

SUPREME COURT OF GEORGIA

Johnson v. State

292 Ga. 785 (2013) · Decided April 15, 2013

SUMMARY

The Supreme Court of Georgia affirmed Paris Leroy Johnson Jr.'s convictions for malice murder and related offenses arising from the fatal beating of Antonio Milton. The court held that the evidence did not warrant a voluntary manslaughter jury instruction, that appellate review of the challenge to cross-examination about Johnson's failure to mention fear was waived and otherwise meritless, and that testimony concerning a marijuana transaction was admissible res gestae evidence or harmless if erroneous.

CASE DETAILS

COURT	Supreme Court of Georgia
WRITING FOR THE COURT	Blackwell, Justice; All Justices
JURISDICTION	Georgia
DECIDED	April 15, 2013
DISPOSITION	affirmed
PROCEDURAL POSTURE	Johnson was convicted by a Walton County jury of malice murder and appealed after the trial court denied his amended motion for new trial.
STANDARD OF REVIEW	The sufficiency of the evidence was reviewed under the rational-trier-of-fact standard. The preserved evidentiary claims were reviewed for trial-court error and, alternatively, for harmless error; the unpreserved cross-examination claim was reviewed for preservation and waiver.
PRECEDENTIAL VALUE	Published opinion; precedential authority of the Supreme Court of Georgia.
PARTIES	Paris Leroy Johnson, Jr. v. State of Georgia

TOPICS

- criminal procedure
- evidence
- preservation of error
- harmless error
- self defense

PRACTICE AREAS

- criminal law
- criminal procedure
- appellate practice
- evidence

QUESTIONS PRESENTED

1. Whether the trial court was required to charge the jury on voluntary manslaughter as a lesser included offense.
2. Whether the State improperly cross-examined Johnson about his failure to mention his claimed fear during his pretrial statement and before trial.
3. Whether the cross-examination claim was preserved for appellate review.
4. Whether testimony concerning Johnson's alleged marijuana transaction impermissibly placed his character in evidence.
5. Whether any evidentiary error warranted reversal in light of the overwhelming evidence of guilt.

HOLDINGS

1. The evidence was sufficient to authorize a rational trier of fact to find Johnson guilty of murder beyond a reasonable doubt.
2. The trial court was not required to charge the jury on voluntary manslaughter because the evidence did not provide even slight evidence that Milton seriously provoked Johnson and that Johnson killed him solely as the result of sudden, violent, and irresistible passion.
3. Johnson waived appellate review of his challenge to the State's cross-examination because he did not object at the time of the challenged questions.
4. Even if the issue had been preserved, it was not improper for the prosecutor to cross-examine Johnson about his failure to mention his claimed fear when he gave his statement or before trial.
5. The trial court did not err in admitting testimony about Johnson's alleged marijuana transaction because the testimony was relevant to the res gestae of the murder, explained the witnesses' presence and Johnson's movements, and was relevant to his state of mind even though it incidentally placed his character in issue.
6. Even assuming the admission of the marijuana-transaction testimony was erroneous, reversal was not warranted because the evidence of guilt was overwhelming and it was highly probable that the testimony did not contribute to the verdict.

KEY QUOTATIONS

“A trial court is required to give such a charge on request “if there is slight evidence showing that the victim seriously provoked the defendant, causing the defendant to kill the victim ‘solely as the result of a sudden, violent, and irresistible passion,’ OCGA § 16-5-2 (a).”” (at 786)

“Georgia “has long followed the contemporaneous objection rule, which provides that counsel must make a proper objection on the record at the earliest possible time to preserve for review the point of error.”” (at 787)

“It was not improper for the prosecutor to cross-examine [him] regarding his failure to mention [his fear] to officers or others when he made his statement or at any other time before trial.” (at 788)

“The State is entitled to present evidence of the entire res gestae of the crime. Even though a defendant is not charged with every crime committed during [or near the time of] a criminal transaction, every aspect of it relevant to the crime charged may be presented at trial.” (at 788-789)

FACTUAL BACKGROUND

Johnson attacked Antonio Milton with a baseball bat outside Johnson's residence after becoming angry about Milton's relationship with Johnson's former girlfriend. Milton was unarmed, made no threats or aggressive movements, and suffered fatal blunt-force trauma to the head. Johnson claimed he struck Milton to scare him away because he feared Milton based on prior reported threats, but admitted Milton had not threatened or attacked him during the encounter. Evidence also showed that Johnson had been arranging a marijuana transaction near the residence shortly before the attack.

