

SUPREME COURT OF GEORGIA

Sharpe v. State

291 Ga. 148 (2012) · Decided May 29, 2012

SUMMARY

The Georgia Supreme Court affirmed Theodore Fred Sharpe’s convictions for two counts of malice murder arising from a fatal house fire. The court rejected challenges to the sufficiency of the evidence, expert testimony concerning manner of death, exclusion of a 911 recording, jury instructions on arson, and the verdict-form charge. The court held that any instructional error was harmless or did not constitute plain error.

CASE DETAILS

COURT	Supreme Court of Georgia
WRITING FOR THE COURT	Thompson, Justice
JURISDICTION	Georgia
DECIDED	May 29, 2012
DISPOSITION	affirmed
PROCEDURAL POSTURE	Direct appeal from the denial of an amended motion for new trial following convictions for two counts of malice murder and sentences of two consecutive life terms.
STANDARD OF REVIEW	The sufficiency of the evidence was reviewed under whether a rational trier of fact could find guilt beyond a reasonable doubt. Evidentiary rulings, including the exclusion of the 911 recording, were reviewed for abuse of discretion. Jury-instruction claims were reviewed for plain error where properly asserted on appeal; the court asked whether the instruction was erroneous, obviously so, and likely to have affected the outcome.
PRECEDENTIAL VALUE	Published opinion of the Supreme Court of Georgia; precedential.
PARTIES	Theodore Fred Sharpe v. State of Georgia

TOPICS

- criminal procedure
- evidence
- hearsay
- jury instructions
- appellate procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support Sharpe's convictions for two counts of malice murder.
2. Whether the trial court erred by allowing the medical examiner to characterize the victims' manner of death as homicide.
3. Whether the medical examiner's testimony improperly expressed an opinion on an ultimate issue or bolstered the arson investigator's opinion.
4. Whether the trial court erred by excluding a 911 recording made by Sharpe as a self-serving declaration and inadmissible hearsay.
5. Whether the trial court improperly instructed the jury on first-degree arson by including statutory methods not alleged in the indictment.
6. Whether any error in the arson instruction constituted plain error affecting the outcome.
7. Whether the jury instructions adequately informed the jury that a not-guilty verdict could operate as a general acquittal of the murder charges.

HOLDINGS

1. The evidence was sufficient to enable a rational trier of fact to find Sharpe guilty beyond a reasonable doubt of the murders.
2. The trial court did not err in allowing the medical examiner to testify that the victims' manner of death was homicide.
3. The medical examiner did not improperly bolster the arson investigator's opinion merely by relying on information concerning the fire in forming his medical opinion.
4. Even if admitting the medical examiner's testimony had been error, any error was harmless.
5. The trial court did not abuse its discretion by excluding Sharpe's 911 call as a self-serving declaration and inadmissible hearsay.
6. Any error in instructing the jury on statutory methods of committing first-degree arson beyond the method alleged in the indictment did not require reversal because the indictment was provided to the jury, the court instructed that the State had to prove every material allegation and essential element beyond a reasonable doubt, and the record did not show that the jury convicted Sharpe of an unindicted offense.
7. The jury charge adequately informed the jury concerning the not-guilty option and did not constitute plain error requiring reversal.

KEY QUOTATIONS

“In criminal cases, the opinions of experts on any question of science, skill, trade, or like questions shall always be admissible; and such opinions maybe given on the facts as proved by other witnesses.” (150)

“Where the indictment charges a defendant committed an offense by one method, it is reversible error for the court to instruct the jury that the offense could be committed by other statutory methods with no limiting instruction.” (151)

“The defect is cured, however, where... the court provides the jury with the indictment and instructs jurors that the burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt.” (151)

FACTUAL BACKGROUND

On June 9, 2008, Herman Cadle and Stillson Lawrence died in a fire that swept through their residence while they slept. Sharpe lived with the victims and was seen arguing with Celisa Hamilton immediately before the fire; a witness saw Sharpe leave with a flashlight, approach an area where multiple gas cans were later found, return with something in his hand, and stand with Hamilton near the front doorway before flames erupted. Sharpe and Hamilton fled, and Sharpe later returned and stated that he was glad one of the victims was dead. Investigators found evidence of an accelerant, and an arson expert concluded that the fire was intentionally set.

PROCEDURAL HISTORY

A Richmond County grand jury indicted Sharpe and Celisa Heard Hamilton for two counts of malice murder and two counts of felony murder predicated on arson. Sharpe was tried separately, and a jury found him guilty on October 29, 2008. The trial court imposed two consecutive life sentences for malice murder and vacated the felony-murder counts. After his motion for new trial was amended and denied, Sharpe appealed. The Supreme Court of Georgia reviewed the case on briefs and affirmed.

