Rel: February 7, 2020

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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-0454

Allen Devante Jackson

v.

State of Alabama

Appeal from Tuscaloosa Circuit Court
(CC-17-2728)

COLE, Judge.

Allen Devante Jackson appeals his convictions for attempted murder, a violation of §§ 13A-6-2 and 13A-4-2, Ala. Code 1975, and for discharging a firearm into an unoccupied dwelling, a violation of § 13A-11-61, Ala. Code 1975, and his

resulting concurrent sentences of 20 years in prison and 10 years in prison, respectively.

Facts and Relevant Procedural History

Because Jackson does not challenge the sufficiency of the State's evidence, only a brief recitation of the facts underlying his convictions is necessary here. On the night of April 7, 2017, Brandious Davis, a friend of Jackson's, agreed to an unarmed fist fight with Jeremy Nixon because of a dispute involving Nixon's former girlfriend, Tierra Todd. The two met at a designated location in a residential neighborhood in Northport, Alabama. Jackson and his aunt, Nakiesha Tate, were also present, along with a few other people, including Brittany Hall.

Before the fight began, Tate patted down both fighters and found no weapons. Shortly after Davis and Nixon began fighting, Nixon was shot multiple times. One of the bullets fired at Nixon went through the living room window of a nearby house. No one was home at the time.

After the shooting, Davis and Jackson left the scene in Jackson's car and went to a birthday party for Davis's sister.

According to Davis, Jackson drove the speed limit when they left.

After he was shot, Nixon was taken to a hospital, where he stayed for several months. As a result of the shooting, Nixon has permanent disabilities, including nerve damage in both hands.

When the police arrived at the scene, investigators found eight 9-mm shell casings on the ground near "a large pool of blood." (R. 190.) That evening, Tate told the police that Jackson admitted to the shooting and that she saw a gun in Jackson's hand. Hall told the police that she heard "about five gunshots" and that she saw a "gray Nissan speed off after that without lights with two passengers." (R. 151.)

The morning after the shooting, Todd learned that the police were looking for her. Todd decided "to head down to the police station because it was ... too much for [her] to handle." (R. 168.) Jackson drove Todd to the Sheriff's Office in his silver Nissan Altima automobile. After they arrived at the sheriff's office, the police searched Jackson's car and found an empty Ruger brand pistol case. The police

later recovered a 9-mm Ruger pistol from one of Jackson's family members. Thereafter, Jackson was arrested.

In June 2017, Jackson was indicted for attempted murder and for discharging a firearm into an unoccupied dwelling. Jackson's jury trial began on October 15, 2018.

During Jackson's trial, a dispute arose concerning the statement Hall had given to the police on the night of the shooting. The State called Hall as a witness, but, when it asked her about the shooting, Hall claimed that she did not remember it. The State then showed Hall a copy of her handwritten statement to the police, which Hall recognized, identified as being done in her handwriting, confirmed that it was signed by her, and confirmed that her statement was true. When the State asked Hall whether her statement refreshed her recollection of the shooting, Hall responded, "No." (R. 147.) The State then asked Hall to read her statement into the record, Jackson objected, and the following exchange occurred outside the presence of the jury:

> "[Jackson's Counsel]: Judge, the witness has said several times she does not remember. She did make a statement to the police. If the statement is admissible for any purpose, it cannot be for substantive evidence but only for impeachment or an inconsistent statement. I probably need to take a

look at it and see if there's any inadmissible hearsay in it as well. She's made clear she doesn't remember anything about that night. She's been shown the statement and says it doesn't refresh her memory, and I don't think they should be able to ask her any questions directed towards the idea that anything she says at this point would be considered as substantive evidence of anything.

"[Prosecutor One]: My argument would be that this witness is intentionally not wanting to testify and not remember. She's been shown the statement to refresh her recollection. She continues to say that she is not refreshed.

"The Court: Are you saying, [Jackson's counsel], that it is not admissible, the statement itself, since the foundation has been laid that she gave the statement, that's her writing, that's her signature?

"[Jackson's counsel]: But it cannot be admitted as substantive evidence. I had this come up in a capital case in Dothan last year.

"The Court: What is an impeachment?

"[Jackson's counsel]: Well, I don't know. I guess they would say that she does remember something. I don't know that it would be impeaching anything really. I don't think it's admissible at all. If it's admissible for anything, it would be she does remember, but seems to me it's confusing. Your Honor.

"The Court: All right. I think he's right as far as the extrinsic evidence, impeaching versus substantive. Do you have any different view on it, [Prosecutor Two]?

