IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
August 15, 2006 Session

STATE OF TENNESSEE v. LORNE JAMES CLABOUGH

Direct Appeal from the Criminal Court for Bradley County
Nos. M-04-180 - 183 R. Steven Bebb, Judge

No. E2005-02133-CCA-R3-CD - Filed January 8, 2007

Lorne James Clabough, the defendant, appeals his convictions and sentences of especially aggravated kidnapping (Class A felony), aggravated assault (Class C felony), two counts of aggravated assault by recklessness (Class D felonies), and evading arrest (Class E felony). The defendant was sentenced to an effective twenty years of incarceration as a Range I, violent offender. The defendant presents three issues for review: (1) The trial court erred in the method utilized for jury selection; (2) The trial court erred in refusing to admit the defendant's recorded statement into evidence; and (3) The trial court erred in sentencing. After review, we conclude that no reversible error is present and affirm the judgments of the trial court.

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

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which ALAN E. GLENN, J., joined. GARY R. WADE, P.J., not participating.

James F. Logan, Jr., Cleveland, Tennessee, for the appellant, Lorne James Clabough.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Jerry N. Estes, District Attorney General; and Kristie L. Luffman and Shari T. Young, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Facts

This case concerns the defendant's visitation to Bradley Memorial Hospital on December 31, 2003, armed with a shotgun. There the defendant confronted certain individuals, attacked his wife, and forcefully abducted her. He then led officers on a high speed chase to the defendant's home. Eventually, the defendant surrendered peacefully, and the victim was found unharmed.

The facts underlying the charges in this case were not disputed. On December 30-31, 2003, the defendant's estranged wife, Kayla Marlow, was with her sister, Misty Ankeny, at Bradley Memorial Hospital. Mrs. Ankeny was hospitalized for delivery of a child. That evening the defendant had called his wife to discuss his moving to Montana and taking their child for a six-month period. According to Mrs. Marlow, the conversation was "heated."

In the early hours of December 31, the defendant came to the hospital and signed in as a visitor. The defendant was wearing camouflage coveralls and, initially, was concealing a shotgun. The defendant knocked on Mrs. Ankeny's door which was answered by Thomas Chandler, Kayla Marlow's dating partner. The defendant told Chandler to go outside with him. The defendant then held the barrel of a shotgun within five or six inches of Chandler's head. Chandler escaped through another door with the defendant briefly in pursuit. The defendant then returned to Mrs. Ankeny's hospital room, grabbed his wife by her hair, and pushed her head into a door frame. The defendant escorted his wife out of the hospital while openly carrying the shotgun. Misty Ankeny was emerging from the bathroom when she saw the defendant in her room. The defendant put one hand on her shoulder while holding the shotgun in the other hand and told her to return to the bathroom. When Mrs. Ankeny exited the bathroom, the defendant and her sister were gone.

Tammy Rucker, a labor and delivery nurse, saw the armed defendant and witnessed him push his wife's head into a door frame. Ms. Rucker and other staff members attempted to barricade the nursery entrance door with the incubators, then placed the infants present into a supply closet. Some witnesses at the hospital described the defendant's demeanor as very calm as he escorted his wife from the hospital.

The defendant, with his wife as a passenger, was pursued by officers as the defendant drove to his mobile home. Officer Morgan Johnson, one of the pursuing officers, said speeds reached 120 to 130 miles per hour. Portions of the trip were over winding and curving roads, some with ninety degree turns. At one point, the defendant swerved at a police unit traveling beside his vehicle. The defendant said, "If I am going to die, they are going to die." The defendant was successful in reaching his home and parked behind the mobile home. After going inside, the defendant talked to his wife about reconciliation. He also discussed her mother's suicide and the accidental death of one of the defendant's friends.

Eventually, Deputy Todd Olinger, an acquaintance of the defendant, was able to talk by phone to the defendant and persuade him to surrender. Deputy Olinger stated that the defendant followed all instructions during the surrender, was calm and cooperative, and seemed regretful. A stipulation was entered that the defendant's weapon was not loaded when found by officers at the defendant's home.

The defendant testified that he had been hospitalized in June 2003, for attempted suicide. After one and one-half weeks in Peninsula Hospital, he was discharged and prescribed medications which he refused to take. He stated that he had been diagnosed as manic depressive with homicidal thoughts.

The defendant recounted the events of December 30-31, 2003, as he remembered them. He stated he had been bowling on the night of December 30. He did not recall visiting his twin sister at her work as she had testified. The defendant recalled a phone conversation with his wife concerning custody of their daughter. His next recall was seeing Thomas Chandler at the hospital, but he did not recall having a weapon or chasing Mr. Chandler. He stated he did not recall hitting his wife but did remember helping her up from the floor. He recalled having his wife with him and driving fast on his way home.

Jury Voir Dire

The defendant, in his first issue, alleges error in the trial court's method of jury selection. Specifically, the defendant complains that counsel was required to conduct voir dire of all prospective jurors at the same time, without the benefit of further examination, after they were placed on the panel.

