IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 25, 2023 Session

STATE OF TENNESSEE v. DEMARCUS TAIWAN RUSSELL, JR.

Appeal from the Criminal Court for Greene County
No. CC21CR82 Alex E. Pearson, Judge

No. E2022-01428-CCA-R3-CD

The Defendant, Demarcus Taiwan Russell, Jr., was convicted by a Greene County Criminal Court jury of driving under the influence ("DUI"), simple possession of marijuana, driving on a suspended license, and speeding. He was sentenced by the trial court to an effective term of 11 months, 29 days, suspended to supervised probation after service of two days in the county jail. On appeal, he challenges the sufficiency of the evidence for his DUI conviction and argues that the State made an improper closing argument. Based on our review, we affirm the judgments of the trial court.

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

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which KYLE A. HIXSON, J., joined. TOM GREENHOLTZ, J., filed a separate opinion concurring in part and dissenting in part.

Joseph O. McAfee, Greeneville, Tennessee (at trial and on appeal), for the appellant, Demarcus Taiwan Russell, Jr.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglass, Senior Assistant Attorney General; Dan E. Armstrong, District Attorney General; and Ritchie D. Collins, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

Late on the night of March 5, 2020, Sergeant Jeremy Shelton of the Tennessee Highway Patrol conducted a traffic stop of the Defendant after clocking him driving 72 miles per hour in a 55 mile per hour zone through Mosheim in Greene County. As he approached the Defendant's driver's door, he detected the odor of marijuana and observed that the Defendant's eyes were bloodshot. The Defendant, whose driver's license was suspended, told Sergeant Shelton that he had recently smoked marijuana and acknowledged ownership of a small bag of marijuana found in his passenger's pants. The Defendant failed several field sobriety tests attempted at the scene. Following his arrest, he consented to a blood draw, the results of which indicated the presence of THC, the active ingredient of marijuana, in his blood. The Greene County Grand Jury subsequently returned an indictment charging the Defendant with DUI, possession of marijuana, driving on a suspended license, and speeding.

At trial, Sergeant Shelton first described the extensive training he had received to detect the signs of impaired driving, which included the administration of field sobriety tests. He then testified that he was working the graveyard shift in Greene County on May 5-6, 2020, when he encountered a vehicle approaching at a high rate of speed. After clocking the vehicle at 72 miles per hour, he turned around, activated his lights and sirens, and followed. It took him an "unusual amount of time to catch up with the vehicle[,]" but when he did, the driver pulled over and stopped on the side of the highway.

Sergeant Shelton testified that the Defendant was driving the vehicle and Teran Houston was his passenger. As he spoke to the Defendant and obtained his driver's license, he detected the odor of marijuana from the Defendant's vehicle. After he learned that the Defendant's license was suspended for failure to file insurance certification, he asked the Defendant to step out of the vehicle and began talking to him about the marijuana he smelled. At that point, the Defendant told him that he had smoked marijuana approximately five minutes prior to the traffic stop.

Sergeant Shelton testified that he administered several of the standard field sobriety tests to the Defendant: the "HGN" or horizontal gaze and nystagmus test; the walk and turn test; and the one leg stand test. In addition, he asked the Defendant to do "an alternative test, . . . the lack of convergence test." He instructed the Defendant how to perform the tests, and the Defendant attempted them without mentioning any medical or physical problems that might affect his performance.

Sergeant Shelton testified that the Defendant showed five of the nine "clues" of impairment on the walk and turn test: he took the wrong number of steps; stepped off the line; did not touch heel to toe; raised his hands for balance after stumbling; and did an "improper turn." The Defendant "hit three" of the four clues of impairment in the one leg stand test: he swayed from side to side; raised his arms to maintain his balance; and put his foot down when he lost his balance. After the walk and turn test and the one leg stand test, he asked the Defendant to perform the lack of convergence test, which he described as follows:

> The lack of convergence test is when we look into a subject's eyes and we have them follow our finger around in a circle, and we bring it to their nose. When we bring it to their nose their eyes are supposed to be able to cross. There are certain drugs, such as cannabis, that when you do this, it will not allow your eyes to be able to cross because of the relaxation of the eyes. So your eyes - - one eye will kick out or both eyes will just kinda fight to cross, but in this case [the Defendant's] right eye would not move inward, only his left eye, which is an indication that he was under [the influence of] marijuana.

