IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1999 SESSION

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 02C01-9901-CR-00007**
Appellee,	)	
	)	**SHELBY COUNTY**
VS.	)	
	)	**HON. CAROLYN WADE BLACKETT,**
RICHARD MCKEE,	)	**JUDGE**
	)	
Appellant.	)	(Second-Degree Murder)

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OPINION FILED: _____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was convicted by a jury of second-degree murder and subsequently sentenced by the trial court as a Range II Multiple Offender to a term of forty years. The defendant's motion for judgment of acquittal and/or new trial was overruled. The defendant now appeals and presents the following issues for our review:

> (1) Whether the evidence is sufficient to support a conviction for second-degree murder;
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> (2) Whether the trial court erred in allowing a State witness to testify with regard to statements made by the victim on the day of the murder;
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> (3) Whether the trial court erred in its application of enhancement factor (10);
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> (4) Whether the trial court erred in sentencing the defendant as a Range II Multiple Offender.

The evidence at trial established that the defendant and the victim were neighbors in a rooming house. Testimony revealed that the defendant and the victim had a history of disagreements. Francis Humphrey, also a tenant of the rooming house, testified that the defendant "picked on" and tried to "provoke" the victim on many occasions. The victim would usually lock himself in his room during these incidents and wait for someone else to arrive before he would come out of his room. According to Ms. Humphrey, on two occasions when the defendant tried to provoke the victim and the victim locked himself in his room, the defendant threw beer bottles in front of the victim's door.

Ms. Humphrey testified that on October 2, 1995, she passed the rooming house on her way to a doctor's office. Ms. Humphrey said she noticed the defendant in the doorway as she passed the house. The defendant was wearing a brown shirt and brown sunglasses and was holding his pool cue. When she returned to the house approximately thirty minutes later, the victim was sitting on the porch alone. Ms. Humphrey testified that the victim told her that he had been in the upstairs bathroom preparing to go to work when the defendant came in and made the victim leave. Ms. Humphrey stated that the victim was upset and angry. Ms. Humphrey then went to her room to care for her grandson. When she returned to the porch two to three minutes later, the victim was lying in the front yard beaten to such an extent that Ms. Humphrey did not readily recognize him.

According to Ms. Humphrey, lying near the victim's body were a pair of brown sunglasses that belonged to the defendant and which he wore with his brown shirt. In addition, Ms. Humphrey noticed

a pool cue lying near the victim's body. Ms. Humphrey stated that this pool cue belonged to the defendant and he carried it with him on many occasions. Ms. Humphrey testified that the defendant never returned to the rooming house after this incident.

James Parker, an officer with the Tennessee Public Service Commission at the time of the offense, also testified at trial. According to Mr. Parker, while traveling home from work on October 2, 1995, he was flagged down by another motorist who witnessed the victim's beating. Mr. Parker then saw the defendant standing over the victim holding a two by four board in his hands. According to Mr. Parker, the defendant threw down the board and started running. When Mr. Parker reached the victim, he was unconscious and bleeding from the back of his head and ear. The victim never made a statement in Mr. Parker's presence.

When police arrived on the scene, a pair of sunglasses, several pieces of wood, a piece of metal, a broken pool cue tip, a broken pool cue handle, and a two by

four board were lying around the area where the victim's body was found. Several of these objects, although not tested, appeared to be covered with bloodstains. Dr. Wendy Gunther performed the victim's autopsy and testified that the victim had died as a result of several blunt traumas to the head. According to Dr. Gunther, the victim had sustained a minimum of three blows to the head, a minimum of two blows to the left arm, and at least one injury to his face. Dr. Gunther testified that any one of the traumas to the head could have been fatal. In addition, Dr. Gunther stated that these injuries were consistent with a two by four piece of wood and were consistent with a pool cue. The defendant was apprehended two days after the victim's murder when he arrived at the courthouse with regard to an unrelated charge.

The defendant now contends that the evidence is insufficient to support his conviction. Specifically, the defendant argues that there were no eyewitnesses to the crime, the case was based entirely on circumstantial evidence, there was no fingerprint or blood evidence connecting the defendant to the crime, the defendant was never found in possession of any bloody clothing, and Mr. Parker's identification of the defendant was unreliable.

A defendant challenging the sufficiency of the proof has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

Moreover, a criminal offense may be established exclusively by circumstantial evidence. State v. Jones, 901 S.W.2d 393, 396 (Tenn. Crim. App. 1995). However, in order for this to occur, the circumstantial evidence "must be not only consistent with the guilt of the accused but it must also be inconsistent with his [or her] innocence and must exclude every other reasonable theory or hypothesis except that of guilt." State v. Tharpe, 726 S.W.2d 896, 900 (Tenn. 1987). In addition, "it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that [the defendant] is the one who committed the crime." Tharpe, 726 S.W.2d at 896. In other words, a "web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other

reasonable inference save the guilt of the defendant beyond a reasonable doubt." State v. Crawford, 470 S.W.2d 610, 613 (Tenn. 1971); see also State v. McAfee, 737 S.W.2d 304, 306 (Tenn. Crim. App. 1987).

