IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs March 05, 2014

STATE OF TENNESSEE v. KHALIQ RA-EL

Appeal from the Criminal Court for Shelby County
No. 1105196 W. Mark Ward, Judge

No. W2013-01130-CCA-R3-CD - Filed July 11, 2014

A Shelby County Jury convicted Defendant, Khaliq Ra-el, of attempted voluntary manslaughter, reckless aggravated assault, and employing a firearm during the commission of a dangerous felony. He received concurrent sentences of three years each for attempted voluntary manslaughter and reckless aggravated assault to be served consecutively to a six-year sentence for employing a firearm during the commission of a dangerous felony. On appeal, Defendant argues that the evidence was insufficient to support his convictions for attempted voluntary manslaughter and employing a firearm during the commission of a dangerous felony. After a thorough review, we affirm the judgments of the trial court.

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

THOMAS T. WOODALL, J., delivered the opinion of the Court, in which ROBERT W. WEDEMEYER, J., joined. JAMES CURWOOD WITT, JR. concurs in results only and filed a separate opinion.

Stephen C. Bush, District Public Defender; Tony N. Brayton and Jimmy Hale, Assistant Public Defenders; Memphis, Tennessee, for the appellant, Khaliq Ra-el.

Robert E. Cooper, Jr., Attorney General and Reporter; Caitlin E.D. Smith, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Kirby May, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

At approximately 12:30 p.m. on January 2, 2011, Nikko Moore, the victim, was at the home of M.V. Peoples located at 2129 Howell in Memphis. She was cooking. Ms. Moore was dating Mr. Peoples at the time and had asked him to go to the grocery store to pick up some hamburger buns. Defendant, Mr. Peoples' nephew, also resided in the residence at the time. While Ms. Moore was at the house, she and Defendant had said hello to each other earlier in the day.

The victim brought a bowl from the bedroom to the kitchen and began washing it in the sink. She was also speaking to her goddaughter on her cellular phone. When Defendant emerged from his bedroom, the victim noticed out of the corner of her eye that he was holding a gun. She also thought that he was wearing a glove. Defendant accused Ms. Moore of taking his laptop computer, and he threatened to kill her. Concerning Defendant's behavior, Mr. Moore testified:

> And he was like talking about, you have my computer. You got my computer. And I'm like, what computer are you talking about? He was like, you know what computer I'm talking about. I said, why would I take something from you? I be [sic] here all the time. And he was like, well, you know where my computer at [sic]. I said, well, no, I don't. And then, before I knew it, I was shot.

Ms. Moore testified that Defendant was standing approximately twelve feet away when he shot her with what she thought was a revolver. Ms. Moore testified that the bullet hit her on the right side and went through both of her breasts and her left arm breaking it. She then hit the wall and fell to the ground. Ms. Moore testified that she was "begging" for her life. She said:

> I was just asking him don't kill me because I got kids and I want to go home to my children and he was just saying, I'm going to kill you , I'm going to kill you. And I was like, don't kill me, why would you kill me over something stupid. And he was going to shoot me again but I kept begging him and begging him, I said, please, don't kill me.

Ms. Moore testified that Defendant was walking toward her at the time still pointing the gun at her. He continued yelling at her about finding the computer.

Ms. Moore testified that she got up and asked Defendant to call for an ambulance. Defendant told her to sit on the couch, and he called someone but Ms. Moore did not know who he called. Ms. Moore sat down on the couch but then got up and walked to Mr. Peoples' room and sat down on a futon. She did not want to remain in the room with Defendant because she feared that he would shoot her again. Ms. Moore told Defendant that she could not breathe. She then walked from the bedroom out the front door. Defendant was still on the phone with the gun in his hand. While Ms. Moore was outside, Mr. Peoples drove up, and she told Mr. Peoples that Defendant had shot her. Mr. Peoples then drove her to a fire station. Police arrived at the fire station, and an ambulance transported her to the hospital.

