IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1996 SESSION

FILED

November 27, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)
	) C.C.A. No. 01C01-9511-CC-00357
Appellee,	)
	) Macon County
V.	)
	) Honorable J. O. Bond, Judge
	)
PATRICIA YOW WILCOX,	) (Second Degree Murder)
	)
Appellant.	)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

O P I N I O N

The appellant, Patricia Wilcox, was convicted by a jury of second degree murder and sentenced to twenty-five years confinement in the Department of Correction. On appeal she raises the following issues for our review:

1. Whether the trial court erred in denying the appellant's motion for mistrial after the prosecutor made comments regarding the appellant's invocation of her constitutional right against self-incrimination;

2. Whether the trial court erred in denying the appellant's motion to review the notes of a testifying witness;

3. Whether the trial court erred in refusing to allow the appellant to introduce the prior arrest record of the decedent;

4. Whether the evidence was sufficient to support a verdict of guilt beyond a reasonable doubt; and

5. Whether the sentence imposed was excessive.

After reviewing the record, we find no reversible error. The judgment of the trial court is affirmed.

FACTS

In January 1993, Myron Wilcox, the murder victim, failed to make a customary birthday call to his son in Florida. The son thought this was unusual and made several unsuccessful attempts to contact his father. He eventually contacted his stepmother, the appellant. The appellant informed him that she did not know where the victim was but assumed he had gone to Florida.

In February 1993, the son instigated a search for his father. The search concluded in February 1994, when a body was recovered from a well on the appellant's property. Based upon strong circumstantial evidence which we discuss later, the Macon County Sheriff's Department concluded the body was that of Myron Wilcox and that the appellant shot him in the head with a small

caliber weapon. The appellant was subsequently indicted for the first degree murder of her husband and convicted of second degree murder.

ISSUE 1: WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR MISTRIAL AFTER THE PROSECUTOR MADE COMMENTS REGARDING THE APPELLANT'S INVOCATION OF HER CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION.

The appellant contends that the trial court erred by denying a mistrial after the assistant district attorney commented on the appellant's invocation of her fifth amendment right against self-incrimination. This contention arises from the following colloquy between the assistant district attorney and a prosecution witness:

> Q: Now down there in Texas when you went down there and you searched this van. After you searched the van, can you tell the jury or not there was any rights advisement of this defendant down there in Texas?
>
> A: Yes, sir.
>
> Q: And after those rights were read to her there was no statement made, right?
>
> A: Yes, sir.
>
> Q: She wanted to see an attorney which is fine, right?
>
> A: Yes, sir.

At this point defense counsel objected and requested a mistrial. The trial judge denied the motion for mistrial and issued the following curative instruction:

> I'm going to tell you something now. That was an improper question, completely improper. A defendant, and we all know, does not have to make any statement at any time, that's your Constitutional right. Nothing can be inferred from that, from your point of view at all. I would instruct you not to infer anything from it. That's a protection you've got, I've got and every citizen of this country has got. And there's no reason to make a statement. In fact defendants or anyone who is being questioned, is better off not to make a statement in those cases. And this defendant just exercised her Constitutional right.

In reviewing a claim alleging error in not declaring a mistrial because of prosecutorial misconduct, this Court must determine whether the improper conduct could have affected the verdict to the prejudice of the defendant. Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976). This Court has set out five factors which must be considered in making this determination. Id. at 344. These factors are as follows:

1. the conduct complained of in light of the facts and circumstances of the case;

2. the curative measures undertaken;

3. the intent of the prosecutor in making the improper remarks;

4. the cumulative effect of the improper conduct and any other errors in the record; and

5. the relative strength or weakness of the case. Id.

Furthermore, the prompt instruction of a trial judge generally cures any error unless the error is so prejudicial that it more probably than not affected the judgment. State v. Tyler, 598 S.W.2d 798 (Tenn. Crim. App. 1980).

The state presented a substantial amount of evidence against the appellant. Also, the trial judge responded with a thorough curative instruction. The record reveals that the improper comments occurred during redirect examination of a prosecution witness. It was the state's position that the appellant had created the note allegedly left by the victim explaining he was leaving for Florida. On cross examination, defense counsel created the inference that the prosecution failed to compare the note allegedly left by the victim to the handwriting of the appellant. On redirect, the prosecutor attempted to bring out the fact that the state could not take a writing exemplar from the appellant to make a comparison because the appellant invoked her fifth amendment rights. It is evident that the prosecutor had a non-malicious motive in asking this series of questions.

We find that these comments did not affect the verdict to the prejudice of the defendant.[1] This issue is without merit.

ISSUE 2: WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO REVIEW THE NOTES OF A TESTIFYING WITNESS.

The next issue presented by the appellant is whether the trial court erred in refusing her the opportunity to inspect notes of a testifying investigative officer.

The appellant contends that this information constituted Jencks Act material and was subject to disclosure pursuant to Tenn.R.Crim.P. 26.2. This contention is true only if the investigator's notes constitute a "statement" as defined by Rule 26.2.[2] The determination of what constitutes a producible statement is a matter that rests purely within the discretion of the trial judge and can only be set aside by this Court if the decision is clearly erroneous.