PROCEDURAL HISTORY

Johnson was indicted for malice murder, felony murder, and aggravated assault arising from the beating death of Antonio Milton. The jury found him guilty on all counts; the felony-murder verdict was vacated, aggravated assault merged into malice murder, and the trial court imposed a sentence of life without parole. The trial court denied Johnson's amended motion for new trial, and the Supreme Court of Georgia affirmed.

DISPOSITION

affirmed

CASES CITED

- Jackson v. Virginia, 443 U.S. 307, 319 (1979)
- Glover v. State, 291 Ga. 152, 153 (1) (2012)
- Merritt v. State, 292 Ga. 327, 331 (2) (2013)
- Howard v. State, 288 Ga. 741, 745-746 (4) (2011)
- Robinson v. State, 129 Ga. 336, 338 (2) (1907)
- Izzo v. State, 265 Ga. App. 143, 143 (1) (2004)
- Hayward v. State, 258 Ga. App. 566, 569 (2)(a) (2002)
- Jolly v. Zarella, 252 Ga. App. 130, 131-132 (2001)
- State v. Larocque, 268 Ga. 352, 353 (1997)
- Whitehead v. State, 287 Ga. 242, 246-248 (2) (2010)
- Martin v. State, 281 Ga. 778, 780 (2) (2007)
- Sanders v. State, 289 Ga. 655, 659 (2) (2011)
- Stringer v. State, 285 Ga. 842, 845-846 (4) (2009)
- Kendrick v. State, 287 Ga. 676, 677-678 (2) (2010)
- Collins v. State, 289 Ga. 666, 668-669 (2011)
- Pearson v. State, 277 Ga. 813, 817 (5)(c) (2004)

- Johnson v. State, 264 Ga. 456, 457 (1) (1994)
- Roberts v. State, 282 Ga. 548, 551 (6) (2007)
- Shealey v. State, 257 Ga. 437, 438 (2) (1987)
- Carter v. State, 269 Ga. 891, 892 (3) (1998)
- Frazier v. State, 257 Ga. 690, 698 (16) (1987)
- Walker v. State, 282 Ga. 703, 705 (2) (2007)
- Malcolm v. State, 263 Ga. 369, 371-374 (4)-(5) (1993)
- Miranda v. Arizona, 384 U.S. 436 (1966)
- Holland v. State, 176 Ga. App. 343, 344 (3) (1985)
- Dasher v. State, 285 Ga. 308, 311 (4) (2009)
- Askew v. State, 254 Ga. App. 137, 139 (2) (2002)

OPINION

BLACKWELL, J.

Blackwell, Justice. Paris Leroy Johnson, Jr. was tried by a Walton County jury and convicted of the murder of Antonio Milton. Following the denial of his motion for new trial, Johnson appeals, contending that the trial court erred when it failed to charge the jury on voluntary manslaughter as a lesser included offense, when it allowed the State to cross-examine him about his failure to come forward and make a statement, and when it admitted testimony that impermissibly placed his character into evidence.

Upon our review of the record and briefs, we see no error and affirm.¹ 1. Viewed in the light most favorable to the verdicts, the evidence shows that Milton was dating Jessica Smith, who remained friendly with Johnson, her ex-boyfriend. Johnson disapproved of Smith's new relationship, told her that he felt like hurting and killing somebody, and sent her this text message: "[I]f I can't have you, nobody can." On the evening of October 9, 2009, Smith went to the residence of Johnson and his mother to take a pregnancy test.

