

*State of Tennessee v. Lajuan Harbison*

No. E2015-00700-SC-R11-CD

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LaJuan Harbison, the defendant, was indicted by a Knox County grand jury on four counts of attempted first-degree murder and four counts of employing a firearm during the commission of a dangerous felony.<sup>1</sup> These charges arose out of a shooting incident near the Austin-East high school in Knoxville. In the same indictment, the grand jury charged Arterious North with four counts of attempted first-degree murder and four counts of employing a firearm during the commission of a dangerous felony, and Laquinton Brown and Carlos Campbell with three counts of attempted first-degree murder, three counts of employing a firearm during the commission of a dangerous felony, two counts of attempted especially aggravated robbery, and two counts of attempted aggravated robbery. On Sept. 7, 2012, around 4:30 p.m., the Defendant was driving toward Austin-East high school when he noticed another car had pulled over and its occupants were accosting a group of students standing on the side walk. Campbell was driving the car, Brown was a front-seat passenger, with two others in the back seat of the car. Brown stepped out of the car to approach the students and asked which one of them “had thrown up a gang sign (using a hand gesture).” With the butt of his hand gun showing, Brown ordered the students to empty their pockets.<sup>2</sup>

Witnesses, including an Austin-East high school teacher driving a car, her daughter riding as a passenger, and a Knoxville Area Transit bus driver, testified that they thought the occupants

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<sup>1</sup> *State v. Harbison*, 539 S.W.3d 149, 154 (Tenn. 2018).

<sup>2</sup> *Id.*

of the Campbell car were robbing the students, who raised their hands and emptied their pockets.<sup>3</sup> The Defendant stopped his car, and he and North fired hand guns at the Campbell car. Brown pulled out a gun from Campbell's car, and along with passengers in that car, returned fire. After a brief exchange of gun fire, the occupants reentered their respective cars and sped away. During the altercation, a gun fired by a passenger in the Defendant's car seriously wounded one of the by-stander students.<sup>4</sup>

The trial court granted Campbell's and Brown's motions for acquittal on one charge of attempted especially aggravated robbery of minor L.P. (by violence) and one charge of attempted aggravated robbery of minor Q.T. (by violence). The trial court partially granted Campbell's and Brown's motions for acquittal on one charge of attempted especially aggravated robbery of L.P. (by putting in fear) and one charge of attempted aggravated robbery of Q.T. (by violence) and reduced the charges to two counts of aggravated assault. The basis for the trial court's action was the lack of proof that Brown intended to take anything from L.P. or Q.T.<sup>5</sup>

A jury convicted the Defendant of four counts of attempted voluntary manslaughter and four counts of employing a firearm during the commission of a dangerous felony.<sup>6</sup> The Court of Criminal Appeals reversed the convictions and remanded for a new trial, holding that the trial court erred in denying the Defendant's request for a separate trial, stating that his multiple convictions for employing a firearm during the commission of a dangerous felony violated the prohibition against double jeopardy, and that the evidence was insufficient to support one of the

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<sup>3</sup> *Id.* at 154-55.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 154, Note 3.

<sup>6</sup> *Id.* at 157.

counts of attempted voluntary manslaughter and employment of a firearm during the commission of a dangerous felony.<sup>7</sup>

The Tennessee Supreme Court granted the State's application for permission to appeal to determine (1) whether the trial court properly exercised its discretion by denying the Defendant's motion for severance; (2) whether the Defendant waived the double jeopardy issue; and if not, (3) whether the Defendant's convictions for employing a firearm during the commission of a dangerous felony violate the prohibition against double jeopardy when he used one firearm but was convicted of multiple dangerous felonies against different victims.<sup>8</sup>

The Defendant, who was only aged 18 at the time of the offense, previously attended Austin-East high school and personally knew minors Q.T. and L.P. Just before the shooting started, the Defendant stopped his vehicle near Austin-East High School after seeing an approaching school bus in the opposite lane extend its stop sign. When the Defendant saw L.P. and Q.T. hold up their hands, the Defendant believed Brown was robbing them. As Brown stepped back towards Campbell's vehicle, the Defendant saw Brown draw a handgun and fire a shot. The Defendant pulled his gun and fired it twice into the air. The Defendant claimed he fired his gun only to protect L.P. and Q.T. and to prevent Brown from robbing them. He said he did not intend to harm anyone. After the Defendant fired into the air, he heard "shots coming up out of - from everywhere." The Defendant, North, and other passengers began firing their weapons. As the Defendant drove away, he continued to hear gunfire coming from behind him.<sup>9</sup>

The Defendant argued that the trial court should have granted a severance because of the overt hostility between him and two of his co-defendants and courtroom spectators, the mutually

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<sup>7</sup> *Id.* at 157-58.

<sup>8</sup> *Id.* at 158.

<sup>9</sup> *Id.* at 156.

antagonistic defenses, and his inability to present his defense.<sup>10</sup> Second, the Defendant argued that the trial court's denial of a severance resulted in the admission of "lurid testimony and videos about guns, unindicted bad actors, and other crimes unrelated to the Defendant and irrelevant to his charges."<sup>11</sup> Further, the Defendant argued that a severance was necessary to avoid prejudice from evidence that would not have been admitted had the Defendant's trial been severed from his co-defendants.<sup>12</sup>

The Tennessee Supreme Court held that the trial court did not abuse its discretion in denying the Defendant's request for a separate trial.<sup>13</sup> In Tennessee, two or more defendants may be charged in a single indictment when conspiracy is not charged and all of the defendants are not charged in each count, if the offenses charged were part of a common scheme or plan or were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.<sup>14</sup> A defendant may seek a severance under Tenn. R. Crim. P. 14(c)(2), which requires a trial court to grant the request if severance is found to be appropriate to promote a fair determination of guilt or innocence of one or more defendants.

