IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 20, 2000 Session

STATE OF TENNESSEE v. JOEL RICHARD SCHMEIDERER

Appeal from the Circuit Court for Bedford County
No. 14447 William Charles Lee, Judge

No. M1999-02546CCA-R3-CD - Filed November 9, 2000

The Defendant, Joel Richard Schmiederer, was found guilty by a jury of the following eight offenses: first degree felony murder, first degree premeditated murder, two counts of attempted first degree premeditated murder, burglary of an automobile, theft under $500, and possession of a firearm with an altered serial number. The two murder convictions were merged into a single first degree murder conviction, and the Defendant was given a life sentence for that offense. He was also sentenced as a Range I, standard offender to twenty-five years for each of the two attempted first degree murder convictions, two years for burglary of an automobile, and eleven months twenty-nine days each for theft under $500 and for possession of a handgun with an altered serial number. The trial court then ordered the two sentences for attempted murder to be served consecutive to each other and consecutive to the first degree murder conviction. On appeal, the Defendant argues (1) that the evidence was insufficient to convict him of any offense except possession of a handgun with an altered serial number; (2) that the trial court erred by charging the jury with felony murder and with first degree premeditated murder; (3) that the trial court erred by not instructing the jury on additional lesser included offenses; and (4) that the trial court erred by imposing the maximum sentence for each of the felony offenses and by ordering three of the felony sentences to be served consecutively. We find no reversible error; accordingly, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

DAVID H. WELLES, J., delivered the opinion of the court, in which JOE G. RILEY and NORMA MCGEE OGLE, JJ., joined.

John B. Nisbet, III, Cookeville, Tennessee; Donna Orr Hargrove, Public Defender; and Andrew Jackson Dearing, III, Assistant Public Defender, Shelbyville, Tennessee, for the appellant, Joel Richard Schmiederer.

Paul G. Summers, Attorney General and Reporter; J. Ross Dyer, Assistant Attorney General; Mike McCown, District Attorney General; and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The proof at trial established that on October 9, 1998, during the late afternoon, Tony Stout and his friend, Jamie Helmick, stopped at the Belfast Market to get something to drink. They were in Mr. Stout's blue pickup truck. When he drove in, Mr. Stout noticed a tan "new model" car sitting by the pay phone. Mr. Stout drove up next to the building and left Mr. Helmick in the truck while he went inside. When he returned, Mr. Stout saw "a couple of guys" standing by his truck on the passenger's side. Mr. Stout did not speak to the individuals; he got in his truck and pulled out. As he left, someone either "kicked" or "bumped" his truck. Mr. Stout did not stop; he continued to drive away.

As he was driving, Mr. Stout observed in his rearview mirror the vehicle that had been sitting at the pay phone. The vehicle appeared to be attempting to catch up to Mr. Stout's truck. Mr. Stout observed the car letting a female passenger get out on the side of the road. The car then continued to follow Mr. Stout. Mr. Stout turned right, and the vehicle followed. Looking in his rear view mirror, Mr. Stout saw a gun "hang out the window" of the driver's side of the other car, and then he saw smoke.

Mr. Stout drove toward the Lewisburg town square where he hoped to find people, and the car followed. He drove three-quarters of the way around the square and then made a sudden right turn. The car behind him attempted to follow, but ran over the curb and hit a stop sign. After hitting the sign, the car continued to pursue Mr. Stout. Mr. Stout made several turns, and the car was always there. At one point, Mr. Stout came to a stop sign where other traffic was stopped. Daniel Rodriguez, a person whom Mr. Stout knew, jumped out of the tan car and started toward the driver's side of Mr. Stout's truck. Mr. Stout knew Mr. Rodriguez because Mr. Rodriguez once dated Mr. Stout's girlfriend. Before Mr. Rodriguez could get to the truck, Mr. Stout "shot across a line of traffic" and drove away. The other car followed, abandoning Mr. Rodriguez.

Mr. Stout drove back to Belfast and then turned onto Liberty Valley Road, which was a "country road." Mr. Stout estimated that he was driving eighty-five miles an hour, attempting to get away from the car. The car continued to follow, traveling about three or four feet behind the truck. When Liberty Valley Road ended, Mr. Stout turned left on Pickle Road, going into Bedford County. Just after he turned left, he heard a loud "pow," and he noticed that his front windshield was "busted." Mr. Stout and Mr. Helmick laid down in the seat because they were being fired upon, and Mr. Stout's truck hit a mail box and ran off the road into a field. Mr. Stout did not stop; he continued traveling through the field, and then he returned to the road, where the car was still following them. He testified that he and Mr. Helmick decided to stop for help at the next house which appeared to have someone home. At this point, they had been chased by the car for approximately twenty miles. As they approached the house and started to turn in the driveway, they were rear-ended by the car and knocked into a ditch. The car kept going, so Mr. Stout and Mr. Helmick exited the truck and jumped the white gate blocking the driveway.