When Smith started to leave, Johnson became angry, and when Milton came to the front door, Johnson became even angrier, slammed the door, and armed himself with a handgun. Smith convinced Johnson to put the gun away. While Smith and Milton were talking at the door, Johnson walked past them to a truck where he spoke to some men about a marijuana transaction.

It is undisputed that the only words exchanged *786at any time between Milton and Johnson were Milton's request for a cigarette and Johnson's negative answer. After Johnson twice returned to the house, he went back outside, struck Milton in the head with a baseball bat, chased him into the parking lot, knocked him to the ground, and struck him with the bat several more times.

Milton was unarmed and had not threatened Johnson or made any aggressive movements toward him. When the men in the truck asked Johnson why he had attacked Milton, Johnson said that

Milton “shouldn’t have come over here.” Johnson told a neighbor that he had just knocked somebody out and not to call anyone, and he then dragged Milton across the parking lot.

After police officers arrived and told Johnson that he would be detained so as to remove him from the crime scene, he responded that “it don’t matter anyways, I’m going to jail[,]” and “I knew something was going to happen because he kept harassing me.” Milton died two days later, and the medical examiner testified that the cause of death was severe blunt-force trauma to the head from at least two impacts.

Johnson testified that he had hit Milton once with the bat to scare him away because Smith had told Johnson that Milton previously made threats about harming Johnson and, as a result, Johnson feared for his own safety and that of his mother. But Johnson admitted that while Milton was outside Johnson’s home, Milton did not yell at Johnson, threaten him or his mother, make aggressive movements, or pull a weapon.

Although Johnson does not dispute that the evidence is sufficient to sustain his conviction, we have independently reviewed the record, and we conclude that the evidence adduced at trial, including the eyewitness testimony of Smith and of two men who were in the truck, was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that Johnson was guilty of murder.

Jackson v. Virginia, 443 U. S. 307, 319 (III) (B) (99 SCt 2781, 61 LE2d 560) (1979). See also Glover v. State, 291 Ga. 152, 153 (1) (728 SE2d 221) (2012). 2. We next consider the contention that the trial court should have charged the jury, as Johnson requested, on voluntary manslaughter as a lesser included offense. A trial court is required to give such a charge on request “if there is slight evidence showing that the victim seriously provoked the defendant, causing the defendant to kill the victim ‘solely as the result of a sudden, violent, and irresistible passion,’ OCGA § 16-5-2 (a).” Merritt v. State, 292 Ga. 327, 331 (2) (737 SE2d 673) (2013) (citation and punctuation omitted).

The evidence in this case shows, at most, that Milton had told Smith on prior occasions that he might harm Johnson, but Johnson was not present at the time of those threats. See Howard v. State, 288 Ga. 741, 745 (4) *787(707 SE2d 80) (2011). It is undisputed that, while Milton was in Johnson’s presence on October 9, 2009, Milton did not use threatening words, make aggressive movements, or pull a weapon.

Under these circumstances, Johnson’s response to the provoking incident was objectively unreasonable, and nothing in the evidence required a charge on voluntary manslaughter. See *id.* at 746 (4); Robinson v. State, 129 Ga. 336, 338 (2) (58 SE 842) (1907). 3.

We turn now to the claim that the trial court improperly allowed the State to cross-examine Johnson about his failure to come forward and make a statement. Soon after the crime occurred,

Johnson waived his Miranda² rights, was interviewed by a police investigator, and did give a statement. During cross-examination of Johnson, the prosecuting attorney elicited testimony that at no point during the interview or at any other time did Johnson ever indicate that he feared for his safety or the safety of his mother.

Johnson then agreed that, at a hearing two weeks before trial, he testified for the first time about being afraid for his safety. And the prosecuting attorney asked him, “So, almost a year and a half went by before you ever mentioned anything about being in fear of your safety?” Johnson argues that by this cross-examination, especially the question just quoted, the State improperly commented on his silence and failure to come forward after his pretrial statement.

