

OPINION

This is an appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Defendant was convicted on a jury verdict of second degree murder.¹ For this Class A felony, he was sentenced as a Range I standard offender to the minimum sentence of fifteen years in the Department of Correction. On this appeal, he argues that the evidence is insufficient to support a conviction for second degree murder and is sufficient only to sustain a voluntary manslaughter conviction. He also argues that the trial judge did not properly perform his function as the thirteenth juror. We find no merit to his arguments and affirm the judgment of the trial court.

The Defendant and the victim were lifelong friends. The victim was seventy-three years old and the Defendant was sixty-two years old. The Defendant's sister was the live-in girlfriend of the victim. She was sixty-one years old. At the time of the killing, the Defendant also lived in the house with his sister and the victim. The victim and the Defendant had been drinking heavily on the day of the offense. At about eight o'clock that night, they argued over whether the television should be turned off. The Defendant stabbed the victim in the chest area four times with a knife, resulting in the victim's death.

The Defendant was indicted by the Rutherford County grand jury for the offense of second degree murder. The case was tried before a jury which returned a verdict of guilty as charged. On this appeal, the Defendant first argues that the State failed to prove beyond a reasonable doubt that the killing was unlawful because the proof showed that the Defendant acted in self-defense. He next argues that if the killing was unlawful, it could only be voluntary manslaughter because the Defendant acted in a

¹Tenn. Code Ann. § 39-13-210.

state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner. Finally, he argues that the trial court erred in failing to properly perform its function as the thirteenth juror.

The first issue to be addressed is the sufficiency of the evidence to support the conviction. When an accused challenges the sufficiency of the convicting evidence, this court must review the record to determine if the evidence presented during the trial was sufficient "to support the finding of the trier of fact of guilt beyond a reasonable doubt." T.R.A.P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). This court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Herrod, 754 S.W.2d 627, 632 (Tenn. Crim. App. 1988).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). In State v. Grace, 493 S.W.2d 474 (Tenn. 1973), the Tennessee Supreme Court said, "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." Id. at 476.

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, id., the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record and the inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt. Matthews, 805 S.W.2d at 780.

We now review the testimony presented at the trial. The Defendant's sister, who was the victim's girlfriend, testified that she and the Defendant lived with the victim in the victim's house at the time the victim was killed. These three people had known each other all their lives. She said the two men "had been gone off all day a-drinking, and they come back around night." She said that both the men were "pretty well loaded." She stated that the victim wanted to go to bed but the Defendant wanted to stay up and watch TV and that this was what started the argument. When the Defendant told the victim that he was going to stay up and watch TV, the victim "jumped out of the bed. He was a fit-throwing man. He jumped out of the bed and threw a fit . . ."

She said the victim ran out on the porch and was talking to himself. He came back in and threatened to get a gun and take his own life. She and the Defendant kept him from getting the gun. The victim then went into the kitchen. In her direct testimony, the witness said that the victim got a butcher knife and that he "rise something in the air, looked like a butcher knife, and he was coming at my brother with it." She said the Defendant killed the victim in self-defense. She also said that her brother is a big man and that she couldn't see through him so she couldn't see what happened in the

kitchen. After the victim fell bleeding to the kitchen floor, the Defendant came back into the living room and sat down in the recliner. The Defendant said "I believe he's dead; don't you?" She then called for an ambulance and the police. She stated that the Defendant and the victim had had arguments and had fought before. She admitted that she told the police on the night of the killing that when the Defendant got the knife out, the victim's eyes got real big and he said, "Ernest, don't use that knife on me." After the stabbing, she took the knife that the Defendant had used to kill the victim and put it in another room. She said she was trying to help her brother. She later told the police where the knife was. During direct examination, cross-examination and re-direct and re-cross, several inconsistencies are found in the testimony of this witness concerning the events surrounding this incident.

Officer Lee Young testified that he was the first officer to arrive at the scene of the crime. After he arrived and he asked the Defendant what happened, the Defendant said "I stabbed him." Detective Randy Groce testified that he interviewed the Defendant's sister on the night of the killing. She specifically told him that she saw the Defendant stab the victim and that she thought he stabbed him three times. She said she saw the Defendant take a knife out of its holster and that was the knife with which he stabbed the victim. The officer testified that he specifically asked her if the victim had any type of a weapon that night and that she said he did not.

The victim was five feet, eight and one-half inches tall, weighed one hundred forty-seven pounds and was seventy-three years old. The Defendant was six feet, one inch tall, weighed about two hundred and fifteen pounds and was sixty-two years old at the time the killing occurred.

Dr. Julia Goodin was the medical examiner who performed the autopsy on the victim's body. She stated that the victim received four separate stab wounds to the

chest and abdominal area and that each of the four wounds could have been fatal. The victim also had two superficial wounds on each arm which the doctor testified were consistent with defense wounds.

The Defendant's son testified that about four days after the stabbing, he, his wife and some other people went to the residence where the killing occurred to clean up the place and to get some of his father's things. In the course of cleaning up the kitchen, they moved the refrigerator and found a butcher knife under it. The house was apparently in total disarray with dirty cooking utensils scattered about the kitchen and several items had been dumped behind the refrigerator. While it apparently was the Defendant's theory that the knife found under the refrigerator had been wielded by the victim at the time the Defendant killed him, there was no proof to establish that fact. The Defendant did not testify in his defense.

