IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 23, 2009

STATE OF TENNESSEE v. STEVE GRIFFITH

Appeal from the Criminal Court for Sullivan County
No. S53,071 Robert H. Montgomery, Judge

No. E2008-01962-CCA-R3-CD - Filed July 8, 2009

The defendant, Steve Griffith, appeals from his Sullivan County Criminal Court conviction resulting from merged jury verdicts of guilty of both sale and delivery of .5 grams or more of cocaine, both within 1,000 feet of a school, Class A felonies. *See* T.C.A. §§ 39-17-417(a), (c)(1); - 432(b)(1) (2006). The defendant claims that the convicting evidence is insufficient, that the trial court improperly limited his voir dire of the jury, and that the trial court erred in allowing the prosecutor to read a portion of the jury instructions during his closing argument. We discern no error in the proceedings and affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Larry Dillow, Kingsport, Tennessee, for the appellant, Steve Griffith.

Robert E. Cooper, Jr., Attorney General and Reporter; Clark B. Thornton, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Kent Chitwood, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In the defendant's trial, Debra Depollo testified that she was the principal at Saint Dominique Catholic School, a private elementary school located at 1474 East Center Street in Kingsport. Ms. Depollo identified the school building and its real property on an aerial photograph.

Officer Cliff Ferguson of the Kingsport Police Department's vice and narcotics division testified and introduced into evidence a written statement of the defendant taken on January 24, 2007. In that statement, the defendant said:

> On the date in question Sonna Lastis and I were at Sue Edwards'. She got a call for some crack cocaine. She asked if I would deliver

> crack cocaine to a fat girl waiting at the Laundromat on Fort Henry Drive near Garden Apartments. Sonna Lastis and I went there. I drove Tad's truck. When we got there we met with a fat girl. Sonna handed the girl the crack cocaine and the girl paid us money. I took the money and took it back to Sue. The only payment Sue ever gave me for making deliveries for her was gas for my car, food, and she let me live with her for a while.

Officer Tim Horne, who also worked in the Kingsport police department's vice and narcotics unit, testified that on August 15, 2006, he instructed a police informant to call "Sue" to see if the informant could buy cocaine from her. The informant made the call in Officer Horne's presence and asked for "$100 worth." Officer Horne provided the informant with $100 to buy the cocaine and maintained visual surveillance of her awaiting the delivery of cocaine. He testified that a red truck arrived driven by a white male who was accompanied by a white female. Officer Horne saw the informant hand "the female in the truck what appeared to look like the money that we had given her. That female then in turn handed it to the male driver." The officer testified that the female passenger in the truck "handed out something to our informant" which the informant placed in her purse. Officer Horne identified the package in which he placed the material that he had obtained from the informant.

Officer Horne introduced into evidence a video recording of the August 15, 2006 transaction. The video was recorded by a camera secluded on the informant. Officer Horne narrated the video playback and testified that the informant was standing outside the Laundromat on Fort Henry Drive with the camera "facing towards Saint Dominique's School." The video depicted the informant approaching and interacting with the female in the red truck. The video did not show that the defendant exchanged either drugs or money with the female passenger in the truck. An audio recording of the transaction revealed that a male commented on the cocaine saying, "They're weighed out in 50's." Officer Horne testified that he recognized the voice as the defendant's. The officer also explained that the reference "50's" was "drug lingo" for half-gram units of cocaine.

Officer Horne estimated the distance from the point where the "transaction took place" to the Saint Dominique's School property to be "[a]bout 150, 200 feet."

Jake White, the Geographic Information Systems manager for the City of Kingsport, testified that the site identified as the point of the drug transaction was located within 1,000 feet of the Saint Dominique School.

The State then introduced evidence that the package collected by Officer Horne from the informant on August 15, 2006, was sent to, and received back from, the Tennessee Bureau of Investigation (TBI). A TBI forensic scientist testified that the material in the package weighed .7 grams and contained cocaine base.

The defendant presented no evidence, and the jury convicted the defendant of both the sale and delivery of .5 grams or more of cocaine.

I. Sufficiency of the Evidence

The defendant challenges the sufficiency of the convicting evidence by asserting that the State failed to establish that he was present in the truck that was met on August 15, 2006, by the police informant. We disagree.

