

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 10, 2023

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STATE OF TENNESSEE v. YVETTE ADELE SLEE

**Appeal from the Circuit Court for Montgomery County
No. CC-19-CR-354 William R. Goodman, III, Judge**

No. M2022-00120-CCA-R3-CD

In April of 2013, Defendant, Yvette Adele Slee, was convicted of aggravated child abuse and attempted first degree murder for suffocating the victim, Defendant's eight-month-old child. She was sentenced to an effective sentence of 22 years in incarceration. Subsequently, in May of 2018, the victim died as a result of complications from injuries originally sustained by the aggravated child abuse. Defendant was then indicted for first degree felony murder, the subject offense of this direct appeal. After a bench trial, Defendant was found guilty as indicted. Defendant's sole issue on appeal is whether her conviction for first degree felony murder violates double jeopardy. After a review of the record, the briefs, and applicable authorities, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and ROBERT L. HOLLOWAY, JR., JJ., joined.

Wayne Clemons, Clarksville, Tennessee, for the appellant, Yvette Adele Slee.

Jonathan Skrmetti, Attorney General and Reporter; T. Austin Watkins, Assistant Attorney General; Robert Nash, District Attorney General; and Art Bieber, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On March 3, 2011, Defendant's eight-month-old son, the victim, was taken to the hospital with extensive injuries. The victim was ultimately diagnosed with hypoxic-ischemic encephalopathy due to strangulation or suffocation. The victim had extensive brain injuries, suffered seizures, and was not expected to live for any significant length of

time. He was sent home after about one month in the hospital and received hospice care at home. Subsequently, Defendant was indicted for aggravated child abuse and attempted first degree murder. After a jury trial, she was found guilty as charged. It does not appear that Defendant appealed her convictions or sentence.

In May of 2018, the victim died of complications related to injuries sustained in March of 2011. Defendant was subsequently indicted for felony murder. She waived the right to a jury trial. At trial, the proof revealed that the victim had pneumonia at the time of his death, but an expert witness testified that the cause of death was complications from being suffocated as an infant. The Autopsy Report listed the manner of death as “homicide,” and the circumstances of death as “suffocated as an infant.”

After a bench trial, the trial court found Defendant guilty as charged and sentenced her to life in prison. Defendant filed a motion for new trial in which she argued that her conviction for first degree murder violated double jeopardy. The trial court disagreed, denying the motion for new trial in a written order. Defendant appealed.

Analysis

On appeal, Defendant argues that her successive prosecution for and ultimate conviction of felony murder violates double jeopardy. Specifically, Defendant argues that: (1) “there is no express legislative intent to allow dual prosecutions for aggravated child abuse and felony murder” in Tennessee; (2) the charges arise from the same “act or transaction;” and (3) the offenses of aggravated child abuse and felony murder are the “same offense” for purposes of double jeopardy. As a result, Defendant insists that the conviction for felony murder should be “set aside.” The State disagrees, arguing first that Defendant waived the issue by failing to raise it prior to the bench trial. In the alternative, the State contends that double jeopardy does not bar Defendant’s subsequent prosecution for felony murder.

We first address the State’s waiver argument. At the beginning of the bench trial, counsel for Defendant commented in his opening statement that the proof would “likely raise double jeopardy claims, depending on how it plays out.” In our view, while the better practice would have been for counsel to file a motion to dismiss the indictment on the basis of a double jeopardy violation, counsel’s comments to the trial court regarding the potential “double jeopardy claims” put the issue squarely in front of the trial court and preserved the issue for appeal. Moreover, counsel for Defendant filed a motion to dismiss on the basis of double jeopardy after the State rested its proof. Therefore, we find the State’s waiver argument unavailing.

Moving to Defendant's sole argument as to whether her conviction for felony murder after her convictions for aggravated child abuse and attempted first degree murder violates the double jeopardy clause, requires us to examine the law of double jeopardy. The language of both the federal and state constitutions guarantees in their respective double jeopardy clauses that no person shall be twice put in jeopardy of life or limb for the same offense. U.S. Const. amend. V; Tenn. Const. art. I, § 10. The Double Jeopardy Clause provides three separate protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. *State v. Watkins*, 362 S.W.3d 530, 541 (Tenn. 2012) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *abrogated on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989)). Whether multiple convictions violate the protection against double jeopardy is a mixed question of law and fact, which this Court will review de novo without any presumption of correctness. *State v. Smith*, 436 S.W.3d 751, 766 (Tenn. 2014) (citing *State v. Thompson*, 285 S.W.3d 840, 846 (Tenn. 2009)).

From what we can surmise from Defendant's brief, Defendant argues that her convictions implicate the third type of double jeopardy protection: protection against multiple punishments for the same offense. The Tennessee Supreme Court has divided such claims into two categories: (1) unit-of-prosecution claims, "when a defendant who has been convicted of multiple violations of the same statute asserts that the multiple convictions are for the same offense"; and (2) multiple description claims, "when a defendant who has been convicted of multiple criminal offenses under different statutes alleges that the statutes punish the same offense." *Id.* (citing *Watkins*, 362 S.W.3d at 543-44). Defendant's claim is one concerning multiple description because Defendant was convicted of violating different statutes – the statutes proscribing aggravated child abuse, attempted first degree murder, and first degree felony murder. To address a multiple description claim, courts ordinarily use the two-pronged test laid out in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *See Smith*, 436 S.W.3d at 767; *Watkins*, 362 S.W.3d at 556.