At trial, however, Johnson’s lawyer did not object to the cross-examination of which he now complains until a bench conference that he requested two questions later. See *Izzo v. State*, 265 Ga. App. 143, 143 (1) (592 SE2d 915) (2004); *Hayward v. State*, 258 Ga. App. 566, 569 (2) (a) (574 SE2d 646) (2002); *Jolly v. Zarella*, 252 Ga. App. 130, 131-132 (555 SE2d 798) (2001).

Georgia “has long followed the contemporaneous objection rule, which provides that counsel must make a proper objection on the record at the earliest possible time to preserve for review the point of error.” *State v. Larocque*, 268 Ga. 352, 353 (489 SE2d 806) (1997) (citation omitted). See also *Whitehead v. State*, 287 Ga. 242, 246 (2) (695 SE2d 255) (2010) (standard practice requires a party to make an objection and obtain a ruling “before or as the evidence is admitted”). “The purpose of requiring a timely objection is to avoid placing improper information before the jury.

Removing from a jury’s consideration evidence it has heard is difficult at best and well nigh impossible after it has had time to sink in.” *Martin v. State*, 281 Ga. 778, 780 (2) (642 SE2d 837) (2007) (citation and punctuation omitted).

Because Johnson did not object at the time *788of the complained-of cross-examination, he has waived appellate review of this issue. See *Sanders v. State*, 289 Ga. 655, 659 (2) (715 SE2d 124) (2011). Even if Johnson had made a timely objection, “[i]t was not improper for the prosecutor to cross-examine [him] regarding his failure to mention [his fear] to officers or others when he made his statement or at any other time before trial.” *Stringer v. State*, 285 Ga. 842, 845-846 (4) (684 SE2d 590) (2009) (citations omitted).

See also *Kendrick v. State*, 287 Ga. 676, 677-678 (2) (699 SE2d 302) (2010). Johnson chose to speak to the investigating officer without ever invoking his right to remain silent. Under the circumstances, the State’s questions were proper inquiries into the inconsistency between his pre-trial statement and his testimony at trial. *Stringer*, 285 Ga. at 846 (4). “If [Johnson] has recently manufactured self-serving and exculpatory evidence, the jury surely was entitled to know of that possibility and weigh it in their deliberations.” *Id.* (citations and punctuation omitted).

Moreover, even if we assumed that the State's cross-examination did include improper comments on Johnson's silence, reversal of his conviction would not be warranted because the extensive eyewitness testimony and other evidence that proved his guilt and refuted his claim of self-defense was overwhelming. See *Collins v. State*, 289 Ga. 666, 668-669 (715 SE2d 136) (2011); *Pearson v. State*, 277 Ga. 813, 817 (5) (c) (596 SE2d 582) (2004).

4. Finally, we consider the contention that the trial court erroneously allowed impermissible character evidence when it admitted eyewitness testimony about Johnson's alleged involvement in a marijuana transaction.³ ****8 The court viewed that evidence as part of the *res gestae*⁴ of the crime for which Johnson was being tried.

Under the old rules of evidence that apply here, we have said that [t]he State is entitled to present evidence of the entire *res gestae* of the crime. Even though a defendant is not charged with every crime committed during [or near the time of] a criminal transaction, every aspect of it relevant to the crime charged may be presented at trial. This is true even if the defendant's character is incidentally placed in issue.

Johnson v. State, 264 Ga. 456, 457 (1) (448 SE2d 177) (1994) (citations and punctuation omitted). A statement of an eyewitness as to what occurred shortly before or shortly after the commission of the murder, even if it shows the commission of an additional uncharged crime, generally was admissible under those rules as relevant *res gestae* evidence. *Roberts v. State*, 282 Ga. 548, 551 (6) (651 SE2d 689) (2007); *Johnson*, 264 Ga. at 457 (1).

In the present case, the challenged testimony was relevant to explain the presence of the truck and the testimony of its owner that he drove to a meeting with Johnson yet did not know him well enough to identify him in court, as well as to explain why Johnson kept leaving his residence, walking past Milton and Smith to the truck, and returning to the residence shortly before the murder.

