IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
On Brief November 2, 2010

STATE OF TENNESSEE v. TERRENCE SHAW

Appeal from the Criminal Court for Shelby County
No. 09-01789 W. Mark Ward, Judge

No. W2010-00201-CCA-R3-CD - Filed June 1, 2011

Appellant, Terrence Shaw, was indicted by the Shelby County Grand Jury for reckless endangerment with a deadly weapon. After a jury trial, Appellant was found guilty of misdemeanor reckless endangerment, a lesser included offense. The trial court sentenced Appellant to six months and ordered Appellant to serve the sentence on probation. The trial court denied Appellant's request for judicial diversion. On appeal, Appellant claims that the trial court improperly denied judicial diversion and that the evidence was insufficient to support the conviction. After a review of the record, we determine that the evidence was insufficient to support the conviction. Consequently, the judgment of the trial court is reversed, Appellant's conviction is vacated, and the charge is dismissed. In the event of a further appeal, we determine that the trial court did not abuse its discretion by denying judicial diversion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Reversed, Vacated and Dismissed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JOHN EVERETT WILLIAMS, J., Joined.

Larry E. Fitzgerald, Memphis, Tenenssee, for the appellant, Terrence Shaw.

Robert E. Cooper, Jr., Attorney General and Reporter, J. Ross Dyer, Assistant Attorney General; William L. Gibbons, District Attorney General, and Anita Spinetta, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

Officer Wayne Colson of the Memphis Police Department was dispatched to investigate a call reporting shots fired on the evening of November 4, 2008, election day. Officer Colson could hear shots as he approached the Belle Vista apartment complex. The shots appeared to be coming from the back of the complex so Officer Colson parked his car and walked toward the sound of the shots.

Officer Colson witnessed two males standing by a building. One of the men was firing a handgun into the air. Officer Colson observed the men from the shadows because he was fearful that the men would shoot him or "into the building" if he announced his presence. Officer Colson was ten to twenty feet away from the suspects at that time. He testified that he was afraid for his safety because there might be bullets "falling" from the shots that were fired by the men. When the shooting stopped, Officer Colson announced his presence, directed the subjects to put their hands up, pointed his weapon at the subjects, and shined his light on the subjects. The men ran into a nearby apartment, less than a few yards away. This all took place at an apartment complex where there were "several apartments in there, [and] people."

Officer Colson chased the suspects and forced his way into the apartment. Once inside, Officer Colson detained the suspects. He identified Appellant as the shooter. The men were taken into custody. Officer Colson was able to collect five spent shell casings and one live .9 mm round from the scene. The gun was never recovered.

In March of 2009, the Shelby County Grand Jury returned an indictment charging Appellant with felony reckless endangerment with a deadly weapon. The indictment listed Officer Wayne Colson as the person placed in "imminent danger of death or serious bodily injury." At trial, Appellant testified in his own behalf. Appellant claimed that he was outside talking to friends when police arrived and admitted that he ran inside when he heard the officer announce his presence. Appellant denied having possession of a gun, claiming instead that he saw someone else shooting a handgun.

After hearing the evidence, the jury convicted Appellant of the lesser included offense of misdemeanor reckless endangerment.

The trial court held a sentencing hearing. At the hearing, the trial court sentenced Appellant to six months in the county workhouse. The trial court suspended the sentence and placed appellant on probation. The trial court specifically denied Appellant's request for judicial diversion.

Appellant filed a timely notice of appeal. On appeal, Appellant challenges the sufficiency of the evidence and the denial of judicial diversion.

Analysis
Sufficiency of the Evidence

On appeal, Appellant argues that the evidence was not sufficient to support the conviction for reckless endangerment. Specifically, Appellant argues that because there was no gun found and Officer Colson's testimony was not credible, the evidence is not sufficient to support the conviction. The State disagrees.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S .W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). "The standard of review 'is the same whether the conviction is based upon direct or circumstantial evidence.'" *State v. Genaro Dorantes*, 331 S.W.3d370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

The identity of the perpetrator is an essential element of any crime. *State v. Thompson*, 519 S.W.2d 789, 793 (Tenn. 1975). However, the identification of the defendant as the person who committed the crime is a question of fact for the trier of fact. *See State v. Strickland*, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993). Further, a victim's identification

of a defendant as the perpetrator of an offense is, alone, sufficient to establish identity. *See State v. Hill*, 987 S.W.2d 867, 870 (Tenn. 1998).

