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# ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2013-2014

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CR-10-1892

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**Tawuan Townes**

**v.**

**State of Alabama**

**Appeal from Houston Circuit Court  
(CC-08-1656)**

WINDOM, Presiding Judge.

Tawuan Townes appeals his conviction for capital murder and his sentence of death. Townes was convicted of murder made capital for intentionally killing Christopher Woods during the course of a burglary. See § 13A-5-40(a)(4), Ala.

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Code 1975. The jury, by a vote of 10-2, recommended that Townes be sentenced to death. The circuit court accepted the jury's recommendation and sentenced Townes to death.

Townes had plans to rob Woods, a known drug dealer. Woods lived in a house in Dothan with his girlfriend, India Starks. On November 13, 2008, Townes and Cornelius Benton drove to Woods's house. Townes was armed with a .22 caliber rifle, and Benton was armed with a .380 caliber pistol belonging to Townes's brother. Townes and Benton wore dark clothing and obscured their faces to conceal their identities. Townes was also wearing a toboggan cap.

Around 2 p.m., Starks heard Townes and Benton bang on the door, and, as Woods looked outside, they kicked the door in and entered the house. Woods said, "Please don't do this. ... Man, don't do this. Please don't do this." (R. 437.) Woods backed away and sat in a chair, at which point the men "told him to shut up and just tell [us] where it's at." (R. 437.) As Woods begged for his life and Starks's life, Benton repeatedly hit him in the face to force Woods to give them money. Townes shot Woods in the chest with the .22 caliber rifle and Benton continued to hit Woods. Benton then shot

Woods in the leg, after which he resumed hitting Woods in the face and demanding money. Starks heard Woods screaming and begging, "Man, don't do this." (R. 450.)

After Woods was shot the second time, Starks ran to a neighbor's house to telephone emergency 911. As Starks was escaping, one of the men asked, "Where you going, bitch?" (R. 451.) While Starks was on the telephone with emergency 911, she saw the two men leave. Starks went back to Woods's house to attend to Woods. According to Starks, the room where the attack occurred was ransacked, Woods was slumped over in the chair, and her cellular telephone was missing. Woods died as a result of the bullet wound to the chest.

When Townes was arrested, he was in possession of the SIM card from Starks's cellular telephone.<sup>1</sup> After Townes was arrested, he gave a statement to police. In his statement, Townes admitted that he and Benton went to Woods's house to rob him because Townes needed money. Townes, however, adamantly denied intending to kill Woods. Townes stated that

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<sup>1</sup>"A SIM, or security identity module, card is the device within a phone that contains the unique information identifying a particular subscriber." United States v. Moreno, 701 F.3d 64, 71 n.9 (2d Cir. 2012) (internal quotation marks omitted).

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he intended to scare Woods when he shot the .22 caliber rifle and that the rifle used only "little bullets." (C. 500.)

Townes's defense at trial centered on his alleged lack of intent to kill. In his opening statement, defense counsel argued that Townes had fired the gun to scare Woods but that there was "[n]o specific intent to kill." (R. 397.) To counter Townes's defense, the State asked numerous witnesses "what part of your body tells you to pull the trigger," to which the witnesses responded, "[y]our brain." (R. 536.) Through these questions, the State sought to raise the inference that, because Townes's brain controlled his pulling the trigger of the gun, the fact that Townes pulled the trigger of the gun established that he intended to kill Woods.

During closing arguments, defense counsel again argued that Townes shot Woods to scare him. According to defense counsel, Townes intended to rob a drug dealer who, because of his occupation, would not call the police to report a robbery. Defense counsel then argued that Woods refused to give Townes and Benton money, so Townes fired a shot to scare him. Defense counsel argued that Townes did not have the intent to

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kill; therefore, he was guilty of felony murder as opposed to capital murder.

In response, the State argued:

"[Defense counsel] says [the State] can't prove intent. Well, once again, just -- it's simple. What part of your body tells you to pull the trigger? It's the brain."

(R. 786.)

After closing arguments, the circuit court instructed the jury on the elements of capital murder. Regarding specific intent, the court instructed the jury as follows:

"A specific intent to kill is an essential ingredient of capital murder as charged in this indictment, and may be inferred from the character of an assault, the use of a deadly weapon, or other attendant circumstances. Such intent must be inferred if the act was done deliberately and death was reasonably to be apprehended or expected as a natural and probable consequence of the act. But the facts upon which such inference is drawn must be proved so clearly as to leave no reasonable doubt in the minds of the jury that on the occasion complained of, the defendant intended to kill Christopher Woods."

