s apartment to find that Mr. Kelley—a nephew of the father of Ms. Banks’ oldest child—and Mr. Rice were there in the company of Ms. Banks. Ms. Banks was the mother of the Defendant’s child. Once in the Clearview parking lot, the Defendant remained seated in the Tahoe while his brother engaged in an argument with Mr. Kelley and Mr. Rice concerning their presence at the apartment. Without engaging in the argument or otherwise speaking, the Defendant exited his vehicle with a gun and shot an unexpected and unarmed Mr. Kelley in the back. The Defendant continued to shoot, hitting Mr. Kelley three additional times, before turning the weapon on Ms. Banks. Neither Mr. Kelley nor Mr. Rice had provoked or otherwise threatened the Defendant in any way. Instead of rendering aid to Mr. Kelley and Mr. Rice, the Defendant and his brother returned to the vehicle and sped away. The Defendant was later apprehended in Texas on November 21, 2018.

A juror could rationally conclude from these facts that the Defendant exercised reflection and judgment prior to killing Mr. Kelley. The proof shows that the Defendant had a motive to kill based upon the Defendant’s prior relationship with Ms. Banks and her friendship with Mr. Kelley. Further, a juror could infer that the Defendant “was sufficiently free from excitement and passion as to be capable of premeditation” based upon his decision to sit quietly in the vehicle while the argument ensued between his brother and the two men before exiting the vehicle to shoot. In short, a rational juror could conclude

⁵ This conclusion obviates the need to address the Defendant’s argument that the remainder of the evidence against him is circumstantial, although we note that a criminal offense can be established by direct evidence, circumstantial evidence, or both, and that we would apply the same standard of review regardless of whether the conviction is based upon direct or circumstantial evidence. *See State v. Dorantes*, 331 S.W.3d 370, 379-80 (Tenn. 2011).

that the Defendant acted with premeditation. The Defendant is not entitled to relief on this basis.

B. Attempted First Degree Premeditated Murder of Mr. Rice

First degree premeditated murder and the relevant definitions have been provided in the section above. In addition, criminal attempt, as charged to the jury in this case, occurs when a person acts “with the kind of culpability otherwise required for the offense . . . [and] [a]cts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person’s part.” Tenn. Code Ann. § 39-12-101(a)(2).

Initially, we observe, as the State points out, that the Defendant’s conviction for attempted first degree murder rests on the theory that the Defendant was criminally responsible for his brother’s shooting of Mr. Rice. “A person is criminally responsible as a party to an offense if the offense is committed by the person’s own conduct, by the conduct of another for which the person is criminally responsible, or by both.” Tenn. Code Ann. § 39-11-401(a).

A person is criminally responsible for an offense committed by the conduct of another, if . . . [a]cting with the 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[.]

Id. § 39-11-402(2). Criminal responsibility is not a separate crime, but “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). Mere presence during the commission of the crime is not enough to convict. *State v. Jones*, 15 S.W.3d 880, 890 (Tenn. Crim. App. 1999) (citations omitted). However, “under the theory of criminal responsibility, presence and companionship with the perpetrator of a felony before and after the commission of a crime are circumstances from which an individual’s participation may be inferred.” *State v. Phillips*, 76 S.W.3d 1, 9 (Tenn. Crim. App. 2001) (citation omitted). No particular act need be shown in order to sustain a conviction under this theory. *Jones*, 15 S.W.3d at 890. It is not necessary for one to take a physical part in the crime. *Id.* Encouragement of the principal is sufficient. *Id.* (citation omitted).

The Defendant argues that the proof was insufficient to support his conviction because Mr. Rice did not testify at trial. As the State correctly notes, however, when a witness is equally available to both parties, “[t]he State is not required to call every witness who has any knowledge of the facts.” *Wright v. State*, 512 S.W.2d 650, 656 (Tenn. Crim. App. 1974) (citing *State v. Bomar*, 381 S.W.2d 287, 288 (Tenn. 1964)); see also *State v. Crystal Michelle Rickman*, No. W2020-00882-CCA-R3-CD, 2021 WL 2255509, at *4

(Tenn. Crim. App. June 3, 2021) (affirming an aggravated assault conviction where the victim did not testify and noting that “the State is not required to call any particular witness or to use all witnesses that are equally available to both sides”), *perm. app. denied* (Tenn. Sept. 22, 2021). Even though Mr. Rice did not testify at trial, the jury nevertheless heard proof that he would not provide his name or the name of his shooter to the 911 operator, that he provided a description of his injuries for the operator, and that he could not or would not identify his shooter to either Officer Morrow or Lt. Foglesong. The absence of Mr. Rice’s testimony at trial does not compel a per se conclusion that the proof was insufficient to support the attempted murder conviction pertaining to him.

Moreover, notwithstanding the absence of Mr. Rice’s testimony at trial, the proof was otherwise sufficient to support the jury’s finding that the Defendant was criminally responsible for his attempted murder. First, the proof sufficiently established Deangelo as the principal actor in this offense. Deangelo instigated an argument with Mr. Kelley and Mr. Rice and developed a motive to kill based upon this argument and their presence at his mother’s apartment. Deangelo “walked off” prior to the Defendant’s shooting of Mr. Kelley, a fact that the jury could use to infer that Deangelo had an opportunity to extricate himself from the situation but did not. Deangelo then fired eight to ten rounds at an unarmed man who had not threatened or provoked him, who had attempted to deescalate the argument, and who was in fact running from the scene. Instead of rendering aid to Mr. Rice, Deangelo fled from the scene with the Defendant. On these facts, a rational juror could conclude that Deangelo, intentionally and with premeditation, attempted to kill Mr. Rice. Secondly, the proof sufficiently established that the Defendant was criminally responsible for his brother’s principal action. It was the Defendant who decided to violently escalate a verbal argument into a shooting of two unarmed men. By the Defendant’s conduct of exiting the car and shooting Mr. Kelley in the back, a rational juror could conclude that the Defendant intended to promote or assist in this violent altercation with Mr. Rice and that his actions directed and aided its commission. The Defendant’s “presence and companionship” with his brother both before and after the incident, coupled with the Defendant’s initiation of the violence, allowed the jury in this case to infer the Defendant’s participation in his brother’s shooting of Mr. Rice. *See Phillips*, 76 S.W.3d at 9. The Defendant is not entitled to relief.

III. CONCLUSION

The evidence was sufficient to support the Defendant’s convictions. In consideration of the foregoing and the record as a whole, we affirm the judgments of the trial court.

KYLE A. HIXSON, JUDGE