IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 12, 2009 Session

STATE OF TENNESSEE v. MICHAEL W. KEMP

Appeal from the Circuit Court for Smith County
No. 05-234 John Wootten, Judge

No. M2008-01624-CCA-R3-CD - Filed July 31, 2009

The Defendant, Michael W. Kemp, was charged with three counts of vehicular homicide by recklessness, Class C felonies, and three counts of reckless endangerment with a deadly weapon, Class E felonies. See Tenn. Code Ann. §§ 39-13-213(b)(1), -103(b). He was convicted as charged following a jury trial and sentenced to three years for each vehicular homicide conviction, those sentences to be served consecutively. The trial court ordered split confinement for this effective nine-year sentence, one year in the Department of Correction and the balance to be served on probation. In this direct appeal, the Defendant contends that: (1) the evidence presented at trial was insufficient to convict him; (2) the trial court erred in overruling his motion for judgment of acquittal; (3) the trial court erred in ordering consecutive sentencing; and (4) the trial court erred in failing to merge his convictions for reckless endangerment into his convictions for vehicular homicide by recklessness. After our review, we affirm the Defendant's convictions, but remand for reconsideration of his consecutive sentences and entry of judgment forms properly reflecting merger.

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

DAVID H. WELLES, J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

G. Jeff Cherry and David Veile, Lebanon, Tennessee, for the appellant, Michael W. Kemp.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Tom P. Thompson, District Attorney General; and Howard Chambers, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The State first presented the testimony of Trooper Shannon Brinkley, who arrived at a crash scene outside Carthage at 3:46 a.m. on February 27, 2005, after being dispatched from home. He found emergency personnel and police already present. After investigating the scene, Trooper Brinkley learned that a red Toyota had crashed into a tree at the bottom of a roadside embankment, causing the deaths of each of the Toyota's three passengers. He also learned that the crash had involved two vehicles, "one of which was possibly chasing another one and had left the scene and went to the Sheriff's Department."

Trooper Brinkley notified his supervisor, who requested the presence of crash reconstructionists from the Highway Patrol Critical Incident Response Team ("CIRT"). His supervisor also requested the presence of Agent Pat Hester, a member of the Highway Patrol Criminal Investigations Division. Trooper Brinkley then continued to collect information and evidence. He found a semi-automatic nine millimeter Ruger pistol under the driver's side seat of the crashed Toyota. He also found a black holster on the ground nearby. The Ruger's clip contained four rounds of ammunition. Trooper Brinkley also learned of a shell casing that Chief Steve Hopper of the Carthage Police Department had found lying in the road on the other side of a nearby hill. Trooper Brinkley introduced a number of crime scene photos at trial.

At about 6:30 or 7:00 a.m., Trooper Brinkley proceeded to the Sheriff's Department to inspect the other vehicle involved in the accident, a blue Dodge pickup owned by the Defendant. He noted that the Dodge had an airbag but that it had not deployed. Trooper Brinkley discovered two bullet impacts to the Dodge's front grille. He also noticed damage to the lower front of the grille, including some red paint transfer. Using either a ballpoint pen or a knife, he recovered from the grille what he believed to be fragments of a bullet. He gave these fragments to Agent Hester. Trooper Brinkley observed the Defendant at the Sheriff's Department, and he saw no blood on the Defendant.

Following standard procedure, Trooper Brinkley proceeded to the hospital and watched as blood samples were taken from the bodies of the three victims: Jimmy Bane, Tommy Lee Gooch, and Anthony Billings. Trooper Brinkley also witnessed blood being drawn from the Defendant. He took each of the resulting samples into his possession and personally delivered them to the Tennessee Bureau of Investigation ("TBI") for analysis.

Sergeant Ashley Mercer of CIRT, an expert in crash reconstruction, testified regarding his observations of the crash site. He also introduced a scale diagram of the site. Tire marks appeared near the location where the Toyota had left the road; the marks indicated a sharp right turn off the road, with the car leaning heavily on the left edge of its driver's side tires. The wheels were rotating at the time they left the marks. No skid marks appeared in the area, indicating that the Toyota had not applied its brakes. Sergeant Mercer found four debris sites, each of them indicating contact

between vehicles. Finally, Sgt. Mercer noted near the crash site a trail of fluid left by a damaged vehicle.