(R. 824.) After the circuit court gave the jury its instructions, the jury convicted Townes of murder made capital because it was committed during the course of a burglary.

On appeal, Townes argues, among other things, that the circuit court's jury instructions regarding intent erroneously

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created a mandatory presumption on the issue of specific intent to kill, which alleviated the State's burden to prove Townes's specific intent. Specifically, Townes argues that the instruction that "intent must be inferred if the act was done deliberately and death was reasonably to be apprehended or expected as a natural and probable consequence of the act," id., created a mandatory presumption on the issue of specific intent, relieved the State of its burden to prove intent, and violated Townes's right to due process. Townes did not raise this argument below; therefore, this issue will be reviewed for plain error only. Rule 45A, Ala. R. App. P.

Rule 45A states:

"In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."

The Alabama Supreme Court has explained:

"'Plain error is defined as error that has 'adversely affected the substantial right of the appellant.' The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used

in reviewing an issue that was properly raised in the trial court or on appeal. As the United States Supreme Court stated in United States v. Young, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985), the plain-error doctrine applies only if the error is 'particularly egregious' and if it 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' See Ex parte Price, 725 So. 2d 1063 (Ala. 1998), cert. denied, 526 U.S. 1133, 119 S. Ct. 1809, 143 L. Ed. 2d 1012 (1999)."

"Ex parte Brown, 11 So. 3d 933, 935-36 (Ala. 2008) (quoting Hall v. State, 820 So. 2d 113, 121-22 (Ala. Crim. App. 1999))."

Ex parte Billups, 86 So. 3d 1079, 1083-84 (Ala. 2010).

Further, it is well settled that "[t]he Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" Williams v. State, 710 So. 2d 1276, 1334 (Ala. Crim. App. 1996) (quoting In re Winship, 397 U.S. 358, 364 (1970)). Thus, in a prosecution for capital murder, the State bears the burden of proving beyond a reasonable doubt that the defendant had the specific intent to kill. See Heard v.

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State, 999 So. 2d 992, 1005 (Ala. 2007) ("[A] defendant must have the intent to kill in order to be found guilty of a capital offense."); Ex parte Woodall, 730 So. 2d 652, 657 (Ala. 1998) ("No defendant can be found guilty of a capital offense unless he had an intent to kill . . . ." (citing Beck v. State, 396 So. 2d 645, 662 (Ala. 1981) and Enmund v. Florida, 458 U.S. 782, 797 (1982))); § 13A-5-40(b), Ala. Code 1975.

"In Sandstrom [v. Montana], 442 U.S. 510 (1979)], the Supreme Court [of the United States] held that [jury] instructions which a reasonable jury could interpret as an "irrebuttable direction by the court to find intent" violate a defendant's due process rights.' Sandstrom, 442 U.S. at 517, 99 S. Ct. at 2455-56." Blackmon v. State, 7 So. 3d 397, 435 (Ala. Crim. App. 2005) (quoting Hart v. State, 612 So. 2d 520, 529 (Ala. Crim. App. 1992)). According to the Supreme Court, the principle that a defendant cannot, consistent with the Due Process Clause of the Fourteenth Amendment, be convicted unless the State proves beyond a reasonable doubt each element of the crime "prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a



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reasonable doubt of every essential element of a crime." Francis v. Franklin, 471 U.S. 307, 313 (1985) (citing Sandstrom, 442 U.S. at 520-24).

"The threshold inquiry in ascertaining the constitutional analysis applicable to [a jury instruction relating to presumptions] is to determine the nature of the presumption it describes." Francis, 471 U.S. at 313-14 (quoting Sandstrom, 442 U.S. at 514). Specifically, this "[C]ourt must determine whether the challenged portion of the instruction creates a mandatory presumption or merely a permissive inference." Francis, 471 U.S. at 313-14 (internal citations omitted). The Supreme Court of the United States has explained:

"A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion."

Francis, 471 U.S. at 314 (footnote omitted). The distinction is critical. Mandatory presumptions "violate the Due Process Clause [because] they relieve the State of the burden of persuasion on an element of an offense." Id. (citations omitted). "A permissive inference does not relieve the State

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of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved." Id. While a mandatory presumption relating to an element of the offense violates the Due Process Clause, a permissive inference is constitutional unless "the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." Id. at 314-15 (citations omitted).

