

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1999 SESSION

**FILED**  
January 14, 2000  
Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE, )  
)  
Appellee, )  
)  
v. )  
)  
)  
TAMELA GRACE McGHEE, )  
alias )  
)  
Appellant. )

No. 03C01-9807-CR-00228  
Hamilton County  
Honorable Douglas A. Meyer, Judge  
(Voluntary manslaughter)

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OPINION FILED: \_\_\_\_\_

AFFIRMED

Joseph M. Tipton

Judge

**OPINION**

The defendant, Tamela Grace McGhee, alias,<sup>1</sup> appeals as of right from her conviction for voluntary manslaughter, a Class C felony, following a bench trial in the Hamilton County Criminal Court. She was sentenced as a Range I, standard offender to four years incarceration in the custody of the Department of Correction. She contends that (1) the evidence is insufficient to support her conviction, and (2) the trial court erred in sentencing her to confinement. We affirm the judgment of conviction.

The defendant was convicted of voluntary manslaughter for the stabbing death of her husband, Vernon Needham. At trial, Louee Everett, a friend of the victim, testified that he lived in the same apartment complex as the victim and defendant. He testified that three weeks before the killing, he and the defendant were at a restaurant drinking. He said the defendant was rubbing her hands on a man when the victim walked in. He said the victim shook his head and walked out. Mr. Everett said he told the defendant to leave, and the defendant said she would but that she would come back if the victim beat her. Mr. Everett said that the next day, he noticed a cut on the defendant, and the defendant stated, "I was hitting on him, and he just swatted me off of him." He said that he was unaware of any history of violence between the defendant and victim.

Mr. Everett testified that on September 18, 1996, he and the victim drank a few beers at a restaurant and then bought more beer at a convenience store. He said the victim told him that the defendant was going to move out of the apartment. Mr. Everett said that as they drove toward the apartment complex, they saw the defendant

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<sup>1</sup>The defendant is listed in the indictment as Tamela Grace McGhee alias Tamela Grace Claramunt alias Tamela Grace Givens alias Tamela Grace Needham. For convenience, we will refer to the defendant in this opinion as Tamela Grace McGhee.

outside, talking to a man with whom she worked. Mr. Everett said the victim became irritated and stated, "Looks like I'm going to have to run off another one. Do you want to see the show?" Mr. Everett said he went to his apartment and waited for his friend, Beth Orsbourn, to arrive. He testified that the victim came to his apartment two or three minutes later, got a beer, then went back to his own apartment. He testified that a few minutes later, the defendant banged on the door saying that she needed to call 9-1-1. He said the defendant stated either that she had stabbed or had killed her husband.

Mr. Everett testified that the defendant called 9-1-1, and Ms. Orsbourn ran to the victim's apartment and found him lying on the ground. He said Ms. Orsbourn turned the victim over to resuscitate him, but blood was running out of his mouth. He said Ms. Orsbourn told the victim to breathe, and the victim took four breaths, then closed his eyes. Mr. Everett testified that he had not heard any yelling or screaming from the victim's apartment and that if there had been an argument, he would have heard it. He admitted that he had witnessed the victim's temper before, but he stated that he did not see the victim lose his temper on the night of the homicide.

The 9-1-1 tape was played for the jury. During the call, the defendant stated, "My husband was hitting me and I stabbed him. . . . I can't let him hit me anymore. Please, I don't want to hurt him. . . . I just started - - I just grabbed a knife and I just started stabbing him when he hit me."

Beth Orsbourn testified that she met Mr. Everett and the victim at a restaurant for drinks between 7:00 and 9:00 p.m., then she went to Mr. Everett's apartment. She said she did not hear any yelling or arguing that night at the apartment. She testified that about one minute after she arrived, the defendant pounded on the door saying she needed to call 9-1-1 because she had killed her husband. Ms. Orsbourn said she ran into the victim's apartment and found the victim semi-conscious

and barely breathing. She said the defendant came into the apartment and showed her the knife she had used. She said the defendant alternated between being calm and hysterical. She said she did not see any marks on the defendant nor did the defendant say that the victim had hit her.