In a *Blockburger* analysis, our primary focus is whether the General Assembly expressed an intent to permit or preclude multiple punishments. If either intent has been expressed, no further analysis is required. When the legislative intent is unclear, however, we must apply the "same elements test" from *Blockburger*. Under this test, the first step is to determine whether the convictions arise from the same act or transaction. The second step is to determine whether the elements of the offenses are the same. If each offense contains an element that the other offense does not, the statutes do not violate double jeopardy.

Smith, 436 S.W.3d at 767 (internal citations omitted). We are unaware of a statute expressly prohibiting or condoning multiple punishments. Therefore, we must employ the same elements test from *Blockburger*. Defendant does not challenge whether the convictions arise from the same act or transaction, noting that even though the indictment for felony murder lists the date of the offense as May 30, 2018, “the proof . . . showed only that this was the date on which the [victim] passed away. No evidence was presented of any new or distinct criminal act. . . .” In other words, the convictions, while prosecuted in separate trials, arose out of the same act or transaction.

Examining the next step in the *Blockburger* analysis, Defendant argues that the “offense of [f]elony [m]urder expressly incorporates the entirety of the offense of aggravated child abuse” Defendant concludes that aggravated child abuse and felony murder are the “same offense” according to the *Blockburger* test. Defendant acknowledges “exception[s]” for successive prosecutions but argues that the facts of this case differ from the facts of cases allowing for successive prosecutions.

We acknowledge that in general a defendant cannot be tried for a greater offense if he or she was already convicted of a lesser-included offense based on the same conduct. *See State v. Cloud*, 588 S.W.2d 552, 553 (Tenn. 1979) (citing *Brown v. Ohio*, 432 U.S. 161 (1977)). However,

[a]n exception to the prohibition [against double jeopardy] occurs, and prosecution is allowed for the greater offense, when an element of the greater offense has not occurred at the time of the prosecution for the lesser offense, or when facts necessary to the greater offense were not discovered prior to the first trial, despite the exercise of due diligence. *Jeffers v. United States*, 432 U.S. 137, 151-52 (1977). This is, in effect, two exceptions for the subportions are dealt with separately. The first portion requires only that an element necessary to complete the greater offense has not occurred at the time of the original prosecution. *Diaz v. United States*, 223 U.S. 442, 448-49 (1912). It does not require a showing of due diligence. *United States v. Walker*, 546 F. Supp. 805, 810 (D.C. Hawaii 1982).

State v. Mitchell, 682 S.W.2d 918, 920 (Tenn. 1984) (determining that subsequent prosecution for vehicular homicide after initial prosecution for DUI did not violate double jeopardy). A successive prosecution for a new offense does not violate the prohibition against double jeopardy. *See id.* at 920. “The Double Jeopardy Clause . . . does not offer a guaranty to the defendant that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding.” *State v. Nixon*, 669 S.W.2d 679 (Tenn. Crim. App. 1983) (citing *United States v. Jorn*, 400 U.S. 470, 484 (1971)).

Here, Defendant's argument with regard to a double jeopardy violation ignores the fact that she could not have possibly been initially prosecuted for the death of the victim at the time she was prosecuted for aggravated child abuse and attempted first degree murder. The victim was still alive at the time of that prosecution. In our view, Defendant's successive prosecution for felony murder is not a traditional multiple description claim under the principles of double jeopardy. Even if it were, the elements of felony murder are different than the elements of both aggravated child abuse and attempted first degree murder. See T.C.A. §§ 39-15-402(a), 39-13-202(a)(2), 39-12-101. We find there is no double jeopardy violation.

Moreover, Tennessee courts have permitted dual convictions for felony murder and aggravated child abuse in a single trial. See *State v. Godsey*, 60 S.W.3d 759, 778 (Tenn. 2001); see also *State v. Matthew Thomas Dotson*, No. E2019-01614-CCA-R3-CD, 2021 WL 3161218, at *33 (Tenn. Crim. App. July 27, 2021), *perm. app. denied* (Tenn. Dec. 9, 2021); *State v. Gregory Nelson and Tina Nelson*, No. W2014-00494-CCA-R3-CD, 2015 WL 2128598, at *26 (Tenn. Crim. App. May 5, 2015), *perm. app. denied* (Tenn. Sept. 21, 2015); *State v. Sherri Mathis*, No. M2009-00123-CCA-R3-CD, 2012 WL 4461767, at *31 n.7 (Tenn. Crim. App. Sept. 26, 2012), *perm. app. denied* (Tenn. Feb. 25, 2013). Accordingly, Defendant's conviction for felony murder does not violate double jeopardy. The judgment of the trial court is affirmed.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

TIMOTHY L. EASTER, JUDGE