

SUPREME COURT OF GEORGIA

Hicks v. State, 287 Ga. 260

695 S.E.2d 195 (2010) · No. S10A0177 · Decided April 19, 2010

SUMMARY

The Supreme Court of Georgia affirmed Deanthony Rashawn Hicks's convictions for malice murder and possession of a firearm during the commission of a felony. The court held that the evidence was sufficient despite conflicting and recanted witness testimony, and that the trial court properly refused instructions on defense of others and voluntary manslaughter. The court also held that Hicks waived his challenge to the jury instruction concerning witness identification certainty and that plain error was not shown.

CASE DETAILS

COURT	Supreme Court of Georgia
WRITING FOR THE COURT	Thompson, Justice; All the Justices
JURISDICTION	Georgia
DECIDED	April 19, 2010
DOCKET	S10A0177
DISPOSITION	affirmed
PROCEDURAL POSTURE	Hicks appealed the denial of his motion for new trial following convictions for malice murder and possession of a firearm during the commission of a felony.
STANDARD OF REVIEW	The sufficiency of the evidence is reviewed under whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Whether evidence is sufficient to authorize a requested jury charge is a question of law; refusal to give an unsupported charge is reviewed for error. Unpreserved jury-charge claims are reviewed only for plain error affecting substantial rights under OCGA § 17-8-58(b).
PRECEDENTIAL VALUE	published Georgia Supreme Court opinion
PARTIES	Deanthony Rashawn Hicks v. The State

TOPICS

jury instructions

lesser included offense instructions

instructions objections

criminal procedure

appellate procedure

PRACTICE AREAS

criminal law

criminal procedure

appellate practice

evidence

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain Hicks's convictions for malice murder and possession of a firearm during the commission of a felony.
2. Whether the trial court erred by refusing to instruct the jury on justification based on the use of force in defense of others.
3. Whether the trial court erred by refusing to instruct the jury on voluntary manslaughter as a lesser included offense of malice murder.
4. Whether the trial court's instruction that a witness's level of certainty may be considered in assessing identification reliability constituted reversible error despite Hicks's failure to make a specific objection.

HOLDINGS

1. The evidence was sufficient for a rational trier of fact to find Hicks guilty beyond a reasonable doubt of the offenses for which he was convicted.
2. The trial court properly refused to give a justification instruction because no evidence supported the theory that Hicks acted in defense of Vinson or reasonably feared imminent serious harm.
3. The trial court properly refused to instruct the jury on voluntary manslaughter because the evidence did not show an intentional killing caused by sudden, violent, and irresistible passion resulting from serious provocation.
4. Hicks waived appellate review of his challenge to the instruction concerning a witness's level of certainty because he failed to make a specific objection before the jury retired, and the plain-error exception did not apply.

KEY QUOTATIONS

"[Appellant's] contention that the evidence was conflicting and that the witnesses who testified for the state were not credible does not change this result, as `resolving evidence conflicts and inconsistencies, and assessing witness credibility, are the province of the factfinder, not this Court.'" (197)

"Fighting prior to a homicide `does not constitute the type of provocation that would warrant a charge of voluntary manslaughter.'" (198)

FACTUAL BACKGROUND

Following an argument between the victim, Michael Howard, and Tierra Vinson, Hicks approached Howard while wielding a pistol. When Howard swatted at the firearm and attempted to flee, Hicks shot him three times

in the back, killing him. Witnesses identified Hicks as the shooter or implicated him in statements to police, and bullets of the same caliber as those used in the shooting were found in a codefendant's vehicle. At trial, some witnesses recanted or contradicted their earlier statements, but the jury was presented with both the trial testimony and the prior statements.

PROCEDURAL HISTORY

A Fulton County grand jury indicted Hicks for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony. Following trial, the jury convicted him of malice murder, possession of a firearm during the commission of a felony, and other offenses; the remaining counts were merged or vacated by operation of law. The trial court denied his amended motion for new trial, and Hicks appealed to the Supreme Court of Georgia, which affirmed.