"[Prosecutor Two]: I think they're saying she does not remember the events of that evening today.

I think that we should be allowed to go into what she told that night.

"The Court: Yeah. I think that [Jackson's counsel] is just arguing, yeah, it can come in, but I need to give a limit[ing] instruction[] on whether it's impeaching her or incorporated as substantive evidence by the jury.

"[Prosecutor Two]: I think she just doesn't want to be here.

"The Court: Hang on just a second.

"[Prosecutor One]: All right. Judge, I think Rule 803(5), [Ala. R. Evid.,] the following may not be excluded by the hearsay rule even though the declarant is available as a witness. That being recorded recollection and a memorandum for record concerning about a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately shown to have been made or doctored by the witness, then the matter expression of the witness's memory and to reflect that knowledge correctly. And if admitted, that memorandum or record itself may not be offered as an exhibit but may be read into evidence but itself may not be offered as an exhibit.

"The Court: 803(5)?

"[Prosecutor One]: 803(5). And I think we'll have to waive the predicate. I can't refresh her memory before it can be read into the record.

"[Prosecutor Three]: Which is the rightness in her mind at the time.

"The Court: And are there statements of others?

> "[Prosecutor One]: It is a statement she gave to police at the crime scene.
>
> "The Court: I guess it's past recollection recorded. I'm going to--I'll let you go forward.
>
> "[Prosecutor One]: I'm just going to have her read her statement into evidence.
>
> "THE COURT: Okay. Thank you."

(R. 148-51.) Hall then read her statement to the jury. Jackson did not cross-examine her.

After the State rested its case, Jackson moved for a judgment of acquittal, which the circuit court denied. Jackson did not put on a defense case; instead, he rested and argued to the jury that he shot Nixon in defense of Davis. Jackson argued that Davis fell during the fight, that he thought Nixon was gaining the upper hand in the fight, and that he believed that Nixon was about to inflict serious injury on Davis.[1] The jury rejected Jackson's defense theory and returned guilty verdicts on both charges.

On November 19, 2018, the trial court sentenced Jackson to 20 years in prison for his attempted-murder conviction and

[1]The trial court instructed the jury on self-defense. Jackson does not challenge those instructions in this appeal. (R. 265-66.)

to 10 years in prison for his discharging-a-firearm conviction. Those sentences were to run concurrently.

On December 18, 2018, Jackson filed a motion for a new trial. The trial court denied that motion on February 11, 2019. This appeal follows.

Discussion

I.

Jackson argues on appeal that the trial court abused its discretion in admitting Hall's statement as a recorded recollection under Rule 803(5), Ala. R. Evid., because, he says, the State did not establish the foundation for admissibility under that rule. Specifically, Jackson claims that the State failed to establish that Hall did not have an insufficient recollection about the shooting, she simply did not want to testify. Jackson concludes that the prosecution's statement that Hall was intentionally not wanting to testify is fatally inconsistent with the argument that the statement was admissible as a recorded recollection under Rule 803(5), Ala. R. Evid. Jackson, however, did not make this specific argument in the trial court.

It is well settled that, "in order for this Court to review an alleged erroneous admission of evidence, a timely objection must be made to the introduction of the evidence, specific grounds for the objection should be stated, and a ruling on the objection must be made by the trial court." Shouldis v. State, 953 So. 2d 1275, 1284 (Ala. Crim. App. 2006) (citing Ingram v. State, 729 So. 2d 883 (Ala. Crim. App. 1996)). It is equally well settled that

> "[o]nly those grounds of objection presented to the trial court can serve as a basis for reversal of its action. Bland v. State, 395 So. 2d 164 (Ala. Cr. App. 1981). The trial judge will not be placed in error on grounds not assigned in the objection. Knight v. State, 381 So. 2d 680 (Ala. Cr. App. 1980). Even though evidence may have been inadmissible on different grounds, the defendant is bound by the specified grounds of objection. Turley v. State, 356 So. 2d 1238 (Ala. Cr. App. 1978)."

Bolding v. State, 428 So. 2d 187, 191 (Ala. Crim. App. 1983).

Here, as set out above, when the State asked Hall to read her statement to the jury, Jackson made a general objection as to the admissibility of Hall's statement. When the State initially asserted that Hall was "intentionally not wanting to testify and not remember," Jackson did not argue that this statement by the prosecution was inconsistent with the State's ultimate theory of admissibility under Rule 803(5), Ala. R.

