Alvis A. JORDAN *v.* STATE of Arkansas

CR 95-942 917 S.W.2d 164

Supreme Court of Arkansas
Opinion delivered March 11, 1996

1. APPEAL & ERROR — ARGUMENT CANNOT BE RAISED FOR FIRST TIME ON APPEAL — ARGUMENT WAIVED IF NOT ARGUED IN ORIGINAL BRIEF. — Where appellant admitted that he was not convicted of attempted capital murder and attempted to change his argument to one alleging error for failure to grant a directed verdict on the charge of first-degree murder, the attempt to change arguments was ineffective; if counsel omits to argue an assignment of error in his original brief, such assignment must be treated as waived and abandoned by him unless permission to amend his brief is asked and granted by the court for good cause before the case is submitted.
2. JURY — JURY MAY CONVICT ON SOME COUNTS AND NOT ON OTHERS — DEFENDANT MAY NOT ATTACK HIS CONVICTION ON ONE COUNT BECAUSE IT IS INCONSISTENT WITH HIS ACQUITTAL ON ANOTHER COUNT. — Appellant's argument that the conviction for attempted first-degree murder of one victim should be reversed because it was inconsistent with the conviction of only second-degree murder for killing another victim was without merit; a jury may convict on some counts but not on others, and may convict in different degrees on some counts, because of compassion or compromise, and not solely because there was insufficient evidence of guilt; a defendant may not attack his conviction on one count because it is inconsistent with an acquittal on another count; *res judicata* concepts are not applicable to inconsistent verdicts; the jury is free to exercise its historic power of lenity if it believes that a conviction on one count would provide sufficient punishment.
3. APPEAL & ERROR — ARGUMENT PROCEDURALLY BARRED — DEFENDANT WAS REQUIRED TO ADDRESS LESSER-INCLUDED

OFFENSES IN HIS MOTION FOR DIRECTED VERDICT TO PRESERVE CHALLENGE TO SUFFICIENCY OF EVIDENCE NECESSARY TO SUPPORT CONVICTION FOR LESSER-INCLUDED OFFENSE. — Where appellant's motion at the close of the State's case addressed only capital murder and did not address second-degree murder either by name or by the culpability required for the crime, appellant's failure to question the sufficiency of the evidence for lesser-included offenses, either by name or by apprising the trial court of the elements of the lesser-included offenses, at the close of the State's case constituted a waiver of the argument; a defendant is required to address the lesser-included offenses in his motion for a directed verdict to preserve a challenge to the sufficiency of the evidence necessary to support a conviction for a lesser-included offense.

4. APPEAL & ERROR — NO RULING ON MOTION OBTAINED FROM TRIAL COURT — POINT NOT PRESERVED FOR APPELLATE REVIEW. — Where, before trial, appellant filed a motion to quash the jury panel, but he did not bring the motion to the attention of the trial court, and he did not obtain a ruling on the motion, his argument was not preserved for appellate review; in order to preserve a point for appellate review, a party must obtain a ruling from the trial court.
5. TRIAL — TRIAL COURT HAS WIDE LATITUDE IN CONTROLLING ARGUMENTS OF COUNSEL — RULINGS WILL NOT BE OVERTURNED ABSENT CLEAR ABUSE. — The trial court has a wide latitude of discretion in controlling the arguments of counsel, and its rulings in this regard are not overturned in the absence of clear abuse.
6. TRIAL — APPELLANT MERELY OBJECTED TO APPELLEE'S CLOSING ARGUMENT WITHOUT REQUESTING LIMITING INSTRUCTION OR MISTRIAL — TRIAL OCCUR DID NOT ABUSE ITS DISCRETION. — Where appellant objected to the prosecutor's closing argument, but did not ask for a limiting instruction or a mistrial, and the trial court nonetheless gave a limiting instruction that closing arguments by counsel were not to be considered as evidence, appellant did not ask any relief that was denied by the trial court, and there was no abuse of discretion in the rulings by the trial court.
7. EVIDENCE — REBUTTAL EVIDENCE PRESENTED DURING SENTENCING PHASE OF TRIAL — TRIAL COURT HAD DISCRETION TO ALLOW SUCH EVIDENCE. — A trial court has discretion to allow rebuttal evidence during the sentencing phase of the trial.
8. WITNESSES — ONE WITNESS'S IDENTIFICATION OBJECTED TO, BUT OTHER WITNESSES GAVE SIMILAR EVIDENCE — OBJECTION WITHOUT MERIT. — Appellant's argument that the trial court erred in allowing one witness to identify him in court was devoid of merit where, the day after the crimes, the witness accurately