DISPOSITION

affirmed

CASES CITED

- Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)
- Major v. State, 280 Ga. 746, 747, 632 S.E.2d 661 (2006)
- Brower v. State, 298 Ga. App. 699, 702(1), 680 S.E.2d 859 (2009)
- Broussard v. State, 276 Ga. 216(2), 576 S.E.2d 883 (2003)
- Brown v. State, 267 Ga. 350(2), 478 S.E.2d 129 (1996)
- Lightning v. State, 297 Ga. App. 54(5), 676 S.E.2d 780 (2009)
- Davis v. State, 269 Ga. 276(3), 496 S.E.2d 699 (1998)
- Alexis v. State, 273 Ga. 423(4), 541 S.E.2d 636 (2001)
- Williams v. State, 209 Ga. App. 355(1), 433 S.E.2d 361 (1993)
- Sparks v. State, 277 Ga. 72, 73(2), 586 S.E.2d 645 (2003)
- Brennon v. State, 253 Ga. 240, 241, 319 S.E.2d 841 (1984)
- Nichols v. State, 275 Ga. 246(2), 563 S.E.2d 121 (2002)
- Worthem v. State, 270 Ga. 469(2), 509 S.E.2d 922 (1999)
- Sampson v. State, 282 Ga. 82, 85(5), 646 S.E.2d 60 (2007)
- Malcolm v. State, 263 Ga. 369(5), 434 S.E.2d 479 (1993)
- Ratana v. State, 297 Ga. App. 747, 678 S.E.2d 193 (2009)

OPINION

THOMPSON, J.

695 S.E.2d 195 (2010) HICKS v. The STATE. No. S10A0177. Supreme Court of Georgia. April 19, 2010. *196 Sheueli C. Wang, Atlanta, for appellant. Paul L. Howard, Jr., District Attorney, Bettianne C. Hart, John O. Williams, Asst. Dist. Attys., Thurbert E. Baker, Attorney General,

Reggie A. Lampkin, Assistant Attorney General, for appellee. THOMPSON, Justice. Appellant Deanthony Rashawn Hicks was convicted of malice murder and possession of a firearm during the commission of a felony in connection with the fatal shooting of Michael Howard.[1] He appeals from the denial of his motion for new trial, asserting that the evidence was insufficient to sustain his murder conviction, and that the trial court erred in refusing his requests to instruct the jury on justification by use of force in defense of others and voluntary manslaughter.

For the reasons that follow, we affirm. Viewed in a light most favorable to the verdict, the evidence shows that a group of friends had congregated at a cul-de-sac in a residential subdivision when, following an argument between the victim and Tierra Vinson, appellant appeared from a corner of the street wielding a pistol. He approached the victim pointing the pistol in his face.

The unarmed victim swatted at the firearm and then attempted to run away. As the victim turned and ran, appellant shot him three times in the back, killing him. Appellant left the scene along with co-defendant Soupaisith Ratana in Ratana's vehicle.[2] Eyewitness Quatavius Berry could not identify appellant in a photographic lineup, but he did identify him as the shooter at trial.

Witnesses Jamilah Hamilton and appellant's former girlfriend, Keosha Cox, were present at the time of the shooting and identified appellant from a photographic lineup. Both Hamilton and Cox told police that appellant was running behind the victim at the time of the shooting, and Cox said he was responsible for the murder. At trial, however, both witnesses recanted their previous statements: Hamilton denied seeing appellant run after the victim and Cox claimed that she was intoxicated at the time.

1. Appellant contends that the evidence was insufficient to support the murder conviction because Berry's identification of him as the shooter was not credible, and the only other evidence implicating him consisted of the recanted statements of Cox and Hamilton. While Berry failed to identify appellant from a photographic lineup, he testified at trial that appellant was responsible for the shooting.

In addition to witness testimony *197 implicating appellant, police found bullets of the same caliber used to shoot the victim in co-defendant Ratana's vehicle soon after the shooting. The jury was also shown transcripts and video recordings of statements given to the police by both Cox and Hamilton, in which they implicated appellant. This evidence was ample for any rational trier of fact to find appellant guilty beyond a reasonable doubt of the crimes for which he was convicted.