Second degree murder is defined as the knowing killing of another.² The killing must also be unlawful.³ While it is true that the state's main witness testified that the Defendant acted in self-defense in killing the victim, the jury was free to accept or reject that conclusion. That witness also said that both she and the victim told the Defendant not to use the knife on the victim. The Defendant was more than four inches taller and sixty pounds heavier than the victim. The Defendant was also about ten years younger than the seventy-three-year old-victim.

The Defendant argues that his actions were justified because he acted in self-defense.⁴ The test to determine whether the Defendant's conduct was justified is three-fold: (1) The Defendant must reasonably believe he is threatened with imminent loss

²Tenn. Code Ann. § 39-13-210.

³Tenn. Code Ann. § 39-13-201.

⁴Tenn. Code Ann. § 39-11-611.

of life or serious bodily injury; (2) the danger creating the belief must be real or honestly believed to be real at the time of the action; and (3) the belief must be founded on reasonable grounds. See Tenn. Code Ann. § 39-11-611 Sentencing Commission Comments. These are factual determinations which the jury must resolve. The jury obviously did not believe that the Defendant satisfied the three-prong test. They resolved this issue against the Defendant and determined that the killing was unlawful.

The Defendant next argues that the evidence presented is insufficient to support a conviction for second degree murder and is sufficient only to sustain a voluntary manslaughter conviction. Second degree murder is defined as a "knowing killing of another." Tenn. Code Ann. § 39-13-210(1). It is clear from this record that the killing of the victim was knowing. The Defendant argues that he is guilty of no more than voluntary manslaughter because he acted "in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner."⁵ We again conclude that the jury has resolved this factual issue against the Defendant. It is true that the Defendant and the victim had been involved in an argument prior to the killing. The victim had tried to get a gun while indicating that he was going to kill himself. After the stabbing, the Defendant went back into the living room and sat down in a recliner. The Defendant said "I believe he's dead; don't you?" The jury obviously rejected the Defendant's argument that he acted in such a state of passion produced by adequate provocation to reduce the degree of homicide to voluntary manslaughter.

We conclude that the evidence is sufficient to support the jury's verdict of guilty of second degree murder beyond a reasonable doubt.

⁵Tenn. Code Ann. § 39-13-211.

In his final issue, the Defendant argues that the trial judge erred by failing to properly perform his function as the thirteenth juror. Specifically, the Defendant alleges (1) That the trial judge had insufficient recall or familiarity with the facts of the case to enable him to adequately perform his function as thirteenth juror; (2) that the trial judge simply failed to act as a thirteenth juror; and (3) that the trial judge's comments demonstrate that he misconceived his duty to independently weigh the evidence and thereby committed error by simply deferring to the judgment of the jury.

The trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence. Tenn. R. Crim. P. 33(f). This rule imposes upon a trial court judge the mandatory duty to serve as the thirteenth juror in every criminal case, and approval by the trial judge of the jury's verdict as the thirteenth juror is a necessary prerequisite to the imposition of a valid judgment. State v. Carter, 896 S.W.2d 119, 122 (Tenn. 1995). The rule does not require the trial judge to make an explicit statement on the record. When the trial judge simply overrules a motion for new trial, the appellate court may presume that the trial judge has served as the thirteenth juror and approved the jury's verdict. Id. If the record contains statements by the trial judge expressing dissatisfaction or disagreement with the weight of the evidence or the jury's verdict, or statements indicating that the trial court absolved itself of its responsibility to act as the thirteenth juror, an appellate court may reverse the trial court's judgment. Id.

In the case sub judice, when the jury returned its verdict of guilty, the trial court stated in open court to the Defendant "you have been found guilty by a jury on the charge of second degree murder. I accept that verdict." At the conclusion of the hearing on the motion for a new trial, the judge stated "The jury did rule. I find it quite hard to change a jury's verdict. It was an unfortunate happening, I'll say that, but as far as I see, the State did prove beyond a reasonable doubt that Mr. McCormick did kill the

victim in this case. And, obviously, it was done knowingly, within the definition of the term knowing. So I would overrule your motion."

The trial herein concluded on May 11, 1994. The hearing on the motion for a new trial was conducted on August 29, 1994. At the conclusion of that hearing, the judge stated that he did not recall whether it was the victim that was ready to go to bed and the Defendant who wanted to watch TV or vice versa. Obviously, the judge remembered the facts of the trial and what started the argument. The judge further recalled the knife which was subsequently found under the refrigerator. He could not specifically recall whether that fact was adduced at the trial or at the sentencing hearing. We conclude that the record clearly shows the trial court was sufficiently familiar with the facts to exercise his function as thirteenth juror.

We further conclude that the record is clear that the trial judge did not fail to act as a thirteenth juror. At the time the jury returned the verdict, the judge stated that he accepted the verdict. At the conclusion of the hearing on the motion for a new trial, the judge stated his opinion that the state did prove beyond a reasonable doubt that the Defendant knowingly killed the victim. In view of the other statements made by the trial judge, we cannot conclude that when he said "I find it quite hard to change a jury's verdict," that this demonstrated his failure to perform his duty as thirteenth juror or that he simply deferred to the judgment of the jury. We believe that his additional comments indicated that he thought the State proved guilt of second degree murder beyond a reasonable doubt. This issue is without merit.

The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

GARY R. WADE, JUDGE

JOHN H. PEAY, JUDGE