described appellant and his clothing, described the co-defendant, and picked appellant out of a photo line-up, and where, at trial, she testified that she observed appellant at the crime scene at close range under a street light and was certain of his identity, and identified him as the person who shot and killed one of the victims; additionally, a police officer testified without objection that, the day after the crime, the witness identified appellant from a photo line-up as the one who shot the victim; yet another witness testified that he had known appellant all of his life, that he saw appellant shoot the victim, and he also identified appellant in the courtroom; the co-defendant testified that he was at the scene with appellant and that appellant shot the victim; appellant took the stand and testified that he was at the crime scene and fired a pistol when the victim was killed; identification simply was not an issue; even if in some manner the trial court had erred in allowing the witness's in-court identification of appellant, it would be harmless in light of the other identification testimony, especially since appellant testified in court that he was at the crime scene with a pistol.

Appeal from Ashley Circuit Court; *Don E. Glover*, Judge; affirmed.

*Lee R. Watson*, for appellant.

*Winston Bryant*, Att'y Gen., by: *David R. Raupp*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant Alvis Jordan and co-defendant Cedric Harris were charged with capital murder for shooting and killing Broderick Shavis and with attempted capital murder for shooting and injuring Daniel Williams. Appellant and Harris were tried separately. Appellant was found guilty of second-degree murder for killing Broderick Shavis and guilty of attempted first-degree murder for shooting Daniel Williams. There was substantial evidence that appellant was guilty of both crimes. We affirm both judgments of conviction.

**[1]** In his opening brief, appellant contends that the trial court erred in denying his motion for a directed verdict on the charge of attempted capital murder of Daniel Williams. He argues the required proof of his culpable mental state for attempted capital murder was lacking. We need not address the point in any detail. As appellee's brief points out, the ruling could not have been prejudicial to appellant since he was not

convicted of attempted capital murder, but rather was convicted only of a lesser-included offense, attempted first-degree murder. *See Hickson* v. *State*, 312 Ark. 171, 847 S.W.2d 691 (1993). In his reply brief, appellant admits that he was not convicted of attempted capital murder and attempts to change his argument to one alleging error for failure to grant a directed verdict on the charge of first-degree murder. The attempt to change arguments is ineffective. We have long held that an argument cannot be raised for the first time in the reply brief. *Partin* v. *Bar*, 320 Ark. 37, 894 S.W.2d 906 (1995). As far back as 1919, we wrote: "If counsel should omit to argue any assignment of error in his original brief, such assignment must be treated as waived and abandoned by him unless permission to amend his brief is asked and granted by the court for good cause before the case is submitted." *Commonwealth Pub. Serv. Co.* v. *Lindsay*, 139 Ark. 283, 293, 214 S.W. 9, 13 (1919).

**[2]** As a sub-point appellant argues that the conviction for attempted first-degree murder of Daniel Williams should be reversed because it is inconsistent with the conviction of only second-degree murder for killing Broderick Shavis. While both Shavis and Williams were shot during the one episode, the argument is without merit. A jury may convict on some counts but not on others, and may convict in different degrees on some counts, because of compassion or compromise, and not solely because there was insufficient evidence of guilt. "Indeed, if the rule were otherwise, the State would be entitled to have the jury warned that an acquittal on some counts might undermine a guilty verdict on others — almost the opposite of the standard instructions, which is obviously beneficial to criminal defendants." *McVay* v. *State*, 312 Ark. 73, 77, 847 S.W.2d 28, 30 (1993) (quoting *United States* v. *Greene*, 497 F.2d 1968 (7th Cir. 1974)). The law is clear in that "a defendant may not attack his conviction on one count because it is inconsistent with an acquittal on another count. *Res judicata* concepts are not applicable to inconsistent verdicts; the jury is free to exercise its historic power of lenity if it believes that a conviction on one count would provide sufficient punishment." *Id.* (quoting *United States* v. *Romano*, 879 F.2d 1056 (2d Cir. 1989)).

Appellant next contends that the trial court erred in denying his motion for a directed verdict for the second-degree

murder of Broderick Shavis. He moved for a directed verdict on the capital murder charge for killing Broderick Shavis at the close of the State's case on the ground that there was "insufficient evidence from which reasonable people could agree" that there was, among other things, "premeditation or deliberation." The trial court denied the motion. Appellant then put on his case. At the close of his case, appellant moved for a directed verdict on capital murder and attempted capital murder and all lesser-included offenses on the ground that he had no intent to cause the death of either victim. The trial court denied the motion.