Evid. Jackson argued that Hall's statement was either inadmissible or admissible "for impeachment or an inconsistent statement" but not as substantive evidence. (R. 148.) When the trial court asked Jackson about the State's foundation for showing that the statement was Hall's, Jackson made no argument about the State's foundation for authenticating Hall's statement. (R. 149.) Instead, Jackson continued to argue that Hall's statement could not be admitted as substantive evidence.

When the trial court asked the State to respond to Jackson's objection and noted that Jackson was arguing that the statement "can come in, but [the court] need[s] to give a limit[ing] instruction[] on whether it's impeaching her or incorporated as substantive evidence by the jury," the State argued that Hall's statement was admissible as a recorded recollection under Rule 803(5), Ala. R. Evid. (R. 150.) Jackson made no argument to the contrary, and did not argue at that point that the State had failed to establish the requirements for admissibility under that rule.

Because Jackson did not argue to the circuit court that the State's initial argument was inconsistent with the State's

ultimate argument that Hall's statement was admissible as a recorded recollection under Rule 803(5), Ala. R. Evid., Jackson's argument on appeal is not properly before this Court for appellate review.

Even so, Jackson's argument is without merit. Rule 803(5), Ala. R. Evid., provides:

> "(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party."

(Emphasis added.) The commentary to that rule provides as follows:

> "The primary difference between Rule 803(5) and the principle embodied in Alabama common law lies in the respective threshold requirements regarding the degree of deterioration in the witness's memory that is a condition precedent to admissibility. Under prior Alabama law, a writing was not admissible under the 'past recollection recorded' exception unless the witness manifested 'no present recollection' of the matter. See St. Paul Fire & Marine Ins. Co. v. Johnson, 259 Ala. 627, 67 So. 2d 896 (1953). Rule 803(5) requires only that the witness manifest an 'insufficient recollection to enable the witness to testify fully and accurately.'"

(Emphasis added.)

In Ex parte Key, 890 So. 2d 1056, 1066 (Ala. 2003), our Supreme Court discussed Rule 803(5), Ala. R. Evid., and explained that,

> "[f]or a past recollection recorded to be admissible into evidence, the witness must testify:
>
> > "'(1) That the witness personally observed the event or facts referred to in the memorandum or record and that the memorandum or record was made or seen by the witness either contemporaneously with the event or when the witness'[s] recollection of the event was fairly fresh ....
> >
> > "'(2) That the witness then knew the contents of the memorandum or record and knew such contents to be true and correct ....
> >
> > "'(3) That the witness possesses insufficient recollection, other than his testimony to the matters stated in 1 and 2 above, to enable him to testify fully and accurately.'
>
> "Charles Gamble, McElroy's Alabama Evidence § 116.03(2) (5th ed. 1996) (footnotes omitted)."

Jackson argues on appeal that Hall's statement was not admissible as a recorded recollection because Hall did not, in fact, have an insufficient recollection of the relevant

events.[2] But the trial court found that Hall's recollection was insufficient, and that finding is supported by the record.

As set out above, at trial, Hall testified several times that she did not remember either the events of April 7, 2017, or the contents of her statement to police. Although the prosecutor did tell the trial court that Hall did not want to be at trial, the prosecutor's comment is not inconsistent with a finding that Hall could not remember the events of April 7, 2017. Additionally, to the extent that Jackson suggests that the prosecutor's comment should be taken as an admission that Hall was lying about her recollection, the trial court made a credibility determination and found that Hall had insufficient recollection so as to warrant admission of her prior statement. Because the requirements for admissibility under Rule 803(5), Ala. R. Evid., were met, Hall's previous statement to the police was properly admitted. Thus, Jackson is due no relief as to this claim.

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[2]Jackson does not challenge the other requirements of Rule 803(5), Ala. R. Evid. Thus, we do not address whether Hall's testimony satisfied those requirements. See, e.g., Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995) ("We will not review issues not listed and argued in brief.").

II.

We note, however, that Jackson's 10-year sentence for his shooting-into-an-unoccupied-dwelling conviction does not comply with § 13A-5-6(a)(3), Ala. Code 1975. Although neither party on appeal addresses the propriety of Jackson's 10-year sentence, it is well settled that "[m]atters concerning unauthorized sentences are jurisdictional," Hunt v. State, 659 So. 2d 998, 999 (Ala. Crim. App. 1994), and that this Court may take notice of an illegal sentence at any time, see, e.g., Pender v. State, 740 So. 2d 482 (Ala. Crim. App. 1999).