When two or more defendants are charged in the same indictment, evidence that is not necessarily applicable to another defendant may be admissible against one or more defendants. A defendant is not entitled to a separate trial merely because damaging proof is introduced against another defendant.<sup>15</sup> Hostility between defendants, attempt to cast blame on each other, finger-pointing, and tattling do not necessarily require a severance. Potential hostility among

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<sup>10</sup> *Id.* at 161.

<sup>11</sup> *Id.* at 162.

<sup>12</sup> *Id.* at 163.

<sup>13</sup> *Id.* at 164.

<sup>14</sup> Tenn. R. Crim. P. 8(c).

<sup>15</sup> *State v. Harbison*, 539 S.W.3d 149, 159.

codefendants exists when an indictment charges each co-defendant as a perpetrator of offenses against other codefendants. Mutually antagonistic defenses among codefendants may be the basis for granting a severance in some circumstances but are not *per se* prejudicial.<sup>16</sup> A severance should not be granted simply because there is a disparity in the evidence against the defendants, or a speculative risk of a spill-over effect from a codefendant's prior bad acts.<sup>17</sup>

The court also addressed whether the Defendant preserved a challenge based on double jeopardy to his multiple convictions for employing a firearm during the commission of a dangerous felony by raising the issue in the trial court and the Court of Criminal Appeals. The State argued that the Defendant waived any challenge by not raising the issue in his motion for new trial and appellate brief.<sup>18</sup>

In deciding whether a party has waived an issue on appeal, an appellate court should carefully review the record to determine whether a party is raising an issue for the first time on appeal. A party does not waive an issue by phrasing it differently in the trial court than on appeal.<sup>19</sup> The phrase, *unit of prosecution*, is uniquely associated with claims of error based on double jeopardy.<sup>20</sup> Tennessee recognizes two types of single prosecution, multiple punishment claims: multiple description claims and unit-of-prosecution claims. A multiple description claim is one in which a defendant convicted of multiple criminal offenses under different statutes alleges that the convictions result in double jeopardy because the statutes punish the same

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<sup>16</sup> *Id.* at 161.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 164.

<sup>19</sup> *Id.* at 165. *Fahrner v. SW Mfg., Inc.*, 48 S.W.3d 141, 143 n.1 (Tenn. 2001) (noting that "the failure to use the right label does not result in a waiver").

<sup>20</sup> *State v. Harbison*, 539 S.W.3d 149, 165. *See Sanabria v. United States*, 437 U.S. 54, 69-70 (1978); *State v. Itzol-Deleon*, 537 S.W.3d 434 (Tenn. 2017).

offense. A unit-of-prosecution claim arises when a defendant convicted of multiple violations of the same statute asserts that the multiple convictions are for the same offense.<sup>21</sup>

At trial, the Defendant filed a motion for a new trial and two amended motions. The Supreme Court interpreted the Defendant's argument to mean that the Defendant was claiming that he was overcharged and convicted of multiple violations of Tenn. Code Ann. § 39-17-1324 based on a single act of employing one firearm. Although not well-stated, the disputed issue was whether the proper unit of prosecution was the act of employing the firearm or the act of committing the underlying dangerous felony. The Defendant focused on his use of a single weapon, while the State emphasized the multiple underlying dangerous felonies. Whether the Defendant waived the issue of double jeopardy was a close question given his failure to use the phrase "double jeopardy" or "unit of prosecution" in the trial court. The Court held the Defendant had not waived the issue of double jeopardy on appeal.<sup>22</sup>

Tenn. Code Ann. § 39-17-1324(b) makes it a criminal offense to employ a firearm during the: (1) commission of a dangerous felony; or (2) attempt to commit a dangerous felony. A "dangerous felony" is defined to include numerous offenses, including attempt to commit first-degree murder and attempt to commit voluntary manslaughter.<sup>23</sup> A violation of § 39-17-1324(b) is a specific and separate offense, which shall be pleaded in a separate count of an indictment or presentment and tried before the same jury and at the same time as the dangerous felony.<sup>24</sup> Any sentence imposed for violation of § 39-17-1324(b) must be served consecutive to any other sentence imposed for the conviction of the underlying dangerous felony.<sup>25</sup>

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<sup>21</sup> *State v. Harbison*, 539 S.W.3d 149, 167-68.

<sup>22</sup> *Id.* at 166.

<sup>23</sup> Tenn. Code Ann. § 39-17-1324(i)(1).

<sup>24</sup> Tenn. Code Ann. § 39-17-1324(d).

<sup>25</sup> Tenn. Code Ann. § 39-17-1324(e)(1).

The Tennessee Legislature intended the unit of prosecution for Tenn. Code Ann. § 39-17-1324 to be each act of employing a firearm during the commission of or attempt to commit a dangerous felony.<sup>26</sup> The Tennessee Supreme Court held that the Defendant's multiple convictions for employment of a firearm during the commission of a dangerous felony do not violate the prohibition against double jeopardy. The Supreme Court reversed the judgment of the Court of Criminal Appeals, reinstated the Defendant's three convictions for attempted voluntary manslaughter and three convictions for employment of a firearm during the commission of a dangerous felony, and remanded the case back to the trial court for resentencing and corrected judgments.

The Court's decision will make it more difficult for defendants to obtain separate trials even when evidence of one defendant's crimes may be irrelevant to the charges against another defendant. The Court also clarified that double jeopardy does not bar Tenn. Code Ann. § 39-17-1324 from applying to using a firearm in each instance of a dangerous felony, which in this case was four attempted voluntary manslaughters.

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<sup>26</sup> *State v. Harbison*, 539 S.W.3d 149, 168.