[3] The argument is procedurally barred. Appellant's motion at the close of the State's case addressed only capital murder. Counsel stated that he "moved for a directed verdict on the charge of capital murder" and "that there was no intent to commit the death of the individuals by either party when they went down there. There was no premeditation or deliberation." The motion did not address second-degree murder either by name or by the culpability required for the crime. (Premeditation and deliberation are not required for second-degree murder. Instead, it requires proof that the actor engaged in conduct with the conscious object to produce death. *See* Ark. Code Ann. § 5-10-103 (a)(1) (Repl. 1993) and Original Commentary.) We have held that a defendant is required to address the lesser-included offenses in his motion for a directed verdict to preserve a challenge to the sufficiency of the evidence necessary to support a conviction for a lesser-included offense. *Walker* v. *State*, 318 Ark. 107, 883 S.W.2d 831 (1994). Appellant's failure to question the sufficiency of the evidence for lesser-included offenses, either by name or by apprising the trial court of the elements of the lesser-included offenses, at the close of the State's case constituted a waiver of the argument.

[4] Appellant's third point of appeal is also procedurally barred. Before trial, appellant filed a motion to quash the jury panel. He did not bring the motion to the attention of the trial court, and he did not obtain a ruling on the motion. In fact, to the contrary, the trial court commenced the trial by asking both the State and appellant, "Is this a good jury?" and both responded affirmatively. In order to preserve a point for appellate review, a party must obtain a ruling from the trial court.

*Terry* v. *State*, 309 Ark. 64, 826 S.W.2d 817 (1992).

Appellant's next point of appeal concerns the State's closing argument. The evidence tended to show that Broderick Shavis was struck by both a .25 caliber bullet and a .38 caliber bullet. Appellant contends the trial court erred in allowing the prosecutor to draw an improper inference from the evidence by stating "you can't put a five-sixteenths bullet through that one-eighth, I mean one eighth hole." He additionally argues that the prosecutor was erroneously allowed to argue that victim Daniel Williams' beeper could have been used in his job with a temporary agency. Appellant objected to the statements, but did not seek any relief other than a ruling on the objection.

**[5]** The case of *Littlepage* v. *State*, 314 Ark. 361, 863 S.W.2d 276 (1993) is directly in point. There, the defendant objected to arguments made by the prosecutor, but did not ask the trial court for any relief other than a ruling on his objection. We noted that the trial court gave a limiting instruction that counsel's remarks were not evidence and should be disregarded if not supported by evidence. The trial court explained to the jurors that attorneys are given leeway in closing arguments and can make every argument that is plausible from the evidence. We said, "The trial court has a wide latitude of discretion in controlling the arguments of counsel, and its rulings in this regard are not overturned in the absence of clear abuse." *Id.* at 371, 863 S.W.2d at 281 (citation omitted).

**[6]** In the present case, appellant objected, but, just as in *Littlepage* v. *State*, did not ask for a limiting instruction or a mistrial. After the prosecutor's argument about the size of the wounds the trial court gave a limiting instruction that closing arguments by counsel were not to be considered as evidence. The trial court did not give another limiting instruction after the argument about the beeper, but rather instructed the prosecutor to proceed, and the prosecutor did so without further mention of the beeper. Appellant did not ask any relief that was denied by the trial court, and there was no abuse of discretion in the rulings by the trial court.

**[7]** Appellant next argues that the trial court erred in allowing the State to present rebuttal evidence during the sentencing phase of the trial. We addressed this issue in *Caldwell* v.

*State*, 322 Ark. 543, 910 S.W.2d 667 (1995), and held that a trial court has discretion to allow rebuttal evidence during the sentencing phase of the trial.

Appellant's final point of appeal is that the trial court erred in allowing Kim Walker to identify him in court. The argument is devoid of merit. The day after the crimes, Kim Walker accurately described appellant and his clothing, described the co-defendant, and accurately picked appellant out of a photo line-up. At trial she testified that she observed appellant at the crime scene at close range under a street light and was certain of his identity, and identified him as the person who shot and killed Shavis. David Oliver, a police officer, testified without objection that, the day after the crime, Kim Walker identified appellant from a photo line-up as the one who shot Shavis. Wayne Sherrer testified that he has known appellant all of his life and that he saw appellant shoot Shavis. He also identified appellant in the courtroom. Cedric Harris, the co-defendant, testified that he was at the scene with appellant and appellant shot Shavis. Appellant took the stand and testified that he was at the crime scene and fired a pistol when Shavis was killed. He contended that he merely shot into the air while Harris shot and killed Shavis.

**[8]** Identification simply was not an issue. Even if in some manner the trial court had erred in allowing Walker's in-court identification of appellant, it would be harmless in light of the other identification testimony, especially since appellant testified in court that he was at the crime scene with a pistol.

Affirmed.