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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-0449

Kendrevious Deshaun Dumas

v.

State of Alabama

**Appeal from Lee Circuit Court
(CC-18-303)**

MINOR, Judge.

Kendrevious Deshaun Dumas was convicted of murder, see § 13A-6-2, Ala. Code 1975. The circuit court sentenced Dumas to 30 years' imprisonment. The circuit court also ordered him to pay court costs and a \$7,033.65 crime-victims-compensation assessment.

On appeal, Dumas argues that the circuit court erred: (1) by denying his motion for immunity from prosecution, and (2) by denying his motion for a judgment of acquittal. For the reasons stated below, we affirm.

On the evening of April 2, 2017, Dumas shot and killed Tyquavious Jackson on the steps of an apartment complex in Auburn, Alabama.

According to the statement Dumas gave to police,¹ around 7:00 or 8:00 p.m. on April 2, Jackson pointed a gun at Dumas's head and demanded Dumas's Glock model 23 .40 caliber handgun. Jackson told Dumas to "give [Jackson] [Dumas's] Glock" and to "get off the block" and stated that "if [Jackson] saw [Dumas] on the block again [Jackson] would kill [Dumas]". (R. 434-35.)

Dumas also stated that later that night, he was with Blake Turner, Makeda Brown, Sharif Buchannon, Oliver "OT" Thomas, and Demarcus "D" Giddens at Brown's apartment. Dumas stated that everyone was outside on the balcony when he saw Jackson approach with his hands behind his back and that Jackson appeared to be "high" on cocaine. (R. 435.) Jackson

¹Sgt. Michael Creighton, with the Auburn Police Department, testified that he took Dumas's statement on April 4, 2017.

walked up the steps, and Dumas stood up with his "[Draco] AK pistol" in his hands. (R. 435.) Dumas stated that "[he] was afraid that [Jackson] was going to come looking for [him] after [Jackson] robbed me." (R. 436.) Dumas also stated that he saw Jackson holding the stolen Glock model 23 in his hand as he walked up the steps.

Dumas further stated that he asked Jackson to return his gun but that Jackson did not respond. Dumas stated that Jackson continued to walk toward him holding the gun down by his side. Dumas stated: "Then he made a movement like he was going to pull the gun up. So I just started shooting. I don't know if [Jackson] shot or not or how many times I shot. But I just pulled the trigger and blacked out." (R. 436.) Dumas stated that he then "took off running and took [his] AK with [him]." (R. 436.) Dumas stated that the Glock model 23 was still in Jackson's hand when he stepped over him.

Dumas testified in his own defense at trial that "[Jackson] upped the gun at me. Like he went to reach--like try to shoot me, and that's when I just blacked out." (R. 581.) But, on cross-examination, Dumas admitted that "I guess we shot at the same time, if you could say so." (R. 587.)

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Dumas admitted: "I don't recall [Jackson] getting shot. I remember him raising the gun, but after that I blacked out." (R. 589.) Dumas also admitted that he fled the scene because he was scared and that he disposed of his pistol, which was never found.

Also, the State presented the following evidence.

Both Sharif Buchannon and Blake Turner testified that Dumas told them that Jackson had robbed him of his Glock model 23 handgun; Buchannon testified that Dumas stated that he was also robbed of "soft" or cocaine powder and 20 grams of "loud" or marijuana. Both Buchannon and Turner saw Jackson walk up and Dumas walk to the stairs with a gun in his hand. Turner overheard Dumas ask, "Where is my stuff at," before he heard gunshots. (R. 211, 222.) Turner testified that he never saw a gun in Jackson's hands. Buchannon, however, testified that he saw Jackson with his hand behind his back and that it appeared he had a gun. Buchannon testified that both Dumas and Jackson "went to raising their gun[s] and shots went off." (R. 360.)

Officers Michael Hayden and John Gaither, both with the Auburn Police Department, testified that they responded to

reports of a shooting at the Oakley Cove Apartments. Officer Hayden testified that after he arrived on the scene, he saw Jackson lying dead on the stairwell from multiple gunshots. Neither Officer Hayden nor Officer Gaither saw a weapon near Jackson's body.²

After the State's case-in-chief, Dumas moved for a judgment of acquittal. The circuit court denied the motion. At the close of all the evidence, Dumas renewed his motion, which was again denied. As noted above, the jury found Dumas guilty of murder as charged in the indictment. Dumas appeals.