Reckless endangerment occurs when a person, "recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury." T.C.A. § 39-13-103. Reckless is defined as:

> [A]ct[ing] recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

T.C.A. § 39-11-302(d). "[F]or the threat of death or serious bodily injury to be 'imminent,' the person must be placed in a reasonable probability of danger as opposed to a mere possibility of danger." *State v. Payne*, 7 S.W.3d 25, 28 (Tenn. 1999). In *Payne*, the defendant fled from a police officer. The officer wanted to question the defendant as to why the license tag on his car was registered to another vehicle. During the chase, the defendant made a U-turn and drove his vehicle into the path of the officer's patrol car. The officer managed to avoid a collision and pursued the defendant through a residential area until the defendant turned off his headlights and successfully eluded capture. *Id.* at 26.

Several days later, other officers saw the defendant in the same neighborhood. The defendant refused to get out of his vehicle even after being asked to do so by the officers, driving away as an officer tried to reach into the vehicle to prevent his leaving. The officer held "onto the car for a brief time before letting go." *Id.* Another pursuit ensued through the residential neighborhood during which the defendant exceeded the posted speed limit and ignored traffic signs. There was testimony from the officers that people were present on the sidewalk during the chase and that twice the defendant made a U-turn, driving directly at them and causing them to swerve to avoid being struck by his vehicle. There was even testimony from a witness that was forced to pull his vehicle to the side of the road to avoid being struck by the defendant and saw the defendant pull his vehicle into the opposite lane, striking another car, killing one passenger and injuring the other three people in the vehicle. *Id.* at 27. In *Payne*, the supreme court held:

> [t]hat the term "zone of danger" may be employed to define that area in which a reasonable probability exists that the defendant's conduct would place others

> in imminent danger of death or serious bodily injury if others were present in that zone or area. We further hold that the term "public at large" may be used in an indictment for reckless endangerment to designate that class of persons occupying the "zone of danger." Accordingly, the indictment in the case now before us was not erroneous for employing the term "public at large."

Id. at 28. With regard to the first chase, the court held that the State failed to prove that there were any members of the public at large in the zone of danger. The court upheld the second conviction.

This Court has considered several cases with facts analogous to the case herein. Specifically, this Court has held that the mere act of discharging a gun into the air, standing alone, is not sufficient to constitute the commission of reckless endangerment. *See State v. Fox*, 947 S.W.2d 865, 866 (Tenn. Crim. App. 1996). Instead, the discharge of the gun into the air must create an imminent risk of death or serious bodily injury to some person or class of persons. *Id.* In *Fox*, the defendant discharged his weapon "into the air or up into a tree." 947 S.W.2d 865. There was no testimony presented at trial to show that anyone was either in the tree being fired upon or outside the apartment building in the immediate vicinity of the defendant. *Id.* As a result, this Court concluded that the defendant's:

> [M]ere discharge of a weapon into the air or up into a tree top did not "place another person in imminent danger of death or serious bodily injury." Merely discharging a gun, standing alone, is not sufficient to constitute commission of reckless endangerment. *See People v. Richardson*, 97 A.D.2d 693, 468 N.Y.S.2d 114 (1983) (holding discharge of gun into air does not constitute reckless endangerment). The discharge must create an imminent risk of death or serious bodily injury to some person or class of persons.

Id. at 866.

Similarly, in *State v. Anthony Phillip Geanes*, No. W2007-02223-CCA-R3-CD, 2008 WL 4981083 (Tenn. Crim. App., at Jackson, Nov. 24, 2008), this Court relied on the analysis utilized in both *Fox* and *Payne* to reverse a defendant's conviction for reckless endangerment with a deadly weapon where three eyewitnesses testified that they saw the defendant fire a gun into the air. 2008 WL 4981083, at *5. One witness testified that the defendant fired the shot as a warning shot to stop the commotion that was going on outside the victim's home. There was no testimony to contradict this opinion offered at trial, and there was no proof that the defendant ever fired at any of the three victims, even though additional gun shots were heard and bullet holes were found in the home of the one of the victims. Additionally, the

State did not prove that "a projectile, fired into the air could or may have caused injury as contemplated by the statute upon its descent." *Id.* While a dissenting opinion, written by Judge Glenn opined that the facts in *Anthony Phillip Geanes* were distinguishable from *Fox* and *Payne*, no permission to appeal was filed.

