IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs April 11, 2017

STATE OF TENNESSEE v. LARRY DONNELL GOLDEN, JR.

Appeal from the Circuit Court for Carroll County
No. 14CR49 Donald E. Parish, Judge

No. W2016-01512-CCA-R3-CD

The Defendant, Larry Donnell Golden, Jr., was convicted by a Carroll County Circuit Court jury of second degree murder, a Class A felony, and reckless endangerment for discharging a firearm into an occupied habitation, a Class C felony. He was sentenced to an effective term of twenty-three years in the Department of Correction. On appeal, the Defendant argues that the trial court erred by sua sponte modifying the Tennessee Pattern Jury Instructions relative to the charge of reckless endangerment and that the State improperly commented in its closing argument on his decision not to testify. After review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which TIMOTHY L. EASTER and J. ROSS DYER, JJ., joined.

J. Neil Thompson, Huntingdon, Tennessee, for the appellant, Larry Donnell Golden, Jr.

Herbert H. Slatery III, Attorney General and Reporter; David H. Findley, Senior Counsel; Matthew F. Stowe, District Attorney General; and R. Adam Jowers and Carthel L. Smith, Jr., Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

On February 2, 2014, an altercation arose outside a home located at 328 Hunt Street in Huntingdon, Tennessee, that led to the Defendant's firing a gun at and/or into the residence. Houston Dewayne Brown was shot and pronounced dead a short time later

at a hospital. The Defendant was indicted for first degree premeditated murder on May 5, 2014, as a result of the shooting of Mr. Brown. On October 21, 2014, the Defendant was indicted for one count of reckless endangerment for discharging a firearm into an occupied habitation. On September 8, 2015, the Defendant was indicted for five additional counts of reckless endangerment arising out of the same set of facts, each count listing a specified victim. The indictments were consolidated under one docket number, and the case proceeded to trial. At the close of the State's proof, after the trial court denied the Defendant's motion for judgment of acquittal on the first degree murder charge and was beginning to rule on the Defendant's motion for judgment of acquittal regarding the reckless endangerment charges, the parties announced that they had reached an agreement wherein the State would dismiss all of the reckless endangerment charges except for the one that was originally Count 5 in the September 2015 indictment, at the time known as Count 6 in the consolidated indictment. After the Defendant's proof, the jury convicted the Defendant of the lesser-included offense of second degree murder and of reckless endangerment.

The State presented lengthy proof at trial from multiple witnesses to support the charge of premeditated first degree murder. However, the jury's verdict of second degree murder renders most of this proof irrelevant to this appeal, especially considering that the Defendant only appeals a portion of the jury charge and the propriety of the State's closing argument.

The proof at trial showed that Houston Brown and his fiancée, Sharmaine Algee, hosted a Super Bowl party on February 2, 2014. An argument broke out between two of the attendees, Jermaine Crawford and Shemile Adams. Mr. Adams pinned Mr. Crawford against the wall during the course of a verbal argument about a possible sexual assault committed by Mr. Crawford sometime earlier. Ms. Algee asked Mr. Crawford to leave, and Mr. Crawford went to Dorothy Williams' house across the street.

Ms. Algee determined that Mr. Adams might have been mistaken about Mr. Crawford, so she and Mr. Adams went across the street to Ms. Williams' home to apologize to Mr. Crawford. Mr. Crawford told them, "I'm not trying to hear that shit. It's all about to be handled." Ms. Williams later went to Ms. Algee's house and told her that she had overheard Mr. Crawford on the phone telling someone to "come strapped up," meaning armed, but Ms. Algee did not take Ms. Williams' information seriously.

Sometime later, the Defendant, Cedric Harris, and Jermaine Crawford showed up in Ms. Algee's and Mr. Brown's front yard. Mr. Brown, Mr. Adams, and Landon Gilbreath went outside to meet them, and Mr. Brown told the Defendant and the two men with him "that he couldn't have this at his house because he was on parole and he couldn't afford for the police to be there." However, Mr. Adams and Mr. Harris started

fighting. Ms. Algee saw that the Defendant had a gun in his pocket and went back inside to call the police. While Ms. Algee was on the phone with the dispatcher, several gunshots sounded. After the gunfire stopped, it was discovered that Mr. Brown had been fatally wounded.

