IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 18, 2009 Session

STATE OF TENNESSEE v. FREDDIE L. BROWN

Appeal from the Circuit Court for Rutherford County
No. F-57761 James K. Clayton, Jr., Judge

No. M2008-01306-CCA-R3-CD - Filed October 8, 2009

The Defendant, Freddie L. Brown, was charged with one count of especially aggravated kidnapping, a Class A felony. See Tenn. Code Ann. § 39-13-305(b)(1). Following a jury trial, he was convicted of the lesser included offense of aggravated kidnapping, a Class B felony. See Tenn. Code Ann. § 39-13-304(b)(1). The trial court sentenced him as a persistent offender to twenty-eight years in the Department of Correction. In this direct appeal, the Defendant contends that: (1) the trial court erred in denying his motion to suppress the fruits of a search that recovered a BB gun used as evidence against him; (2) the State presented evidence insufficient to convict him; (3) the trial court erred in denying his motion in limine to conceal a warning label on the BB gun; and (4) the trial court erred in limiting the Defendant's cross-examination of the victim. After our review, we affirm the judgment of the trial court.

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

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

John D. Drake, Murfreesboro, Tennessee, for the appellant, Freddie L. Brown.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; William Whitesell, District Attorney General; and Trevor H. Lynch, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The events underlying this case began on the evening of June 18, 2004. The victim, Vickie Brown, had recently separated from her husband, the Defendant, and she was staying with her mother. The victim testified that the Defendant called her mother's house a number of times on the

evening of June 18. The victim spoke to the Defendant on one or two occasions, and the Defendant demanded that the victim "come back." When the victim refused, the Defendant continued to call. At 12:30 a.m. on June 19, 2004, the victim unplugged her mother's phone so that she and her mother would be able to sleep.

The victim woke up the next morning and drove toward the Smyrna Wal-Mart, her place of employment, for her 7:00 a.m. shift. After buying a breakfast biscuit at a drive-through window at a nearby restaurant, she drove into the Wal-Mart parking lot, stopped her car, and continued to eat breakfast. Parking lot security cameras showed the victim arriving at 6:42 a.m. Shortly after she stopped, the Defendant exited a white truck parked nearby and walked to the victim's rolled-down passenger-side window. The Defendant pointed a long-barreled gun at the victim and said that he planned to kill her and then kill himself. The victim believed the gun to be real and became very afraid. Surveillance tape showed that the Defendant's truck entering the parking lot at 6:01 a.m.

The Defendant then reached through the victim's open passenger-side window, unlocked and opened the door, and sat down in the passenger seat. Still pointing the gun at the victim, he ordered her to drive to the Defendant's son's house in Virginia. The Defendant yelled at the victim for about seven or eight minutes. The victim noted on cross-examination that she had experienced problems with the Defendant before: she said he had assaulted her in the past and had framed her son for marijuana possession. She also admitted that she was already married at the time she married the Defendant.

Surveillance tape showed another Wal-Mart employee named William Barnett drive into the parking lot at 6:40 a.m. Mr. Barnett testified that he heard a loud voice as he exited his car. He turned toward the voice and noticed the Defendant standing by the side of a car with a gun, trying to open the car's door. Although he was acquainted with the victim, he did not know that she was in the car. Mr. Barnett also could not hear anything that was being said. He immediately went inside the Wal-Mart store and asked someone to call 911. When he returned to the parking lot a few minutes later, he saw that the police had arrived.

Officer Jeff Lucas received the resulting dispatch about a possible domestic disturbance at the Smyrna Wal-Mart. He testified regarding the subsequent events both at trial and at a pretrial suppression hearing regarding his search of the victim's vehicle. He was about a half-mile away when he received the call. He proceeded immediately to Wal-Mart, located the victim's vehicle based on the description he received, and pulled up to the car. The car then began to move away from him, circling into the adjacent parking aisle. Officer Lucas activated his blue lights, and the car stopped. Surveillance tape showed that Officer Lucas arrived at 6:50 a.m.

The victim and the Defendant then exited the vehicle. After speaking to the visibly upset victim and hearing her accounts of the Defendant's actions, Officer Lucas arrested the Defendant and placed him in the back of his patrol car. Officer Lucas then searched the passenger seat area of the victim's vehicle, recovering the gun the Defendant had carried. The gun had a long, black, metal

barrel. After examining it, Officer Lucas determined it to be a BB gun, although he noted in his testimony that the barrel appeared to be the size of a .22 caliber rifle.

Officer Lucas directed another officer to take the Defendant to the police station. He then entered the Smyrna Wal-Mart and viewed surveillance tape of the incident. Finally, Officer Lucas noted that the Defendant, at his appearance before a magistrate, said that if he had been in possession of a real gun, he would have shot himself.

The Defendant chose not to testify but presented testimony of family members tending to establish that the BB gun had been inoperative for years and that the victim had an opportunity to see the BB gun in the past, as it had been stored under a bed in the Defendant's mother's house during a visit by the victim and the Defendant.

The jury convicted the Defendant of one count of aggravated kidnapping. He now appeals.

Analysis

I. Denial of Motion to Suppress

The Defendant first contends that the trial court erred in denying his motion to suppress the fruits of the search of the victim's vehicle. "[A] trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). We review a trial court's applications of law to fact de novo, however. See State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001). The party prevailing at the suppression hearing is further "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from such evidence." Odom, 928 S.W.2d at 23.