After arriving at the crash site, Agent Pat Hester began collecting previously-discovered evidence, including "a 9 millimeter luger caliber pistol, Ruger model; four 9 millimeter luger caliber Winchester brand cartridges; one bullet jacket fragment; one lead bullet core; one metal fragment; one fired 9 millimeter luger caliber Winchester brand cartridge case; and one 9 millimeter luger caliber Winchester brand cartridge." She delivered all of these items to the TBI and later received the resulting report.

She also took two statements from the Defendant. The Defendant made his first statement at 6:20 a.m. on February 27, 2005, after reading and signing a rights waiver form. Agent Hester wrote out the statement, recording the Defendant's words and allowing him to amend the statement. Agent Hester introduced the statement into evidence and read it into the record:

> Statement of [the Defendant]. On Friday, February the 25th, I went to bed around 12:00 to 1:00 a.m. I got up about 7:00 a.m. on Saturday morning the 26th. At about 10:30 to 11:00 a.m., I went to Lebanon to drop off my niece with my wife.
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> After that, I did some things, and then that afternoon, I met my wife at Circuit City in Hickory Hollow to pick up my son. We left there and my son and I came back home in Carthage. We stayed at home and watched movies and played some games.
>
> A friend of mine, Steve Ferris, came over around 10:00 p.m. We watched some movies; [the Defendant], his son, and Steve. About 12:00 p.m., I saw a little red car pull up my driveway. I went outside to see who it was. There were three males in the car; one black male and two white males.
>
> I knew one of them was a guy named Bane. They wanted to know if I knew where they could get some marijuana. I told them, no. They then asked me if I wanted some crack cocaine. I told them, no, and they left.
>
> Bane was not the driver and I don't know the other two males . . . Steve left around 12:30 to 1:00 p.m. My son fell asleep on the couch and I went to bed.
>
> I had a small heater on and it makes some noise. Heard my dogs start to bark and they kept on barking. I then heard my door on the house slam. I got up, and when I got in the living room, I saw the little red car backing out of my driveway real fast.
>
> I kept a 9 millimeter Ruger under the cushion in my couch. I went to get it and it was gone. My son did not wake up during any of this. I got dressed and left

the house and tried to follow the car. I lost them. When I got into town, I came upon them.

I came across the bridge and I saw them. I got behind them somewhere around Main Street. I was trying to get a tag number. When I got close to them, I did not see a tag. They had a drive-out tag on the vehicle.

I think Bane was in the back seat. The person in the back seat pulled out a gun and fired shots at me. I backed off but I stayed behind them. Then the driver came out the driver's window and started to shoot at me. He was hanging out the window.

The driver slammed on his brakes and I hit them in the rear and they went off down the hill. I turned around and went over to the Sheriff's Office and told them to get some help. I had left my cell phone at home.

Bane had been at my house before and he knew that I kept a gun under the cushion of my couch. When I went to bed, I don't know if I locked the door. It was probably open. My son did not wake up during any of this. I had seen Bane on Friday. He and another guy were at my house.

When I was following them, they had at least once put on the brakes. On one of the times, I did barely hit them and I backed off. I know they shot at me two different times with multiple shots fired each time. I think Bane was in the back seat. He had a gray shirt and something gray on his head.

I don't remember where we were at when the shots were fired. After they slammed on their brakes and I hit them, I left and came to the Sheriff's Office and had not been back to where the crash happened. I got to the Sheriff's Office and told them what had happened.

Someone from the Sheriff's Department took me over to the hospital. They drew blood. The officer told me that I had to give blood, and he made threats to me if I didn't. I was taken back to jail. I do not drink and I have not had or used any drugs today or since Saturday.

Before they drew blood, I was asking them why do I need to give blood. They said they were going to arrest me and hold me for investigation if I did not agree to give them blood. At that point, they also told me that if he had to, he would take me down or hold me down and beat me and do whatever it takes for the nurses to take blood from me.

> They also told me that I could not talk to an attorney or anyone else until I gave the blood. One of the three nurses – I asked her if she heard what they said, and I needed her name because I was being made to give the blood.

The Defendant declined to sign this statement after making it, preferring to consult with a lawyer first. He did so; he and his lawyer met Agent Hester at the Defendant's house on March 3, 2005. The Defendant signed the statement after also providing a signed addendum, written in his own handwriting:

> After reading the statement, I would like to make further information [word illegible].
>
> After the driver was shooting at me with is [sic] upper body out the window, when he the driver was getting back in the car is when he first hit his brakes causing the first contact [with] the car.
>
> The second and third time of impact is when we came around a curve, they hit their brakes the second time. I hit the car again. They went and took off again and hit there [sic] brakes again I tried to dodge them to the left [and] hit them again, and that's when they went off the road.