Sergeant Shelton testified that, based on the Defendant's performance on the tests, he placed him under arrest for DUI and driving on a suspended license. He said that when the Defendant was informed that Mr. Houston was being placed under arrest for possession of a bag of marijuana and several marijuana "roaches" that had been found in the waistband of Mr. Houston's pants, the Defendant claimed ownership, saying, "It was my weed. I'm sorry." He stated that the Defendant voluntarily consented to a blood draw, which was performed by a registered nurse at the hospital. He said he sent the blood to the Tennessee Bureau of Investigation ("TBI") laboratory in Knoxville for analysis. He identified the video of the traffic stop and sobriety tests, which was published to the jury and admitted as an exhibit.

On cross-examination, Sergeant Shelton agreed that there are three phases to a DUI investigation: the vehicle in motion phase; the driver contact phase; and the pre-arrest screening phase. He acknowledged that he stopped the Defendant only for speeding; he did not observe any signs of impairment in the Defendant's operation of the vehicle, such as weaving or swerving, unnecessary acceleration or deacceleration, failure to signal, failure to maintain control of the vehicle, or difficulty pulling over and stopping. He further acknowledged that he did not observe any of the following signs of impairment in the Defendant during the driver contact phase: difficulty exiting the vehicle; fumbling with license, registration or insurance; swaying or unsteady balance; leaning on the vehicle; slurred speech; slowness in response to questions; incorrect answers or changing of

answers; inappropriate demeanor; or odor of alcohol. He testified that he marked the boxes on his "Alcohol/Drug Influence Report" form indicating that the Defendant had red and bloodshot eyes, appeared to be intoxicated, was both arrogant and cooperative in his demeanor, and exhibited normal mental state, walk, and speech. He said he marked the "undetermined" box for the Defendant's ability to operate a motor vehicle because the period of time in which he observed the Defendant's operation of the vehicle was short. He testified he marked "obvious" for odor detected, "marijuana" for suspected intoxicant, and "slight" for "effects of intoxicant." He agreed that there were no signs that the Defendant was under the influence of alcohol.

Sergeant Shelton testified that the difference between standardized and alternative field sobriety tests is that standardized tests have been verified by the National Highway Traffic Safety Administration, whereas alternative tests have been "studied and shown that they've worked, . . . NHSTA [sic] hasn't verified them or anything yet." He agreed that he was trained in the standardized field sobriety tests to look for "clues" of impairment, and that "two or more of those clues indicate[] the person's blood alcohol is .08 or above[.]" When asked the amount of marijuana present in an individual's system if the individual exhibits two or more clues on a field sobriety test, he replied that there was no set limit with respect to marijuana.

Sergeant Shelton acknowledged that headlights of a passing vehicle or vehicles shone on the Defendant's face while the Defendant was attempting the one leg stand, and that the Defendant turned to look over his shoulder at the approaching vehicle just before he swayed and put his foot on the ground at the approximate nineteen second mark. He testified that he was monitoring the road for safety and that the "divided-attention" one leg stand test required the Defendant to maintain his focus to be successful. He conceded, however, that he did not inform the Defendant not to be concerned about passing vehicles.

Sergeant Shelton acknowledged that he did not observe dilated pupils on the Defendant, which can be a sign that an individual has used marijuana. He further acknowledged that the Defendant was honest and forthright about his use and possession of marijuana, reported that he was a marijuana smoker and that the marijuana he had just smoked was not affecting him, and appeared surprised upon learning that Mr. Houston had attempted to conceal the bag of marijuana in his pants.

Deputy Franklin Morgan of the Greene County Sheriff's Department, who arrived at the scene while Sergeant Shelton was talking to the Defendant, testified that he turned over to Sergeant Shelton the bag of marijuana that Mr. Houston handed him after pulling it out of the waistband of his pants.

TBI Agent Michael Miller, an expert in toxicology, testified that the Defendant's blood tested negative for alcohol and other drugs but positive for the controlled substance of marijuana. Specifically, it contained ten nanograms per milliliter of Delta 9 THC, one nanogram per milliliter of Hydroxy THC, and 123 nanograms per milliliter of Carboxy THC. He testified that Delta 9 THC is the active drug or ingredient in marijuana, and that "[t]en nanograms per milliliter in a person's blood that was driving at the time, it could be an impaired amount in that person." He said that side effects of THC in an individual included lack of short-term memory; impaired psychomotor function, or motor control; delayed reaction time and decision-making; difficulty on a divided-attention test; and trouble focusing and understanding instructions. He described how those side effects were compounded when driving a vehicle:

> It can also cause you to have a lack of ability to react to things quickly, so if things happened while you were driving in the car, you know, a dog came out in the road, it would be more difficult for you to react quickly to, to miss the dog. And other things that happen new to you while you're driving, so if you're driving it works - - it doesn't work, it has worse effects when you're driving, say, and you're bored while you're driving and during a long stretch of road and not much is happening, and then all of a sudden the situation's changed while you're driving. And so that would be where your reactions are worse while you're taking or on THC.