As noted above, Jackson was convicted of shooting into an unoccupied dwelling, a Class C felony. See § 13A-11-61(c), Ala. Code 1975 (recognizing that anyone who is convicted of discharging a firearm into an unoccupied dwelling "shall be deemed guilty of a Class C felony as defined by the state criminal code, and upon conviction, shall be punished as prescribed by law"). The punishment for committing a Class C felony is a sentence of not "more than 10 years or less than 1 year and 1 day and must be in accordance with subsection (b) of Section 15-18-8[, Ala. Code 1975,] unless sentencing is

pursuant to Section 13A-5-9[, Ala. Code 1975]." § 13A-5-6(a)(3), Ala. Code 1975.

To put it differently, unless a defendant is sentenced as a habitual felony offender, a sentence for a Class C felony must fall within the range set out in § 13A-5-6(a)(3), Ala. Code 1975, and must comply with subsection (b) of the Split Sentence Act. That subsection provides, in relevant part, as follows:

> "Unless a defendant is sentenced to probation, drug court, or a pretrial diversion program, when a defendant is convicted of an offense that constitutes a Class C ... felony offense and receives a sentence of not more than 15 years, the judge presiding over the case shall order that the convicted defendant be confined in a prison, jail-type institution, treatment institution, or community corrections program for a Class C felony offense ... for a period not exceeding two years in cases where the imposed sentence is not more than 15 years, and that the execution of the remainder of the sentence be suspended notwithstanding any provision of the law to the contrary and that the defendant be placed on probation for a period not exceeding three years and upon such terms as the court deems best. ..."

§ 15-18-8(b), Ala. Code 1975.

In short, §§ 13A-5-6(a)(3) and 15-18-8(b), Ala. Code 1975, do not allow a trial court to impose a "straight" sentence for a Class C felony when the Habitual Felony

Offender Act does not apply. Instead, under § 13A-5-6(a)(3), once the trial court imposes on a defendant a sentence length between 1 year and 1 day and 10 years, the trial court must either:

> (1) Sentence the defendant to probation, drug court, or a pretrial diversion program; or
>
> (2) "Split" the confinement portion of the defendant's sentence to a period not exceeding two years, suspend the remainder of the defendant's sentence, and impose a term of probation on the defendant that does not exceed three years.

Here, Jackson is not a habitual felony offender, and thus could not be sentenced under § 13A-5-9, Ala. Code 1975. (See Sentencing Transcript R. 6-8.) Yet the trial court sentenced Jackson to a "straight" 10-year sentence in the custody of the Alabama Department of Corrections, which, as explained above, is impermissible under § 13A-5-6(a)(3), Ala. Code 1975.[3] Thus, we must remand this case to the trial court to impose a

[3]The trial court's straight 10-year sentence in this case makes sense, given the fact that Jackson's sentencing event also included a sentence for attempted murder, a Class A felony, in which the trial court gave Jackson a straight 20-year sentence. However, neither § 13A-5-6(a)(3) nor § 15-18-8(b) include any exception that would allow "straight" time for a Class C felony where a trial court imposes a sentence for a Class A or B felony along with that Class C felony.

sentence on Jackson that complies with §§ 13A-5-6(a)(3) and 15-18-8(b).

In so doing, however, we note that Jackson's 10-year sentence is valid; thus, the trial court cannot change the underlying sentence.[4] See generally Moore v. State, 871 So. 2d 106, 110 (Ala. Crim. App. 2003) (recognizing that, when the base sentence imposed by the trial court is valid, the trial court cannot alter it on remand).

Conclusion

Based on the foregoing, Jackson's convictions for attempted murder and discharging a firearm into an unoccupied building are affirmed, and Jackson's 20-year sentence for his attempted-murder conviction is affirmed. However, we remand this case to the trial court for that court to resentence Jackson in accordance with this opinion for his shooting-into-an-unoccupied-dwelling conviction. On remand, the trial court

[4]Because Jackson used a firearm, his 10-year sentence is both the minimum and maximum sentence he can receive for his discharging-a-firearm conviction. See Myers v. State, 715 So. 2d 928, 929 (Ala. Crim. App. 1998) ("[T]he sentence for a Class C felony in the commission of which the defendant used a firearm is 'exactly ten years--no more or no less.' Robinson v. State, 434 So. 2d 292, 293 (Ala. Cr. App. 1983).").

shall take all necessary action to ensure that return be made to this Court within 42 days from the date of this opinion.

AFFIRMED IN PART; REMANDED WITH INSTRUCTIONS.

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