A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict because a guilty verdict destroys the presumption of innocence and replaces it with a presumption of guilt. *See State v. Evans*, 108 S.W.3d 231, 237 (Tenn. 2003); *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). This court must reject a defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *State v. Hall*, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. *See Carruthers*, 35 S.W.3d at 558; *Hall*, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. *See State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Issues of the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this court will not re-weigh or re-evaluate the evidence. *See Evans*, 108 S.W.3d at 236; *Bland*, 958 S.W.2d at 659. This court may not substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. *See Evans*, 108 S.W.3d at 236-37; *Carruthers*, 35 S.W.3d at 557.

It is an offense for a defendant to knowingly deliver or sell a controlled substance. T.C.A. § 39-17-417(a). Violation of subsection 39-17-417(a) "is a Class B felony if the amount involved is point five (.5) grams or more of any substance containing cocaine." *Id.* § 39-17-417(c)(1). A violation of Code section 39-17-417 "that occurs on the grounds or facilities of any school or within one thousand feet (1,000') of the real property that comprises a public or private . . . school . . . shall be punished one (1) classification higher than is provided in § 39-17-417(b)-(i) for such violation." *Id.* § 39-17-432(b)(1).

A defendant's guilt of an offense may be predicated upon his criminal responsibility for the primary act of another when the defendant, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, . . . solicits, directs, aids, or attempts to aid another person to commit the offense." *Id.* § 39-11-402(2).

In the present case, the evidence included the defendant's confession that he, along with a female, transported and sold cocaine to a person waiting near the Laundromat in Kingsport. He admitted that the delivery and sale were done at the bidding of Sue Edwards, who paid him money for gas and food in consideration for his drug deliveries. The confession was corroborated by direct evidence that the defendant, identified by his voice, drove a truck accompanied by a female

and delivered .7 grams of cocaine base to a police informant in exchange for $100. The defendant admitted that he returned the money to Ms. Edwards. The evidence showed that the sale and delivery occurred within 1,000 feet of a school. As such, the evidence established that the defendant, at the very least, was criminally responsible for the sale and delivery of the cocaine that were principally accomplished by the female passenger.

II. Use of the Missing Witness Rule

The defendant next claims that the trial court erred in allowing the State to invoke "the missing witness rule during voir dire which denied the [d]efendant [the right] to question whether any of the potential jurors knew anyone involved in the case."

During jury selection, the State objected to defense counsel's statement that the jurors were "entitled to hear from all of the State's witnesses. Their witnesses are listed on the indictment." The State objected, and the trial court sustained the objection. During the ensuing jury-out hearing on the matter, defense counsel said, "I am not talking about a missing witness"; however, he failed to articulate the basis for his comments to the jury.

In his appellate brief, the defendant, through counsel, says:

> The Court's failure to allow defense counsel to properly voir dire the jury denied the [d]efendant the opportunity to properly determine whether any of the jurors knew anyone involved in the case. Additionally, the trial court's refusal to allow the defense counsel to properly voir dire the jury was an abuse of discretion and reversible error under applicable Tennessee case law.

The defendant cited no authority for these statements.

"The ultimate goal of voir dire is to see that jurors are competent, unbiased, and impartial, and the decision of how to conduct voir dire of prospective jurors rests within the sound discretion of the trial court." *State v. Howell*, 868 S.W.2d 238, 247 (Tenn. 1993); *State v. Harris*, 839 S.W.2d 54, 65 (Tenn. 1992); *State v. Simon*, 635 S.W.2d 498, 508 (Tenn. 1982). A trial court's actions in overseeing jury selection will not be disturbed unless a clear abuse of discretion is shown. *Harris*, 839 S.W.2d at 65.

The prosecution in a criminal case is "under no obligation to produce every possible witness." *Hicks v. State*, 539 S.W.2d 58, 59 (Tenn. Crim. App. 1976). In the present case, the trial court inferred from defense counsel's voir dire comments that the defense would seek to invoke the missing witness rule should the State decline to call all witnesses listed on the indictment. *See* T.C.A. § 40-17-106 ("It is the duty of the district attorney general to endorse on each indictment or presentment . . . the names of the witnesses as the district attorney general intends shall be summoned in the cause . . .").