Agent Miller testified that Hydroxy THC is the primary metabolite of THC and "indicative of recent use of THC[.]" He stated that Carboxy THC was the second metabolite in THC and an inactive compound "that you would see in blood or urine over a prolonged period of time if the person continues using or is a regular user of THC."

On cross-examination, Agent Miller testified that the amount of Delta THC found in the Defendant's blood was an amount that could impair someone. He agreed, however, that it was difficult to determine if someone was impaired based solely on the level of THC in his blood: "That's correct. I don't see the stop, I don't know what the officer observed on the scene, I don't know why the person was pulled over. All I know is what's on the lab report." He further agreed that marijuana works differently from alcohol and that he could not determine based on the THC levels in the Defendant's blood what his level of concentration was when driving his vehicle. On redirect examination, he testified that the effects of THC on the brain begin to occur within the first two to ten minutes of use and can continue for up to four hours.

The Defendant elected not to testify and rested his case without presenting any witnesses. Following deliberations, the jury convicted him of all four counts as charged in

the indictment, and the trial court subsequently sentenced him to an effective term of 11 months, 29 days, suspended to supervised probation after service of two days. Following the denial of his motion for new trial, the Defendant filed a timely appeal to this court in which he challenges the sufficiency of the evidence in support of his DUI conviction and argues that the State gave an improper closing argument that warrants a new trial.

ANALYSIS

I. Sufficiency of the Evidence

The Defendant contends that the evidence at trial was insufficient for the jury to find him guilty of DUI beyond a reasonable doubt. He asserts that the evidence at most showed that he had bloodshot eyes, had recently used marijuana, and was perhaps a regular user of marijuana, and not that he was under the influence when operating his vehicle. In support, he notes that TBI Agent Miller acknowledged that it was impossible to extrapolate from the level of Delta 9 THC in his blood sample whether he was impaired at the time he was operating the vehicle, and that Sergeant Shelton marked "slight" on the form indicating his level of intoxication. He also points out that he was successful on the one leg stand test until his face was lit with the headlights of passing vehicles and he turned his head to look at traffic and lost his balance. The State argues that the evidence was sufficient for the jury to find the Defendant guilty of DUI. We agree with the State.

When the sufficiency of the evidence is challenged on appeal, the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also* Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt."); *State v. Evans*, 838 S.W.2d 185, 190-92 (Tenn. 1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992).

Therefore, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from it. *See State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). "A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

The guilt of a defendant, including any fact required to be proven, may be predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *See State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). The standard of review for the sufficiency of the evidence is the same whether the conviction is based on direct or circumstantial evidence or a combination of the two. *See State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011).

DUI is defined in pertinent part as follows:

> It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, . . . while:
>
> (1) Under the influence of any intoxicant, marijuana, controlled substance analogue, drug, substance affecting the central nervous system, or combination thereof that impairs the driver's ability to safely operate a motor vehicle by depriving the driver of the clearness of mind and control of oneself that the driver would otherwise possess[.]

Tenn. Code Ann. § 55-10-401(1).

The Defendant acknowledges that the proof shows that he had recently used marijuana at the time of the traffic stop but argues that there was insufficient evidence that his ability to safely operate his vehicle was impaired by his use of marijuana. We respectfully disagree. TBI Agent Miller testified about the slowed reaction time and loss of decision-making and judgment that can be caused by THC in a person's system, the effects of which can be compounded when driving. Trooper Shelton, who described his extensive training and experience detecting impaired driving, testified that the Defendant's eyes were red and bloodshot and that the smell of marijuana was coming from the Defendant's vehicle. On the "alcohol/drug influence report," he marked that the Defendant appeared to be intoxicated and that the suspected intoxicant was marijuana. Although he marked "slight" as the apparent level of intoxication on his form, he testified that the Defendant exhibited five of the nine clues of impairment on the walk and turn field sobriety test, and three of the four clues of impairment on the one leg stand test. In addition, the Defendant failed the alternative "lack of convergence" test. The video of the traffic stop corroborates Trooper Shelton's testimony about the Defendant's performance on the field sobriety tests. From this evidence, a rational jury could reasonably conclude that the Defendant was under the influence of marijuana that impaired his ability to safely operate his vehicle by depriving him of the clearness of mind and control of himself that he would otherwise have possessed. We, therefore, affirm the Defendant's conviction for DUI.