Detective Greg Johnson of the Chattanooga Police Department testified that he arrived at the apartment around 10:00 p.m. He testified that he took photographs of the victim and the defendant. He said that he did not see any injuries on the defendant's face, arms or hands. He said the defendant showed him a bruise on her right leg, but he could not determine if it was fresh. He said he did not notice any injuries on the defendant consistent with fighting. Detective Johnson admitted that he did not perform a physical examination of the defendant to check for tenderness where bruises might later appear. He further stated that the defendant was clothed and that he did not examine or photograph any unclothed parts of her body. He stated that he asked the defendant to show him her injuries, and he photographed them. Regarding the victim, he said he saw no bruises, cuts or swelling.

Detective Charles Russell of the Chattanooga Police Department testified that he arrived at the apartment at 10:37 p.m. He testified that he collected a long kitchen knife used in the stabbing. He said he did not see any injuries on the defendant or in the photographs taken at the scene. He said the defendant claimed to have a bump on the top of her head, but he did not see it. He said the defendant would alternate from calm to hysterical. He said that when he told the defendant that the victim had died, the defendant screamed and collapsed to her knees. He said the defendant repeatedly screamed and groaned, saying, "I didn't mean to." He testified that the defendant never wavered in her description of the events and that she maintained that the victim confronted and assaulted her, accusing her of being with

another man. He said the defendant maintained that she stabbed the victim in self-defense.

Detective Russell testified that he found nothing to support the defendant's claim of self-defense. He said he could see no physical injuries, other than a bruise on the back of her leg that appeared to be several days old and red areas on her wrist. He said the defendant was hysterical, and her description of the assault was very vague.

Nana Hendricks testified that she is the defendant's sister and lives in Florida. She testified that she called the district attorney's office six to eight weeks before trial in order to get the defendant's bond revoked. She testified that the defendant was living with her in Florida and that she was concerned that the defendant was going to harm herself. She said she told the district attorney that the defendant was using drugs, prostituting, stealing money, and acting crazy. She denied telling the district attorney that she gave the defendant Valium then put bruises on the defendant's back.

Ms. Hendricks testified that after the homicide, she took the defendant to a clinic in order to document the defendant's injuries. She said that before going to the doctor, the defendant had tried to commit suicide twice. She said that at the doctor's office, the defendant had bruises and injuries on her back, legs and shoulders. She said the defendant had a kick mark on her back in the shape of a footprint and marks on her arm. Ms. Hendricks admitted that she saw the defendant hitting herself in the back of the head with a hairdryer before going to the doctor. She said the defendant was hysterical. She admitted telling the district attorney on the telephone that the defendant hit herself on the head to fabricate bruises, but she testified that she exaggerated to the prosecutor because she wanted the defendant to be put in a place

where she could be monitored. Ms. Hendricks testified that the defendant had bruises all over her before she hit herself with the hairdryer.

Ms. Hendricks testified that she had visited the defendant and victim once before the killing. She testified that the victim was very jealous and possessive of the defendant. She said the victim would not allow the defendant's children to sit on her lap. She testified that when she and the defendant were going out, the victim would not let her wear jeans. She said that if anyone looked at the defendant, the victim would get mad and would make the defendant leave. She said that when she visited, they all went out to a bar and arrived home at 2:00 a.m. She said the victim wanted to set all the clocks to 7:00 a.m. and tell the defendant's son that it was time to get up and go to school. She said the victim thought it would be funny for the defendant's son to walk to school and find it empty. She said that an argument ensued when the defendant refused and that the victim took the defendant to the bedroom and locked the door. She said she heard thumping, yelling, screaming and crying. Ms. Hendricks testified that the defendant told her that the victim would hit her on the head or grab her in order for the bruises to be less obvious.

Dr. Frank King, the Hamilton County Medical Examiner, testified that he performed the autopsy of the victim. He testified that the victim had two stab wounds, one to the left chest and one to the left abdomen, which resulted in internal bleeding and death. He said the victim had smaller superficial injuries, including a cut on his right thumb, two cuts on his left thumb, and multiple abrasions on the chest, wrist, forearm, lower back, spine, and top of the right foot. He said the superficial injuries are consistent with the victim either choosing not to defend himself or not having time to defend himself. Regarding the stab wounds, Dr. King testified that they were simple and required "no extra movement of the knife. It's just in and out." He testified that the victim's blood alcohol level was .13 percent.

