

SUPREME COURT OF GEORGIA

Thomas v. State, 284 Ga. 647

670 S.E.2d 421 (2008) · No. S08A0830 · Decided November 17, 2008

SUMMARY

The Supreme Court of Georgia affirmed Lastarza Rodriguez Thomas's convictions for malice murder, aggravated assault, and possession of a firearm during the commission of a felony. The court held that the prosecutor's use of Thomas's pre-arrest silence was impermissible but could not be raised on appeal because trial counsel did not timely object. The court also rejected Thomas's ineffective-assistance claims, finding no prejudice from counsel's failure to object and no deficient performance in declining to present a defense firearms expert.

CASE DETAILS

COURT	Supreme Court of Georgia
WRITING FOR THE COURT	Benham, Justice; All the Justices
JURISDICTION	Georgia
DECIDED	November 17, 2008
DOCKET	S08A0830
DISPOSITION	affirmed
PROCEDURAL POSTURE	Thomas appealed the denial of his motion for a new trial following convictions for malice murder, aggravated assault, and possession of a firearm during the commission of a felony.
STANDARD OF REVIEW	The sufficiency of the evidence is reviewed under whether a rational trier of fact could find guilt beyond a reasonable doubt. Ineffective-assistance claims require proof of deficient performance and resulting prejudice, and reasonable trial strategy is not deficient performance. Unpreserved prosecutorial comments are generally not reviewable absent a timely objection.
PRECEDENTIAL VALUE	Published opinion of the Supreme Court of Georgia; precedential.
PARTIES	Lastarza Rodriguez Thomas v. The State

TOPICS

- ineffective assistance
- preservation of error
- appellate procedure
- criminal procedure
- self defense

PRACTICE AREAS

criminal law

criminal procedure

appellate practice

post-conviction relief

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support convictions for malice murder, aggravated assault, and possession of a firearm during the commission of a felony.
2. Whether the trial court was required to prohibit, sua sponte, the State's questions and closing comments concerning Thomas's pre-arrest silence despite the absence of a timely objection.
3. Whether trial counsel rendered ineffective assistance by failing to object to the State's use of Thomas's pre-arrest silence.
4. Whether trial counsel rendered ineffective assistance by failing to consult or present a defense firearms expert.

HOLDINGS

1. The evidence was sufficient to authorize a rational trier of fact to find Thomas guilty beyond a reasonable doubt of malice murder, aggravated assault, and possession of a firearm during the commission of a felony.
2. Although Georgia law prohibits prosecutors from impeaching a defendant based on pre-arrest silence, a trial court is not required to intervene sua sponte when the defendant makes no timely objection; the issue therefore was not available for appellate review.
3. Counsel performed deficiently by failing to object to the State's improper use of Thomas's pre-arrest silence, but the failure did not constitute ineffective assistance because Thomas could not establish a reasonable probability that the result would have been different.
4. Counsel's decision not to consult or present a defense firearms expert was a reasonable strategic decision and did not constitute deficient performance.

KEY QUOTATIONS

“a prosecutor may not comment on an accused's pre-arrest silence or failure to come forward voluntarily, even if he chooses to testify at trial” (at 424)

“The decision of how to deal with the presentation of an expert witness by the opposing side, including whether to present counter expert testimony, to rely upon cross-examination, to forego cross-examination and/or to forego development of certain expert opinion, is a matter of trial strategy which, if reasonable, cannot be the basis of a successful ineffective assistance of counsel claim.” (at 425)

FACTUAL BACKGROUND

Thomas spent several days at Charles Worthy's home during a drug binge. After a heated argument in which Worthy repeatedly told Thomas to leave, Thomas followed Worthy outside, drew a gun, and shot Worthy fatally as Worthy moved to close the door; a second shot wounded James Lester. Thomas admitted firing the gun but claimed self-defense and alternatively asserted that the shooting was accidental because the door struck his arm.

Eyewitnesses testified that Worthy was unarmed, no weapon was found near him, and firearms experts testified that the gun required six pounds of trigger force and had no defect that would cause it to fire without the trigger being pulled.