II. Improper Closing Argument by the State

The Defendant complains of the following portion of the prosecutor's closing argument:

> [PROSECUTOR]: . . . Frankly, honestly, I see people do a whole lot worse on those tests. A whole lot worse than what [the Defendant] did. But where do you draw that line? Where do you draw the line? Where are you going to draw the line? That line's got to be drawn close. You - - okay, why?
>
> Well, it's - - how close - - it's simple. How close are the lines on the highway? Nothing separating those lanes but that little strip of yellow or white. That's how much space there is between somebody driving down the road smoking dope and someone who's not. Someone maybe like you, maybe like your child or your grandchild.
>
> [DEFENSE COUNSEL]: Objection, Your Honor. I have to say that's an improper argument for the State.
>
> THE COURT: Okay. I'll overrule the objection. Continue on.
>
> [PROSECUTOR]: So, these tests, these determinations of these tests, these judgment calls that that man has to make, sometimes people take issue with how closely we judge them. But we, we have no other choice. He has no other choice. He had no other choice. Those mistakes on the field sobriety test, they're magnified behind the wheel of a speeding automobile. Maybe the guy that forgets what Trooper Shelton told him, the guy that forgets how Trooper Shelton told him to do something, maybe that's the guy that forgets you're in the other lane. The guy that didn't notice Trooper Shelton's instruction, maybe that's the guy that don't notice the red light. And why doesn't he notice? Why does he forget? You think that rolling that blunt, smoking that blunt had anything to do with it? It had everything to do with it. That's why we've got to draw the line close. We do that so that five miles down the road that line in the middle of the road is not the only thing between you and someone driving high. What we cannot do, we cannot wait until it's obvious beyond all doubt. We do that we're here on a different trial. You can't wait 'til he hurts himself or hurts somebody else.
>
> DEFENSE COUNSEL: Your Honor, may we approach?

THE COURT: You may.

([PROSECUTOR], INAUDIBLE)

[DEFENSE COUNSEL]: I didn't want it in front of the jury, and also I take no pleasure in interrupting. I don't want to.

[THE COURT]: Huh?

[DEFENSE COUNSEL]: All this parenthetical what's going to happen, if you don't find him guilty, will it be your family the next one is absolutely out of line in terms of my objection. I'm trying to be respectful about it and not talk about it in front of the jury, and I hate to interrupt him but I've got to get on the record objecting to it.

THE COURT: Yeah, I understand. Let's, let's - - let's take just a brief - - we're going to take just a brief recess. I want to see the lawyers in chambers just a second.

BAILIFF: All rise.

(JURY EXITS COURTROOM)
(HIS HONOR AND COUNSEL IN CHAMBERS, OFF RECORD)
(JURY ENTERS COURTROOM)

THE COURT: All right. Thank you. You can be seated. All right. The Court notes [defense counsel's] objection. Go ahead, General.

After the prosecutor completed his closing argument, the trial court issued the following curative instruction to the jury:

THE COURT: All right. In just a moment [defense counsel's] going to present his argument. The jury heard [defense counsel] make an objection and all the Court's going to do at this time is instruct you that you will decide solely based on the evidence that was presented from the jury [sic] box and the law as I give it to [you]. The arguments of the, the arguments of both attorneys are merely to assist you in understanding the evidence, but you're to decide it on the evidence that came from the witness stand, as well as the law as I instruct.

The Defendant contends that because the State's case was weak, the prosecutor in closing argument "tried to stretch the proof . . . as far as it could and, . . . to make up ground by playing to the emotions of the jury with references to what might happen and who might be harmed if they found [the Defendant] not guilty." He also contends that the prosecutor referred to facts not in evidence by mentioning the amount of traffic on the highway where the traffic stop occurred and referring to the Defendant's passing a blunt back and forth with his passenger as he was driving.

As an initial matter, we note that defense counsel did not state on the record what occurred in chambers following his objection to the prosecutor's closing argument. Nor did he raise any objection to the curative instruction issued by the trial court. "When a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." *State v. Ballard,* 855 S.W.2d 557, 560 (Tenn. 1993); *see also* Tenn. R. App. P. 24(b). By neither stating on the record what was discussed in chambers, nor objecting to the form of the curative instruction issued by the trial court, the Defendant has arguably waived consideration of this issue on appeal. *See e.g.*, *State v. Martinez*, No. W2019-02033-CCA-R3-CD, 2021 WL 2949514, at *19 (Tenn. Crim. App. July 14, 2021) ("Although the Defendant risked waiving this issue [of alleged error in jury instruction] by failing to include all parts of the record pertaining to the flight instruction, including whatever transpired during the alleged off-the-record conference, we will nevertheless review this issue on the merits."); *State v. Mathis*, No. M2005-02259-CCA-R3-CD, 2007 WL 1890175, at *4 (Tenn. Crim. App. June 28, 2007) (citation omitted) (concluding that in the absence of an adequate record on appeal, which was due to the fact that an "off-the-record" bench conference occurred, this court "must presume the trial court's rulings were supported by sufficient evidence.").