I.

Dumas argues that the circuit court erred by denying his motion for immunity from prosecution. Specifically, Dumas argues that he proved by a preponderance of the evidence that Jackson approached him while Jackson was armed with a pistol and that he shot Jackson in self-defense.

The record shows that on July 21, 2018, Dumas filed a motion for a pretrial evidentiary hearing on the issue of immunity from prosecution based on the ground of self-defense.

²Makeda Brown testified that Buchannon took the gun off Jackson's body after the shooting. Buchannon denied that claim and testified that he saw Demarcus Giddens take the gun.

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(C. 21.) The circuit court held an evidentiary hearing on August 30, 2018. (C. 28, R. 691.) On October 1, 2018, the circuit court issued a written order denying Dumas's motion, finding that "[Dumas] did not meet the burden of proof (preponderance of the evidence) to establish pretrial immunity from prosecution." (C. 29.)

In Smith v. State, 279 So. 3d 1199 (Ala. Crim. App. 2018), this Court held that the proper method of challenging a pretrial ruling denying a motion for immunity from prosecution is a petition for a writ of mandamus:

"In Wood v. People, 255 P.3d 1136 (Colo. 2011), the Colorado Supreme Court held that the proper method of challenging a pretrial ruling denying a motion for immunity is to file an extraordinary writ before trial. In arriving at its holding, that Court stated:

"'A pretrial determination of "make-my-day" [use of deadly physical force against an intruder] immunity is also similar to a preliminary hearing in that the issues raised in such proceedings are resolved by the fact finder at trial under a higher burden of proof. We have held that the issue of whether the prosecution established probable cause at the preliminary hearing to bind a defendant over for trial becomes moot once the defendant has been found guilty beyond a reasonable doubt. See People v. Nichelson, 219 P.3d 1064, 1067 (Colo. 2009). Similarly, the issue of whether a defendant

established the existence of the statutory conditions of "make-my-day" immunity by a preponderance of the evidence becomes moot once a jury concludes the prosecution proved beyond a reasonable doubt that the same statutory conditions did not exist. In short, the jury's verdict subsumes the trial court's pretrial ruling regarding "make-my-day" immunity under section 18-1-704.5.'

"Wood, 255 P.3d at 1141."

Smith, 279 So. 3d at 1202 (emphasis in original).

Here, as noted above, instead of filing a petition for a writ of mandamus challenging the circuit court's ruling on immunity, Dumas proceeded to trial; thus, his argument regarding immunity from prosecution is moot. Id.

II.

Dumas argues that the circuit court erred by denying his motion for a judgment of acquittal. Specifically, Dumas argues that the State's evidence was insufficient to support his conviction for murder and was insufficient to prove that he did not act in self-defense.

Initially, we question whether Dumas's brief regarding this issue complies with Rule 28(a)(10), Ala. R. App. P. Indeed, Dumas fails to cite to any portions of the record in support of his claim for relief. Hart v. State, 852 So. 2d

839, 848 (Ala. Crim. App. 2002) ("By failing to include any citations to the record on this issue, Hart has failed to comply with Rule 28(a)(10), Ala. R. App. P., and has waived this claim for purposes of appellate review."). Thus, Dumas's issue is deemed waived.

Also, the claim is without merit.

"In deciding whether there is sufficient evidence to support the verdict of the jury and the judgment of the trial court, the evidence must be reviewed in the light most favorable to the prosecution. Cumbo v. State, 368 So. 2d 871 (Ala. Crim. App. 1978), cert. denied, 368 So. 2d 877 (Ala. 1979). Conflicting evidence presents a jury question not subject to review on appeal, provided the state's evidence establishes a prima facie case. Gunn v. State, 387 So. 2d 280 (Ala. Crim. App.), cert. denied, 387 So. 2d 283 (Ala. 1980). The trial court's denial of a motion for a judgment of acquittal must be reviewed by determining whether there existed legal evidence before the jury, at the time the motion was made, from which the jury by fair inference could have found the appellant guilty. Thomas v. State, 363 So. 2d 1020 (Ala. Crim. App. 1978). In applying this standard, the appellate court will determine only if legal evidence was presented from which the jury could have found the defendant guilty beyond a reasonable doubt. Willis v. State, 447 So. 2d 199 (Ala. Crim. App. 1983); Thomas v. State. When the evidence raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion for a judgment of acquittal by the trial court does not constitute error. Young v. State, 283 Ala. 676, 220 So. 2d 843 (1969); Willis v. State."