Once they were inside the gate, Mr. Stout and Mr. Helmick encountered Ted Olkowski, who called the police on his cellular phone. During the phone conversation, the car drove back by. Mr. Helmick gave the police the license tag number of the vehicle. The vehicle drove past the house, turned around in a neighbor's driveway, and came back. When they saw the vehicle coming back, Mr. Stout and Mr. Helmick went behind the house. They heard a loud noise while they were behind the house, so they walked back around the house and saw two men in Mr. Stout's pickup truck. One of the men had Mr. Stout's radio in his hand. Mr. Stout shouted, "That's my radio," and the Defendant, who had been driving the other car, pulled out a gun.

Upon seeing the gun, both Mr. Stout and Mr. Helmick started running. Mr. Stout ran toward the woods, and Mr. Helmick ran toward the house. Mr. Stout heard two or three gunshots. He then heard someone say, "I've been shot. Somebody help me." Mr. Stout stayed in the woods until he heard sirens, and then he came out. He saw that his friend, Jamie Helmick, had been shot. Mr. Helmick ultimately died from a gun-shot wound to the chest. Mr. Stout testified that neither he nor Mr. Helmick was armed.

Ted Olkowski testified that he and his wife live at 309 Pickle Road and that on October 9, 1998, around 4:00 or 5:00 in the afternoon, he was working in his shop when he heard a "crash." He went out to investigate and saw that a pickup truck had run into a ditch beside a big cedar tree near his driveway. He encountered two "boys," who appeared scared and who told him that they had been hit and that someone was shooting at them. Mr. Olkowski called 911 and then turned the phone over to Mr. Helmick. While Mr. Helmick was on the phone, a gold car drove by, and Mr. Olkowski observed the tag number on the car. He relayed the tag number to Mr. Helmick, who in turn relayed it to the 911 operator. The car turned around again. Mr. Olkowski testified that he told the "boys" to "get out of sight," which they did. The car stopped in the road by the mailbox, and the Defendant got out. Mr. Olkowski stated, "And then Mr. Schmiederer got out of the driver's side, walked around up to, I'd say, six or seven foot [sic] from me, pulled out a pistol, pointed it at my chest, and pulled the trigger, and it clicked." Mr. Olkowski testified that when the gun did not fire, the Defendant "looked a little bit startled," and he started to "fiddle" with the gun. Mr. Olkowski asked the Defendant why he wanted to shoot him, but instead of answering, the Defendant just asked Mr. Olkowski whether he knew the "boys" in the truck and told him that the "boys" had "caused him to crash the car."

Mr. Olkowski said that he tried to talk with the Defendant to keep him "occupied," and he commented on what a shame it was that the nice new car had been wrecked. While he was talking to the Defendant, Mr. Olkowski had the opportunity to observe the Defendant. He said that the Defendant was "well dressed," "within his wits," and "didn't seem to be intoxicated." The Defendant was "sure of himself," "steady" with the gun, and seemed to have a "purpose." Mr. Olkowski said that the passenger in the car, who was identified as Cody Utmore, walked up to the Defendant and suggested that they look for a CD player or something else in the pickup truck that they could use to help pay for damages to the car. Mr. Utmore went to the truck and entered the truck from the driver's side. He appeared to be attempting to remove a tape deck or CD player. The Defendant then

went to the truck and entered from the passenger's side. They both "were working on odds and ends, just seeing what was in there."

