People v. Elam

541 P.2d 1260 (1975) | Cited 0 times | Colorado Court of Appeals | August 19, 1975

PIERCE, Judge.

Defendant was charged as a principal and convicted of first degree assault, in violation of 1971 Perm.Supp., C.R.S.1963, 40-3-202[1], and was sentenced to serve 18 to 25 years in the state penitentiary. He appeals from both the judgment and the sentence. We affirm.

The conviction arose out of an incident in which the victim was shot while standing in front of his home. The shots were fired from a car parked on the street. Shortly thereafter, the victim identified defendant as having been the driver of the automobile, and stated to police that he believed the car to be one owned by defendant's mother-in-law. At the trial the victim testified that he had been shot a total of five times, once while lying wounded in the street, and he identified defendant as having been the driver of the car, but on cross-examination admitted to having seen silhouettes of at least two other persons in the car with the defendant. He was unable to state with any certainty the precise location within the vehicle from which the shots had been fired.

The defendant offered only two witnesses in his defense, both of whose testimony was directed solely to putting into question the victim's identification of the ownership of the automobile involved in the shooting. The defendant did not testify.

The Judgment

Defendant first alleges as error the failure of the trial court to submit to the jury an instruction on assault in the second degree as well as the first degree instruction given. Noting that the specific intent to cause "serious bodily injury" to another person by means of a deadly weapon is necessary to support a conviction for assault in the first degree, defendant argues that the evidence did not conclusively establish the presence of such intent on his part. Thus, he contends that an instruction on the lesser included offense of assault in the second degree with crime requires only an intent to cause "bodily injury," should have been submitted to the jury as well as the instruction on assault in the first degree. See § 18-3-203, C.R.S.1973. The parties do not dispute that second degree assault is a lesser included offense of first degree assault.

The apparent essence of his argument is that because of the possibility that the actual shots were fired by some other occupant of the automobile, the evidence does not compel a finding of the specific intent to inflict "serious bodily injury" on the part of the defendant, but could also support a determination by the jury that he possessed only the intent to do "bodily injury." We reject this

contention.

Where defendant requests an instruction on a lesser included offense, the trial court must submit such instruction to the jury if it is warranted by the evidence, People v. Reed, 180 Colo. 16, 502 P.2d 952, and if there is a rational basis for acquittal on the greater offense and conviction on the lesser. Section 18-1-408(6), C.R.S. 1973; see also Smith v. People, 1 Colo. 121. Even where the lesser offense is not included in the greater, the defendant is entitled to an instruction on the lesser offense where he requests such instruction and it is warranted by the evidence. People v. Rivera, Colo., 525 P.2d 431.

Although the defendant contends that the evidence did not show that he personally had the requisite intent, the circumstances not only support, but mandate the inference of such intent on the part of whoever fired the shots from the vehicle which defendant was identified as driving. Here, an occupant, or occupants, of that automobile shot a total of five bullets into the victim, under circumstances which compel an inference of an intent to inflect "serious bodily injury."

Since there is no evidence in the record that defendant's role in the assault was in any way limited, defendant is either guilty as a principal, or not at all. Section 18-1-603, C.R.S.1973, and see People v. Thompson, Colo., 529 P.2d 1314. Therefore, it was not error for the trial court to refuse to submit an instruction on second degree assault to the jury.

The Sentence

Defendant also contends that the trial court abused its discretion in sentencing him to 18 to 25 years in the state penitentiary. Jurisdiction for our review of such sentence is provided by § 18-1-409(1), C.R.S.1973; however, in the absence of a clear showing that the sentence imposed is excessive, or that the trial court otherwise abused its discretion, we may not modify the sentence there imposed. People v. Duran, Colo., 533 P.2d 1116.

The sentence imposed is within the range of 5 years to 40 years provided by statute, § 18-1-105(1), C.R.S.1973, and we find no support for the argument that the sentence is excessive. This is a very serious offense, and the circumstances of the particular assault indicate that it was not perpetrated impulsively, but was calmly and cooly planned. It is fortunate indeed that this was not a homicide. The serious and aggravated nature of the offense committed, coupled with the existence of a prior criminal record on the part of this defendant, which we need not detail here, are strong factors supportive of the trial court's judgment. Upon careful review of the nature of this offense, the character of the defendant and his chances for rehabilitation, and the necessity for protection of the public, see People v. Duran, supra, we conclude that the determination of the trial court should not be disturbed.

The judgment and sentence are affirmed.

VAN CISE and STERNBERG, JJ., concur.

1. Now § 18-3-202, C.R.S.1973.