PROCEDURAL HISTORY

A Bibb County grand jury indicted Thomas for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony. A jury found him guilty on all charges, and the trial court sentenced him to life imprisonment for malice murder, twenty years for aggravated assault to run concurrently, and five years for firearm possession to run consecutively; the felony-murder count was vacated by operation of law. The trial court denied Thomas's amended motion for a new trial, including his ineffective-assistance claims, 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)
- Mallory v. State, 261 Ga. 625(5), 409 S.E.2d 839 (1991)
- Chapel v. State, 270 Ga. 151(4), 510 S.E.2d 802 (1998)
- Barnes v. State, 269 Ga. 345(12), 496 S.E.2d 674 (1998)
- Pearson v. State, 277 Ga. 813, 817(5c), 596 S.E.2d 582 (2004)
- Hudson v. State, 250 Ga. 479(4), 299 S.E.2d 531 (1983)
- Landers v. State, 270 Ga. 189, 190-191(2), 508 S.E.2d 637 (1998)
- Marable v. State, 247 Ga. 509, 510, 277 S.E.2d 52 (1981)
- Pruitt v. State, 282 Ga. 30, 34(4), 644 S.E.2d 837 (2007)
- Lampley v. State, 284 Ga. 37(2b), 663 S.E.2d 184 (2008)
- Jackson v. State, 282 Ga. 494(2), 651 S.E.2d 702 (2007)
- Moore v. State, 278 Ga. 397(2a), 603 S.E.2d 228 (2004)
- Wright v. State, 274 Ga. 730, 732(2b), 559 S.E.2d 437 (2002)
- Eason v. State, 283 Ga. 116(4), 657 S.E.2d 203 (2008)
- Smith v. State, 283 Ga. 237(2a), 657 S.E.2d 523 (2008)
- Wallace v. State, 272 Ga. 501(3)(b), 530 S.E.2d 721 (2000)
- Crane v. State, 281 Ga. 635, 637, 641 S.E.2d 795 (2007)

OPINION

BENHAM, J.

670 S.E.2d 421 (2008) THOMAS v. The STATE. No. S08A0830. Supreme Court of Georgia. November 17, 2008. *423 Michael S. Katz, Decatur, for Thomas. Howard Zachary Simms, Dist

Atty., Thurbert E. Baker, Atty. Gen., Sheila Elizabeth Gallow, Asst. Atty. Gen., for appellee. BENHAM, Justice. Charles Worthy was fatally shot at his home in Bibb County on January 3, 2005.[1] Appellant Lastarza Rodriguez Thomas had been at Worthy's home for three days on a drug binge leading up to the early morning hours of January 3, 2005.

That morning, the two had a heated argument, during which Worthy repeatedly told appellant to leave. Worthy went outside his duplex unit and appellant followed, drawing a gun from his waistband. James Lester, who was inside the duplex, yelled for Worthy to come back inside. Worthy went back into his home and, while Worthy was moving to close the door, appellant fatally shot Worthy and shot and wounded Lester.[2] Appellant then left the scene in his blue minivan.

Later that afternoon, the police issued a warrant and arrested appellant at his Baldwin County home where the murder weapon was recovered. At trial, although appellant testified he fired his gun because Worthy was armed, no gun was found on or near Worthy's body and four eyewitnesses testified Worthy was unarmed. Appellant admitted to pulling the trigger and to shooting at the victim; however, he testified that the shooting was accidental because the door to the duplex hit his arm.

Testimony elicited by the State from the investigating officer and appellant, as well as comments made at closing argument, revealed that, between the time appellant left the scene on the early morning of the shooting and later that afternoon when a warrant was served and he was arrested, appellant did not contact law enforcement or return to the scene to tell the authorities that the shooting was accidental.

The State also produced a firearms expert who testified that it would take six pounds of force to pull the gun's trigger and that there was no defect in the gun that would have caused it to discharge without the trigger being pulled.