Agent Hester also subpoenaed and introduced into evidence the phone records from the Defendant's home phone, his cell phone, and a number associated with Mr. Bane. The records show that someone used the number associated with Mr. Bane to call the Defendant's land line eleven times between 9:26 p.m. on February 25 and 9:28 p.m. on February 26, 2005. Someone used the Defendant's land line to call that number back once, at 10:59 p.m. on February 25, 2005. Agent Hester also noted that she interviewed about twenty people who heard the crash. None of them actually saw the crash.

The State next introduced the testimony of Special Agent John Harrison, a TBI forensic scientist and expert in toxicology. Agent Harrison received the blood samples in this case and tested them for alcohol content. He discovered that: Mr. Bane's blood was negative for alcohol; Mr. Gooch had a blood alcohol level of .03%; Mr. Billings, established as the driver of the crashed vehicle, had a blood alcohol level of .19%, over twice the legal limit and the Defendant's blood was negative for alcohol. Special Agent Kelly Hopkins, also a TBI forensic scientist and expert in toxicology, tested the blood samples in this case for drugs. She discovered that: Mr. Bane's blood contained cocaine and valium; Mr. Gooch's blood contained cocaine; Mr. Billings' blood contained cocaine; and the Defendant's blood contained cocaine and Prozac. However, the Defendant's blood did not contain any metabolites of cocaine; Agent Hopkins testified that cocaine metabolizes relatively quickly, and that the lack of the resulting metabolites in a subject's blood indicates recent use.

Finally, the State presented the testimony of Special Agent Alex Brodhag, a TBI firearms examiner and expert in firearms. He received the physical evidence collected by Agent Hester,

including the Ruger found in the victims' Toyota. He test-fired the gun and testified that it functioned normally. The lead bullet core Agent Hester delivered had no markings allowing identification. The metal fragments were not pieces of a bullet. The recovered cartridge case had been fired by the Ruger. After the close of the State's proof, the Defendant and the State stipulated to the accuracy of the autopsy reports on the three victims.

The Defendant chose to testify and gave his account of the relevant events. On the evening of February 26, 2005, he engaged in everyday activities like watching television and working outside. He picked up his son, returning home at about 4:30 or 5:00 p.m. They then went into town and rented some movies. The Defendant and his son watched a movie; later, the Defendant's friend, Steve Ferris, stopped by. The Defendant and Mr. Ferris conversed while the Defendant's son played video games. Mr. Ferris left around midnight.

The Defendant's son fell asleep on the couch. The Defendant proceeded upstairs to his bedroom and also fell asleep after turning on a small heater to provide some "white noise." The Defendant habitually left his door unlocked, and he did so that evening.

The Defendant woke up around 3:00 a.m. to the sound of barking dogs. After listening for a minute from his bedroom, he heard his front door slam. The Defendant walked to the living room. His son was still asleep. The Defendant looked out the window and saw a red car driving down his driveway. He went to retrieve his gun from under the couch cushions because "normally if someone [came] around [his] house, [he'd] pull [his] little gun . . . and [] walk out on the porch and [] boom, boom, boom up in the air just to scare – keep everybody away from [his] house . . . ." His gun was gone, however.

The Defendant explained that he normally stored his gun in the nightstand in his bedroom. He had put it under his couch cushions a few days before, however. On the evening of February 25, 2005, Mr. Bane, a friend of the Defendant and the nephew of the local sheriff, had visited the Defendant for about five to ten minutes in order to use his phone. The Defendant testified that Mr. Bane frequently stopped by asking for a ride into town or to use the phone. Mr. Bane had called the Defendant several times on February 25 and 26, leaving a message each time. The Defendant called his number back once. During the February 25 visit, Mr. Bane had noticed the gun under the couch cushions and briefly conversed with the Defendant about it.

Realizing that his gun had been stolen, the Defendant put on jeans and a t-shirt. He began driving toward town after the Toyota, intending to get its tag number because he did not know who was in the car. He lost sight of the Toyota briefly but located it again. He lost sight of it a second time. After some additional driving, however, he came upon the car parked on the side of the road. He parked his truck behind the Toyota and left his lights on, intending to question its occupants about his stolen gun. The Toyota drove off as he approached. The Defendant returned to his truck and again drove after the Toyota. The Defendant testified that at no point was this chase conducted at high speed and that neither car was ever speeding. He described himself as "a very cautious driver."