Landon Gilbreath saw Mr. Adams and Mr. Harris exchanging words in the yard before fighting each other. The Defendant was on the other side of the cars parked in the driveway. Mr. Harris fell to the ground, and when Mr. Adams hit or kicked him, Mr. Harris screamed something. After that, the Defendant began firing. Mr. Gilbreath heard Mr. Brown say, "I'm hit," and then everyone "scattered."

Ja'Leesa Cherry, who testified for the Defendant, said that Mr. Harris was down on the ground and Mr. Adams was kicking him. Mr. Harris yelled, "Shoot," after which Ms. Cherry saw flashes coming from where the Defendant was standing and heard Mr. Brown say that he had been shot.

Mr. Adams, who also testified for the Defendant, said that his confrontation with Mr. Crawford at the Super Bowl party was motivated by an incident several nights earlier at a nightclub between Mr. Adams's girlfriend and Mr. Crawford. Mr. Adams admitted pushing Mr. Crawford during the confrontation at the party but then went across the street to apologize to him. Sometime after returning to Mr. Brown's house from apologizing to Mr. Crawford, Mr. Adams heard Mr. Brown "ranting and raving" about Mr. Crawford. Mr. Adams said that a short time later Mr. Brown and others left in a hurry when they saw a group of men, including the Defendant and Mr. Harris, approaching the front yard. Mr. Adams and Mr. Harris exchanged words and began fighting. Mr. Adams admitted to kicking Mr. Harris in the face while Mr. Harris was on the ground. When Mr. Adams kicked Mr. Harris in the head a second time, Mr. Harris yelled "shoot."

The Defendant did not introduce any evidence at trial refuting the fact that he fired a firearm during the altercation on February 2, 2014. The State presented proof that the Defendant made statements to several of his cellmates after he was taken into custody, in which he admitted to firing the shots. In particular, the Defendant told one cellmate that he went to a party where a fight was taking place between rival gangs and "that he had to do what he had to do."

Five shell casings, all fired from the same gun, were found in the yard and driveway of the residence. Three bullets, as well as apparent bullet holes, were found in areas inside and outside the home. It was stipulated that Mr. Brown died from a gunshot wound to the chest.

ANALYSIS

I. Jury Instructions

The Defendant argues that the trial court erred by sua sponte modifying the Tennessee Pattern Jury Instructions relative to the reckless endangerment charge. He asserts that the pattern instruction defines "occupied" as "the condition of the lawful physical presence of any person at any time while the defendant is within the habitation or other building," but the trial court modified the pattern instruction to omit the requirement that the Defendant be within the habitation.

Tennessee Pattern Jury Instruction – Criminal 6.03 provides, in pertinent part:

> Any person who commits the offense of reckless endangerment is guilty of a crime.
>
> For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:
>
> (1) that the defendant engaged in conduct which placed or might have placed another person in imminent danger of death or serious bodily injury;
>
> and
>
> (2) that the defendant acted recklessly;
>
> [and
>
> (3) that the offense was committed with a deadly weapon.]
>
> [and
>
> (4) Only for offenses committed on or after 1/1/12: that the defendant discharged a firearm into an [occupied][unoccupied] habitation.]
>
> . . . .
>
> ["Habitation":

(1) means any structure designed or adapted for the overnight accommodation of persons, including buildings, module units, mobile homes, trailers and tents;

and

(2) includes a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant;

and

(3) includes each separately secured or occupied portion of the structure or vehicle and each structure appurtenant to or connected with the structure or vehicle.]

["Occupied" means the condition of the lawful physical presence of any person at any time while the defendant is within the habitation or other building.]

Id. (footnotes omitted).