Mr. Olkowski testified that while the Defendant and Mr. Utmore were inside the truck, the other young men ran back around the house and one of them yelled, "Get out of my truck. Quit tearing my truck up." At this point, the Defendant came out of the truck with the pistol. Mr. Olkowski ran to the back of the house while the two "boys" ran around the front of the house. Mr. Olkowski saw the Defendant fire one shot at the young men from the gate across the driveway and then start running after the two men. Mr. Olkowski ran to his back door, opened it, and saw his wife standing by the bay window in the front of the house. Looking out the window, Mr. Olkowski saw the gun fire toward the front door. The Defendant tried to fire the gun again, but it jammed. At this point, Mr. Olkowski ran back around the house toward the front, and he heard Mr. Helmick yell, "You've killed me." Mr. Olkowski saw the Defendant, who had apparently cleared the jam and was preparing to shoot again. Mr. Olkowski then "leaped" on the Defendant, grabbed the gun, "conked" the Defendant on the head with the gun, and tossed the gun out of reach. Mr. Utmore came running around the house, but ran away and drove off in the Defendant's car after Mr. Olkowski pointed the gun at him. Mr. Olkowski testified that while he was sitting on top of the Defendant, he asked the Defendant why he had tried to shoot him. The Defendant replied "that he thought I was one of them's [sic] fathers or a friend." Mr. Olkowski said that he did not see Mr. Stout or Mr. Helmick with a weapon; only the Defendant had a weapon that day.

Linda Olkowski testified that she was in her house on October 9 when she heard a loud crash outside. She stepped outside onto her screened porch and saw the blue truck and two "boys" jump over the gate. They yelled, "Call the sheriff. Somebody is shooting at us." Ms. Olkowski called 911 and reported the incident. She returned to the porch, where she saw her husband at the gate and two "boys going back and forth from a car to the blue truck, taking things out of the blue truck, putting them in the car." She saw both "boys" in the blue truck. Assuming her husband had things under control, Ms. Olkowski went back inside. She heard gunshots, and then she saw Mr. Helmick jump the white picket fence to the front patio and try to get in the front door. The door was locked, and Ms. Olkowski said that she could not open the door because to do so would have placed her in the line of fire. Looking out the bay window, Ms. Olkowski saw the Defendant take aim and shoot Mr. Helmick. When the Defendant shot, he had his arm straight out and was aiming the gun toward Mr. Helmick. His hand was steady. The Defendant attempted to shoot a second time, but his gun jammed. Ms. Olkowski heard Mr. Helmick "hit the house" and scream, "He's killed me."

Nicole Sanders, a neighbor of the Olkowskis, testified that she was outside removing groceries from her vehicle when she heard gunshots. When she turned around, she saw a gold car chasing a blue truck. The vehicles were traveling "fast." A person in the passenger's side of the gold car had his arm hanging out the window, and he was shooting a gun directly at the blue truck. Ms. Sanders heard more than one shot, but she did not know the exact number of shots fired.

The Defendant testified on his own behalf at trial. He stated that he left his home about noon on October 9, 1998, driving his mother's new 1997 gold Sebring. He ran into Cody Utmore and

Daniel Rodriguez while he was "driving around." The Defendant said that he, Mr. Utmore, and Mr. Rodriguez each took a couple of Xanax pills. The Defendant had purchased fifty Xanax pills for $100. They also smoked three or four "joints" of marijuana. They "rode around" and then decided to go to Nashville to visit a friend who was in the hospital. They stopped at Consumers Market, where they encountered another friend, Shelly Peters. Ms. Peters joined them, and they decided to drive back to the Defendant's house to get the rest of the Xanax pills. The Defendant testified that he was "intoxicated" at this time due to the marijuana and the Xanax.

After going to the Defendant's house, they returned to town. Ms. Peters was driving because she did not like the way the Defendant had been driving. Ms. Peters pulled into the Belfast Market to use the pay phone. The three young men went into the store while Ms. Peters used the pay phone. When they came out of the store, Mr. Rodriguez saw Mr. Stout and Mr. Helmick in the blue truck. The Defendant testified that he "didn't see anything unusual until Daniel Rodriguez saw . . . Stout and Jamie Helmick in the blue truck. And apparently he had a problem with them, and they got into it." Mr. Rodriguez "kind of waved his hands, what's up, and said some obscenities, and they gave obscenities back." The blue truck pulled out, and Mr. Rodriguez ran after it. The three men returned to the Defendant's car, and the Defendant told Ms. Peters to get in the passenger's side because he was driving. She complied, and the Defendant drove in pursuit of the blue truck.

The Defendant said that he drove at a high rate of speed and caught up with the truck. During this time, they were all taking Xanax. He said that they took most of the pills; only a few were left. The Defendant testified that Mr. Rodriguez was "getting all pumped up," and the Defendant "got pumped up with him." Ms. Peters got scared and demanded to be let out of the car, which the Defendant allowed. The Defendant said, "Daniel pretty much, he want the [sic] fight for some reason or another. And usually when -- you know, I was messed up, and that excited me even more that he wanted to fight somebody. So, automatically, I just wanted to fight them, too." He said that he "had no reason at all" to fight "except that Daniel wanted to."