After briefly driving behind the Toyota, the Defendant saw Mr. Bane stick a gun out of the back window and shoot at him a number of times. At the top of the hill where Chief Hopper later recovered a casing, the driver of the Toyota positioned his entire upper body out of his window and fired a number of additional rounds at the Defendant. The driver returned to the inside of the Toyota and slammed on its brakes, at which point the Defendant bumped into the back of the car. It drove off again, "[flying] right through" a stop sign. The Defendant then "felt something funny" with his truck's power steering and power brakes. He rolled slowly through the stop sign and, realizing he was close to the police station, began honking his horn. No one responded.

He then considered going to the Sheriff's Department but decided not to because Bane, being the Sheriff's nephew, "got away with everything." The Defendant was therefore convinced that his gun would not be recovered, and he did not want to be implicated in some future crime in which his gun might be used. The Defendant proceeded after the Toyota. Turning a corner, the Defendant "looked up and there they were," stopped on the road. He bumped the car again. The Toyota "took off" and then slammed its brakes on again. The pursuing Defendant tried to maneuver his truck around the left side of the car but "bumped them just barely." The Toyota then sped off the side of the road, and the Defendant saw its red lights disappear.

The Defendant therefore testified that there were three impacts between his Dodge and the Toyota. The Defendant testified that he had not hit the car at one of the debris sites identified by Sgt. Mercer; that debris had come off the Toyota as it bottomed out cresting a hill. The Defendant maintained that the car was not speeding.

Seeing the victims' car in the ditch on the side of the road, the Defendant concluded its occupants would get out and try to shoot him. He therefore proceeded to the Sheriff's Department, where he reported the night's events. The Defendant testified that, during the chase, he did not see a single car that he could have flagged down for help. He also testified that there were no cars at the police station when he drove by honking his horn. He had loaded his Ruger with fifteen rounds shortly before the theft; as it had four rounds remaining upon recovery, the Defendant concluded that eleven total rounds had been fired at him. The Defendant clarified that he had merely wanted to recover the Toyota's tag number until he saw that Mr. Bane was an occupant, although he said on cross-examination that he originally wanted to follow the car until he could find a police officer. The Defendant also confirmed that he had told Agent Hester about his loss of power steering and power brakes.

The State recalled Chief Hopper, who testified in rebuttal that there was always at least one car present outside the police station and that a dispatcher was present at all times. No officer routinely sat outside the building, however. The State also recalled Sgt. Mercer, who testified that he went to the Defendant's house to examine his truck on March 17, 2005, and discovered no puddling of fluids under it or damage to its brake lines. Sergeant Mercer believed that the Defendant's truck had been parked in the Defendant's driveway since the incident and had not been moved.

The jury found the Defendant guilty as charged, and his motion for a new trial was denied. He now appeals.

Analysis

I. Sufficiency of the Evidence

The Defendant first contends that the State presented evidence insufficient to convict him beyond a reasonable doubt of vehicular homicide by recklessness. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." 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 verdict of guilt destroys the presumption of innocence and imposes 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 convicted criminal 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 (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). Questions about 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. Nor will this Court 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.

As charged against the Defendant, vehicular homicide is the reckless killing of another by the operation of an automobile as the proximate result of conduct creating a substantial risk of death or serious bodily injury to a person. See Tenn. Code Ann. § 39-13-213(a)(1). "Reckless" refers to a person who acts 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. Tenn. Code Ann. § 39-11-302(c). 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. Tenn. Code Ann. § 39-11-302(c).

We conclude the evidence is sufficient for any rational jury to have convicted the Defendant. In the light most favorable to the State, it showed that the Defendant, under the influence of cocaine, chased after the victims' Toyota and at four separate times hit it hard enough to cause debris to fall

into the road. The final impact occurred immediately before the crash site; testimony established that no skid marks appeared in the area, meaning that neither car forcefully applied its brakes. The red car was, however, moving fast enough that the left edges of both driver's side tires left markings on the road as the car skidded to the right into a ditch. These facts are sufficient to allow a rational jury to disbelieve the Defendant's account of a low-speed chase featuring slight accidental contact, and to believe that the Defendant hit the Toyota having consciously disregarded the attendant danger of death or serious bodily injury.