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). "[Appellant's] contention that the evidence was conflicting and that the witnesses who testified for the state were not credible does not change this result, as `resolving evidence conflicts and inconsistencies, and assessing witness credibility, are the province of the factfinder, not this Court.'" Major v. State, 280 Ga. 746, 747, 632 S.E.2d 661 (2006).

2. Appellant asserts as error the trial court's refusal to give his requested jury instruction on justification by use of force in defense of others. Under OCGA § 16-3-21(a), "a person is justified in using force which is intended or likely to cause death or great bodily harm only if he or she reasonably believes that such force is necessary to prevent death or great bodily injury to himself or herself or a third person or to prevent the commission of a forcible felony."

This is an affirmative defense. With a legal affirmative defense, the accused admits the elements of the crime, but seeks to justify, excuse, or mitigate by showing no criminal intent; all elements of the parts of the crime are admitted with the exception of the intent. All defenses which have been held to be statutory affirmative defenses meet this criteria; i.e., justification, self-defense or defense of others....

Each of these affirmative defenses requires that the defendant admit the crime before he can raise such defense. *Brower v. State*, 298 Ga.App. 699, 702(1), 680 S.E.2d 859 (2009). See also *Broussard v. State*, 276 Ga. 216(2), 576 S.E.2d 883 (2003) ("[j]ustification is an affirmative defense whereby the defendant admits acting with the intent to inflict an injury, but claims that he did so while in reasonable fear of suffering immediate serious harm to himself or another"); *Brown v. State*, 267 Ga. 350(2), 478 S.E.2d 129 (1996) ("[a]n affirmative defense is a defense that admits the doing of the act charged but seeks to justify, excuse, or mitigate it"); *Lightning v. State*, 297 Ga.App.

54(5), 676 S.E.2d 780 (2009) (a defendant must admit the act or he is not entitled to a charge on justification). During opening statement and in closing argument, appellant's counsel proffered the sole theory of the defense that some other, unidentified person in the group at the cul-de-sac was the shooter and that appellant was the "convenient fall guy" who was wrongfully charged.

The defense presented no evidence. Appellant asserts that his requested charge was authorized because the evidence established that the victim and Vinson had been arguing and it could be inferred that appellant intervened in Vinson's defense.

To authorize a requested jury instruction, there need only be slight evidence supporting the theory of the charge. *Davis v. State*, 269 Ga. 276(3), 496 S.E.2d 699 (1998). "Whether the evidence presented is sufficient to authorize the giving of a charge is a question of law." *Id.* It is not error to refuse a justification charge where there is no evidence to support it.

Alexis v. State, 273 Ga. 423(4), 541 S.E.2d 636 (2001). Appellant points to no evidence that he entered the fracas in defense of Vinson. In addition, the undisputed evidence established that the unarmed victim was shot three times in the back as he was attempting to flee after appellant assaulted him with a firearm.

We therefore conclude that appellant "could not have been in imminent fear at the time he committed the acts for which he was being tried." *Broussard*, supra at 217, 576 S.E.2d 883.

Because "no construction of the evidence would support a finding that [appellant] shot in self-defense, the trial court properly refused to charge on that issue." *Id.* Compare *Williams v. State*, 209 Ga.App.

355(1), 433 S.E.2d 361 (1993) (where defendant offered conflicting alternative evidence first admitting to being involved in the altercation, and then denying that she committed the crime it was error to refuse to give a charge on justification). *198 3. Appellant also contends that the trial court erred in refusing to give his requested jury instruction on voluntary manslaughter as a lesser included crime of malice murder.

"Voluntary manslaughter is not a defense to murder, but it may be a lesser included offense of that crime." *Sparks v. State*, 277 Ga. 72, 73(2), 586 S.E.2d 645 (2003). A person commits the offense of voluntary manslaughter when he causes the death of another human being under circumstances which would otherwise be murder and if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person....

OCCA § 16-5-2(a); see also *Brennon v. State*, 253 Ga. 240, 241, 319 S.E.2d 841 (1984). Again appellant argues that the altercation between the victim and Vinson provided the "serious provocation" which caused appellant to act with "sudden, violent, and irresistible passion." But "[v]oluntary manslaughter presupposes an intentional killing, which was completely inconsistent with [appellant's] own version of the events."