Dr. King testified that he examined the photographs of the defendant made at the scene. He said he saw one possible contusion and a few discolorations that were a few days old. He testified that it is possible that injuries resulting from minor blunt trauma may not be visible for several hours. Dr. King testified that he also examined the report from the clinic where the defendant was treated several days after the homicide. He said that some of the injuries described in the report are covered up in the photographs that were made a few hours after the killing. Dr. King testified that the clinic's report was relevant regarding documentation of the defendant's injuries but that it was not relevant regarding the cause of the injuries or when they occurred.

Dr. Gary Gesualdi testified that he is a senior resident at Memorial Hospital. He testified that he examined the defendant on September 22 at Physician's Care walk-in clinic. He testified that the defendant was hysterical and sobbing uncontrollably and that she complained of knots on her head, the back of her legs, and on her left hip. Dr. Gesualdi said he documented in his report that the defendant stated, "Unfair, lots of people stabbed and they don't die." He said the defendant was upset and remorseful.

Dr. Gesualdi testified that he found several areas of tenderness on the defendant, including slight swelling on the back of the head. He said he found five to seven bruises on her legs and thighs that were greenish blue, a large knot on her back that was greenish blue, and a tender area on her left forearm that was yellow. He said the defendant's injuries were about three to six days old. He said he examined the photographs taken a few hours after the killing, and he said the majority of the defendant's injuries are not seen in the pictures because the defendant is clothed. He testified that most of the defendant's injuries were inflicted from behind as if the

defendant was protecting herself from an assault. He testified that the photographs taken after the murder show that the defendant has no marks or tears on her shirt.

Sergeant Thomas Mize, Jr., of the East Ridge Police Department, testified that he responded to a domestic call involving the victim and defendant on April 13, 1996. He testified that the defendant reported that the victim had made her stay in bed and had slammed her into the bed when she tried to get up. He said the defendant reported that the victim slammed her into a vanity, pulled her hair and threw a bowl into her arm. He testified that the defendant reported that the victim took a hammer and beat the bed, saying, "I will beat your brains out." Sergeant Mize testified that he did not note in his report that the defendant had any visible marks. He stated that charges were filed against the victim but were dismissed.

Officer Jackie Mullinax, a patrolman with the East Ridge Police Department, testified that he was called to the defendant and victim's apartment on March 24, 1996, at 2:45 a.m. He said the defendant reported that the victim had assaulted her. He said a bedroom door had been kicked off its hinges, and he testified that the victim was sitting on the couch, cold and detached. He said he did not recall any visible injuries on the defendant. He testified that when he served the warrant on the victim a few weeks later, the victim was moving out of the apartment.

Officer Joseph Mayes of the East Ridge Police Department testified that he responded to the call on March 24. He testified that the defendant was crying and had red marks on her face. He said the defendant reported that the victim had been enraged and that she tried to lock herself in a bedroom. Officer Mayes said the door was off its hinges, and the door frame was cracked. He said this would require a lot of strength. He testified that the victim's veins were pulsing on his head, and he was sweaty, flushed, and out of breath. He said the victim admitted breaking down the door



but denied hitting the defendant. He testified that both the defendant and victim had been drinking but did not appear intoxicated. He said that he never felt threatened by the victim but that if the victim had tried to assault the officers, they would have had difficulty restraining him because of his large size and arm strength.

Deputy Chief Tommy Standifer of the Hamilton County Sheriff's Department testified that he had previously investigated the defendant's father for involvement in the drug trade. He said the defendant became an informant, cooperated with the state, and testified against her father in federal court. He said the defendant admitted past drug use and was truthful. He said the defendant entered a guilty plea to drug charges and received a five-year suspended sentence in exchange for her cooperation.

Michael Claramunt, the defendant's fifteen year-old son, testified that he previously lived in Chattanooga, splitting his time between his mother and his stepfather, Jerry Givens. He testified that when he stayed with his mother, he saw her and the victim fight. He said the victim had an unpredictable temper. He said the victim would prevent his mother from taking a bath, would not let her go on walks or speak to relatives, and would not let her play with her other two sons. He said that when his mother and the victim got into fights, the victim would shut his mother in the bedroom, and he would hear yelling and noises, as if things were being pushed around. He testified that he saw bruises on his mother's arms.

