

SUPREME COURT OF GEORGIA

Cornell v. State, 277 Ga. 228

587 S.E.2d 652 (2003) · No. S03A0820 · Decided October 20, 2003

SUMMARY

The Supreme Court of Georgia affirmed Wilmer Cornell’s convictions for malice murder and possession of a firearm during the commission of a felony. The court held that trial counsel was not ineffective for failing to request an accident instruction or present a firearms expert, and it rejected claims concerning the admission of a victim photograph and the aggravated-assault jury charge.

CASE DETAILS

COURT	Supreme Court of Georgia
WRITING FOR THE COURT	Fletcher, Chief Justice
JURISDICTION	Georgia
DECIDED	October 20, 2003
DOCKET	S03A0820
DISPOSITION	affirmed
PROCEDURAL POSTURE	Cornell appealed his convictions for malice murder and possession of a firearm during the commission of a felony, asserting ineffective assistance of trial counsel and evidentiary and jury-instruction errors.
STANDARD OF REVIEW	The sufficiency of the evidence was reviewed under whether a rational trier of fact could find guilt beyond a reasonable doubt. Ineffective-assistance claims were evaluated under the deficiency-and-prejudice standard. Admission of the photograph was reviewed for abuse of discretion.
PRECEDENTIAL VALUE	Published opinion; precedential authority of the Supreme Court of Georgia.
PARTIES	Wilmer Cornell v. The State

TOPICS

- ineffective assistance
- criminal procedure
- evidence
- appellate procedure
- standard of review

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support Cornell's convictions for malice murder and possession of a firearm during the commission of a felony.
2. Whether trial counsel was ineffective for failing to request a jury instruction on accident.
3. Whether trial counsel was ineffective for failing to present an expert witness to refute the State's firearm expert.
4. Whether the trial court erred by admitting a photograph of the victim taken during life.
5. Whether the jury instruction on aggravated assault was reversible error when the aggravated-assault conviction merged into the malice-murder conviction and Cornell was not sentenced on aggravated assault.

HOLDINGS

1. The evidence was sufficient for a rational trier of fact to find Cornell guilty beyond a reasonable doubt of the crimes for which he was convicted.
2. Counsel was not ineffective for failing to request an accident instruction because the evidence did not support an accident defense; intentionally firing a gun at the victim does not invoke accident even if the defendant intended only to scare or drive the victim back.
3. Counsel was not ineffective for choosing to cross-examine the State's firearm expert rather than presenting a defense expert because the choice was not patently unreasonable.
4. The trial court did not abuse its discretion by admitting a photograph of the victim taken during life because such photographs are admissible for comparison with postmortem photographs to establish the victim's identity.
5. The challenge to the aggravated-assault instruction was moot because the aggravated-assault conviction merged into the malice-murder conviction as a matter of fact, and Cornell was not sentenced on aggravated assault or on any count relying on it.

KEY QUOTATIONS

"Cornell's intentional firing of the gun at the victim, even if only intended to scare the victim and 'back him off,' does not invoke the defense of accident." (654)

"Counsel's 'decision to avoid the battle of the experts and rely upon cross-examination of the State's experts' is an acceptable tactic if not 'patently unreasonable.'" (654)

FACTUAL BACKGROUND

After the victim fought with Cornell's brother outside a strip club, Cornell obtained a gun and joined his brother in searching for the victim. Cornell testified that the victim ran toward them and pulled up his shirt, causing

Cornell to believe the victim had a gun; Cornell then shot the victim in the chest. Witnesses testified that Cornell threatened the victim beforehand and stood over him preparing to shoot again before being dissuaded.

PROCEDURAL HISTORY

Cornell was indicted in Fulton County on malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony. A jury convicted him on all counts on October 18, 2001; the felony-murder conviction was vacated by operation of law, and he received life imprisonment for malice murder plus five consecutive years for firearm possession. His amended motion for new trial was denied, and the Supreme Court of Georgia affirmed.

DISPOSITION

affirmed

CASES CITED

- Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)
- Strickland v. Washington, 466 U.S. 668, 687, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)
- Berry v. State, 267 Ga. 476, 478, 480 S.E.2d 32 (1997)
- Scott v. State, 261 Ga. 611, 612, 409 S.E.2d 511 (1991)
- Canada v. State, 275 Ga. 131, 133, 562 S.E.2d 508 (2002)
- Davis v. State, 255 Ga. 598, 606, 340 S.E.2d 869 (1986)

OPINION

FLETCHER, J.