Prior to charging the jury, the trial court held a jury charge conference with counsel and announced the results of the conference on the record. Defense counsel objected to the trial court's decision to not use the pattern instruction. The trial court overruled the objection, concluding that the legislative intent behind the statute was that shooting into an occupied dwelling was a more serious offense than shooting into an abandoned property, which its proposed instruction met.

"It is well-settled in Tennessee that a defendant has a right to a correct and complete charge of the law so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions." State v. Farner, 66 S.W.3d 188, 204 (Tenn. 2001) (citing State v. Garrison, 40 S.W.3d 426, 432 (Tenn. 2000); State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990)). Accordingly, trial courts have the duty to give "a complete charge of the law applicable to the facts of the case." State v. Davenport, 973 S.W.2d 283, 287 (Tenn. Crim. App. 1998) (citing State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986)). Tennessee law does not mandate that any particular jury instructions, or "pattern instructions," be given so long as the trial court gives a complete charge on the applicable law. See State v. James, 315 S.W.3d 440, 446 (Tenn. 2010); State v. West, 844 S.W.2d 144, 151 (Tenn. 1992). An instruction will be considered prejudicially erroneous only if it fails to submit the legal issues fairly or misleads the jury as to the

applicable law. State v. Faulkner, 154 S.W.3d 48, 58 (Tenn. 2005) (citing State v. Vann, 976 S.W.2d 93, 101 (Tenn. 1998)).

Despite the Defendant's apparent presumption otherwise, the pattern jury instructions are not controlling. See James, 315 S.W.3d at 446 ("Trial courts are not limited to the mere recitation of the pattern instructions."); State v. Hodges, 944 S.W.2d 346, 354 (Tenn. 1997) ("[P]attern jury instructions are not officially approved by this Court or by the General Assembly and should be used only after careful analysis. They are merely patterns or suggestions.").

The Defendant was charged with reckless endangerment, Tennessee Code Annotated section 39-13-103, which provides as follows:

> (a) A person commits an offense who recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury.
>
> (b)(1) Reckless endangerment is a Class A misdemeanor.
>
> (2) Reckless endangerment committed with a deadly weapon is a Class E felony.
>
> (3) Reckless endangerment by discharging a firearm into a habitation, as defined under § 39-14-401, is a Class C felony, unless the habitation was unoccupied at the time of the offense, in which event it is a Class D felony.

Id. § 39-13-103(a), (b)(1)-(3).

The statute itself plainly requires proof of firing into a habitation, not firing within a habitation, as the Defendant argues. The reckless endangerment statute specifically relies on the definition of "habitation" found in the burglary statute, Tennessee Code Annotated section 39-14-401, but evinces no such reliance for the definition of the word "occupied" as defined in the burglary statute. It appears that the Tennessee Pattern Jury Instruction makes an unwarranted inference that the definition of "occupied" should also be drawn from the burglary statute. However, such inference would lead to the illogical result that the only way for a defendant to be convicted of felony reckless endangerment would be for him or her to be inside a habitation while firing shots into the habitation. This would mean, for instance, that a defendant who committed a drive-by shooting could not be convicted of reckless endangerment. The trial court noted this issue with the pattern jury instruction and chose instead to charge the jury based on the intent of the

statute. Because the trial court accurately charged the jury on the elements of the crime, the Defendant is not entitled to relief on this issue.

The Defendant argues that he relied on the pattern instruction in developing his trial strategy and that "the jury instructions were not modified until after the close of the proof." In his brief, he cites to page 107 of the technical record to support this claim, contending that the jury charge was agreed upon at a pretrial conference. However, the pretrial order he references only addressed fines and motions in limine. Moreover, the Defendant raised no detrimental reliance argument when the trial court issued its final charge or in his motion for new trial.

We conclude that the trial court properly charged the jury, and the Defendant is not entitled to relief on this issue.

II. Closing Argument

The Defendant next argues that the State improperly commented in its closing argument about his decision not to testify. He recounts that the prosecutor told the jury, "Have you ever been accused of something you did not do?" and then stated, "[I]n a world where I suggest to you the average person is accused of something that they didn't do, their reaction is, woe [sic], wait a minute, please let me tell you my side of the story or explain to you what really happened."

