

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1998 SESSION

<p>FILED</p> <p>August 17, 1998</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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STATE OF TENNESSEE,)
)
 Appellee,)
)
 v.)
)
 DONNIE WAYNE FOULKES)
)
 Appellant.)

No. 03C01-9705-CR-00194
 Greene County
 Honorable James E. Beckner, Judge
 (Second degree murder)

For the Appellant:

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 and
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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
 Judge

OPINION

The defendant, Donnie Wayne Foulks, appeals as of right from his jury conviction in the Greene County Criminal Court for second degree murder. The trial court sentenced the defendant as a Range I, standard offender to twenty-five years in the custody of the Department of Correction. It also imposed a fine of five thousand dollars. The defendant contends that the trial court erred by applying certain enhancement factors and by failing to consider and apply mitigating factors. We affirm the judgment of conviction.

The record only includes the trial court records, the appellate file, the briefs of the parties, and a portion of the sentencing hearing transcript, consisting of a presentence report introduced as an exhibit, the arguments of counsel, and the trial court's findings. Neither a transcript of the trial proceedings nor a transcript of the testimony presented at the sentencing hearing was included in the record on appeal. In any event, the record reflects that on January 21, 1996, the defendant shot and killed his wife, Robin Foulks, with a shotgun at their home while the victim was in bed. It also shows that the three-year-old son of the defendant and the victim was in the bed with the victim when the shooting occurred. The record reflects that the child tried to stop the victim's bleeding. Several hours passed before the victim and the child were discovered.

The presentence report states that the then-forty-three-year-old defendant had no prior felony convictions. It shows that the defendant had misdemeanor convictions in 1977, 1978, 1979 and 1986 for offenses including public intoxication, assault and battery, speeding and hunting without a permit. It reflects that the defendant obtained a GED and that he was employed as a truck driver. The report also

states that because the defendant failed to submit a personal questionnaire, a complete report could not be submitted to the court.

At the conclusion of the sentencing hearing, the trial court sentenced the defendant to the maximum sentence of twenty-five years in the custody of the Department of Correction. In sentencing the defendant, the trial court applied the following enhancement factors pursuant to T.C.A. § 40-35-114:

(1) the defendant had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;

(3) the offense involved more than one (1) victim;

(4) a victim of the offense was particularly vulnerable because of age or physical or mental disability;

(9) the defendant possessed or employed a firearm during the commission of the offense; and

(15) the defendant abused a position of private trust that significantly facilitated the commission or the fulfillment of the offense.

The trial court applied factor (1) based on the defendant's prior misdemeanor convictions and the defendant's earlier acts of violence against the victim, including "shootings of guns and bruises and hair pulling." The trial court noted that the defendant's prior convictions were old and alone were not significant. However, it stated that the prior convictions became more significant in view of the evidence presented.

The trial court considered the three-year-old child as a victim for purposes of applying factors (3) and (4), noting that the child was in bed with the victim when she was shot, that the child tried to stop the victim's bleeding, and that the victim and the child were not discovered for several hours. It also noted that there was no specific proof of trauma to the child, but it stated that the factors were applicable under the peculiar circumstances of the case because it was obvious that the child must have

been greatly traumatized. The court gave great weight to factors (3) and (4). In applying factor (15), the court found that the defendant would not have had access to the house without the private relationship with the victim and the child. The trial court determined that factor (15) was not of much weight.

As for mitigating factors, the defendant requested that the trial court consider the following mitigating factors as provided in T.C.A. § 40-35-113:

(8) the defendant suffered from a mental or physical condition that significantly reduced the defendant's culpability for the offense;

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

(13) the defendant accepted responsibility for his actions.

Defense counsel argued that mitigation should be considered because the defendant did not go to the victim's house willingly as evidenced by the proof, although he conceded that the defendant went there with a shotgun. Defense counsel acknowledged that voluntary intoxication may not be considered in mitigation under T.C.A. § 40-35-113(8), but he argued that factor (8) applied due to the defendant's depression as recounted by witnesses. The defendant contended that factor (11) applied because it would be beyond imagination for a person to have a sustained intent to violate the law given the circumstances of the case. He argued that the offense must have occurred on the spur of the moment. Defense counsel also asserted that the trial court should consider under T.C.A. § 40-35-113(13) that the defendant accepted responsibility for his actions as evidenced by his candid testimony and by the fact that the defendant did not deny that he shot the victim.

The trial court found no mitigating factors applicable. The court refused to apply factor (8) because voluntary intoxication does not qualify as proper mitigation. See T.C.A. § 40-35-113(8). As for factor (11), the trial court concluded that the

evidence introduced relative to the relationship between the defendant and the victim before the killing rendered the factor inapplicable. Specifically, it found that the relationship was a stormy one, involving assaults, threats and the use of guns by the defendant against the victim. In refusing to apply factor (13), the trial court noted the defendant's sorrow but found the defendant's testimony to be incredible.

