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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-0174

Michael Joray Norton

v.

State of Alabama

Appeal from Madison Circuit Court
(CC-16-4976)

COLE, Judge.

Michael Joray Norton appeals his conviction for intentional murder, a violation of § 13A-6-2(a)(1), Ala. Code 1975, and his resulting sentence of 40 years in prison.

Facts and Procedural History

In December 2016, Norton was indicted for the intentional murder of Perez Burruss by shooting him with a handgun. Norton's jury trial began on July 30, 2018. The evidence at his trial showed the following: On November 13, 2015, Norton was "hanging out" with his friend Dylan Potter in Hazel Green. Potter drove Norton to pick up their friend Austin Pressnell and then drove Norton and Pressnell to Huntsville so that Pressnell could take a court-ordered drug test. At some point that day, Norton asked Potter where he could obtain some Xanax, a controlled substance. Potter contacted Perez Burruss by telephone and arranged to meet Burruss at a skate park in downtown Huntsville for Norton to purchase Xanax from Burruss.

Norton, Potter, and Pressnell met Burruss at the skate park that afternoon. Burruss arrived in an automobile driven by Ferron Johnson. At Burruss's insistence, Johnson waited for Burruss while he attempted to sell his headphones and some pills to the occupants of the other vehicle. After initially meeting at the skate park, Norton and Burruss agreed to relocate to a nearby Chevron gas station due to the number of people around the skate park and their need for secrecy. They

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drove both vehicles to the Chevron station and stayed there for several minutes. Norton and Burruss determined that it was still "too suspicious" to conduct the drug transaction at the Chevron station, and they drove both vehicles to a nearby abandoned building to finish the deal.

Pressnell testified that he learned that there was going to be a drug transaction after Potter and Norton had taken him to his court-ordered drug test but before they arrived at the skate park. At the site of the shooting, Pressnell saw Burruss with pills in his hands and he watched Potter and Norton get out money. Potter testified that Pressnell looked on a pill-identification website to verify the authenticity of the drugs.

Burruss got out of Johnson's vehicle, walked to Potter's vehicle, and got into the back seat of Potter's vehicle with Norton while Johnson stayed in his vehicle. After several minutes in Potter's vehicle, Burruss got out of Potter's vehicle, was shot, and fell to the ground. He was found dead in the same location a short time later. Burruss was shot once in the back, which caused fatal injuries to his heart, kidney, and other organs.

After Burruss was shot, Johnson fled to his house in his vehicle. Potter also fled in his vehicle with Norton and Pressnell. No one called the police or paramedics to assist Burruss. Pressnell testified that he, Potter, and Norton initially went to a friend's house for Norton to drop off the gun and then went to Norton's house and stayed there. Potter left to hang out with his girlfriend but eventually returned to Norton's house to spend the night.

Neither Potter nor Pressnell initially reported the shooting to the police. Potter spoke with law-enforcement officers the next day after his parents informed him that the police were looking for him. Pressnell spoke with officers a day after that, on November 15, 2015. Both Potter and Pressnell testified that Norton had been in the back seat of Potter's vehicle with Burruss and that Norton had shot Burruss.¹ Johnson testified that he did not know the men in the other vehicle and could not identify them.

Crime-scene investigators recovered evidence from the crime scene but found nothing that could be tied to Potter,

¹Norton did not make a statement to the police and did not testify at trial. There was no evidence at trial regarding why Norton shot Burruss or how the shooting occurred.

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Pressnell, or Norton. Officers were able to recover security footage from a nearby business showing the vehicles, but no people were identifiable in the video. Police investigators identified Potter from a surveillance video at the Chevron gas station, but the other participants were not visible on that video.

At the close of the State's case, Norton moved for a judgment of acquittal, which the Madison Circuit Court denied. Norton did not present any evidence. Thereafter, the parties presented their closing arguments, the circuit court instructed the jury, and the jury retired to deliberate. After its deliberations, the jury found Norton guilty of intentional murder, a felony. The circuit court held a sentencing hearing on October 19, 2018, and sentenced Norton to 40 years in prison. On November 6, 2018, Norton filed a motion for a new trial, which the circuit court denied the same day. Norton appealed.