The Defendant pursued Mr. Stout and Mr. Helmick at speeds of seventy-five to eighty miles an hour until they entered the Lewisburg city limits and encountered traffic. Although he had a gun in the car, the Defendant said he was not planning to shoot anybody; he only wanted to fight. While he was driving around the square, the blue truck "cut in front" of the Defendant, causing the Defendant to run off the road and hit a stop sign. The Defendant said that after hitting the sign, he "was scared because [his] mother had just got [sic] the car a few months prior to that." He testified, "And I was mad at the same time. And I just lost all contact with what I was thinking about. I just automatically wanted to chase them down and fight them." When the truck stopped by a Krystal's restaurant, the Defendant pulled up behind it, and Mr. Rodriguez jumped out and tried to get up by the driver's side window of the truck. The truck pulled away, and the Defendant chased after it, leaving Mr. Rodriguez. When asked why he abandoned Mr. Rodriguez, the Defendant replied, "I really don't know. I just kept following them. I was mad. I just wanted to follow them."

Mr. Utmore, who was still in the car, crawled from the back seat into the passenger's seat. The Defendant continued to follow the truck through sharp curves, going fifty-five to sixty miles per

hour. Mr. Utmore used the Defendant's gun to fire a shot out the window. The Defendant said, "I was enraged. I just wanted to catch up to them. I just wanted to fight them. I really don't remember much else besides wanting to fight them." The Defendant admitted firing one shot out of his window, but he testified that Mr. Utmore did most of the shooting. He said that while Mr. Utmore was shooting, the truck hit a sign and ran off the road into a field. The truck came out of the field, and the Defendant kept following it. The truck hit the brakes, and the Defendant ran into it. The truck ran off the road into a ditch.

The Defendant said he pulled up at the Olkowskis' house and got out of the car. He had the gun concealed inside his coat pocket. The Defendant said he did not remember much that happened after he stopped, but he remembered Mr. Utmore going into the truck and taking the radio. He said that he was standing by the truck, and Mr. Utmore threw him a can that had coins in it. The Defendant shook the can and threw it down. The Defendant testified that Mr. Stout and Mr. Helmick came around the side of the house, and "when I saw them, all that – everything just went blank, and I chased after them." The Defendant stated that he did not remember seeing Mr. Olkowski until Mr. Olkowski had tackled him after he shot Mr. Helmick. He did not recall pointing his gun at Mr. Olkowski and pulling the trigger before shooting Mr. Helmick. He said that he remembered shooting at Mr. Helmick, but he did not realize that he had shot Mr. Helmick until the next day. He said that he thought he saw Mr. Helmick reach into his belt, and then he shot one time at Mr. Helmick. After that, he was tackled by Mr. Olkowski.

The Defendant gave two statements to the police: one at the hospital and one at the police station. He said that he remembered giving the statement at the police station, but he did not remember giving the statement at the hospital. In the second statement, the Defendant stated, "Jamie Helmick is an enemy of ours so we apprehended him." On cross-examination, the Defendant admitted that he knew Mr. Helmick and that it was a fair statement to say that Mr. Helmick was an enemy of his. Also in the second statement, the Defendant said,

> When we got there I was so mad at Jamie [Helmick] and Stout that I wanted to fight but by wrecking my car it triggered a whole new anger in me and I wanted to shoot them. Then the owner of the land got in my way and I pulled the gun on him. He then beat my ass. I also pulled the trigger on him but the gun jammed. When I started the chase it was over Daniel Rodriguez because he didn't like either of the boys in the truck. It ended up the way it did because while chasing them I wrecked my mother's new car, which brought anger upon me, which ended up the way it did.

At trial, the Defendant testified that when he stated he pulled the gun on the owner of the land, he meant that he tried to shoot Mr. Olkowski when Mr. Olkowski tackled him. He said he did not remember trying to shoot Mr. Olkowski at any other time.