587 S.E.2d 652 (2003) 277 Ga. 228 CORNELL v. The STATE. No. S03A0820. Supreme Court of Georgia. October 20, 2003. *653 Zell & Zell, Rodney S. Zell, Atlanta, for appellant. Paul L. Howard, Jr., Dist. Atty., Bettieanne C. Hart, Marc A. Mallon, Asst. Dist. Attys., Thurbert E. Baker, Atty. Gen., Jason C. Fisher, Asst. Atty. Gen., for appellee. FLETCHER, Chief Justice.

Wilmer Cornell appeals from his convictions for malice murder and possession of a firearm during the commission of a felony.[1] Cornell claims that his trial counsel was ineffective in failing to request a charge on accident and in not presenting an expert witness to refute an expert for the State.

Because trial counsel was not ineffective, we affirm. 1. The evidence at trial showed that on October 14, 2000, the victim got into a fight with Cornell's brother outside of a strip club. Cornell's brother called Cornell at home and told him about the incident. Cornell got his gun, joined his brother outside the strip club, and they both searched for the victim.

Cornell testified that the victim ran at them and pulled up his shirt, which made Cornell think that he had a gun. Cornell shot him once in the chest. Although Cornell claims that he shot only to scare the victim and to "back him off," witnesses testified that before shooting Cornell told the victim that no one was going to mess with his brother. Cornell also stood over the victim and prepared to shoot him again, but was dissuaded by one of the witnesses.

After reviewing the evidence in the light most favorable to the jury's determination of guilt, we conclude that a rational trier of fact could have found beyond a reasonable doubt that Cornell was guilty of the crimes for which he was convicted.[2] 2. Cornell claims that his trial counsel was ineffective in not requesting a jury charge on accident.[3] In order to prove ineffective assistance of counsel, Cornell must prove that his trial counsel was deficient, and that but for the deficiency, there is *654 a reasonable probability that the outcome of his trial would have been different.[4] There is a strong presumption that counsel was not deficient.[5] Cornell's trial counsel was not deficient in failing to request a jury charge on accident because the facts do not support such a defense.

Cornell's intentional firing of the gun at the victim, even if only intended to scare the victim and "back him off," does not invoke the defense of accident.[6] 3. Cornell also claims that his trial counsel was ineffective by failing to present an expert witness to refute a State's expert on the type of firearm used in the shooting.

The State's expert testified that the murder weapon was a revolver from which spent cartridges must be ejected manually. The State argued at trial that Cornell showed malice by taking the time to manually eject the spent cartridge and leave it at the victim's feet after shooting him. Cornell claims that this scenario was not possible because he used a semi-automatic pistol that ejected spent cartridges automatically.

Trial counsel was not deficient in choosing to cross-examine the State's expert on this issue rather than calling her own expert. Trial counsel's "decision to avoid the battle of the experts and rely upon cross-examination of the State's experts" is an acceptable tactic if not "patently unreasonable." [7] Counsel's decision in this trial was not patently unreasonable.

4. Cornell claims that the introduction of a photograph of the victim during life was error. Such photographs are admissible for comparison with photographs of the victim after death to prove the identity of the victim.[8] The trial court did not abuse its discretion by admitting this photograph into evidence. 5. Cornell's final enumeration of error is that the indictment charged him with aggravated assault by use of a deadly weapon, but the trial court also charged the jury on aggravated assault by use of "any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury."

This claim is moot because the aggravated assault conviction merged as a matter of fact into the malice murder conviction, and because Cornell was not sentenced on aggravated assault or a count which relied upon it. Judgment affirmed. All the Justices concur. NOTES [1] The crimes occurred on October 14, 2000.

On January 9, 2001, Cornell was indicted for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony. On October 18, 2001, a Fulton County jury convicted Cornell on all counts.

The felony murder conviction was vacated by operation of law. Cornell was sentenced to life in prison for the malice murder and to five consecutive years for the possession. Cornell filed a timely motion for new trial on November 7, 2001. He amended his motion for new trial on August 29, 2002, which was denied on November 12, 2002. Cornell filed his timely notice of appeal on December 9, 2002.

This case was docketed in this Court on February 21, 2003, and submitted on the briefs on April 14, 2003. [2] *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). [3] OCGA § 16-2-2 provides the defense of accident.

[4] *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). [5] *Id.* at 689, 104 S.Ct. 2052. [6] See *Berry v. State*, 267 Ga. 476, 478, 480 S.E.2d 32 (1997) (defendant's testimony that he fired to defend himself and scare the victim did not invoke the defense of accident); *Scott v. State*, 261 Ga. 611, 612, 409 S.E.2d 511 (1991) (no trial court error in failing to charge on accident when undisputed that defendant intentionally pulled the gun's trigger).

[7] *Canada v. State*, 275 Ga. 131, 133, 562 S.E.2d 508 (2002). [8] See *Davis v. State*, 255 Ga. 598, 606, 340 S.E.2d 869 (1986).