

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY SESSION, 1996

FILED

June 6, 1996

C.C.A. NO. 02C02-9507-CR-00185
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

C.C.A. NO. 02C02-9507-CR-00185
SHELBY COUNTY)

VS.)

HON. W. FRED AXLEY
PRESIDING JUDGE)

GLEN D. CLAYBORNE,)

Appellant.)

(Second Degree Murder and
Reckless Homicide - Direct Appeal)

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

A Shelby County Criminal Court jury found Appellant Glen Clayborne guilty of one count of second degree murder and one count of reckless homicide. As a Range I standard offender, Appellant received a sentence of twenty-five years for the second degree murder conviction and two years for the reckless homicide conviction. He also received an eight year sentence as a result of parole violation. All sentences were ordered served consecutively. In this appeal, Appellant presents four issues for review: (I) whether the evidence presented at trial is legally sufficient to sustain a conviction for second degree murder; (II) whether the trial court erred in admitting certain evidence; (III) whether the trial court erred in finding no mitigating factors in determining the length of his sentence; and (IV) whether the trial court erred in refusing to allow Appellant's trial counsel to instruct the jury regarding moral certainty.¹

After a review of the record, we affirm the judgment of the trial court.

I. SUFFICIENCY OF THE EVIDENCE

Appellant alleges that the evidence presented at trial is legally insufficient to support a conviction for second degree murder. When an appeal challenges the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the State, 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, 318 (1979);

¹Technically, these issues are waived since Appellant has failed to make appropriate references to the record. See Tenn. R. Crim. P. 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988). Nevertheless, we will address these issues on the merits.

State v. Evans, 838 S.W.2d 185, 190-91 (Tenn. 1992); Tenn. R. App. P. 13(e). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). This Court will not reweigh the evidence, re-evaluate the evidence, or substitute its evidentiary inferences for those reached by the jury. State v. Carey, 914 S.W.2d 93, 95 (Tenn. Crim. App. 1995). In a criminal trial, great weight is given to the result reached by the jury. State v. Johnson, 910 S.W.2d 897, 899 (Tenn. Crim. App. 1995).

Once approved by the trial court, a jury verdict accredits the witnesses presented by the State and resolves all conflicts in favor of the State. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). The credibility of witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury as trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). A jury's guilty verdict removes the presumption of innocence enjoyed by the defendant at trial and raises a presumption of guilt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant then bears the burden of overcoming this presumption of guilt on appeal. State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991). We will review the facts of this case in light of these well-established principles of law.

Eenetrich Yancey was shot during an argument with Appellant. The head wound was inflicted from three or more feet away and proved fatal. At the time she was shot, Ms. Yancey was pregnant with Appellant's baby. Medical testimony established the fetus Ms. Yancey was carrying was viable

and died of suffocation as a result of the mother's death.² Appellant gave varying accounts of the circumstances surrounding the shooting. Initially, Appellant stated that Ms. Yancey shot herself while playing with the gun. However, as the police investigation proceeded, Appellant changed his story, maintaining that he pulled the trigger in the mistaken belief that the safety was engaged. Based on tests performed by the police, it was established that the gun in question would not fire with the safety engaged.

On at least two prior occasions, Ms. Yancey called the police regarding domestic altercations with Appellant. Just two weeks before her death, Ms. Yancey stated that she needed to get away from Appellant before he killed her. On one occasion prior to the shooting, Appellant threatened Ms. Yancey with a gun. On another occasion, Appellant beat Ms. Yancey with a stick of some kind while she was holding a baby. In 1991, she sought and acquired an order of protection against Appellant. However, she continued to live with Appellant from the time of the order of protection until the time of the shooting.