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Breckenridge v. State, 628 So. 2d 1012, 1018 (Ala. Crim. App. 1993).

A person commits the crime of murder if "[w]ith intent to cause the death of another person, he or she causes the death of that person or of another person." § 13A-6-2, Ala. Code 1975.

The issue of self-defense is to be decided by the jury. See Chestang v. State, 837 So. 2d 867, 871 (Ala. Crim. App. 2001) ("Where, as here, the killing was admitted, the question of whether or not it was justified under the theory of self-defense was a question for the jury." (quoting Quinlivan v. State, 627 So. 2d 1082, 1087 (Ala. Crim. App. 1992), quoting in turn Townsend v. State, 402 So. 2d 1097, 1098 (Ala. Crim. App. 1981))).

Section 13A-3-23, Ala. Code 1975, provides, in pertinent part:

"(a) A person is justified in using physical force upon another person in order to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he or she may use a degree of force which he or she reasonably believes to be necessary for the purpose. A person may use deadly physical force, and is

legally presumed to be justified in using deadly physical force in self-defense or the defense of another person pursuant to subdivision (5), if the person reasonably believes that another person is:

"(1) Using or about to use unlawful deadly physical force.

". . . .

"(3) Committing or about to commit a kidnapping in any degree, assault in the first or second degree, burglary in any degree, robbery in any degree, forcible rape, or forcible sodomy.

". . . .

"(b) A person who is justified under subsection (a) in using physical force, including deadly physical force, and who is not engaged in an unlawful activity and is in any place where he or she has the right to be has no duty to retreat and has the right to stand his or her ground.

"(c) Notwithstanding the provisions of subsection (a), a person is not justified in using physical force if:

"(1) With intent to cause physical injury or death to another person, he or she provoked the use of unlawful physical force by such other person.

"(2) He or she was the initial aggressor, except that his or her use of physical force upon another person under the circumstances is justifiable if he or she withdraws from the encounter and effectively communicates to the other

person his or her intent to do so, but the latter person nevertheless continues or threatens the use of unlawful physical force.

"(3) The physical force involved was the product of a combat by agreement not specifically authorized by law."

Here, it is undisputed that Dumas shot Jackson and that Jackson died as a result of his injuries. Dumas claimed that earlier that day, Jackson robbed him and threatened him. Dumas also claimed that Jackson approached the apartment complex and that he was armed with Dumas's stolen gun and appeared "high" on cocaine. However, there was conflicting testimony regarding whether Jackson fired any shots or whether he was even armed. Buchannon testified that both Dumas and Jackson "went to raising their gun[s] and shots went off." (R. 360.) "Any conflicts created by this testimony were for the jury to resolve." Smith, 279 So. 3d at 1206. Although Dumas testified that Jackson "went to reach" or "rais[ed]" the gun, he also admitted more than once that he "blacked out" before shooting. When the evidence is viewed, as it must be, in a light most favorable to the State, the evidence was sufficient to support the jury's verdict. Thus, the circuit court did not err when it denied Dumas's motion.

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Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and McCool and Cole, JJ., concur. Kellum, J., concurs specially, with opinion.

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KELLUM, Judge, concurring specially.

I concur with the conclusion reached by this Court that Kendrevious Deshaun Dumas waived his right to challenge the Lee Circuit Court's adverse ruling on his motion seeking immunity from prosecution because Dumas did not challenge that ruling before trial and conviction by filing a petition for a writ of mandamus with this Court. I write specially to invite the legislature to consider amending § 13A-3-23(d), Ala. Code 1975, to include a right to appeal a circuit court's pretrial ruling on an immunity defense. See Smith v. State, 279 So. 3d 1199 (Ala. Crim. App. 2018) (Kellum, J., concurring specially).