See *Roberts*, 282 Ga. at 551 (6); *Shealey v. State*, 257 Ga. 437, 438 (2) (360 SE2d 266) (1987). The challenged testimony was also relevant to Johnson's state of mind because it showed that his concern about Milton was not such that it prevented Johnson from leaving Milton at the front door so that Johnson could arrange a drug deal. See *Carter v. State*, 269 Ga. 891, 892 (3) (506 SE2d 124) (1998); *Frazier v. State*, 257 Ga. 690, 698 (16) (362 SE2d 351) (1987).

Accordingly, the trial court did not err when it admitted testimony about the marijuana transaction even though it incidentally placed Johnson's character in issue. See *Roberts*, 282 Ga. at 551 (6). Moreover, even if the court did err when it admitted the testimony as part of the *res gestae* of the murder, the error is harmless because, as discussed above in Division 3, the evidence of Johnson's guilt was overwhelming and it is therefore highly probable that the admission of the challenged testimony did not contribute to the verdict.

See *Walker v. State*, 282 Ga. 703, 705 (2) (653 SE2d 468) (2007). Judgment affirmed. All the Justices concur. *790Decided April 15, 2013. Anthony S. Carter, for appellant. Layla H. Zon, District Attorney, Samuel S. Olens, Attorney General, Paula K. Smith, Senior Assistant Attorney General, Benjamin H. Pierman, Anne M. Kurtz, Assistant Attorneys General, for appellee.

The events that form the basis for the conviction occurred on or about October 9, 2009. Johnson was indicted on November 20, 2009 and charged with malice murder, felony murder, and aggravated assault. His trial commenced on February 14, 2011, and the jury returned its verdict on February 16, 2011, finding Johnson guilty on all counts.

The verdict as to felony murder was vacated, the aggravated assault merged into malice murder, see *Malcolm v. State*, 263 Ga. 369, 371-374 (4), (5) (434 SE2d 479) (1993), and the trial court sentenced Johnson to imprisonment for life without parole for malice murder. Johnson filed a motion for new trial on February 25, 2011, and he amended it on July 13, 2012.

The trial court denied the motion for new trial as amended on September 18, 2012. Johnson timely filed his notice of appeal on September 25, 2012, and the case was docketed in this Court for the January 2013 term and submitted for decision on the briefs. See *Miranda v. Arizona*, 384 U. S. 436 (86 SCt 1602, 16 LE2d 694) (1966).

The State asserts that this issue is waived because, as the trial court noted in its order denying the motion for new trial, Johnson failed to object to the prosecuting attorney's questions about the drug deal. But Johnson did make an oral motion in limine that the trial court said it "would not grant." It is not clear, however, from our review of the entire colloquy, whether the trial court denied the motion or deferred a ruling.

Holland v. State, 176 Ga. App. 343, 344 (3) (335 SE2d 739) (1985). Nevertheless, we will assume, for purposes of this appeal, that Johnson's motion in limine was denied and that he was therefore not required to renew his objection to evidence. See *Whitehead*, 287 Ga. at 247-248 (2). Cf. *Dasher v. State*, 285 Ga. 308, 311 (4) (676 SE2d 181) (2009) ("Where the trial court reserves ruling on a challenge to the admission of evidence, a defendant's subsequent failure to object to the testimony when it is admitted or to invoke a ruling by the trial court preserves nothing for appellate review.") (citations omitted); *Askew v. State*, 254 Ga. App.

137, 139 (2) (564 SE2d 720) (2002) (issue was not preserved where trial court was not inclined to admit the evidence but was not yet saying absolutely that it would be excluded). Although our new Evidence Code does not apply because this case was tried before January 1, 2013, see Ga. L. 2011, pp. 99,214, § 101, we note that the new Evidence Code provides that "[o]nce the court makes a definitive ruling on the record admitting or excluding any evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve such claim of error for appeal." OCGA § 24-1-103 (a).

We observe that the new Evidence Code does not use the term “res gestae.”

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