Further, there are two types of mandatory presumptions: a mandatory conclusive presumption and a mandatory rebuttable presumption. Francis, 471 U.S. at 314 n.2.

"A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted.

Francis, 471 U.S. at 314 n.2. A mandatory rebuttable presumption shifts the burden to the defendant to disprove an element of the offense, but requires the jury to determine whether that element of the offense exists. A mandatory conclusive presumption is more troubling, because it relieves

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the State of its burden to establish an element of the offense, which "conflicts with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime, and ... invades [the] factfinding function which in a criminal case the law assigns solely to the jury" by removing from the jury's consideration whether an element of the offense exists. Sandstrom, 442 U.S. at 523 (internal citations and quotations omitted).

The Supreme Court explained that, to determine what type of presumption was created by a jury instruction, a court's

"[a]nalysis must focus initially on the specific language challenged, but the inquiry does not end there. If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of an offense, the potentially offending words must be considered in the context of the charge as a whole. Other instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption. Cupp v. Naughten, 414 U.S. 141, 147, 94 S. Ct. 396, 400, 38 L. Ed. 2d 368 (1973). This analysis 'requires careful attention to the words actually spoken to the jury ... , for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.' Sandstrom, 442 U.S., at 514, 99 S. Ct., at 2454."

Francis, 471 U.S. at 315.

Here, the circuit court correctly instructed the jury that Townes could not be convicted of capital murder unless the jury found that he had the specific intent to kill. The circuit court also correctly informed the jury that intent "may be inferred from the character of an assault, the use of a deadly weapon, or other attendant circumstances." (R. 824.) However, the circuit court then instructed the jury that specific "intent must be inferred if the act was done deliberately and death was reasonably to be apprehended or expected as a natural and probable consequence of the act." (R. 824; emphasis added.)

After having been instructed that intent may be inferred from the use of a deadly weapon coupled with having heard evidence and argument to the effect that Townes's pulling the trigger proved he intended to kill, a reasonable juror would have understood the circuit court's instruction that specific "intent must be inferred if the act was done deliberately and death was reasonably to be apprehended or expected as a natural and probable consequence of the act," to establish a mandatory presumption that Townes intended to kill if he deliberately pulled the trigger of the rifle while the rifle

was pointed in Woods's direction.<sup>2</sup> (R. 824; emphasis added.) See Sandstrom, 442 U.S. at 524 (holding that a trial court's instruction that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" created an unconstitutional mandatory presumption on the issue of intent); Francis, 471 U.S. at 309 (holding that a trial court's instruction that "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted" created an unconstitutional mandatory presumption); Sullivan v. Louisiana, 508 U.S. 275, 280 (1993) (recognizing that "[a] mandatory presumption [instruction] ... that a person intends the ordinary consequences of his voluntary acts -- violates the Fourteenth Amendment, because it may relieve the State of its burden of proving all elements of the offense" (citing

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<sup>2</sup>The circuit court's use of the phrase "must be inferred" created the mandatory presumption. (R. 824.) Had the circuit court used the phrase, "may be inferred," there would have been no error. Blackmon v. State, 7 So. 3d 397, 434-35 (Ala. Crim. App. 2005) (upholding the circuit court's instruction that specific "intent may be inferred if the act is done deliberately and the death was reasonably to be apprehended or expected as a natural and probable consequence of the act").

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Sandstrom, 442 U.S. 510; Francis, 471 U.S. 307)); Salmon v. State, 460 So. 2d 334, 338-40 (Ala. Crim. App. 1984) (holding that the circuit court's instruction that "the law says one is presumed to intend the natural and probable and inevitable consequence of his own intentional acts" created a mandatory presumption in violation of the Due Process Clause). Further, the circuit court's instruction was conclusive or irrebuttable because it instructed the jury that it must find that Townes intended to kill if he deliberately did an act and "death was reasonably to be apprehended or expected as a natural and probable consequence of the act." (R. 824.) Francis, 471 U.S. at 314 n.2. ("A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption."). Consequently, the circuit court's instruction regarding specific intent violated Townes's right to due process under the 14th Amendment to the Constitution of the United States.