Discussion

On appeal, Norton argues (1) that he was entitled to a judgment of acquittal because his conviction was based solely on the uncorroborated testimony of his accomplices, (2) that

the issue of complicity should have been submitted to the jury, and (3) that the circuit court erred in failing to give him an opportunity to speak before imposing sentence. We address each issue in turn.

I. Uncorroborated Accomplice Testimony

Norton first argues that the evidence was insufficient to support his conviction for intentional murder because, he says, the only evidence linking him to the crime was the uncorroborated testimony of his accomplices, Pressnell and Potter.

Section 12-21-222, Ala. Code 1975, provides:

"A conviction of felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient."

In discussing this statute, this Court has held:

"[W]hen a defendant contends that a witness is an accomplice, he has the burden of proving that fact. *Cumbo v. State*, 368 So. 2d 871 (Ala. Cr. App. 1978), cert. denied, 368 So. 2d 877 (Ala. 1979). Where there is no conflict in the testimony, the issue of whether a witness is an accomplice is a question of law for determination by the trial court. *Id.*"

"Bone v. State, 706 So. 2d 1291, 1295 (Ala. Crim. App. 1997)."

Daniel v. State, 906 So. 2d 991, 1000-01 (Ala. Crim. App. 2004) (emphasis added). Further, corroboration of accomplice testimony was generally not required at common law, and § 12-21-222 must be strictly construed because it is in derogation of the common law. Cunningham v. State, 54 Ala. App. 656, 658, 312 So. 2d 62, 63 (Ala. Crim. App. 1975).

It does not appear that either Pressnell's or Potter's testimony that Norton shot and killed Burruss was corroborated by any other evidence. In fact, the circuit court found that the only link between Norton and the shooting was their testimony. Moreover, the State does not argue that Potter's and Pressnell's testimony was corroborated; rather, the State argues that they simply were not accomplices and, thus, that their testimony did not require corroboration.

Although an accomplice's testimony must be corroborated, § 12-21-222 does not apply unless Potter and Pressnell were actually accomplices to Norton's crime. The test for making such a determination is simple and well settled:

"The classic and usual test to determine whether a witness is an accomplice is whether he could be indicted and convicted for the particular offense,

either as principal or accessory.... An accomplice is defined as "an associate in crime; a partner or partaker in guilt". Darden v. State, 12 Ala. App. 165, 167, 68 So. 550, 551 (1915)."

Jacks v. State, 364 So. 2d 397, 401-02 (Ala. Crim. App. 1978) (emphasis added). See also Reynolds v. State, 114 So. 3d 61, 122 (Ala. Crim. App. 2010) ("The test for determining whether a witness is an accomplice is whether he or she could have been indicted and convicted for the offense charged, either as principal or accessory." Russell v. State, 365 So. 2d 343, 346 (Ala. Cr. App. 1978).") (quoting Gordon v. State, 611 So. 2d 453, 455 (Ala. Crim. App. 1992)). The State argues that neither Potter nor Pressnell is an accomplice because they could not have been indicted for and convicted of intentional murder under § 13A-6-2(a)(1), the offense for which Norton was charged.

In Lewis v. State, 414 So. 2d 135, 138 (Ala. Crim. App. 1982), this Court addressed accomplice testimony and phrased the above-quoted test as whether the witness "could be indicted and convicted for the same offense for which the accused is then being tried."² (Emphasis added.) The Lewis

²In other words, when addressing whether a witness's testimony requires corroboration, this Court has looked to whether the witness could be indicted and convicted for the

Court noted that the witness in that case had been "adjudged guilty of the offense of conspiracy to commit murder, where appellant was tried for the offense of murder," and that the question was "could [the witness] have been indicted and convicted for the offense of murder." Id. It is well settled in Alabama that the test for being an accomplice is whether the witness could be indicted and convicted for the same offense for which the defendant is being tried.