DISPOSITION

affirmed

CASES CITED

- Jackson v. Virginia, 443 U.S. 307 (1979)
- Maxwell v. State, 262 Ga. 73, 76, 414 S.E.2d 470 (1992)
- Wall v. State, 269 Ga. 506, 500 S.E.2d 904 (1998)
- Willis v. State, 274 Ga. 699, 558 S.E.2d 393 (2002)
- Suits v. State, 270 Ga. 362, 365-366, 507 S.E.2d 751 (1998)
- Parker v. State, 276 Ga. 598, 581 S.E.2d 7 (2003)
- Bonilla v. State, 289 Ga. 862, 863, 717 S.E.2d 166 (2011)
- Hunley v. State, 227 Ga. App. 234, 235, 488 S.E.2d 716 (1997)
- Stanford v. State, 236 Ga. App. 597, 512 S.E.2d 708 (1999)
- Mikell v. State, 286 Ga. 722, 724, 690 S.E.2d 858 (2010)
- State v. Kelly, 290 Ga. 29, 33, 718 S.E.2d 232 (2011)
- Jones v. State, 289 Ga. 145, 148, 710 S.E.2d 127 (2011)

- *Malcolm v. State*, 263 Ga. 369, 434 S.E.2d 479 (1993)

OPINION

THOMPSON, J.

Thompson, Justice. Appellant Theodore Fred Sharpe was convicted of malice murder in connection with the deaths of Herman “Rusty” Cadle and Stillson “Larry” Lawrence and was sentenced to two consecutive life terms. 1 Appellant’s amended motion for new trial was denied, and he now appeals that decision.

On appeal, appellant challenges the sufficiency of the evidence and alleges trial court error in allowing an expert witness to express an opinion regarding an ultimate issue in the case, *149in excluding exculpatory evidence, in improperly charging the jury on the offense of arson, and in failing to give a complete charge on the form of the verdict.

For the reasons that follow, we affirm. 1. Viewed in a light most favorable to the verdict, the evidence shows that Cadle and Lawrence died in a fire that swept through their residence while they slept on the night of June 9, 2008. Appellant, who lived with the victims, and Celisa Hamilton were seen arguing at the residence immediately before the fire. A witness heard Hamilton yell that she was going to kill somebody and saw appellant exit through the front door with a flashlight and walk over to an area on the side of the residence where law enforcement later discovered multiple gas cans.

Appellant reentered the residence with something in his hand and then stood in the front doorway with Hamilton. The witness observed them “throw something” followed by the eruption of flames in the front portion of the house at which time appellant and Hamilton fled. Appellant later returned to the scene of the fire as firefighters were trying to revive one of the victims and commented that he was glad one of the victims was dead.

A crime scene investigator and an arson investigation expert both concluded that an accelerant had been used, and the arson expert determined that the fire was intentionally set. Appellant contends that the actual cause of the arson was never determined and all of the evidence against him was circumstantial. Contrary to appellant’s assertions, however, there was substantial evidence linking him to the murders, and we conclude the evidence was sufficient to enable a rational trier of fact to find him guilty beyond a reasonable doubt.

Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979). 2. Next, appellant argues that the trial court erred in allowing the medical examiner to characterize the manner of death for the two victims as homicides.² He contends that this testimony constituted both an expression of opinion as to an ultimate issue in the case and an improper bolstering of the arson investigator’s opinion.

We disagree. Generally, witnesses are prohibited from expressing opinions on an ultimate issue where jurors can come to their own conclusion from *150 factors within their understanding. *Maxwell v. State*, 262 Ga. 73, 76 (414 SE2d 470) (1992), overruled on other grounds, *Wall v. State*, 269 Ga. 506 (500 SE2d 904) (1998).

However, “[i]n criminal cases, the opinions of experts on any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses.” OCGA § 24-9-67.

Here, the medical examiner based his opinions on his specific expertise and training as a pathologist and on evidence presented to him by law enforcement regarding the fire. Testifying that it was part of his job to determine both the cause and manner of death, the witness clarified that his classification of the manner of death as a homicide was limited to the medical aspect for the autopsy report and was not a legal charge.

As the medical examiner’s testimony regarding the manner of death did not improperly invade the province of the jury on the ultimate issue of whether the deaths were intentional killings or accidents, the trial court did not err in allowing him to explain his classification. See *Willis v. State*, 274 Ga. 699 (558 SE2d 393) (2002). Nor do we agree with appellant’s unsupported assertion that simply by using the arson investigator’s testimony as a basis for his conclusion, the medical examiner improperly “bolstered” the investigator’s opinion.

Finally, we conclude that even had the trial court erred in permitting this testimony, such error was harmless where the plain and overwhelming inference to be drawn from the evidence presented at trial was that the fire was intentionally set and there was no evidence presented to the contrary. See *Suits v. State*, 270 Ga. 362, 365-366 (507 SE2d 751) (1998).

3. Appellant additionally complains that the trial court erroneously excluded exculpatory evidence when it refused to admit a recording of a 911 call appellant made to report the fire. However, appellant chose not to testify at trial and was not subject to cross-examination, thus the trial court did not err in holding that the 911 call was a self-serving declaration and inadmissible hearsay.