The State's firearms expert, as well as the expert appellant presented at the motion for new trial hearing, further testified that there were no means to test the accidental circumstances described by appellant of being hit in the arm while holding the gun. At the trial's conclusion, the jury returned a guilty verdict. 1.

The evidence adduced at trial and summarized above was sufficient to authorize a rational trier of fact to find appellant guilty beyond a reasonable doubt of the malice murder of Worthy, the aggravated assault of *424 Lester, and possession of a firearm during the commission of a felony. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

2. Appellant concedes he did not object when the prosecution asked questions and made comments regarding his pre-arrest silence. Appellant contends on appeal, however, that the trial court erred when it failed to bar, sua sponte, these questions and comments by the State regarding his failure

to contact the police between the time of the shooting and his arrest to tell them there had been an accidental shooting.

Georgia law prohibits prosecutors from impeaching defendants based on their pre-arrest silence. *Mallory v. State*, 261 Ga. 625(5), 409 S.E.2d 839 (1991) (overruled on other grounds by *Chapel v. State*, 270 Ga. 151(4), 510 S.E.2d 802 (1998)).

Therefore, appellant is correct that the prosecutor's questions and comments concerning appellant's failure to contact the police and tell them he shot someone accidentally were impermissible. *Barnes v. State*, 269 Ga. 345(12), 496 S.E.2d 674 (1998); *Pearson v. State*, 277 Ga. 813, 817(5c), 596 S.E.2d 582 (2004) ("a prosecutor may not comment on an accused's pre-arrest silence or failure to come forward voluntarily, even if he chooses to testify at trial").

The trial court, however, was not required, absent a timely objection, to prohibit the prosecutor's questions and comments. *Hudson v. State*, 250 Ga. 479(4), 299 S.E.2d 531 (1983) (trial court need not interpose itself to stop prejudicial statements made by the prosecutor in the absence of a timely objection). Since appellant concedes there was no timely objection made to the prosecutor's questions and comments regarding his pre-arrest silence, he may not pursue the matter on appeal.

Id.; *Landers v. State*, 270 Ga. 189, 190-191(2), 508 S.E.2d 637 (1998); *Marable v. State*, 247 Ga. 509, 510, 277 S.E.2d 52 (1981). 3. Appellant claims his trial counsel was ineffective when he failed to object to testimony and comments concerning his pre-arrest silence and when counsel failed to consult or retain an expert at trial.

To prevail on a claim of ineffective assistance of trial counsel, appellant must show counsel's performance was deficient and that the deficient performance prejudiced him to the point that a reasonable probability exists that, but for counsel's errors, the outcome of the trial would have been different. A strong presumption exists that counsel's conduct falls within the broad range of professional conduct.

(Citation and punctuation omitted.) *Pruitt v. State*, 282 Ga. 30, 34(4), 644 S.E.2d 837 (2007). For the reasons below, we affirm the trial court's denial of a new trial based on this claim. (a) Appellant asserts his counsel was ineffective when he failed to object to the questions and comments concerning his pre-arrest silence.

Because the prosecutor's conduct violated *Mallory v. State*, *supra*, counsel's performance was deficient to the extent he did not object. *Lampley v. State*, 284 Ga. 37(2b), 663 S.E.2d 184 (2008). However, appellant was not prejudiced by trial counsel's deficient performance.

In light of the overwhelming evidence of guilt, appellant cannot show that had an objection been made and the questions and comments prohibited that there was a reasonable probability the outcome of the trial would have been any different. *Id.* at 39, 663 S.E.2d 184. See also *Jackson v.*

State, 282 Ga. 494(2), 651 S.E.2d 702 (2007) (appellant was not prejudiced by counsel's failure to object to comments concerning pre-arrest silence); *Moore v. State*, 278 Ga. 397(2a), 603 S.E.2d 228 (2004); *Pearson v. State*, supra, 277 Ga. at 817, 596 S.E.2d 582.