Sparks, supra at 74(3), 586 S.E.2d 645. Even assuming that we ignore the fact that appellant maintained his noninvolvement in the crimes, we hold that a charge on voluntary manslaughter is precluded by the evidence.

As noted previously, appellant assaulted the victim with a deadly weapon and then fired the fatal shots into his back as he attempted to flee. Fighting prior to a homicide "does not constitute the type of provocation that would warrant a charge of voluntary manslaughter." [Cit.] There being no evidence to illustrate the existence of provocation before the fatal shot[s] [were] fired, the trial court did not err by refusing to charge the jury on voluntary manslaughter.

Nichols v. State, 275 Ga. 246(2), 563 S.E.2d 121 (2002). In addition, there is no evidence that appellant and Vinson had any type of relationship that would explain an impassioned attack by appellant. In fact, no one else in the cul-de-sac was particularly interested or surprised by the altercation between Vinson and the victim, which onlookers claimed was fairly routine.

There is thus no evidence to show that appellant acted out of sudden, violent, and irresistible passion resulting from serious provocation. See *Worthem v. State*, 270 Ga. 469(2), 509 S.E.2d 922 (1999) (where defendant initiated the conflict by aggressively assaulting the victim with a deadly

weapon, and other evidence does not show defendant acted out of sudden, violent and irresistible passion, a charge on voluntary manslaughter was properly refused).

The trial court did not err in refusing to instruct the jury on voluntary manslaughter. 4. Finally, appellant contends that the trial court erred in instructing the jury that the "level of certainty shown by the witness" may be a factor in assessing the reliability of that witness' identification.

However, in order to preserve the issue for appeal in this post-July 1, 2007 trial, appellant was required to "inform the court of the specific objection and the grounds for such objection before the jury retires to deliberate." OCGA § 17-8-58(a) (amended in 2007). Failure to do so "preclude[s] appellate review of such portion of the jury charge, unless such portion of the jury charge constitutes plain error which affects substantial rights of the parties."

OCGA § 17-8-58(b). Our review of the record reveals that appellant failed to lodge a specific objection to the charge and assert the grounds for his objection. Accordingly, this claim was waived for purposes of appellate review. And where it is "highly probable that the jury charge on 'level of certainty' did not contribute to the verdict[]," *Sampson v. State*, 282 Ga. 82, 85(5), 646 S.E.2d 60 (2007), the plain error exception does not apply.

As in *Sampson*, there were identification witnesses in this case who were acquainted with appellant; in addition, the trial court instructed the jury of the State's burden of proving the identity of the perpetrator beyond a reasonable doubt.

We thus find it highly probable that the charge in this case did not contribute to the verdict. *Id.* Judgment affirmed. All the Justices concur. NOTES [1] The crimes were committed on September 10, 2006. Appellant was indicted by a Fulton County grand jury on December 22, 2006, on charges of malice murder, felony murder while in the commission of an aggravated assault, three counts of aggravated assault, and possession of a firearm during commission of a felony.

Trial commenced on October 8, 2007, and on October 12, 2007, a jury found appellant guilty of the charges, except for two counts of aggravated assault against Quatavius Berry. He was sentenced on October 23, 2009, to life in prison plus a consecutive five-year term of imprisonment on the firearm possession offense.

The remaining counts were merged or vacated by operation of law. See *Malcolm v. State*, 263 Ga. 369(5), 434 S.E.2d 479 (1993). Appellant filed a motion for new trial on October 18, 2007, which was amended on May 1, 2009 and again on July 7, 2009.

The amended motion for new trial was denied on July 9, 2009. Appellant filed his notice of appeal on July 28, 2009. The case was docketed in this Court on October 6, 2009 and submitted for decision on the briefs. [2] Hicks and Ratana were jointly indicted and tried. Ratana was convicted

of aggravated assault and possession of a firearm in the commission of a felony and acquitted of the remaining offenses.

His conviction was affirmed by the Court of Appeals. *Ratana v. State*, 297 Ga.App. 747, 678 S.E.2d 193 (2009).

Retrieved from lawtools.ai · <https://lawtools.ai/cases/state/georgia-supreme-court-of-georgia/2010/hicks-v-state-287-ga-260-c7x3og8f>