The method utilized by the trial court was to seat twelve potential jurors in the jury box with forty additional potential jurors seated on two rows behind the jury box. All potential jurors were questioned at the same time. Some were excused with their replacements being seated in the jury box until a jury of twelve and one alternate were seated.

This procedure, as the defendant alleges, deviates from Rule 24 of Tennessee Rules of Criminal Procedure, the controlling standard for jury selection in Tennessee criminal trials. Counsel is entitled to personally examine prospective jurors both by Rule 24 and by Tennessee Code Annotated section 22-3-101.

> The relevant portion of Rule 24(c) of Tennessee Rules of Criminal Procedure is as follows: After prospective jurors have been passed for cause, counsel will submit simultaneously and in writing, to the trial judge, the name of any juror in the group of the first twelve who have been seated that either counsel elects to challenge peremptorily. Upon each submission, each counsel shall submit either a challenge or a blank sheet of paper. Neither party shall make known the fact that the party has not challenged. Replacement jurors will be seated in the panel of twelve in the order of their selection. If necessary, additional replacement jurors will then be examined for cause and, after passed, counsel will again submit simultaneously, and in writing, to the trial judge the name of any juror in the group of twelve that counsel elects to challenge peremptorily. This procedure will be followed until a full jury has been selected and accepted by counsel. Peremptory challenges may be directed to any member of the jury, and counsel shall not be limited to replacement jurors. Alternate jurors will be selected in the same manner.

The procedure utilized by the trial court did not provide for additional questioning of a replacement juror as provided by Rule 24(c). However, the record did reflect one instance when defense counsel was allowed to pose additional questions to a juror.

The State contends that the defendant, in failing to object to the jury selection process, has waived the issue. We agree. There is no obligation or duty to grant "relief to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of error." Tenn. R. App. P. 36(a). In the absence of plain error, the failure to make a contemporaneous objection or motion for mistrial constitutes a waiver of the issue. State v. Robinson, 971 S.W.2d 30, 42-43 (Tenn. Crim. App. 1997).

The defendant makes no attempt at a demonstration of prejudice, and we discern none. Both the defendant and the State participated in the selection method in accordance with the same rules. The defendant has failed to prove prejudice due to the selection method and, accordingly, is not entitled to relief. State v. Blunt, 708 S.W.2d 415, 419 (Tenn. Crim. App. 1985).

Defendant's Statement

The defendant alleges error by the trial court in its refusal to admit a recorded statement given by the defendant to Officer Mark Gibson, the chief investigating officer. The defendant attempted to introduce the statement during his direct examination of Officer Gibson and later during the defendant's testimony. The trial court disallowed the statement as self-serving hearsay. In the initial attempt at introduction, the defendant attempted justification for admissibility by characterizing the statement as "against penal interest" and containing "inculpatory information." The defendant now argues that the recorded statement "is the best evidence of the defendant's state of mind at the time of the commission of the offenses." He contends that it was especially relevant in that insanity was his sole defense. The defendant did not make an offer of proof; consequently, the recorded statement is not included in the record.

> As a general rule, self-serving statements are inadmissible.
> A declaration made by a defendant in his own favor, unless part of the res gestae or of a confession offered by the prosecution, is not admissible for the defense. A self-serving declaration is excluded because there is nothing to guarantee its testimonial trustworthiness. If such evidence were admissible, the door would be thrown open to obvious abuse: an accused could create evidence for himself by making statements in his favor for subsequent use at his trial to show his innocence.

Hall v. State, 552 S.W.2d 417, 418 (Tenn. Crim. App. 1977) (quoting Wharton's Criminal Evidence, 13th ed., § 303)). Statements against penal interest qualify as a hearsay exception only if the defendant is unavailable. Tenn. R. Evid. 804(b)(3).

The defendant contends that the statement was admissible pursuant to the "state of mind" hearsay exception, Tennessee Rule of Evidence 803(3):

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

A trial court's ruling excluding evidence may not be challenged on appeal unless the substance of the evidence and its evidentiary basis supporting admission are presented to the trial court by an offer of proof or were apparent from the context. Tenn. R. Evid. 103(a)(2); State v. Robinson, 73 S.W.3d 136, 150 (Tenn. Crim. App. 2001). The offer of proof must demonstrate the substance, purpose, and relevance of the excluded evidence so the trial court may make an informed ruling. Alley v. State, 882 S.W.2d 810, 815 (Tenn. Crim. App. 1994). An offer of proof also creates a record from which the appellate court can review the trial court's decision. State v. Goad, 707 S.W.2d 846, 852-53 (Tenn. 1986). If the excluded evidence is not contained in, or apparent from, the record, the appellate court will not consider the issue. State v. Robinson, 971 S.W.2d 30, 40 (Tenn. Crim. App. 1997).

In the absence of the recorded statement, we could only speculate as to its contents and whether it qualified as a state of mind exception. If it was consistent with the defendant's trial testimony, it would only serve to demonstrate a purported fragmented memory of the events surrounding the offenses. We conclude that the defendant has failed to demonstrate error concerning this issue.