Dr. Charles Harlan was called to testify because he performed the autopsy on Jamie Helmick. While on the stand, Dr. Harlan was asked about the effects of the drug Xanax. Dr. Harlan testified that Xanax "would have an anti-anxiety effect upon the central nervous system and would cause a

person to be less anxious." He agreed that Xanax could make a person appear calm and lethargic. When asked whether Xanax could cause someone to become "irrational" and "heighten some episode of passion," Dr. Harlan replied, "That is not a commonly found effect. . . . Xanax does not normally have that effect. There are different cases reported in the literature where rare instances of almost anything can occur." Dr. Harlan testified that a person who had ingested a large amount of Xanax at one time "would probably become sleepy." When asked if a large amount would have any other effect on that person, Dr. Harlan testified, "Probably not much." However, he said that if the person took enough of it, it could eventually cause death.

SUFFICIENCY OF THE EVIDENCE

The Defendant first challenges the sufficiency of the convicting evidence. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." Evidence is sufficient if, after reviewing 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 (1979). In addition, because conviction by a trier of fact destroys the presumption of innocence and imposes a presumption of guilt, a convicted criminal defendant bears the burden of showing that the evidence was insufficient. McBee v. State, 372 S.W.2d 173, 176 (Tenn. 1963); see also State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992) (citing State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1976), and State v. Brown, 551 S.W.2d 329, 331 (Tenn. 1977)); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Holt v. State, 357 S.W.2d 57, 61 (Tenn. 1962).

In its review of the evidence, an appellate court must afford the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." Tuggle, 639 S.W.2d at 914 (citing State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978)). The court may not "re-weigh or re-evaluate the evidence" in the record below. Evans, 838 S.W.2d at 191 (citing Cabbage, 571 S.W.2d at 836). Likewise, should the reviewing court find particular conflicts in the trial testimony, the court must resolve them in favor of the jury verdict or trial court judgment. Tuggle, 639 S.W.2d at 914. All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact, not the appellate courts. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987).

The Defendant asserts that the evidence was insufficient to support any of his convictions with the exception of possession of a firearm with an altered serial number. However, he makes no argument regarding the two attempted first degree murder convictions. Accordingly, any issue regarding the sufficiency of the evidence of the two attempted first degree murder convictions is waived. See Tenn. Ct. Crim. App. R. 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988). As to his other convictions, we will address each conviction separately, beginning with first degree premeditated murder.

To establish the Defendant's guilt of first degree premeditated murder, the State was required to prove that the Defendant intentionally and with premeditation killed Jamie Helmick. See Tenn. Code Ann. § 39-13-202(a)(1). Premeditation is "an act done after the exercise of reflection and judgment. 'Premeditation' means that the intent to kill must have been formed prior to the act itself." Id. § 39-13-202(d). When determining whether premeditation is present, the "mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation." Id.

The Defendant argues that the State did not prove premeditation because the evidence did not establish that he was "sufficiently free from excitement and passion" when he killed Mr. Helmick. He points to his own testimony in which he said that he was "enraged" and that he did not remember much except wanting "to fight them." However, the jury was not required to accept the Defendant's testimony. Looking at the evidence in the light most favorable to the State, the evidence established that the Defendant began a high speed chase for the sole reason that one of his passengers had a "problem" with one or both of the occupants of a blue truck. The Defendant continued the chase after the passenger with the "problem" exited the vehicle. During the chase, both the Defendant and Mr. Utmore fired shots at the blue truck. Upon seeing Mr. Helmick and Mr. Stout at the Olkowski's house the Defendant immediately started shooting at the young men and chasing them. After shooting Mr. Helmick one time, the Defendant's gun jammed. He attempted to clear the jam and was starting to shoot Mr. Helmick again when he was tackled by Mr. Olkowski. Mr. Olkowski testified that when he talked to the Defendant before the Defendant shot Mr. Helmick, the Defendant was "sure of himself," "steady," and seemed to have a "purpose." From this evidence, a rational jury could have determined that the Defendant formed the intent to kill after the exercise of reflection and judgment and that he was sufficiently free from excitement and passion as to be able to premeditate. Therefore, the evidence is sufficient to support the verdict.