In reviewing the facts in the light most favorable to the State, the evidence established that the defendant and the victim had a prior history of conflict. On the day of the murder, the defendant was wearing a brown shirt, brown sunglasses, and carrying his pool cue. Shortly before the murder, the defendant and the victim were involved in an argument. A witness saw the defendant standing over the victim's body holding a two by four board. The defendant dropped the board and ran from the scene. The victim was found lying in the front yard of the rooming house bleeding and unconscious. The defendant's brown sunglasses and broken pool cue were lying near the victim's body. In addition, a two by four piece of board, several broken pieces of wood, and a piece of metal were lying near the victim's body. These wooden objects were apparently covered in blood. The victim died as a result of several blunt traumas to his head. After the murder, the defendant never returned to the rooming house.

The defendant argues that there were no eyewitnesses to the crime. However, Mr. Parker testified that he saw the defendant standing over the victim holding the bloody two by four board found lying beside the victim's body. The defendant also argues that the case was based entirely on circumstantial evidence. However, as stated earlier, circumstantial evidence alone may be sufficient to support a conviction. Jones, 901 S.W.2d at 396. The defendant further mentions that there was not any fingerprint or blood evidence connecting him to the crime, that the defendant was never found in possession of any bloody clothing, and that Mr. Parker's identification of the defendant was unreliable. However, the identity of an accused as the perpetrator of an offense is

a question of fact for the determination of the jury. State v. Livingston, 607 S.W.2d 489, 491 (Tenn. Crim. App. 1980). In addition, the credibility of witnesses and the weight to be given to the evidence is a matter for the jury. Cabbage, 571 S.W.2d at 835. As such, we find that sufficient proof existed to allow a rational trier of fact to find beyond a reasonable doubt that the defendant unlawfully and knowingly killed the victim. See T.C.A. §§ 39-13-201, -210(a)(1). This issue is without merit.

The defendant next contends that the trial court erred in allowing Francis Humphrey, a State witness, to testify as to statements made by the victim regarding an alleged argument between the victim

and the defendant on the day of the murder. The defendant argues that these statements were inadmissible hearsay. Due to the trial court's failure to instruct the jury as to how to properly consider hearsay testimony, the defendant asserts that the error in admitting the hearsay testimony was not harmless.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). In the case at bar, Ms. Humphrey testified to the victim's statement about an argument between the victim and defendant. It is clear that this statement was offered to prove that an argument had in fact occurred between the victim and defendant. This statement was therefore hearsay.[1] As we can find no applicable hearsay exception, the trial court erred in ruling that this testimony was admissible. However, in light of the amount of proof presented at trial, we conclude that any error was harmless. Tenn. R. Crim. P. 52(a).

The defendant next contends that the trial court erred in determining his sentence. When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). As we find the trial court erred in its application of an enhancement factor, our review is de novo without a presumption of correctness.

The Sentencing Reform Act of 1989 established a number of specific procedures to be followed in sentencing. It mandates the court's consideration of the following:

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[1] The State contends that the victim's statement was not hearsay as it was offered for the purpose of illustrating the "bad blood" between the victim and the defendant, not for proving the truth of the matter asserted. In support of this contention, the State relies on State v. Williams, 977 S.W.2d 101 (Tenn. 1998). In Williams the defendant's sister had been involved in a knife fight with Glorissa Buchanan. At the juvenile hearing held with regard to the knife fight, the victim testified that after the defendant's sister was stabbed, the defendant struck Ms. Buchanan twice with a gun. Several days after the juvenile hearing, the defendant killed the victim. At the defendant's subsequent trial, Ms. Buchanan's mother, Gloria Buchanan, testified as to the victim's statements at that juvenile hearing. The Tennessee Supreme Court ruled that Gloria Buchanan's testimony was not hearsay because it was not offered for the truth of the matter asserted but instead was offered for the purpose of showing the "bad blood" between the parties and their families. Id. at 108. However, in Williams, the truth of the victim's statement at the juvenile hearing was irrelevant. In fact, the Court pointed out that if the victim's statement was false it would have increased the probative value of the evidence because it would have further shown the "bad blood" between the parties. Id. It was the fact that the victim had testified adversely to the defendant, not the content of that testimony, that was relevant. Conversely, in the case at bar, the truth of the victim's statement and its contents are relevant. As such, Williams is distinguishable from the case at bar.

> (1) The evidence, if any, received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in his own behalf about sentencing.

T.C.A. § 40-35-210.