Because the circuit court in this case determined that Potter was an accomplice, we do not address whether Potter's testimony needed to be corroborated. Instead, the question we must answer to determine whether Norton is entitled to relief is whether the circuit court erred in holding that Pressnell was not an accomplice to intentional murder. But even Norton, at trial and on appeal, does not argue that Pressnell could have been indicted for or convicted of the intentional murder of Burruss--the offense for which Norton was being tried. As Norton apparently concedes, there is no evidence in the record that Pressnell was complicit in the intentional killing. Moreover, there is no evidence in the record that Pressnell

same offense the accused is on trial for, regardless of what the accused is ultimately convicted of.

knew that Norton had a gun. Although Norton argues that Pressnell was an accomplice to the intentional murder under the felony-murder statute and, thus, that his testimony required corroboration, felony murder and intentional murder are separate offenses. See Davis v. State, 262 So. 3d 1275, 1286 (Ala. Crim. App. 2017) ("Felony murder and intentional murder may be considered as separate offenses under the test set out in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), because felony murder requires proof of a felony, which intentional murder does not, and intentional murder requires proof of intent, which felony murder does not."); see also Miller v. State, 264 So. 3d 907, 915 (Ala. Crim. App. 2017) (same). Because felony murder and intentional murder are separate offenses, whether Pressnell was guilty of an offense that Norton was not tried for does not factor into a determination of whether his testimony requires corroboration.

In sum, under well settled Alabama law, Pressnell's testimony does not need to be corroborated. Thus, the trial court did not err when it determined that Pressnell was not an

accomplice and that his testimony was sufficient to support Norton's conviction.

II. Submission of Complicity Issue to the Jury

Norton next argues that, even if Pressnell is not found to be an accomplice as a matter of law, the issue of his complicity should have still been submitted to the jury. Although Norton correctly points out that the circuit court initially indicated that the jury would need to determine whether Pressnell was an accomplice, the circuit court changed its position and held that, as a matter of law, Pressnell was not an accomplice. This Court has held that

"where there is a doubt or dispute whether a witness is in fact an accomplice, the question is for the jury and not the trial court. Where there is doubt whether a witness is in fact an accomplice, and testimony is susceptible to different inferences on that point, that question is for the jury."

Miller v. State, 518 So. 2d 801, 806 (Ala. Crim. App. 1987).

But, as explained above, this is not a case in which there was a doubt as to whether Pressnell was an accomplice to intentional murder.³ Thus, the circuit court did not err by

³On appeal, even Norton concedes that, at most, Pressnell was an accomplice to a felony murder, which was not the offense for which Norton was tried.

refusing to submit the question whether Pressnell was an accomplice to the jury.

III. Failure to Afford Norton An Opportunity to Speak Before Imposition of Sentence

Finally, Norton argues that the circuit court erred in not giving him an opportunity to speak before it imposed sentence. Norton argues that Rule 26.9(b)(1), Ala. R. Crim. P., requires the court to "[a]fford the defendant an opportunity to make a statement in his or her behalf before imposing sentence." Norton argues that the circuit court heard arguments of counsel as to the appropriate sentence and then immediately imposed sentence without affording him an opportunity to speak. See Banks v. State, 51 So. 3d 386 (Ala. Crim. App. 2010) (a sentence imposed without allowing an allocution is erroneous). The State agrees that Norton should have been given an opportunity to speak before his sentence was imposed. (State's brief, p. 21-22.)

Because Norton was not afforded an opportunity to make a statement in his own behalf before the circuit court sentenced him, this Court is compelled to reverse the sentence and to remand this case to the circuit court for that court to resentence Norton. See Green v. State, 200 So. 3d 677, 678-79

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(Ala. Crim. App. 2015) (holding that the lack of allocution requires remand because a sentence imposed without allowing an allocution is erroneous).

On remand the circuit court shall conduct a sentencing hearing at which a proper allocution is provided pursuant to Rule 26.9(b), Ala. R. Crim. P. The circuit court is directed to make a return to this Court showing compliance with these instructions within 49 days from the date of this opinion. The return to remand shall include a transcript of the sentencing hearing and copies of documents, if any, relied upon by the circuit court in imposing Norton's sentence.

AFFIRMED AS TO CONVICTION; REMANDED WITH INSTRUCTIONS AS TO SENTENCING.

Windom, P.J., and Kellum, McCool, and Minor, JJ., concur.