There was overwhelming evidence, including eyewitness accounts, that appellant shot the unarmed victim and then fled the scene. There was also evidence disproving beyond a reasonable doubt[3] appellant's defense of accident, including expert testimony that the gun could not be discharged without pulling the trigger and that the gun required six pounds of force on its trigger to discharge.

Eyewitness testimony *425 that Worthy was unarmed and the fact that no weapon was recovered from his person similarly disproved appellant's claim of self-defense. Accordingly, the trial court did not err in denying appellant's ineffective assistance of counsel claim on this basis. *Id.* (b) Appellant also argues that trial counsel was ineffective when he failed to consult or hire an expert witness to support his defense of accident.

At trial, appellant admitted to carrying a gun, pointing it at Worthy and pulling the trigger, but asserted the shooting was "unintentional" because the door to the duplex hit his arm purportedly causing him to fire the weapon.

The State presented a firearms expert who testified that it took six pounds of force to pull the trigger on appellant's gun and that there was no defect in the gun that would cause it to discharge without the trigger being pulled.

The trial transcript also reveals that the State's firearms expert testified that there were no means to test the accidental circumstances described by appellant of being hit in the arm while holding the gun. Appellant contends his trial counsel was ineffective by failing to consult or present any expert witnesses to counter the testimony of the State's firearms expert on the issue of an "accidental shooting" versus an "unintentional shooting."

"As a general rule, matters of reasonable trial strategy and tactics do not amount to ineffective assistance of counsel." *Wright v. State*, 274 Ga. 730, 732(2b), 559 S.E.2d 437 (2002). The decision of how to deal with the presentation of an expert witness by the opposing side, including whether to present counter expert testimony, to rely upon cross-examination, to forego cross-examination and/or to forego development of certain expert opinion, is a matter of trial strategy which, if reasonable, cannot be the basis of a successful ineffective assistance of counsel claim.

Eason v. State, 283 Ga. 116(4), 657 S.E.2d 203 (2008); *Smith v. State*, 283 Ga. 237(2a), 657 S.E.2d 523 (2008); *Wallace v. State*, 272 Ga. 501(3)(b), 530 S.E.2d 721 (2000). Here, trial counsel filed an unsuccessful motion in limine to exclude the State's expert testimony and otherwise relied upon cross-examination to challenge the State's expert. At the hearing for the motion for new trial, trial counsel clarified his strategy, testifying that he did not want to challenge the State's firearms

expert on the issue of the force necessary to pull the trigger because appellant had testified that he carried the gun in the waistband of his pants and it would not make sense to carry a weapon in that manner if it discharged with little force.

Also, at the hearing for the motion for new trial, appellant presented testimony from his own expert who agreed with the State's expert that there were no means to test for the "human" factor (i.e., the door hitting appellant's arm) in this case. Counsel's strategic decision to forego calling a defensive expert and to proceed with other tactics was reasonable and did not constitute deficient performance.

Id. Accordingly, the trial court did not err in finding against appellant on his ineffective assistance of counsel claim. Judgment affirmed. All the Justices concur. NOTES [1] On January 17, 2006, appellant was indicted by the Bibb County grand jury on charges of malice murder, felony murder, aggravated assault (of James Lester), and possession of a firearm during the commission of a felony.

On February 22, 2006, a jury found appellant guilty on all charges and the court sentenced him to life in prison for malice murder (felony murder count vacated by operation of law), twenty years for aggravated assault to run concurrently, and five years for possession of a firearm, to run consecutively. Appellant moved for a new trial on March 10, 2006 and, through new counsel, amended that motion on May 1, 2007.

After a hearing on the motion for new trial was conducted on May 1, 2007 and continued on July 11, 2007, the trial court denied the motion on August 30, 2007. A notice of appeal was filed on September 19, 2007, pursuant to which the appeal was docketed in this Court on January 29, 2008. It was submitted for decision on the briefs.

[2] Appellant fired a single shot and the bullet went through Worthy and lodged in Lester's knee.
[3] See *Crane v. State*, 281 Ga. 635, 637, 641 S.E.2d 795 (2007) (State must disprove justification defense beyond a reasonable doubt).