In the case herein, Appellant was indicted for reckless endangerment that put Officer Colson in "imminent danger of death of serious bodily injury." Viewing the evidence in a light most favorable to the State, the evidence produced at trial showed that Officer Colson was afforded the opportunity to see Appellant as the perpetrator as he approached the scene and stayed hidden in the shadows. The officer witnessed Appellant shooting a gun into the air. The evidence at trial showed that Officer Colson stayed in the shadows about ten to twenty feet away from Appellant because he was fearful that a bullet would come out of the sky or that Appellant would notice his presence. There was no testimony by the State that Officer Colson's hidden location a distance of ten to twenty feet away from a gun that is being fired in the air was within the zone of danger created by Appellant's actions. After Officer Colson announced his presence, the shooting ceased. There was no testimony proffered by the State to indicate that the area was heavily populated or that the nearby apartments were occupied. In fact, Officer Colson testified that there were no other people outside at the time he witnessed the shots. There is simply no evidence in the record to indicate that Officer Colson or anyone else was within the zone of danger contemplated by *Payne*. 7 S.W.3d at 28. The evidence was insufficient to support the conviction for reckless endangerment. Accordingly, the judgment is reversed and remanded.

Judicial Diversion

Next, Appellant complains that the trial court improperly denied judicial diversion where he had no criminal history and was an "ideal" candidate for diversion. Specifically, Appellant points out that it was not "established that [he] was untruthful during his testimony." This was "simply an opinion offered by the judge based on mere suspicion." While this issue is technically moot as a result of the reversal of Appellant's conviction, we choose to address the issue in the event of further appeal in this matter.

According to Tennessee Code Annotated section 40-35-313, commonly referred to as "judicial diversion," the trial court may, at its discretion, following a determination of guilt, defer further proceedings and place a qualified defendant on probation without entering a judgment of guilt. T.C.A. § 40-35-313(a)(1)(A). A qualified defendant is one who:

> (a) Is found guilty of or pleads guilty or nolo contendere to the offense for which deferral of further proceedings is sought;

(b) Is not seeking deferral of further proceedings for a sexual offense or a Class A or Class B felony; and

(c) Has not previously been convicted of a felony or a Class A misdemeanor.

T.C.A. § 40-35-313(a)(1)(B)(i)(a), (b), & (c). When a defendant contends that the trial court committed error in refusing to grant judicial diversion, we must determine whether the trial court abused its discretion by denying the defendant's request for judicial diversion. *State v. Cutshaw*, 967 S.W.2d 332, 344 (Tenn. Crim. App. 1997). Judicial diversion is similar to pretrial diversion. However, judicial diversion follows a determination of guilt, and the decision to grant judicial diversion is initiated by the trial court, not the prosecutor. *State v. Anderson*, 857 S.W .2d 571, 572 (Tenn. Crim. App. 1992). When a defendant challenges the trial court's denial of judicial diversion, we may not revisit the issue if the record contains any substantial evidence supporting the trial court's decision. *Cutshaw*, 967 S.W.2d at 344; *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996).

The criteria that the trial court must consider in determining whether a qualified defendant should be granted judicial diversion are similar to those considered by the prosecutor in determining suitability for pretrial diversion and includes the following: (1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social history; (5) the defendant's physical and mental health; and (6) the deterrence value to the defendant and others. *Parker*, 932 S.W.2d at 958; *Cutshaw*, 967 S.W.2d at 343-44. An additional consideration is whether judicial diversion will serve the ends of justice, i.e., the interests of the public as well as of the defendant. *See Parker*, 932 S.W.2d at 958; *Cutshaw*, 967 S.W.2d at 344; *State v. Bonestel*, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000).

After hearing the evidence, the trial court concluded that the circumstances of the offense weighed heavily in favor of the grant of diversion but found be a preponderance of the evidence Appellant committed perjury. It stated that Appellant's clear perjury on the stand during trial weighed heavily against the grant of diversion. The trial court noted that Appellant "came up with a farfetched story as to why he wasn't the one that shot this gun in the air." Specifically, the trial court acknowledged the fear that Appellant's perjury would be "rewarded" with a grant of diversion. In the end, despite the factors weighing in favor of diversion, the trial court concluded that Appellant had not shown his suitability for judicial diversion. Untruthfulness is a factor that bears amenability to rehabilitation and may be considered in sentencing. *See State v. Neely*, 679 S.W.2d 48, 49 (Tenn. 1984); *State v. Dowdy*, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994); *State v. Anderson*, 857 S.W.2d 571,

574 (Tenn. Crim. App. 1992). After reviewing the evidence presented to the trial court at the sentencing hearing, we determine that the trial court considered the necessary factors and that there was "substantial evidence" to support the trial court's denial of judicial diversion. *See Cutshaw*, 967 S.W.2d at 344; *Parker*, 932 S.W.2d at 958. This issue is without merit.

Conclusion

For the foregoing reasons, the judgment is reversed. Appellant's conviction is vacated and the charge is dismissed.

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JERRY L. SMITH, JUDGE