To establish that the Defendant was guilty of felony murder, the State had to prove that the Defendant killed Mr. Helmick "in the perpetration of or attempt to perpetrate any . . . burglary." Id. § 39-13-202(a)(2). The Defendant asserts that felony murder was not established because the burglary of Mr. Stout's automobile was separate, distinct, and independent from the killing. We disagree. Mr. Olkowski testified that Mr. Utmore suggested to the Defendant that they look inside Mr. Stout's truck for a CD player or something else of value to help pay for damages done to the Defendant's mother's car. After that suggestion, Mr. Utmore entered the truck, followed by the Defendant. Both the Defendant and Mr. Utmore were in the truck "working on odds and ends, just seeing what was in there." When Mr. Stout and Mr. Helmick came around the side of the house and yelled at the Defendant and Mr. Utmore to get out of the truck, the Defendant complied, coming out of the truck with a gun. He then immediately proceeded to shoot at Mr. Stout and Mr. Helmick, ultimately killing Mr. Helmick. A rational jury could have thus found that the Defendant killed Mr. Helmick during the perpetration of a burglary of Mr. Stout's truck.

Also, the Defendant asserts that the evidence was insufficient to support the convictions for burglary of an automobile and for theft. A person commits the offense of burglary when that person

enters an automobile without the effective consent of the property owner "with intent to commit a felony, theft or assault." Id. § 39-14-402(a)(4). A person commits the offense of theft "if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." Id. § 39-14-103. The Defendant asserts that the evidence did not establish that he entered the blue truck with the intent to commit theft. However, Mr. Olkowski testified that after Mr. Utmore suggested to the Defendant that they search the truck for something of value, both Mr. Utmore and the Defendant entered the truck and started looking around. Mr. Olkowski, Ms. Olkowski, and Mr. Stout placed the Defendant inside the truck. The Defendant did not have permission to be in Mr. Stout's truck. From this evidence, a rational jury could have found that the Defendant entered Mr. Stout's truck with the intent to commit theft. In addition, the evidence established that a radio and a jar of game tokens were removed from Mr. Stout's truck. A rational jury could have likewise found the Defendant guilty of theft. Accordingly, the evidence is sufficient to support the convictions.

JURY CHARGE ON FIRST DEGREE MURDER

The Defendant argues that the trial court erred by charging the jury with first degree premeditated murder and with felony murder. He asserts that because the evidence was insufficient to support either type of first degree murder, the trial court erred by instructing the jury on first degree murder. Based on our resolution of the Defendant's first issue, this argument must fail. We have already determined that the evidence was sufficient to support a conviction for both first degree premeditated murder and felony murder; thus, it was appropriate and proper for the trial court to instruct the jury on those offenses.

The Defendant also argues that the trial court erred by instructing the jury on both types of first degree murder because it allowed the State two "bites at the apple" to convict him of first degree murder and "gave the jury the impression that they had to convict Mr. Schmiederer of something." He asserts that the State was required to elect between offenses. He does not, however, cite any authority in support of his position. For this reason, the issue is waived. See Tenn. Ct. Crim. App. R. 10(b); Killebrew, 760 S.W.2d at 231. Nevertheless, we note that our supreme court has held that the State is not required to elect between first degree premeditated murder and felony murder charged in separate counts of the indictment for a single offense, and both theories of first degree murder may be submitted to the jury. See State v. Hurley, 876 S.W.2d 57, 69-70 (Tenn. 1993); State v. Henley, 774 S.W.2d 908, 916 (Tenn. 1989); State v. Zirkle, 910 S.W.2d 874, 889 (Tenn. Crim. App. 1995); Welch v. State, 836 S.W.2d 586, 589 (Tenn. Crim. App. 1992).

LESSER INCLUDED OFFENSES

The Defendant next asserts that the trial court erred by failing to instruct the jury on additional lesser included offenses. Specifically, he asserts that the jury should have been instructed on criminally negligent homicide, reckless homicide, aggravated assault, felony reckless endangerment, and misdemeanor reckless endangerment as lesser included offenses of first degree

premeditated murder.[1] He also asserts that the jury should have been instructed on aggravated assault, attempted aggravated assault, felony reckless endangerment, misdemeanor reckless endangerment, and attempted reckless endangerment as lesser included offenses of attempted first degree premeditated murder.[2] However, the Defendant failed to include this issue in his motion for a new trial. Therefore, this issue has been waived. Tenn. R. App. P. 3(e); see also State v. Clinton, 754 S.W.2d 100, 103 (Tenn. Crim. App. 1988).