We note that the record does indeed show the portion of the State's argument referenced by the Defendant, but it also shows that the statement was made after the State argued that "actions speak louder than words" in challenging the Defendant's self-defense theory, noting that the Defendant fled after the shooting, the Defendant's car was found abandoned, and the murder weapon was never recovered.

Defense counsel objected to the prosecutor's statement on the basis that it was a comment on the Defendant's right not to testify. The trial court cautioned the prosecutor, "[Y]ou've come precariously close to commenting on the [D]efendant's failure to testify here. . . . [Y]ou can comment that he left, as you were talking about, that there's flight, but don't go down that trail any further with respect to no testimony." The prosecutor explained, "I was about to say this was in a time frame prior to his arrest and prior to charges being lodged against him. This was when they were looking for him that night." The court reiterated, "To the extent your comments are relative to flight, that's a fair subject of discussion, but nothing else."

Both the United States Constitution and the Tennessee Constitution "guarantee criminal defendants the right to remain silent and the right not to testify at trial." State v.

Jackson, 444 S.W.3d 554, 585 (Tenn. 2014). "While closing argument is a valuable privilege that should not be unduly restricted, . . . comment upon a defendant's exercise of the state and federal constitutional right not to testify should be considered off limits to any conscientious prosecutor." Id. at 590 (internal citations and quotation marks omitted). In addition to direct comments on a defendant's decision not to testify, "indirect references on the failure to testify also can violate the Fifth Amendment privilege." Id. at 587 (quoting Byrd v. Collins, 209 F.3d 486, 533 (6th Cir. 2000)) (internal quotation marks omitted).

Our supreme court has adopted a two-part test for determining whether a prosecutor's remark amounted to an improper comment on a defendant's constitutional right to remain silent and not testify. Id. at 587-88. The test evaluates: "(1) whether the prosecutor's manifest intent was to comment on the defendant's right not to testify; or (2) whether the prosecutor's remark was of such a character that the jury would necessarily have taken it to be a comment on the defendant's failure to testify." Id. at 588. Our review of a defendant's claim of impermissible prosecutorial comment on the right not to testify is de novo. Id.

Though the trial court in this case cautioned the prosecutor that his comment was "precariously close" to a comment on the Defendant's right not to testify, a review of the record shows that the prosecutor's comment was directed at the Defendant's choice to flee from the area, rather than stay and explain that he acted in self-defense. The Defendant does not dispute that the flight charge given by the trial court was warranted in his case. The State's isolated comment in this case is vastly different than that in Jackson, in which our supreme court overturned a second degree murder conviction where the prosecutor, during closing rebuttal argument, "walked across the court room, stood in front of [the d]efendant, gestured toward her, and demanded in a loud voice, 'Just tell us where you were! That's all we are asking, [the defendant]!'" Id. at 589. We conclude that the prosecutor's statement in this matter was not an impermissible comment on the Defendant's right not to testify.

Moreover, even if we were to conclude that the State's comment was an impermissible comment on the Defendant's right not to testify, such error was harmless beyond a reasonable doubt. In determining whether the State has met its burden of proving that a non-structural constitutional error is harmless beyond a reasonable doubt, "courts should consider the nature and extensiveness of the prosecutor's argument, the curative instructions given, if any, and the strength of the evidence of guilt." Id. at 591 (citations omitted).

Here, the prosecutor's remark was isolated. There is nothing in the record to suggest that there was anything forceful or poignant in the prosecutor's delivery of the

remark. The remark at issue came during the State's initial closing argument, giving the Defendant the opportunity to respond to it if desired. The trial court instructed the jury numerous times throughout the trial that the Defendant was not required to testify and that it was the State's burden to prove the Defendant's guilt. Additionally, the evidence against the Defendant was quite overwhelming, unlike the "entirely circumstantial" case against the defendant in Jackson. See State v. Colvett, 481 S.W.3d 172, 208-09 (Tenn. Crim. App. 2014). We conclude that, even if there was error, it was harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court.

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ALAN E. GLENN, JUDGE