Sentencing

In his challenge to the sentence imposed, the defendant advances two issues: the enhancement factors applied were violative of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004); and certain enhancement factors applied were inappropriate.

This court's review of the sentence imposed by the trial court is de novo with a presumption of correctness. T.C.A. § 40-35-401(d). However, this presumption is conditioned upon an affirmative showing that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Pettus, 986 S.W.2d 540, 543 (Tenn. 1999). If the trial court fails to comply with the statutory directives, then our review is de novo without a presumption of correctness. State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997). A reviewing court should uphold the sentence imposed if: (1) the sentence complies with the purposes and principles of the 1989 Sentencing Act, and (2) the trial court's findings are adequately supported by the record. State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). The appealing party has the burden of demonstrating that a sentence is improper. T.C.A. § 40-35-401, Sentencing Commission Comments; Arnett, 49 S.W.3d at 257.

The trial court sentenced the defendant to twenty years on the conviction for especially aggravated kidnapping. Concurrent with this sentence, the following sentences were imposed: three years for each reckless aggravated assault; three years for aggravated assault; and one year for felony evading arrest.

In calculating the sentence for especially aggravated kidnapping, the trial court found the following enhancement factors applicable: (4) the offense involved more than one victim; (10) the

defendant possessed a firearm during the commission of the offense; (11) the defendant had no hesitation about committing a crime when the risk to human life was high; and (17) the crime was committed under circumstances under which the potential for bodily injury to a victim was great. T.C.A. § 40-35-114(4), (10), (11), (17) (2003).

The trial court found one mitigating factor: the defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability for the offense. T.C.A. § 40-35-113(8) (2003). The trial court found that the enhancement factors and the mitigating factor "cancel each other out" and imposed a sentence of twenty years for especially aggravated kidnapping.

The defendant contends that factors eleven and seventeen were improperly applied as being elements of the offense. The State concedes that factor seventeen was an element of the offense and adds that factor ten was also.

The enumerated enhancement factors contained in Tennessee Code Annotated section 40-35-114 are permitted when "appropriate for the offense and "not themselves elements of the offense." State v. Poole, 95 S.W.2d 93, 95 (Tenn. 1997). We agree that factor ten was an element of the offense and impermissible as an enhancement factor. Factor seventeen is a part of the general nature of especially aggravated kidnapping and thus, was improperly applied. "Enhancement factors are not intended to allow sentence adjustments based on the general nature of the offense." State v. Kissinger, 922 S.W.2d 482, 488 (Tenn. 1996). We conclude that factor seventeen, the risk to human life is high, is applicable in this case. When multiple lives are put at risk, the factor is appropriate. See State v. Lewis, 44 S.W.3d 501, 507 (Tenn. 2001). Herein, there was evidence that the defendant, on his drive home with the victim, reached speeds of 120 to 130 miles per hour. Not only did this jeopardize the public, but there was evidence that the defendant swerved his vehicle toward officers during the high speed pursuit. There was specific testimony that other drivers were encountered during the chase.

Although unmentioned by the parties, there is an additional mitigating factor which was applicable. Tennessee Code Annotated section 39-13-305(b)(2) provides as follows:

> If the offender voluntarily releases the victim alive or voluntarily provides information leading to the victim's safe release, such actions shall be considered by the court as a mitigating factor at the time of sentencing.

Our review reveals that two aggravating factors remain and that two mitigating factors are applicable. We conclude that the presumptive, midrange sentence of twenty years as imposed by the trial court was appropriate.

The defendant also argues that the trial court erred by applying enhancement factors not addressed by the jury, in violation of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). This issue was addressed in State v. Gomez, 163 S.W.3d 632 (Tenn. 2004). Therein, our Supreme

Court considered the constitutionality of the Tennessee Criminal Sentencing Reform Act in light of the Blakely holding and made the following holding:

> The Reform Act authorizes a discretionary, non-mandatory sentencing procedure and requires trial judges to consider the principles of sentencing and to engage in a qualitative analysis of enhancement and mitigating factors. The Reform Act does not include a formula, a grid, or any other mechanical process. It instead sets out broad sentencing principles, enhancement and mitigating factors, and a presumptive sentence, all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature. Under the Reform Act, the finding of an enhancement factor does not mandate an increased sentence. The Reform Act does not provide a system which requires or even allows judicial power to "infringe upon the province of the jury." Blakely, 124 S. Ct. at 2540. Thus, for these reasons, and in accordance with our duty to indulge every presumption in favor of the constitutionality of statutes . . . we conclude that Tennessee's sentencing structure does not violate the Sixth Amendment.

Id. at 661.

Accordingly, the defendant is not entitled to relief on this issue.

Conclusion

We conclude that the record contains no reversible error and affirm the judgments of conviction and sentencing.

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JOHN EVERETT WILLIAMS, JUDGE