Improper closing argument occurs when the prosecutor intentionally misstates the evidence or misleads the jury on the inferences it may draw from the evidence; expresses his or her personal opinion on the evidence or the defendant's guilt; uses arguments calculated to inflame the passions or prejudices of the jury; diverts the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions on the consequences of the jury's verdict; and intentionally refers to or argues facts outside the record, other than those which are matters of common public knowledge. *State v. Goltz*, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003). Tennessee courts "have traditionally provided counsel with a wide latitude of discretion in the content of their final argument" and trial judges with "wide discretion in control of the argument." *State v. Zirkle*, 910 S.W.2d 874, 888 (Tenn. Crim. App. 1995). A party's closing argument, however, "must be temperate, predicated on evidence introduced during the trial, relevant to the issues being tried, and not otherwise

improper under the facts or law." *State v. Middlebrooks*, 995 S.W.2d 550, 557 (Tenn. 1999).

We agree with the Defendant that the prosecutor should not have appealed to the emotions of the jurors by arguing that they or their loved ones might become victims of the Defendant's impaired driving. Our supreme court "has cautioned that the State may risk reversal by engaging in argument which appeals to the emotions and sympathies of the jury." *State v. Cribbs*, 967 S.W.2d 773, 786 (Tenn. 1998). However, "[a] criminal conviction should not be lightly overturned solely on the basis of the prosecutor's closing argument." *State v. Banks*, 271 S.W.3d 90, 131 (Tenn. 2008) (citation omitted). "An improper closing argument will not constitute reversible error unless it is so inflammatory or improper that [it] affected the outcome of the trial to the defendant's prejudice." *Id.* (citations omitted)

We review the following factors in determining whether a prosecutor's improper argument affected the verdict to the prejudice of a defendant:

> (1) the conduct at issue in light of the facts and circumstances of the case, (2) the curative measures undertaken by the trial court and the prosecution, (3) the intent of the prosecutor in making the improper argument, (4) the cumulative effect of the improper argument and any other errors in the record, and (5) the relative strengths and weaknesses of the case.

Id. (citations omitted).

The failure of the Defendant to include the substance of the chambers conference regarding his objection to the state's closing argument, and the discussion about a curative instruction creates a substantial problem in assessing the impact of factor 2. After the chambers conference a curative instruction was given, but there was no objection by the defendant lodged, nor was there any request for a mistrial. With an incomplete record, this court cannot determine if the defendant asked for this curative instruction or agreed with the content.

Furthermore, we disagree with the Defendant that the State's case was weak, or that the prosecutor intentionally appealed to the emotions of the jury because he believed it was the only way he could win a conviction. Agent Miller described the detrimental effects of THC on the reaction time, motor functioning skills, and decision making of an individual, and Trooper Shelton testified that the Defendant appeared intoxicated and exhibited clues of impairment on the field sobriety tests. The video of the field sobriety tests shows this to be the case. The prosecutor's admission that he had seen others perform worse on field

sobriety tests was simply that - - an acknowledgment that the Defendant's performance on the field sobriety tests was not the worst that he had seen. Nonetheless, the Defendant performed poorly on those field sobriety tests, leading Trooper Shelton to place him under arrest for DUI. Moreover, the trial court issued a curative instruction that the arguments of counsel were not evidence, and that the jury was to consider only the proof presented at trial in reaching their verdicts. "It is an elementary principle of law that jurors are presumed to follow the instructions of the trial court." *State v. Williams,* 977 S.W.2d 101, 106 (Tenn. 1998).

We agree with the State that the prosecutor's reference to the Defendant's passing of a "blunt" to his passenger was a reasonable inference to be drawn from his admission to Trooper Shelton that he had just smoked a blunt, combined with the fact that a bag containing marijuana and marijuana roaches was found on his passenger, and his passenger can be heard on the video telling the officers that he rolled the blunt in the vehicle. As for the traffic conditions on the highway or the danger posed by leaving one's lane of traffic, we note that the video of the traffic stop shows that the road was busy, with multiple passenger vehicles and semi-tractor trailers passing in both directions during the duration of the stop. We, therefore, conclude that the complained-of comments did not affect the verdict of the jury and do not warrant reversal of the conviction and a new trial.

CONCLUSION

Based on our review, we affirm the judgments of the trial court.

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JOHN W. CAMPBELL, SR., JUDGE