The Fourth Amendment to the United States Constitution states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." Our supreme court has noted that "a warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997). The record contains some testimony that the Defendant co-owned the victim's vehicle, although the vehicle's title was not introduced. Because the record is unclear, we will assume for the purpose of argument that the Defendant had standing to challenge Officer Lucas' search of the vehicle.

One exception to the Fourth Amendment warrant requirement provides that a police officer may, incident to a lawful arrest, search the person arrested and the immediately surrounding area. See Chimel v. California, 395 U.S. 752, 862-63 (1969). We conclude, and the Defendant appears to concede, that Officer Lucas had "reasonable cause for believing [the Defendant] committed [a] felony," and that the Defendant's warrantless arrest was thus lawful. See Tenn. Code Ann. § 40-7-103(a)(3).

"In cases where the arrestee is an occupant of a vehicle, police officers may conduct searches, contemporaneous to the arrest, of the passenger compartments inside the vehicle." State v. Crutcher, 989 S.W.2d 295, 300 (Tenn. 1999) (citing New York v. Belton, 453 U.S. 454, 457 (1981)). "The rationale for those searches is the need to disarm the arrestee in order to safely take him into custody, and the need to preserve evidence for later use at trial." Id. (citing United States v. Robinson, 414 U.S. 218, 234 (1973)). Our supreme court "has joined several jurisdictions in upholding the validity of those searches even where the arrestee is neutralized in the back seat of a police car when the search was conducted," as was the Defendant in this case. Id. (citing State v. Watkins, 827 S.W.2d 293, 295 (Tenn. 1992)). Under the test our supreme court followed in Crutcher, Officer Lucas' contemporaneous search of the victim's passenger compartment was therefore constitutional.

The United States Supreme Court, however, recently disapproved the application of Belton adhered to by our supreme court, holding that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." Arizona v. Gant, -- U.S.--;129 S.Ct. 1710, 1723 (2009). As the Supreme Court decided Gant after the events underlying this case, we would normally consider whether or not the new rule should be applied retroactively. See generally Griffith v. Kentucky, 479 U.S. 314, 320-27 (1987). Because the victim in this case described the Defendant's conduct to Officer Lucas before the search, however, Officer Lucas was reasonable in his belief that a search of the victim's vehicle would reveal evidence of the Defendant's offense of arrest. Officer Lucas' search was thus constitutional under either Crutcher or Gant; we therefore need not determine whether Gant should be retroactively applied. This issue is without merit.

II. Sufficiency of the Evidence

The Defendant next contends that the State presented evidence insufficient to convict him of aggravated kidnapping. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State

v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557. In attacking the sufficiency of the evidence against him, the Defendant relies entirely on his opinion that the victim's testimony was not credible. The jury obviously credited the victim's testimony, however.

Tennessee Code Annotated section 39-13-304 states, in part, that aggravated kidnapping is false imprisonment committed while threatening the use of a deadly weapon or with the intent to terrorize a victim. A person commits the offense of false imprisonment who knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty. Tenn. Code Ann. § 39-13-302(a).

Taken in the light most favorable to the State, we conclude that the evidence was sufficient to convict the Defendant of aggravated kidnapping. The Defendant confined the victim to her car by making threats with what the victim reasonably believed to be a firearm. The evidence is also sufficient to demonstrate that the Defendant did so in order to terrorize the victim. This issue is without merit.

III. Denial of Motion in Limine

The Defendant next contends that the trial court erred by denying his motion in limine to suppress the label on the BB gun because that label referred to the gun as a "dangerous or deadly weapon." The trial court apparently heard argument on this motion in limine in a pretrial hearing. The Defendant has failed to include a transcript of this hearing in the record, however. Because the Defendant has not provided a record sufficient for us to review this issue, we must presume the determinations made by the trial court are correct. State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991); see also Tenn. R. App. P. 24(b).

IV. Limited Cross-Examination of Victim

During cross-examination of the victim, the Defendant attempted to introduce extrinsic evidence that: (1) the victim was already married at the time she married the Defendant; (2) the victim previously accused the Defendant of assault before retracting the accusation; and (3) the Defendant had caused the victim's son to be arrested for possession of marijuana. The trial court denied his requests to introduce this evidence. He now contends that this denial was error.

On appeal, the Defendant argues that he should have been allowed to introduce these items of evidence under Tennessee Rule of Evidence 616, which allows a party to "offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness." The State correctly notes, however, that the Defendant attempted to introduce this evidence at trial only under Tennessee Rule of Evidence 608 in order to establish

specific instances of the victim's conduct for the purpose of demonstrating her untruthfulness. Such instances of conduct cannot be proved by extrinsic evidence, however. See Tenn. R. Evid. 608(b).

Relative to the admissibility of evidence, "[a] defendant may not change theories from the trial court to the appellate court," and this issue is therefore waived. State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993) (citations omitted). Even if the issue were not waived, however, we would find no reversible error, as the victim admitted at trial that she was already married when she married the Defendant, that she believed the Defendant framed her son for possession of marijuana, and that she asked prosecutors to dismiss a previous assault charge against the Defendant. See Tenn. R. App. P. 36(b) (stating that "[a] final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process"). This issue is without merit.

Conclusion

Based upon the foregoing authorities and reasoning, we affirm the Defendant's conviction.

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DAVID H. WELLES, JUDGE