Mr. Claramunt testified that the victim never hit him nor did he ever see the victim hit anyone else, other than spanking his younger brothers. He said he had no knowledge of his mother's crack cocaine problem, and he had not heard of her using crack since the victim's death. He said he had heard that his mother had broken out the windows of his stepfather's car and had slashed his sofa with a knife. He said he

was aware of a physical altercation between his mother and stepfather which resulted in his mother giving his stepfather two black eyes.

Anna Givens testified that she is Jerry Givens' mother and the defendant's former mother-in-law. She testified that when the defendant was released on bond in this case, the defendant came to Mr. Givens' apartment. She said the defendant had bruises on her body, one of which appeared to be in the shape of a footprint. She said she had previously seen bruises on her grandson, Steven, and Steven had told her that the victim had whipped him hard. Ms. Givens testified that she did not know if her son left the defendant because of the defendant's drug problem. She said she heard that the defendant had given her son two black eyes during a fight and had cut up a couch with a knife.

Lois Hendricks, the defendant's mother, testified that she stayed with the defendant and victim a few days after they were married. She testified that the victim was possessive and did not want the defendant to spend time alone with her. She testified that one day, the victim forced the defendant to spend the entire day with his mother and that when she returned, the victim took the defendant into the bedroom and would not let Ms. Hendricks see her. She said the defendant called her about six times regarding violent episodes with the victim. She said the defendant told her that she had the victim arrested and that the defendant would call her from a pay telephone, saying that the victim had "beat the hell out of [her] again." Ms. Hendricks said that after the homicide, the defendant called her several times and said she wanted to die to be with the victim.

Howard Barnes testified that he was friends with the defendant and victim. He testified that he once saw the victim flick a lit cigarette in the defendant's face and hit her. He said the night the defendant and victim got married, the victim became

angry about a ring the defendant was wearing. He said the victim demanded that the defendant take off the ring and that it took the defendant thirty minutes to remove the ring with soap and ice. Mr. Barnes testified that he had heard that the defendant smoked crack. He said he never saw the victim smoke crack.

The defendant testified that the victim would alternate between being nice to her and beating her. She said that one time when she returned home, the victim tore off her clothes and told her never to go out without him. She testified that on the night of their wedding, the victim became angry because she was wearing a ring given to her by her ex-husband. She said the victim demanded that she remove the ring, and she had to work for thirty minutes to get it off. She said the victim told her that he would cut off her finger if necessary. She said that if she talked to anyone when they went out, the victim would become violent and irrational. She said he once kept her in bed for two days and threatened to beat her brains out if she got up. She said the victim told her that if she left him, he would run over her children. She testified that she was not allowed to talk to her family and that the victim once jerked the telephone out of the wall and threw it in a tree to prevent her from calling anyone. She said that before the victim's death, the victim hit her about once each week. She said he once choked her until she nearly passed out.

The defendant testified that on the night of the killing, the victim gave her permission to play pool with two of her friends, Guy and Jeremiah. She said they had a few beers, then she and Guy walked to her apartment. She said that as they were walking back, she saw the victim and Louee Everett drive by and stop at the apartment. She said she and Guy walked across the street, and Guy said hello to the victim. She said the victim was angry and red in the face, and he told Guy, "You better walk on." She said the victim asked her where she had been, then grabbed her purse and hit her with it. She said the victim then went into the apartment with her purse.

The defendant testified that when she went into their apartment, the victim was at Mr. Everett's apartment. She said she locked the door, and when the victim returned, he banged on the door and threatened to break it down. She said she let the victim in, and Mr. Everett was behind him. She said she and Mr. Everett exchanged words, then Mr. Everett went to his apartment as Ms. Orsbourn arrived. The defendant said she went to get a drink in the kitchen, and the victim followed her and slung her against the counter. She said the victim kicked her and hit her in the back of the head. She said she did not remember grabbing the knife, but she remembered that when she stabbed the victim, it felt like she did not hit anything, "like it went in forever." She testified that she did not want or mean to kill her husband.

The defendant denied inflicting bruises on herself. She said that she did not remember trying to commit suicide and that she did not ask her sister to put bruises on her. She admitting telling Jerry Givens that she once hit a sleeping man with a baseball bat, but she said the man had hit her with a frying pan. She said she did not remember calling Mr. Givens while the victim was beating on her door and telling Mr. Givens that if the victim came in, she would stab him, but she stated that if Mr. Givens said she did, then it was true. She said she did not remember going to Parkway Billiards with Mr. Givens after the homicide and telling people that "this is the husband I didn't kill." She admitted that she had previously broken a window in the victim's truck.