On appeal, the defendant concedes that the trial court appropriately applied enhancement factor (1) based upon his prior criminal convictions. However, he argues that the court erred when it also considered the defendant's prior history of criminal behavior based upon prior bad acts of the defendant. He argues that the trial court should not have been permitted to consider prior bad act evidence under Rule 404(b), Tenn. R. Evid., in determining that factor (1) was applicable and entitled to great weight. The defendant asserts that the trial court erred by applying enhancement factors (3) and (4) because the child may not be considered as a "victim" for enhancement purposes. With respect to factor (15), the defendant contends that the evidence does not support its application. As for mitigating factors, the defendant asserts that the trial court erred by finding that no mitigating factors applied.

As we previously noted, the record does not include a transcript of the trial proceedings or a full transcript of the sentencing hearing. Pursuant to Rule 24(a), T.R.A.P., the defendant filed with the clerk of the trial court a designation of less than the full record on appeal and a statement of the issue to be raised on appeal. Although the defendant raised a sentencing issue, he believed that less than the full record on appeal was necessary to convey a fair, accurate and complete account of what transpired with respect to the sentencing issues raised on appeal. Even though questioned during oral argument regarding the possibility of supplementing the record, defense counsel filed a letter with the court following oral argument stating that after careful consideration, they had decided not to supplement the record on appeal.

Pursuant to Rule 24(a), T.R.A.P., the appellate record must include the transcript or statement of the evidence or proceedings, unless less than a full record is deemed sufficient to convey a fair, accurate and complete account of what transpired with respect to the issues raised on appeal. The appealing party has an obligation to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues which form the basis of the appeal. State v. Boling, 840 S.W.2d 944, 951 (Tenn. Crim. App. 1992). In State v. Ballard, 855 S.W.2d 557 (Tenn. 1993), our supreme court stated:

Where the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue. Absent the necessary relevant material in the record an appellate court cannot consider the merits of an issue.

Id. at 560-61.

Moreover, pursuant to T.C.A. § 40-35-210(b), the trial court is required to consider for sentencing purposes the following:

- (1) The evidence, if any, received at the trial and the sentencing hearing;
- (2) The presentence report;
- (3) The principles of sentencing and arguments as to sentencing alternatives;
- (4) The nature and characteristics of the criminal conduct involved;
- (5) Evidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and
- (6) Any statement the defendant wishes to make in the defendant's own behalf about sentencing.

Consideration of these factors is mandatory. In similar fashion, the fact that our standard of review is de novo on the record requires us, as well, to consider the factors. Thus, even if the limited record before us indicates trial court error that might ordinarily overcome the statutory presumption of correctness that applies to the trial court's determinations, we will still be unable to conduct a proper de novo review of the statutorily relevant factors.

The defendant has relied upon the facts introduced at trial and the sentencing hearing to support his contentions as to enhancement and mitigating factors. Most of the trial court's decisions with respect to the application of enhancement and mitigating factors were based upon the proof introduced at the trial and the sentencing hearing. Moreover, the defendant made several references in his appellate brief to evidence introduced at trial in support of his arguments that the trial court erred. Under these circumstances, the full trial and sentencing hearing transcripts are necessary to convey a fair, accurate and complete account of what transpired with respect to the sentencing claims raised on appeal. Absent a complete record, we are unable to perform a complete de novo review.

We are able to determine from the record before us that the trial court incorrectly applied enhancement factors (3) and (4) pursuant to T.C.A. § 40-35-114. On appeal, the state concedes that the trial court inappropriately considered the child as a victim for enhancement purposes under T.C.A. § 40-35-114(3) and (4). See State v. Raines, 882 S.W.2d 376, 384 (Tenn. Crim. App. 1994) (“the word ‘victim’ as used in Tenn. Code Ann. § 40-35-114(3), is limited in scope to a person or entity that is injured, killed, had property stolen, or had property destroyed by the perpetrator of the crime”). However, the state urges the court to revisit its earlier ruling in Raines. There is no need to do so in this case.

On the other hand, although the trial court incorrectly applied enhancement factors (3) and (4), the record indicates the applicability of enhancement factor (10), dealing with commission of a crime when the risk to life was high, based upon the presence of the child in the bed when the defendant shot the victim. Although factor (10) does not apply in a murder case because the factor is inherent in the offense relative to the victim, it may be considered when there is a person other than the

murder victim in the area of high risk. That is the case here, and enhancement factor (10) should be considered to enhance the defendant's sentence.

As for the defendant's claims with respect to enhancement factors (1) and (15) and mitigating factors (8), (11), and (13), we are unable to conduct a full de novo review because the circumstances of the offense are particularly relevant to our decision. Given the state of the record, we presume the trial court was correct in its determinations with respect to these factors.

In summary, we hold that the trial court incorrectly applied enhancement factors (3) and (4) but that factor (10) is applicable. Given the record before us, we uphold the trial court's imposition of a sentence of twenty-five years.

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

Joseph M. Tipton, Judge

CONCUR:

Gary R. Wade, Presiding Judge

Curwood Witt, Judge