On cross-examination, Ms. Moore testified that Mr. Peoples had previously told her on December 28, 2010, that the computer was missing. She said that Mr. Peoples had told Defendant that if Defendant thought that Ms. Moore took it, he should ask her about it. Ms. Moore noted that Defendant had called police that day and that she was standing in the door when they were called. She said that Defendant did not threaten to kill her at the time. She said, "He just walked past me, he looked in the room, because the room door was open. He looked in the room and went out the door." Mr. Moore testified that Defendant never asked her about the computer until he shot her.

Officer David Hallum of the Memphis Police Department testified that he responded to a 911 hang-up call from 2129 Howell Avenue on January 1, 2011. While on his way to the residence, he was dispatched to a shooting victim at the fire station on Chelsea Avenue. Officer Jeremy Montgomery was also there. The victim informed Officer Hallum that Defendant shot her at the residence on Howell Avenue. Officer Hallum asked the victim what happened. He testified:

> I asked her what happened and she told me what she said happened is she was in the kitchen cooking and [Defendant] was upset about a computer that supposedly came up missing several days prior and she said that he thought she had something to do with it and came in the kitchen with a gun and threatened to shoot her if she didn't tell him where the computer was and she stated that he shot her.

Officer Hallum later went back to the residence on Howell Avenue with other officers, and he walked to the rear of the house to make sure that no one fled out of the house.

Officer Montgomery also responded to the residence on Howell Avenue. He and another officer went to the front door which was open. They called out looking for Defendant, and Defendant came to the front door, and he was taken into custody.

Defendant testified that at the time of the offenses, he had known the victim for approximately four months. Defendant said that when Mr. Peoples, his uncle, and the victim first began dating, he did not live in the house on Howell Avenue but was in the army stationed at Fort Riley in Kansas. Defendant testified that he had a gun permit and carried a silver forty-four magnum Taurus revolver for protection.

Defendant testified that he filed a police report on December 28, 2010, concerning his missing laptop computer. He did not know who took the computer, and he did not tell police that he knew who took it. Defendant admitted that he never discussed the computer with Ms. Moore prior to January 1, 2011. Defendant testified that he attended a party from December 31, 2010, until January 1, 2011, and he arrived home at approximately 5:00 a.m. on January 1. He woke up at approximately 11 a.m. and walked out of his bedroom. Defendant testified that he did not see Ms. Moore at the time. He said that he walked outside and started his car and then walked back inside the house. Defendant testified that Mr. Peoples was a truck driver. He did not see Mr. Peoples' eighteen wheeler parked outside when he started his car so he assumed that no one was at the residence but himself. He admitted that the truck had been there when he arrived home at 5:00 a.m. Because of crime in the neighborhood, Defendant had his gun at the time in the event that someone attempted to steal anything. Defendant testified that once he got back into the house, he placed his gun on the counter and used the restroom.

Defendant testified that he walked back out of the bathroom and got his gun. He said: "As I was walking towards the door, I felt some movement, out of my peripheral, to the right of me, and I fired in that direction, blindly." Defendant testified that he never threatened to kill Ms. Moore because of the stolen computer. He estimated that he was ten feet away from Ms. Moore when he shot her. Defendant testified that he stumbled after shooting Ms. Moore and dropped the gun. He said:

> When I was picking it up, and then I realized who it was that was in there, and then I go in there, I was trying to see was everything all right, and then I noticed the bullet hole in the drier [sic], and that's when I was pointing it out to her, and then I noticed, I seen blood on her. And so, then she started panicking and she felt like - - she fell back into the window, and I was like, I'm fixing to call 9-1-1. But she didn't want me to call 9-1-1, she wanted me to call my uncle instead.

Defendant testified that he had already dialed 9-1-1 but hung up because Ms. Moore told him that she was "on the run" at the time. He did not get the chance to call Mr. Peoples because he was trying to calm Ms. Moore, and he heard Mr. Peoples drive up. Defendant testified that he attempted to get Ms. Moore to sit down so that he could put something over the

wound. He said that he did not threaten her after the shooting. Defendant testified that he voluntarily walked out of the house when police arrived. He said that he was not upset about the missing laptop because insurance was going to reimburse him.