Regarding her drug addiction, the defendant testified that her father gave her drugs when she was twelve or thirteen and that she began selling drugs for her father when she was sixteen. She said she was addicted to drugs but was able to overcome her addiction when she was arrested and that she agreed to cooperate with the authorities by testifying against her father. She said she began smoking crack again when she started dating the victim and that they smoked crack every weekend. She denied smoking crack and prostituting while on bond in Florida. She testified that

the victim was five feet, ten inches tall and weighed one hundred seventy-five pounds. Upon the foregoing evidence, the trial court found the defendant guilty of voluntary manslaughter.

### **I. SUFFICIENCY OF THE EVIDENCE**

The defendant contends that the evidence is insufficient to support her conviction for voluntary manslaughter. She argues that the proof showed that she acted in self-defense. The state contends that the evidence is sufficient.

Our standard of review when the sufficiency of the evidence is questioned on appeal is “whether, after viewing the evidence in the light most favorable to the prosecution, 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, 99 S. Ct. 2781, 2789 (1979). This means that we do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Voluntary manslaughter is defined as “the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.” Tenn. Code Ann. § 39-13-211(a). Tennessee’s self-defense statute, Tenn. Code Ann. § 39-11-611(a), provides as follows:

A person is justified in threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other’s use or attempted use of unlawful force. The person must have a reasonable belief that there is an imminent danger of death or serious bodily injury. The danger creating the belief of imminent death or serious bodily injury must be real, or honestly believed to be real at the time, and must be

founded upon reasonable grounds. There is no duty to retreat before a person threatens or uses force.

The defendant contends that the trial court found that she acted in self-defense but determined that the defense did not apply because she used excessive force. She argues that this is improper and cites State v. Douglas Sexton, No. 257, Hamilton County (Tenn. Crim. App. Jan. 13, 1988), which holds that a defendant acquitted of aggravated assault on the basis of self-defense cannot then be convicted of the lesser offense of assault.

The record reveals, however, that the trial court did not accept the defendant's claim of self-defense, finding instead that the defendant did not have a reasonable belief of imminent death or serious bodily injury. In rejecting the defendant's claim, the trial court stated that:

there's no question in the Court's mind that the defendant imposed or self-inflicted some of the injuries that show, the bruises and abrasions, either she did it all by herself or her sister assisted her, and I believe that she did so to bolster a self-defense, and that was the purpose of doing so.

I think she probably did fear [the victim], she had been beaten by him on other occasions, but I do not believe that she feared death or serious bodily injury, and that she used excessive force, so I do not accept self-defense.

The defendant's reliance on Sexton is misplaced because in the present case, the trial court rejected the claim of self-defense. The record supports the trial court's findings, and the evidence is sufficient to support the voluntary manslaughter conviction.

## **II. SENTENCING**

The defendant contends that she should have received a sentence alternative to confinement. She argues that in considering the manner of service, the trial court erred in its application of an enhancement factor and its denial of proposed mitigating factors. The state contends that the trial court properly sentenced the defendant to confinement.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). As the Sentencing Commission Comments to this section note, the burden is now on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, “the presumption of correctness which accompanies the trial court's action 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). In this respect, for the purpose of meaningful appellate review,

the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

Also, in conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf and (7) the

potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229 (Tenn. 1986).

The sentence to be imposed by the trial court for a Class C felony is presumptively the minimum in the range when there are no enhancement or mitigating factors present. Tenn. Code Ann. § 40-35-210(c). Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and then reduce the sentence as appropriate for any mitigating factors. Tenn. Code Ann. § 40-35-210(d), (e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. Tenn. Code Ann. § 40-35-210, Sentencing Commission Comments; Moss, 727 S.W.2d at 237; see Ashby, 823 S.W.2d at 169.

At the sentencing hearing, the victim's family testified about the devastating effect of the victim's death on their lives. The defendant testified and expressed remorse for the victim's death. She stated that she was employed full-time and was willing to pay restitution for the victim's funeral expenses.