Parker v. State, 276 Ga. 598 (581 SE2d 7) (2003). While a defendant is allowed to declare his innocence in open court, he is not allowed to avoid this opportunity by “pre-trial declarations of innocence.” *Id.* Although appellant argues that the 911 call could have been admitted under the *res gestae* exception to hearsay pursuant to OCGA § 24-3-3, a determination of admissibility under this exception is left to the trial court’s sound discretion.

See *Bonilla v. State*, 289 Ga. 862, 863 (717 SE2d 166) (2011). We find no abuse of discretion and hold that this enumeration lacks merit. 4. Appellant also argues that the trial court improperly charged the jury on the offense of arson in the first degree by charging *151 provisions of the arson statute not alleged in the indictment. He asserts that although his indictment only charged him with

a violation of OCGA § 16-7-60 (a) (1), the trial court's jury instructions erroneously included charges for both OCGA § 16-7-60 (a) (1) and (a) (5).³ Further, appellant claims there is at least a modicum of evidence that the jury convicted him of a crime not in the indictment.

See *Hunley v. State*, 227 Ga. App. 234, 235 (488 SE2d 716) (1997); but see *Stanford v. State*, 236 Ga. App. 597 (512 SE2d 708) (1999). We disagree. Where the indictment charges a defendant committed an offense by one method, it is reversible error for the court to instruct the jury that the offense could be committed by other statutory methods with no limiting instruction.

[Cit.] The defect is cured, however, where... the court provides the jury with the indictment and instructs jurors that the burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt. [Cits.] *Mikell v. State*, 286 Ga. 722, 724 (690 SE2d 858) (2010).

We find no evidence that the jury convicted appellant of a crime not in the indictment and, as the trial court read the indictment to the jury, properly instructed the jury as to the burden of proof, and sent the actual indictment out with the jury during deliberations, appellant's claim lacks merit. Nor does this claim survive a plain error analysis. *State v. Kelly*, 290 Ga. 29 (718 SE2d 232) (2011) (appellate review for plain error is required whenever appealing party properly asserts an error in jury instructions).

In conducting such a review, “ ‘the proper inquiry is whether the instruction was erroneous, whether it was obviously so, and whether it likely affected the outcome of the proceedings.’ [Cit.]” (Punctuation omitted.) *Id.* at 33.

The jury convicted appellant of two *152counts of malice murder based on the same evidence that supported the two counts of felony murder. The court sentenced appellant on the two counts of malice murder and vacated the felony murder charges.

As the court properly charged the jury on malice murder consistent with the charging language of the indictment, we conclude that any error as to the felony arson charge did not affect the outcome of the proceedings. Decided May 29, 2012. Peter D. Johnson, for appellant. R. Ashley Wright, District Attorney, Samuel S. Olens, Attorney General, Paula K. Smith, Senior Assistant Attorney General, Clint C. Malcolm, Assistant Attorney General, for appellee.

5. Finally, we reject appellant's claim that the trial court's charge to the jury failed to inform the jurors that the “not guilty” option could operate as a general acquittal of the murder charges. Not only were the trial court's instructions not deficient in the manner urged by appellant, see *Jones v. State*, 289 Ga. 145, 148 (710 SE2d 127) (2011), but we find no plain error to require a reversal.

See *Kelly*, *supra*. Judgment affirmed. All the Justices concur. The crimes occurred on June 9, 2008. A Richmond County grand jury returned an indictment charging appellant and Celisa Heard

Hamilton with two counts of malice murder and two counts of felony murder while in the commission of arson. Appellant filed a motion to sever and was tried separately from Hamilton on October 27, 2008.

On October 29, 2008, a jury found appellant guilty as charged. He was sentenced on November 12, 2008 to two consecutive terms of life imprisonment for malice murder and the remaining counts of felony murder were vacated under *Malcolm v. State*, 263 Ga. 369 (434 SE2d 479) (1993). Appellant filed a motion for new trial on November 13, 2008, which was amended on July 21, 2011, and denied on September 26, 2011.

A notice of appeal was filed on September 28, 2011. The appeal was docketed to the April 2012 term of this Court and was submitted for a decision on briefs. The medical examiner testified that both victims died as the result of smoke, soot, and super heated gas inhalation and further opined that both died as a result of a homicide. He explained, “[T]here are five manners of death.

There’s homicide, suicide, accident, undetermined and natural death. What I do is I try to determine which of those classifies for each death, in other words, cause of death and manner of death.... When I use manner of death... I use that in the medical sense for an autopsy report.” Further clarifying, he stated, “I don’t decide whether or not it’s justifiable or not, but it’s still a homicide.” OCGA § 16-7-60 provides in pertinent part: (a) A person commits the offense of arson in the first degree when, by means of fire or explosive, he or she knowingly damages or knowingly causes, aids, abets, advises, encourages, hires, counsels, or procures another to damage: (1) Any dwelling house of another without his or her consent or in which another has a security interest, including but not limited to a mortgage, a lien, or a conveyance to secure debt, without the consent of both, whether it is occupied, unoccupied, or vacant; (5) Any building, vehicle, railroad car, watercraft, aircraft, or other structure under such circumstances that it is reasonably foreseeable that human life might be endangered.