Additionally, under the circumstances of this case, the constitutionally infirm instruction resulted in plain error. Rule 45A, Ala. R. Crim. P. The issue of intent was very much at issue in this case. See Manuel v. State, 711 So. 2d 507,

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513 (Ala. Crim. App. 1997) (recognizing that a mandatory-presumption instruction relating to an element of the offense will be harmless if "the erroneous instruction was applied to an element of the crime that was not at issue at trial" (citing Freeman v. State, 555 So. 2d 196, 209 (Ala. Crim. App. 1988))). In fact, Townes's intent to kill was the only issue left for the jury to decide. Townes admitted that he and Benton forced their way into Woods's house with the intent to rob Woods. Townes's only defense was that he did not intend to kill Woods; instead, he shot the .22 caliber rifle to scare Woods. Intent was the only issue the defense left for the jury to decide, and the circuit court's instruction to the jury that specific "intent must be inferred if the act was done deliberately and death was reasonably to be apprehended or expected as a natural and probable consequence of the act," (R. 824) "remove[d] th[at] presumed element from the case," Francis, 471 U.S. at 314 n.2., and "completely eliminate[d] [Townes's] defense of no intent." Salmon, 460 So. 2d at 340 (citations and quotations omitted). See also Connecticut v. Johnson, 460 U.S. 73, 85 (1983) (recognizing that "[t]he trial court's instruction [requiring the jury to presume intent]

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removed th[e] [no intent] defense from the jury and directed it to find that the State had proved the intent element of the offenses).

Moreover, the evidence establishing Townes's intent to kill was not so overwhelming as to render harmless the circuit court's erroneous instruction. See Manuel, 711 So. 2d at 513 (recognizing that a mandatory-presumption instruction relating to an element of the offense may be harmless "where the evidence as to the defendant's guilt [or the element of the offense to which the instruction applied] was overwhelming" (citing Freeman, 555 So. 2d at 209)). Although "[i]ntent may be inferred from ... the use of a deadly weapon ...," Farrior v. State, 728 So. 2d 691, 695 (Ala. Crim. App. 1998) (citations and quotations omitted), Townes used a small caliber rifle, a .22 long rifle. Cf. Goans v. State, 465 So. 2d 482, 482 (Ala. Crim. App. 1985) (holding that the victim, who was shot in the collarbone with a .22 caliber pistol and lived, did not sustain a serious physical injury). When asked if he was attempting to scare Woods when he pulled the trigger, Townes stated "Yes, sir, ... they was little bullets." (C. 500.) Further, Townes and Benton attempted to



conceal their identities during the burglary. Concealing their identities could suggest that they did not intend to kill witnesses to their crime. Additionally, Townes and Benton did not shoot at or attempt to kill Starks when she fled the house. Finally, Townes shot Woods before Woods had given the men what they were there to steal. In fact, after Townes shot Woods, the men continued to assault Woods and Benton shot Woods in the leg to force Woods to give them money. While the State presented more than sufficient evidence to submit to the jury the issue of Townes's intent to kill, the State's evidence was not so overwhelming that the circuit court's direction for the jury to infer such intent was harmless.

Finally, this is not a case in which "the predicate facts conclusively establish[ed] intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not intend to cause injury." Carella v. California, 491 U.S. 263, 266 (1989) (quoting Rose v. Clark, 478 U.S. 570, 580-81 (1986)). Pulling the trigger of or even shooting someone with a .22 caliber rifle does not conclusively establish intent to kill. Cf. Goans, 465 So. 2d

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at 482 (holding that the victim, who was shot in the collarbone with a .22 caliber pistol and lived, did not sustain a serious physical injury). Rather, when considering all the circumstances of Townes's crime, the jury could have believed that Townes shot Woods with the intent to scare him into giving them money.

The mandatory-conclusive presumption instruction in this case "invade[d] [the] factfinding function which in a criminal case the law assigns solely to the jury," Sandstrom, 442 U.S. at 523, by removing from the jury's consideration whether Townes had the specific intent to kill Woods and "completely eliminate[d] [Townes's] defense of no intent." Salmon, 460 So. 2d at 340 (citations and quotations omitted). As such, the instruction had "an unfair prejudicial impact on the jury's deliberations," Ex parte Bryant, 951 So. 2d 724, 727 (Ala. 2002) (citations and quotations omitted), and "adversely affected [Townes's] substantial right[s]." Ex parte Brown, 74 So. 3d 1039, 1043 (Ala. 2011). Therefore, plain error resulted from the circuit court's instruction regarding specific intent. Rule 45A, Ala. R. Crim. P.

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Accordingly, Townes's conviction for capital murder and his sentence of death are reversed, and this cause is remanded for further proceedings.

REVERSED AND REMANDED.

Welch, Kellum, Burke, and Joiner, JJ., concur.