The "missing witness rule" as recognized in Tennessee provides that

> [a] party may comment about an absent witness when the evidence shows "that the witness had knowledge of material facts, that a relationship exists between the witness and the party that would naturally incline the witness to favor the party and that the missing witness was available to the process of the Court for the trial."

State v. Bough, 152 S.W.3d 453, 463 (Tenn. 2004) (quoting *Delk v. State*, 590 S.W.2d 435, 440 (Tenn. 1979)). "The missing witness rule is premised on the idea that 'the absent witness, if produced, would have made an intelligent statement about what was observed.'" *Dickey v. McCord*, 63 S.W.3d 714, 722 (Tenn. Ct. App. 2001) (quoting *State v. Francis*, 669 S.W.2d 85, 89 (Tenn. 1984)). In the present case, we discern that the trial court understandably inferred from defense counsel's comments that the missing witness rule would be implicated during the trial if the State failed to call all the witnesses listed on the indictment. During the jury-out hearing, defense counsel said nothing to disabuse the trial court of that inference.

We assume that defense counsel meant to preface his voir dire inquiry into the prospective jurors' knowledge of the potential State witnesses by referring to the witness list on the indictment as the universe of persons the State might call. In any event, such was not the import of the comment to the jury as interpreted by the trial court and as interpreted by this court upon review of the record. In sum, we see no abuse of discretion in the trial court's sustaining the State's objection to the comment as phrased and posed by defense counsel. Moreover, we fail to see any merit to the claim that the trial court's ruling precluded defense counsel from inquiring about prospective jurors' knowledge of State witnesses.

III. The State's Closing Argument

Finally, the defendant claims that the trial court erred in allowing the prosecuting attorney to read jury instructions during his closing argument. We note that the trial court imparted jury instructions at the beginning of the trial.

In his closing argument, the prosecutor addressed the issue of complicity and referred the jury to the trial court's three paragraphs of instructions on criminal responsibility. He then stated, "I'm going to point out just a little bit of it for you. A defendant is criminally responsible as a party to the offense, not an accessory or not helping someone out, this is a party to the offense." Defense counsel stated, "Your Honor, I object to him arguing your instructions. You're the one that gives the instructions." After the court overruled the objection, the prosecutor spoke to the jury about Ms. Lastis' role in the drug transaction and stated, "Each party to the offense may be charged with the commission of the offense." Defense counsel objected again, stating, "Judge, he's not arguing, he's reading." The trial court overruled the objection, stating that the prosecutor was engaging in proper argument.

In its brief, the State points out that the advisory commission comments to Tennessee Rule of Criminal Procedure 30 indicate that the rule's authorizing jury instructions before closing arguments are presented "may improve the utility of counsel's closing argument by enabling lawyers

to make specific reference to the law at issue in the case." Tenn. R. Crim. P. 30, Advisory Comm'n Comments.

The scope of a closing argument is subject to the trial court's discretion. *State v. Armstrong*, 256 S.W.3d 243, 249 (Tenn. Crim. App. 2008). The parties should be granted wide latitude provided the argument is "temperate, predicated on evidence introduced during the trial, relevant to the issues being tried, and not otherwise improper under the facts or law." *State v. Thornton*, 10 S.W.3d 229, 235 (Tenn. Crim. App. 1999); *State v. Bigbee*, 885 S.W.2d 797, 809 (Tenn. 1994).

We hold that the trial court did not abuse its discretion in overruling the defendant's objections. The defendant cites no authority that posits that a prosecutor's reading of already-imparted jury instructions is improper. Indeed, the comments to Rule 30 bespeak a policy of allowing pre-argument instructions so that counsel may "make specific reference to the law at issue in the case."

IV. Conclusion

The defendant has presented no claims on appeal that justify reversal. The judgment of the trial court is affirmed. On remand for execution of the trial court's judgment, it shall correct the reference in the judgment for count 2 (delivery of cocaine) that incorrectly classified that conviction offense as a Class B felony. The indictment, the evidence introduced at trial, and the jury's verdict all indicate that the defendant was convicted of a Class A felony in count 2.

JAMES CURWOOD WITT, JR., JUDGE