Defendant testified that he had told Mr. Peoples that the laptop was missing but he never told Mr. Peoples that he thought Ms. Moore had taken it. He said, "I assumed that she may have took it."

II. Analysis

Sufficiency of the Evidence

Defendant was indicted, and tried, for attempted second degree murder. The jury found him guilty of the lesser included offense of attempted voluntary manslaughter. Defendant challenges the sufficiency of the evidence for his convictions for attempted voluntary manslaughter and employing a firearm during the commission of a dangerous felony. More specifically, he argues that the State did not prove that he either knowingly or intentionally attempted to kill the victim as a result of adequate provocation. Defendant further argues that because the proof was insufficient to convict him of attempted voluntary manslaughter, then his conviction for employing a firearm during the commission of a dangerous felony must be reversed and that count of the indictment dismissed. We disagree.

When an accused challenges the sufficiency of the convicting evidence, our standard of review is whether, after reviewing the evidence in a 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, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). The trier of fact, not this Court, resolves questions concerning the credibility of the witnesses, and the weight and value to be given the evidence as well as all factual issues raised by the evidence. *State v. Tuttle*, 914 S.W.2d 926, 932 (Tenn. Crim. App. 1995). Nor may this Court reweigh or re-evaluate the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. *Id*. Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this Court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). "[D]irect and circumstantial evidence should be treated the same when weighing the sufficiency of [the] evidence." *State v. Dorantes*, 331 S.W.3d 370, 381 (Tenn. 2011).

Voluntary manslaughter is 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." T.C.A. § 39-13-211(a).

A person commits a criminal attempt where, "acting with the kind of culpability otherwise required for the offense," the person acts in one of the following ways:

> (1) Intentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believed them to be;
>
> (2) Acts with intent to cause a result that is an element of the offense if the circumstances surrounding the conduct were as the person believed them to be; or
>
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

Tenn. Code Ann. § 39-12-101(a) (2006). In order to commit attempted voluntary manslaughter, therefore, a defendant must either (1) intentionally engage in conduct that would cause the victim's death if the circumstances surrounding the conduct were as the person believed them to be; (2) act with intent to cause the victim's death if the circumstances surrounding the conduct were as the person believed them to be; or (3) act with intent to cause the victim's death, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense. Tenn. Code Ann. § 39-13-211(a); Tenn. Code Ann. § 39-12-101(a). A person acts intentionally when he has the "conscious objective or desire to engage in the conduct or cause the result." Tenn. Code Ann. § 39-11-302(a) (2006).

In Tennessee, it is a crime to employ a firearm during the commission of or attempt to commit a dangerous felony. Tenn. Code Ann. § 39-17-1324(b)(1) and (2). Attempted voluntary manslaughter is defined as a dangerous felony. Tenn. Code Ann. § 39-17-1324(i)(1)(C) and (M).

Viewing the evidence in a light most favorable to the State, the proof showed that Defendant intentionally or knowingly attempted to kill the victim in a state of passion produced by adequate provocation which was sufficient to lead a reasonable person to act in an irrational manner. There was evidence presented that Defendant accused the victim of

stealing his laptop computer. Defendant had even filed a police report on the computer before confronting the victim. When the victim denied having the computer, Defendant grew extremely upset and continued to yell at her and demand the whereabouts of the computer. During the confrontation, Defendant suddenly shot the victim. He then continued to yell at the victim about the computer and threatened to kill her. Ms. Moore testified that Defendant was standing approximately twelve feet away when he shot her and that the bullet hit her on the right side and went through both of her breasts and broke her arm. She then hit the wall and fell to the ground. Ms. Moore testified that she was "begging" for her life. Defendant admitted that he shot the victim with a silver forty-four magnum Taurus revolver.