A presentence report was admitted into evidence. The report reflects that at the time of sentencing, the defendant was thirty-three years old. She dropped out of high school in the tenth grade to get married, and she reported a lengthy history of drug abuse, beginning at age thirteen. The defendant also reported mental health problems and stated that she was taking medication for depression. The record reflects that the defendant has four previous convictions from 1987 for attempted felony sale, delivery and possession of cocaine for which she received a five-year suspended sentence.



The trial court sentenced the defendant to four years of confinement in the custody of the Department of Correction, applying the following enhancement factors, as listed in Tenn. Code Ann. § 40-35-114:

(1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; [and]

(9) The defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense.

The trial court initially stated that it applied factor (10), that the defendant had no hesitation about committing a crime when the risk to human life was high, but later indicated that this was not an appropriate factor. The trial court found the following mitigating factors applicable:

(2) The defendant acted under strong provocation;

(3) Substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense; [and]

(11) The defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct.

Pursuant to factor (13), the trial court also considered that the defendant called 9-1-1 and that the defendant would punish herself for the rest of her life. In denying a sentence alternative to straight confinement, the trial court determined that confinement is necessary "to avoid depreciating the seriousness of the offense [and] . . . is particularly suited to provide an effective deterrence to others likely to commit similar offenses[.]"

The defendant contends that she should have received a sentence alternative to confinement. First, she argues that the trial court improperly considered enhancement factor (10). We agree with the defendant that this factor is inherent in the

offense of voluntary manslaughter, but the trial court later indicated that it did not consider this factor in sentencing.

The defendant also contends that the trial court erred by not considering her proposed mitigating factors. First, she argues that the trial court erred by not considering factor (11), however the record shows that the trial court did apply this factor in mitigation although the court gave it little weight. The defendant argues that the trial court erred by not applying factor (12), that the defendant acted under duress, and by failing to consider the defendant's cooperation with the authorities, poor upbringing, need to care for her minor children, involvement in domestic abuse counseling, support of her family, and good behavior while on bond. See Tenn. Code Ann. § 40-35-113(13). With respect to factor (12), the trial court indicated that the defendant did not reasonably fear imminent serious bodily injury or death and that she used excessive force. These findings militate against a conclusion that the defendant acted under duress. We also note that the trial court did consider the defendant's cooperation with the authorities when it considered that she called 9-1-1. With respect to the defendant's remaining claims of mitigation, the trial court did not state its reasons for not applying them. Nevertheless, we believe that even if we apply these factors, they would be entitled to very little weight. We conclude that they would not justify a sentencing alternative in light of the strength of the enhancement factors and the need to avoid depreciating the seriousness of the offense.

The defendant argues that the state did not overcome the presumption in favor of alternative sentencing. See Tenn. Code Ann. § 40-35-102(6). With regard to the trial court's reliance upon the need for deterrence to deny an alternative sentence, we note that little evidence exists to support a finding that confinement would be particularly suited to provide an effective deterrent to others similarly situated. See Tenn. Code Ann. § 40-35-103(1)(B); see also State v. Horne, 612 S.W.2d 186, 187

(Tenn. Crim. App. 1980); State v. Smith, 735 S.W.2d 859, 864 (Tenn. Crim. App. 1987) (holding that the trial court's finding that the sentence will have a deterrent effect cannot merely be conclusory but must be supported by proof). On the other hand, the defendant's history of violent outbursts toward her partners, culminating in the present offense, reflects a need to impress upon her the seriousness of her conduct and the need for change. In this respect, confinement is particularly suited to deter the defendant personally from similar conduct in the future and serves to impress upon her the seriousness of her conduct.

Also relative to the use of confinement to avoid depreciating the seriousness of the offense, we note that the trial court stated that the proof was very close regarding whether the defendant committed second degree murder or voluntary manslaughter. This is a factor to be considered in determining whether a sentencing alternative to confinement is appropriate. See State v. Travis, 622 S.W.2d 529, 534 (Tenn. 1981) (noting that in a crime of personal violence, the fact that the proof presents a close question between the lesser convicting offense and the greater indicted offense is a significant factor in justifying the denial of probation). In sum, we believe that the record justifies a denial of probation.

In consideration of the foregoing and the record as a whole, we affirm the judgment of conviction.

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Joseph M. Tipton, Judge

CONCUR:

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Jerry L. Smith, Judge

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Thomas T. Woodall, Judge