In addition, this section provides that the midpoint within the range is the presumptive sentence for Class A felonies. However, if there are enhancing and mitigating factors, the court must start at the minimum sentence within the range and enhance the sentence as appropriate for the enhancement factors and then reduce the sentence within the range a appropriate for the mitigating factors. If there are no mitigating factors, the court may set the sentence above the minimum in that range but still within the range. The weight to be given to each factor is left to the discretion of the trial judge. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

At the sentencing hearing, the trial court found that enhancement factors (1), that the defendant has a previous history of criminal convictions or criminal behavior in addition to that necessary to establish the appropriate range, and (10), that the defendant had no hesitation about committing a crime when the risk to human life was high, were applicable. T.C.A. § 40-35-114(1), (10). The trial court found no applicable mitigating factors. The trial court subsequently sentenced the defendant to a term of forty years to be served in the Tennessee Department of Correction. Because this offense is a Class A felony, T.C.A. § 40-35-110, and because the defendant was found to be a Range II offender, this was the maximum sentence available. T.C.A. § 40-35-112(b)(1).

The defendant does not challenge the trial court's application of enhancement factor (1). The application of this factor is clearly appropriate in light of the defendant's prior convictions for assault with intent to commit murder, grand larceny, two weapons offenses, assault, disorderly conduct, traffic offense, driving on a suspended license, two petit larcenies, two counts of driving while under the influence, possession of marijuana, attempted voluntary manslaughter, and third degree burglary.

However, the defendant does challenge the trial court's application of enhancement factor (10), that the defendant had no hesitation about committing a crime when the risk to human life was high. T.C.A. § 40-35-114(10). The State concedes and we agree that this factor was inapplicable in the case at bar when no one other than the victim was subject to being injured. See State v. Belser, 945 S.W.2d 776,

792 (Tenn. Crim. App. 1996); State v. Makoka, 885 S.W.2d 366, 373 (Tenn. Crim. App. 1994). However, the mere fact that an enhancement factor was applied improperly does not automatically result in a reduction of sentence. See State v. Lavender, 967 S.W.2d 803, 809 (Tenn. 1998). This Court has previously held

> The mere number of existing enhancement factors is not relevant - the important consideration being the weight to be given each factor in light of its relevance to the defendant's personal circumstances and background and the circumstances surrounding his criminal conduct. In this respect, the more negatives shown to exist in the defendant's background and the greater degree of his proven culpability in the offense may translate into the application of multiple enhancement factors, but the extent of sentencing enhancement flows from the increased personal negatives and degree of culpability, not the number of applicable factors.

State v. Hayes, 899 S.W.2d 175, 186 (Tenn. Crim. App. 1995).

In addition, while enhancing factor (10) was misapplied, another enhancing factor, not applied by the trial court, is applicable in the case at bar. We note that this Court is allowed, in conducting its de novo review, to consider any enhancing or mitigating factors supported by the record, even if not relied upon by the trial court. State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993); State v. Smith, 910 S.W.2d 457, 460 (Tenn. Crim. App. 1995). In the case at bar, the trial court failed to apply enhancing factor (11), that the felony resulted in death to the victim and the defendant has previously been convicted of a felony which resulted in death or bodily injury. T.C.A. § 40-35-114(11). As the defendant has a previous conviction for second-degree murder, this enhancement factor is applicable.

In light of the foregoing applicable enhancement factors, lack of mitigating factors, and the defendant's extensive prior criminal record, we find the defendant's sentence to the maximum within his range is reasonable and appropriate.

The defendant next contends that the trial court erred in finding him to be a Range II multiple offender. Specifically, the defendant argues that the State failed to produce a certified copy of the defendant's alleged prior second-degree murder conviction and, as the trial court did not apply enhancement factor (11), the trial court apparently did not find the State's proof regarding such conviction to be reliable or sufficient.[2]

To impose an increased sentencing range, the trial court must find the existence of the

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[2] The defendant further contends that the documents offered by the State fail to prove that the defendant was represented by counsel or waived his right to counsel before he was convicted of second-degree murder and therefore such conviction cannot be used to enhance the defendant's punishment. However, this issue was not raised at the sentencing hearing. As such, this issue cannot be considered on appeal. See State v. Lunati, 665 S.W.2d 739, 749 (Tenn. Crim. App. 1983).

requisite prior felonies beyond a reasonable doubt. State v. Richard Douglas Lowery, No. 03C01-9604-CC-00146, Jefferson County (Tenn. Crim. App. filed May 19, 1997, at Knoxville) (citing T.C.A. §§ 40-35-106(c), -107(c), -108(c)). At the sentencing hearing, the trial court stated that after a review of the presentence report and accompanying documents, it found the defendant to be a Range II multiple offender. We note that the defendant's second-degree murder conviction was listed in the presentence report and the State's Notice of Intent to Seek Enhanced Punishment. In addition, the defendant admitted the existence of this conviction at the sentencing hearing. Specifically, the defendant stated, "This murder conviction . . . happened over thirty years ago." In light of the foregoing, the existence of the requisite prior felony was established beyond a reasonable doubt. As such, the defendant was properly classified as a Range II multiple offender. See T.C.A. § 40-35-106(a)(2), -118.

Accordingly, we affirm the defendant's conviction for second-degree murder and his sentence of forty years as a Range II multiple offender. The judgment of the trial court is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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NORMA M. OGLE, Judge

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ALAN E. GLENN, Judge