Appellant testified that the shooting was an accident and that he did not intend to harm Ms. Yancey. He stated that he originally retrieved the gun for protection, as he was planning on going out for the evening. He conceded that, as a convicted felon, the possession of a firearm violated the conditions of his parole. According to Appellant's testimony, while he was checking to make sure that the safety was engaged, Ms. Yancey asked him to stop

² For the death of Ms. Yancey, the jury found Appellant guilty of second degree murder. See Tenn. Code Ann. § 39-13-210 (Supp. 1995). For the death of the fetus, the jury found Appellant guilty of reckless homicide. See id. §39-13-215; see also id. § 39-13-214 (recognizing a viable fetus as a person for the purposes of criminal homicide).

handling the gun. He responded to her request by first stating that the gun would not fire with the safety engaged and then “playfully” pointing the weapon at Ms. Yancey and pulling the trigger. The gun fired, and a bullet struck Ms. Yancey in the head. Appellant stated that, immediately following the shooting, he told the police that Ms. Yancey shot herself because he feared that the investigators would not believe his claim that the shooting was an accident. Appellant admitted that he had hit Ms. Yancey in the past but denied ever beating her with a stick or pointing a gun at her during an argument. Despite his own admission to previous physical abuse of Ms. Yancey, Appellant testified that he loved her and would never have done anything to hurt her.

Having heard the foregoing evidence, the jury found Appellant guilty of the second degree murder of Ms. Yancey. In order to sustain a conviction of second degree murder in this case, the State was required to prove that Appellant knowingly killed the victim. See Tenn. Code Ann. § 39-13-210(a)(1) (Supp. 1995). Appellant argues that the prosecution failed to prove, beyond a reasonable doubt, that the killing was “knowing.” According to Tenn. Code Ann. § 39-11-302(b) (1991), “[a] person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result.” The record reveals that, during an argument, Appellant pointed a gun at Ms. Yancey and pulled the trigger. The record further reveals that Appellant had previously threatened Ms. Yancey with a gun as well as subjected her to other forms of physical abuse. Appellant’s actions following the shooting, the evidence of past abuse by Appellant, and other physical and circumstantial evidence are sufficient to allow a rational trier of fact to find beyond a reasonable doubt that Appellant

knowingly, if not intentionally, killed Ms. Yancey. Determining credibility of witnesses and resolving conflicts between witnesses are matters entrusted exclusively to the jury as trier of fact. See Sheffield, 676 S.W.2d at 547. As such, it was within the province of the jury to disbelieve Appellant's testimony that the shooting was an accident. Instead, the jury rationally concluded that, based on the evidence presented by the State, Appellant was aware that his conduct was reasonably certain to cause the death of Ms. Yancey. Appellant has failed to overcome his presumption of guilt. Thus, we find that, when viewed in a light most favorable to the State, the evidence on the record is legally sufficient to support Appellant's conviction for second degree murder.

II. ADMISSION OF EVIDENCE

Appellant alleges that the trial court erred in admitting the following evidence: testimony concerning prior fights between Appellant and Ms. Yancey, a 1991 protective order obtained by Ms. Yancey against Appellant, and testimony regarding statements made by Ms. Yancey that Appellant was going to kill her. Appellant argues that, in each case, the prejudicial effect of the evidence outweighed its probative value. The Tennessee Rules of Evidence provide the following:

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Tenn. R. Evid 403 (emphasis added).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be

admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:

- (1) The court upon request must hold a hearing outside the jury's presence;
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and
- (3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b)(3) (emphasis added).

First, Appellant argues that the trial court should have excluded evidence of Appellant's prior abuse of Ms. Yancey. When determining the admissibility of such testimony, a trial court must find that a material issue exists other than the defendant's propensity for conduct in conformity with these prior bad acts. State v. Nichols, 877 S.W.2d 722, 732 (Tenn. 1994). Furthermore, the trial court must exclude the evidence if the degree of unfair prejudice outweighs the probative value of the evidence. Id. Here, the trial court admitted evidence of these violent episodes not to prove that Appellant acted in accord with his character but as part of the proof establishing intent. Violent acts indicative of the relationship between the victim of a violent crime and the defendant prior to the commission of the offense are relevant to show intent. State v. Smith, 868 S.W.2d 561, 574 (Tenn. 1993). This evidence is particularly relevant in view of Appellant's defense that the shooting was an accident. We conclude that the probative value of the testimony outweighed its prejudicial effect and that the testimony was properly admitted.

As mentioned previously, Appellant testified that the shooting was an accident and that he did not intend to harm Ms. Yancey. Further, Appellant

denied severely beating Ms. Yancey and denied previously threatening her with a gun. In an effort to rebut this testimony, the State introduced a copy of a protective order obtained by Ms. Yancey against Appellant, wherein Ms. Yancey reported that Appellant beat and kicked her as well as threatened her with a gun. Appellant argues that the trial court should have excluded the 1991 protective order, again asserting that its prejudicial effect outweighed its probative value.³ The order was probative in showing a history of abuse and in rebutting Appellant's claim that the shooting was an accident. Furthermore, Ms. Yancey obtained the protective order just two years before the shooting. We conclude that the probative value of the protective order outweighed its prejudicial effect and that the order was properly admitted.