Notwithstanding, while we decline to consider whether the trial court should have instructed the jury on the offenses set forth by the Defendant, we do hold that any error in instructing the jury on additional lesser included offenses was harmless. Our supreme court has held that "by finding the defendant guilty of the highest offense to the exclusion of the immediately lesser offense . . . the jury necessarily rejected all other lesser offenses." State v. Williams, 977 S.W.2d 101, 106 (Tenn. 1998). In Williams, the defendant was charged with and convicted of first degree murder, and the jury was given instructions on first degree murder and second degree murder. Id. In finding the failure to instruct the jury on voluntary manslaughter harmless, the supreme court stated,

> [T]he trial court's erroneous failure to charge voluntary manslaughter is harmless beyond a reasonable doubt because the jury's verdict of guilt on the greater offense of first degree murder and its disinclination to consider the lesser included offense of second degree murder clearly demonstrates that it certainly would not have returned a verdict on voluntary manslaughter.

Id. Here, the jury was instructed on two lesser included offenses of both first degree premeditated murder and attempted first degree premeditated murder. By convicting the Defendant of the highest offense, the jury necessarily rejected all lesser offenses, including those set forth by the Defendant on appeal. Thus, any alleged error would be harmless.

SENTENCING

Finally, the Defendant argues that the trial court erred by imposing the maximum sentence for the two counts of attempted first degree premeditated murder and burglary of an automobile and by ordering three of the felony sentences to be served consecutively. When an accused challenges the length, range, or manner of service of a sentence, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption 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).

---

[1] The jury was instructed on the lesser included offenses of second degree murder and voluntary manslaughter.

[2] The jury was instructed on the lesser included offenses of attempted second degree murder and attempted voluntary manslaughter.

When conducting a de novo review of a sentence, this Court must consider: (a) the evidence, if any, received at the trial and sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement made by the defendant regarding sentencing; and (g) the potential or lack of potential for rehabilitation or treatment. State v. Thomas, 755 S.W.2d 838, 844 (Tenn. Crim. App. 1988); Tenn. Code Ann. §§ 40-35-102, -103, -210.

If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The presumptive sentence for a Class A felony is the midpoint in the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). The presumptive sentence for a Class B, C, D, or E felony is the minimum sentence in the range if there are no enhancement or mitigating factors. Id. When determining the proper sentence length, the trial court is to start at the presumptive sentence, enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for mitigating factors. Id. § 40-35-210(e).

In sentencing the Defendant, the trial court found the following seven enhancement factors: (1) the Defendant was a leader in the commission of an offense involving two or more criminal actors; (2) the offense was committed to gratify the Defendant's desire for pleasure or excitement; (3) the Defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community; (4) the Defendant possessed or employed a firearm during the commission of the offense; (5) the Defendant had no hesitation about committing a crime when the risk to human life was high; (6) the crime was committed under circumstances under which the potential for bodily injury to a victim was great; and (7) the Defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult. See id. § 40-35-114(2), (7), (8), (9), (10), (16), (20). The Defendant does not challenge the application of any of these enhancement factors. Instead, he argues that the trial court should have applied three mitigating factors.

The Defendant asserts that the following three mitigating factors were present in this case: (1) that substantial grounds exist tending to excuse or justify the Defendant's conduct, though failing to establish a defense; (2) that the Defendant, because of his youth, lacked substantial judgment in committing the offense; and (3) that 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. See id. § 40-35-113(3), (6), (11). The trial court explicitly rejected the Defendant's argument regarding these mitigating factors, stating

> The Court agrees with the State, that there are no mitigating factors in this case.
>
> The defendant argues that he -- somehow, substantial grounds existed to excuse or justify his criminal conduct. And not to take away from Mr. Dearing's argument -- he has to argue as best as he can with the facts that he has -- but that is just plain ludicrous, that could any grounds [sic] justify the defendant's conduct in this particular case.
>
> And, furthermore, the Court does not find because of his youth -- the defendant has an extensive background with the criminal justice system. And if anyone should know, regardless of their age, the ramifications of their acts, it should be the defendant.
>
> And neither does the Court find that there could be any justification for the defendant's conduct based upon any form of intoxication. If there was any intoxication, it was all voluntary.

We agree with the trial court that the three mitigating factors proposed by the Defendant are not applicable. Thus, the trial court did not err by failing to apply them. Accordingly, we conclude that the trial court properly enhanced the Defendant's sentences for attempted first degree murder from the mid-point in the range, twenty years, to the maximum in the range, twenty-five years. See id. § 40-35-112(a)(1). We likewise conclude that the trial court properly enhanced the Defendant's sentence for burglary of an automobile from the minimum in the range, one year, to the maximum in the range, two years. See id. § 40-35-112(a)(5).