The Defendant argues that the actions of the car's driver, Mr. Billings, were themselves so reckless as to negate the possibility of the Defendant's conduct proximately causing the victims' deaths. The Defendant largely relies on his own testimony in doing so, however, pointing out Mr. Billings' sudden stops and decision to lean his upper body out of the car to fire at the Defendant. The jury was not required to believe this account. We agree with the Defendant that Mr. Billings' .19% blood alcohol level was well established; this does not, however, render irrational a jury's finding that the actual crash proximately resulted from the Defendant's actions. This issue is without merit.

II. Denial of Defendant's Motion for Judgment of Acquittal

The Defendant moved for a judgment of acquittal after the close of the State's proof. Instead of ruling on the motion, the trial court said, "Under Rule 29, I'll reserve making a decision. I can do so. I can make a decision before the jury returns a verdict, after the jury returns a verdict or even after it's discharged. Are you all ready to continue on?" The Defendant then presented his proof.

At the hearing on the Defendant's motion for a new trial, the trial court admitted that its ruling was erroneous, and that it "should have made a specific finding either granting the Motion or denying it at that time." Indeed, Tennessee Rule of Criminal Procedure 29(d) allows a trial court to reserve decision on a motion for a judgment of acquittal only for such motions made after the close of all the evidence. "There is no authority in our practice or procedure in a criminal case for the trial judge to take under advisement a motion for a judgment of acquittal made at the conclusion of all the State's proof." State v. Mathis, 590 S.W.2d 449, 453 (Tenn. 1979).

While the State concedes that the trial court erred, it argues that the Defendant has waived this issue by failure to stand on his motion. We agree. See State v. Thompson, 549 S.W.2d 943, 945 (Tenn. 1997) (stating that "[s]ince the respondent did not rest her case at the end of the State's proof but offered evidence on her own behalf, her motion made at the conclusion of the State's proof was, in trial parlance, 'waived'"). See also State v. Ball, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998). The State also notes our holding that "[t]he strict guidelines as set forth by our supreme court [in Mathis] for preserving as error a trial court's denial of or inaction upon a motion for judgment of acquittal leave no room for plain error analysis." State v. Frank E. Huey, No. M2000-02793-CCA-R3-CD, 2002 WL 517132, at *15 (Tenn. Crim. App., Nashville, Apr. 5, 2002). This issue is without merit.

III. Consecutive Sentencing

During the Defendant's sentencing hearing, the trial court held unconstitutional Tennessee's consecutive sentencing statute, Tennessee Code Annotated section 40-35-115. It then imposed consecutive sentences based on its "inherent powers." The Defendant contends, and the State concedes, that the trial court erred in taking both of these actions.

Our supreme court has since upheld the constitutionality of Tennessee's consecutive sentencing statute. See State v. Allen, 259 S.W.3d 671, 690 (Tenn. 2008). The statute requires certain findings to be made before a trial court can order consecutive sentences. See Tenn. Code Ann. § 40-35-115(b). Because the trial court did not make any such findings, it erred in ordering the Defendant to serve consecutive sentences. We accordingly remand for reconsideration of this issue.

IV. Merger

The Defendant next contends that the trial court failed to merge his convictions for reckless endangerment into his convictions for vehicular homicide by recklessness. Because each pair of convictions arose from the same criminal conduct, the Defendant correctly argues that such a failure to merge would violate constitutional protections against double jeopardy. See U.S. Const. amend V; see also Tenn. Const. art. I, § 10. The State agrees but contends that the judgment forms properly reflect merger.

The record contains six judgment forms, one for each of the Defendant's convictions for vehicular homicide and reckless endangerment. The three reckless endangerment judgment forms each note a sentence length, but in the area specifying concurrent service say, "This count to merge with [the corresponding count of vehicular homicide]." We conclude that double jeopardy protections require, however, that one judgment of conviction be entered per criminal act, with any merged offenses noted therein. See, e.g., State v. Emmanuel Odom, No. M2007-01671-CCA-R3-CD, 2008 WL 4791488, at *6 (Tenn. Crim. App., Nashville, Nov. 3, 2008). We therefore vacate the current judgments and remand for entry of three judgments of conviction of vehicular homicide by recklessness that merge the corresponding convictions of reckless endangerment.

Conclusion

Based on the foregoing authorities and reasoning, we uphold the Defendant's convictions and sentences but remand for reconsideration of his consecutive sentences and for entry of corrected judgments properly reflecting that the reckless endangerment convictions were merged into judgments for vehicular homicide.

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DAVID H. WELLES, JUDGE