Finally, Appellant argues that the trial court should have excluded the statement made by Ms. Yancey regarding her belief that Appellant would kill her. According to the testimony of Ms. Jenetta Holmes, Ms. Yancey stated that she "need[ed] to get away from [Appellant] before he kills me." Appellant concedes that the statement qualifies as an exception to the hearsay rule but argues that its prejudicial effect outweighs its probative value. However, under the Tennessee Rules of Evidence, the state of mind exception to the hearsay rule contemplates only that the declarant's conduct, not some third party's conduct, is provable under this exception. See Tenn. R. Evid. 803(3) advisory commission comments. Therefore, Ms. Yancey's statement that she feared for her life is not admissible to prove Appellant's state of mind at the

³At first blush, the introduction of this order appears to be an improper use of extrinsic evidence to prove a specific instance of conduct denied by a witness. See Tenn. R. Evid 608(b). However, specific instances of conduct may be introduced for other purposes, such as to rebut a defendant's theory that the charged offense was an accident or mistake. See State v. West, 844 S.W.2d 144, 149 (Tenn. 1992).

time of the shooting. We conclude that the statement made by Ms. Yancey was inadmissible hearsay. However, in light of the protective order, the other evidence of abuse, and the fact that the shooting occurred during an argument, we are of the opinion that the introduction of Ms. Yancey's statement did not unduly prejudice the jury nor affect the outcome of the trial. Considering the record as a whole, we conclude that the admission of Ms. Yancey's statement was harmless error. See Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

III. SENTENCING

Appellant next alleges that the trial court erred in finding no mitigating factors in determining the length of his sentence. When an appeal challenges the length, range, or manner of service of a sentence, the appellate court conducts a de novo review, with a presumption that the determination of the trial court was correct. Tenn. Code Ann. § 40-35-401(d) (1990). However, the presumption of correctness only applies when the record demonstrates that the trial court properly considered the relevant sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting a review of the sentence, this Court must consider the evidence, the presentence report, the sentencing principles, the arguments of counsel, the nature and character of the offense, mitigating and enhancement factors, any statements made by the defendant, and the potential for rehabilitation or treatment. State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993). The defendant bears the burden of showing the impropriety of the sentence imposed. State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993).

Appellant asserts that the following mitigating factor is applicable to his sentence: “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 his conduct.” Tenn. Code Ann. § 40-35-113(11) (1990). Appellant maintains that the shooting was an accident and that the circumstances surrounding the accident make it unlikely that a sustained intent to violate the law motivated his conduct. However, the jury rejected the defense of accident. Moreover, the record reveals a number of previous incidents where Appellant acted violently toward Ms. Yancey, including threatening her with a gun and beating her with a stick of some kind. Appellant also has an extensive criminal record, reflecting consistent criminal conduct from the age of fourteen until his arrest for these offenses at age twenty-three. In light of Appellant’s history of violence toward Ms. Yancey and his extensive criminal record, we cannot characterize murder as aberrant behavior for Appellant. Appellant has failed to set forth circumstances warranting the application of this, or any, mitigating factor. Thus, we find that the trial court properly found no mitigating factors in determining the length of Appellant’s sentence.

IV. JURY INSTRUCTION BY TRIAL COUNSEL

Finally, Appellant alleges that the trial court erred in refusing to allow his trial counsel to instruct the jury regarding moral certainty. Appellant does not argue that the trial court failed to provide an adequate definition of reasonable doubt but instead that his trial counsel should have been allowed to discuss

moral certainty before the jury. Regardless of whether the substance of the intended instruction by Appellant's counsel was an accurate statement of the law, a trial court may prohibit counsel from explaining the law to the jury during voir dire. See State v. Washington, 658 S.W.2d 144, 145 (Tenn. Crim. App. 1983). This issue is without merit.

Accordingly, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

JOSEPH B. JONES, PRESIDING JUDGE

GARY R. WADE, JUDGE