The Defendant also argues that the trial court erred by ordering the two attempted first degree murder convictions to be served consecutive to each other and consecutive to his first degree murder conviction. According to Tennessee Code Annotated section 40-35-115(b), a court may order sentences to run consecutively if the court finds by a preponderance of the evidence that

> (2) The defendant is an offender whose record of criminal activity is extensive;
> . . . [or,]
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high.

In ordering the sentences to be served consecutively, the trial court stated,

> The Court does find that although it be a juvenile record, the defendant's record of criminal activity is extensive.
>
> And the Court does find that the defendant is a dangerous offender, whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high. And the Court specifically finds that incarceration of this defendant is necessary for the protection of society.

> For those reasons, the Court will sentence the defendant -- . . . the two charges of attempted murder in the first degree shall run consecutively to one another and consecutively to the life sentence that the defendant has.

Thus, the trial court ordered consecutive sentencing based on its findings that the Defendant has an extensive criminal record and that the Defendant is a "dangerous offender." We believe that the record supports both findings.

While the Defendant's prior criminal record consists entirely of juvenile offenses, it is certainly extensive. At the age of fifteen, the Defendant had acquired fourteen juvenile offenses, eleven of which would have been felonies had the Defendant been an adult. He was ultimately committed to the Department of Youth Development until his nineteenth birthday, but was released on March 27, 1998, seven months prior to his nineteenth birthday. The offenses in the present case were committed on October 9, 1998, just a little over six months from the time he was released from State custody and just twenty days prior to his nineteenth birthday. We believe this prior history indicates the Defendant's tendency to commit crimes when he is not physically prevented from doing so. Thus, the trial court's finding that the Defendant's record of criminal activity is extensive is adequately supported by the record, making consecutive sentences appropriate.

Also, although the trial court did not expound on its reasons for finding the Defendant to be a "dangerous offender," we believe that the record supports the trial court's conclusion that the Defendant is subject to consecutive sentencing because he is a "dangerous offender." The offenses committed in the present case show that the Defendant is an offender who has little or no regard for human life and no hesitation about committing a crime when the risk to human life is high. He engaged in a high speed chase for no reason other than one of his friends had a "problem" with the people in a blue truck. The Defendant admitted that he had no personal reason to confront or fight the men in the blue truck. He wanted to fight because his friend wanted to fight. He wanted to fight so badly that he abandoned his friend on the side of the road and continued pursuing the blue truck for about twenty miles, shooting at the truck out his window. When the blue truck ran into a ditch, the Defendant stopped, pulled his gun on a total stranger, and pulled the trigger. He appeared surprised when the gun did not fire and kill the stranger. When Mr. Helmick and Mr. Stout appeared, the Defendant immediately started shooting at them and chasing them. He aimed his gun at Mr. Helmick and pulled the trigger, killing Mr. Helmick. These actions clearly indicate the Defendant's little regard for human life.

However, finding the Defendant to be a "dangerous offender," standing alone, is not sufficient to support consecutive sentences. In State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995), our supreme court set forth two additional requirements for consecutive sentences when the defendant is a "dangerous offender": the trial court must also find (1) "that an extended sentence is necessary to protect the public against further criminal conduct by the defendant," and (2) "that the consecutive sentences . . . reasonably relate to the severity of the offenses committed." Id. at 939. The requirement of additional findings when the defendant is a "dangerous offender" "arises from the fact that of all of the categories for consecutive sentencing, the dangerous offender category is

the most subjective and hardest to apply." State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999). The other categories for consecutive sentencing have "self-contained limits"; thus, the additional findings are limited to cases involving consecutive sentencing of "dangerous offenders." Id.

Notwithstanding, we believe that the additional requirements have been met. As we previously noted, the Defendant's prior history of criminal activity indicates his tendency to commit crimes when not physically restrained. This not only establishes the Defendant's criminal history, but it shows that an extended period of incarceration is necessary to protect the public from the Defendant's criminal actions. We also conclude that consecutive sentences are reasonably related to the severity of the offenses. The Defendant had no qualms about chasing another vehicle, shooting at the vehicle, trying to shoot a complete stranger who was assisting the individuals in the vehicle, and shooting and killing Jamie Helmick. Thus, based on the severity of the offenses and the need to protect society from further criminal activity, we believe the trial court was justified in ordering the Defendant to serve three of his sentences consecutively.

Accordingly, the judgment of the trial court is affirmed.

_____

DAVID H. WELLES, JUDGE