The record before us is void of the investigator's notes. It was incumbent upon the appellant to prepare a record that included all materials necessary for disposition of her appeal. Tenn.R.App.P. 24(e); State v. Beech, 744 S.W.2d 585 (Tenn. Crim. App. 1987). In the absence of an adequate record we must presume that the trial court's ruling was adequately supported by the evidence. Id. at 588; Tenn.R.App.P. 13(c) and 36(a). Without the investigator's notes we cannot determine whether the trial judge's ruling was clearly erroneous and must presume he ruled correctly. This issue is, therefore, overruled.

ISSUE 3: WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE

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[1]It should be noted that the defense reopened this subject on examination of the appellant.

[2]A "statement" is defined in Tenn.R.Crim.P. 26.2(g) as:

> (1) A statement made by the witness that is signed or otherwise adopted or approved by the witness; or
> (2) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and this is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof.

APPELLANT TO INTRODUCE THE PRIOR ARREST RECORD OF THE DECEDENT.

The appellant contends that the trial court erred by refusing to allow her to introduce the victim's prior arrest record. The record indicates that the victim had been arrested for assaulting her son. She alleges that this arrest record was critical in establishing the victim's height and weight[3] and to illustrate that her son had both the motive and opportunity to kill the victim.

Any error in ruling the evidence inadmissible was harmless. See Tenn. R. App. P. 36(b). The appellant was able to establish the victim's height and weight through other testimony. The appellant questioned her son about the assault incident leading to the victim's arrest and asked him the height and weight of his stepfather. Although the actual arrest record was not admitted into evidence, the information the appellant sought to establish was heard by the jury. This issue is without merit.

ISSUE 4: WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT A VERDICT OF GUILT BEYOND A REASONABLE DOUBT.

The appellant contends that the evidence presented at trial is insufficient to support her conviction. Great weight is given to the result reached by the jury in a criminal trial. A jury verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Moreover, a guilty verdict removes the presumption of innocence which the appellant enjoyed at trial and raises a presumption of guilt on appeal. State v.

[3]The height and weight of the victim were in issue because the state could not positively identify the body. The appellant alleged that the body removed from the well was taller and heavier than her husband.

Grace, 493 S.W.2d 474, 476 (Tenn. 1973). The appellant has the burden of overcoming this presumption of guilt. Id.

Where sufficiency of the evidence is challenged, the relevant question for this Court 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 or crimes beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn.R.App.P. 13(e). The weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury as the triers of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984).

The evidence was sufficient to sustain the appellant's conviction. The state presented a substantial amount of circumstantial evidence implicating the appellant. The victim's body was found in a well on the property of the appellant. The appellant instructed her youngest son to cover the well soon after Myron Wilcox was last seen alive. The state established that the body had been in the well approximately thirteen months, the same amount of time that Myron Wilcox had been missing.

The state introduced testimony that the body was clothed in a red vest similar to a vest worn by Myron Wilcox. It was also established that the appellant owned and used guns of the same caliber that caused the death of the body recovered from the well. Finally, a romantic acquaintance of the appellant testified that she had told him that she shot her husband and stored his body in "cool springs."

Tennessee's Supreme Court has held that a conviction may be based entirely on circumstantial evidence where the facts are "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the defendant and

the defendant alone." State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971). In this case the finger of guilt points at the appellant. The state introduced sufficient evidence from which a jury could have concluded the appellant was guilty of second degree murder beyond a reasonable doubt. This issue is without merit.

ISSUE 5: WHETHER THE SENTENCE IMPOSED UPON THE APPELLANT WAS EXCESSIVE.

The appellant next contends that her sentence was excessive. Our review of the sentence imposed by the trial court is de novo, with a presumption that the determinations of the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1990); State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993). The presumption of correctness which attaches to the trial court's action is conditioned upon an 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). Furthermore, the burden of showing that the sentence was improper rests with the appellant. Id. at 169.

In conducting our review, we consider the evidence presented at the sentencing hearing, the presentence report, the sentencing principles, arguments of counsel, statements of the defendant, the nature and characteristics of the offense, mitigating and enhancing factors, and the appellant's amenability to rehabilitation. Tenn. Code Ann. § 40-35-210(b) (1990); Ashby, 823 S.W.2d at 168. Also, the presumptive sentence shall be the minimum within the range if no enhancement or mitigating factors exist. Tenn. Code Ann. § 40-35-210 (c) (1990). If enhancement factors exist but there are no mitigating factors, the trial court may set the sentence above the minimum in that range but still within the range.

In this case, the trial court found two enhancement factors: the appellant had a previous criminal history, and the appellant possessed or employed a firearm during the commission of the offense. Her history included the shooting assault of another husband. The trial court found no mitigating factors. The court also questioned the veracity and sincerity of the appellant throughout the trial and sentencing process. This Court finds that the appellant has not overcome the presumption of correctness. The sentence imposed by the trial court is affirmed.

Having reviewed the entire record and all the issues presented for review, we find no error mandating reversal. Accordingly, the judgment of the trial court is affirmed.

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PAUL G. SUMMERS, Judge

CONCUR:

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GARY R. WADE, Judge

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L. T. LAFFERTY, Special Judge