Although Defendant argues that there was no adequate provocation is this case to establish an element of voluntary manslaughter, this is a question of fact that must be decided by the jury under the particular facts of each case. *State v. Johnson*, 909 S.W.2d 461, 464 (Tenn. Crim. App. 1995). As pointed out by the State, the jury considered the evidence presented and determined that Defendant acted out of adequate provocation based on Defendant's belief that the victim stole his computer along with her denial of the theft when he confronted her. *See State v. Jeffery Lee Mason*, No. M2002-01709-CCA-R3-CD, 2004 WL 1114581, at *5(Tenn. Crim. App. May 19, 2004)(Defendant's conviction for attempted voluntary manslaughter upheld where defendant attempted to shoot a police escort during a medical appointment); *State v. Andrianne Kiser*, No. W2011-01937-CCA-R3-CD, 2012 WL 6115087 (Tenn. Crim. App. Aug. 7, 2012)(Defendant's conviction for attempted voluntary manslaughter upheld where defendant shot two security guards at a skating rink after being forced out of the building after defendant entered the skating rink without paying). Ms. Moore testified that she denied Defendant's allegations that she had taken his computer or knew the location of the computer. She testified that Defendant then kept yelling "you need to find my m - - - - r f - - - - - g laptop." Defendant continued yelling at her even after he shot her. The statute requires "adequate" provocation - there is no requirement that there is "rational" provocation.

We will briefly respond to Judge Witt's concerns set forth in his separate opinion. There are two opinions of the Tennessee Supreme Court which should be mentioned and not disregarded. In *State v. Parker*, 350 S.W.3d 883 (Tenn. 2011) our supreme court held,

> [W]hen reviewing a convicted defendant's claim that the evidence is not sufficient to support his or her conviction, the review must be undertaken with respect to the crime of which the defendant was convicted, not the crime with which he was charged. *See* [*Jackson v. Virginia*, 443 U.S. 307, 324 n. 16 (1979)] (stating that the standard of review "must be applied with explicit reference to the substantive elements of the criminal offense [challenged] as defined by state law"). That the proof may support

> conviction of a different, even a "greater," offense does not obviate the constitutional requirement that the proof support each and every element of the offense for which the defendant was *actually* convicted.

Id. at 907.

Further, in *State v. Williams*, 38 S.W.3d 532 (Tenn. 2001), the Court addressed a defendant's assertion that his conviction for second degree murder could not be sustained because the proof showed that he and the victim were involved in "mutual combat" and as a result, the killing was, as a matter of law, voluntary manslaughter. *Id*. at 534. In its analysis, our supreme court noted,

> Comparing the revised second degree murder and voluntary manslaughter statutes, **the essential element** that now distinguishes these two offenses (which are both "knowing" killings) is whether the killing was committed "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)]

Id. at 538. (emphasis added)

Later in the opinion our supreme court reiterated that "a state of passion produced by adequate provocation" is an element of voluntary manslaughter.

> Although the statutory elements of second degree murder and voluntary manslaughter changed with the adoption of the revised criminal code in 1989, the current definition of voluntary manslaughter preserved the common law concept of "provocation." Even though the common law doctrine of mutual combat is directly related to the **provocation element**, we conclude that the revised code abrogated the mutual combat doctrine.

Williams, 38 S.W.3d at 539 (emphasis added)

Judge Witt's separate opinion makes pertinent observations that are certainly worthy of discussion. However, we respectfully submit that in light of *Parker* and *Williams*, the final determinative discussions that would adopt Judge Witt's analysis should be made by the Tennessee Supreme Court.

Based on our review of the evidence, we conclude that the evidence was sufficient to support beyond a reasonable doubt Defendant's convictions for attempted voluntary

manslaughter and, as a result, the offense of employing a firearm during the commission of a dangerous felony. Defendant is not entitled to relief on this issue.

For the foregoing reasons, the judgments of the trial court are affirmed.

THOMAS T. WOODALL, JUDGE