IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1999 SESSION

STATE OF TENNESSEE,	)	
	)	**C.C.A.**
M1998 00343 CCA R3 CD		
Appellee,	)	
	)	**ROBERTSON COUNTY**
VS.	)	
	)	**HON. ROBERT W. WEDEMEYER,**
BRYAN LAMONT MURRAY,	)	**JUDGE**
	)	
Appellant.	)	(Second-Degree Murder)

FOR THE APPELLANT:

MICHAEL R. JONES
District Public Defender
113 Sixth Ave., West
Springfield, TN 37172

FOR THE APPELLEE:

PAUL G. SUMMERS
Attorney General & Reporter

ELIZABETH B. MARNEY
Asst. Attorney General
Cordell Hull Bldg., 2nd Fl.
425 Fifth Ave., North
Nashville, TN 37243-0493

JOHN W. CARNEY
District Attorney General

DENT MORRISS
Asst. District Attorney General
500 South Main St.
Springfield, TN 37172

OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was found guilty by a jury of second-degree murder and subsequently sentenced by the trial court to a term of twenty-four years. The defendant's motion for a new trial was overruled. The defendant now appeals and presents the following issues for our review:

(1) whether the evidence was sufficient to support his conviction;

(2) whether the trial court erred in denying defendant's objection to the prosecutor's opening statement;

(3) whether the trial court correctly sentenced the defendant.

The evidence at trial established that on July 26, 1997, the defendant went to a local car wash where some of his friends were socializing and drinking. After greeting his friends, which included the victim, the defendant began a conversation with the victim. At some point, the conversation turned into an argument and the defendant turned around and started to walk away. The victim then said something to the effect of, "Go ahead on, you punk a-- n-----." Upon hearing this, the defendant turned and walked back toward the victim. The defendant placed his drink on a nearby pole. When the drink fell to the ground and the defendant reached down to retrieve it, the victim hit the defendant. The defendant stumbled backwards, pulled a gun out of his waistband, and fired a shot. As the crowd scattered, the victim fled and the defendant pursued him. The defendant fired his gun at the victim several times while chasing him. The victim's body was subsequently found lying in a gravel lot located approximately three-tenths of a mile from the car wash. The trail of blood along the route from the car wash to where the victim's body was ultimately found clearly established that the victim sustained several gunshot wounds while he was running from the defendant. The defendant testified that he was not thinking while running after and shooting at the victim. The defendant further testified that the chase ended when the victim turned around in the gravel lot and the defendant immediately fired two shots at him.

The victim sustained a total of five gunshot wounds. The State's evidence established that, of the five bullet wounds, three were not life threatening. All three of

these bullets entered the victim from behind. One of these bullets pierced the victim's right kidney, another entered behind his arm pit and went into his chest wall, and the other bullet entered the back of the victim's left thigh. The remaining two wounds were caused by bullets that entered the victim from the front. Either of these wounds would have been fatal. One of the bullets entered the victim in the chest and pierced his heart, diaphragm, stomach, liver, and went into his belly. The second entered the victim's forehead and went into his brain. The expert testimony at trial established that all five of these gunshot wounds were fired within a range of twenty-four to forty-eight inches from the victim. In addition to the gunshot wounds, the defendant had fresh abrasions on his left knee.

The defendant now contends that the evidence is insufficient to support his conviction for second-degree murder. Specifically, the defendant argues that the evidence established that he was adequately provoked such that his conviction should be reduced to voluntary manslaughter. A defendant challenging the sufficiency of the proof has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "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). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Second-degree murder is defined as a "knowing" killing of another. T.C.A.

§ 39-13-210(a)(1). "Knowing" is defined as follows:

> a person . . . acts knowingly with respect to the conduct or to the circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. 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.

T.C.A. § 39-11-302(b).

The defendant contends that the proof presented at trial amounted to a case of voluntary manslaughter, not second-degree murder. However, voluntary manslaughter is defined as the "intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." T.C.A. § 39-13-211. While the jury in the case at bar was charged with the law on voluntary manslaughter as a lesser grade of second-degree murder, the jury obviously chose to reject this theory. This was the jury's prerogative. See State v. Johnson, 909 S.W.2d 461, 464 (Tenn. Crim. App. 1995). The proof established that the defendant shot the victim three times while the victim was running away from him and twice while the victim faced the defendant. There was no evidence that the victim was armed with any type of weapon. The only evidence of sufficient provocation was that the victim struck the defendant one time. The evidence was clearly sufficient for the jury to decide that the defendant knowingly shot and killed the victim, thereby properly convicting him of second-degree murder.

The defendant next contends that the trial court erred in denying his motion for a new trial based on the prosecutor's opening statement. Specifically, the defendant argues that the prosecutor's remarks indicating that this case involved an execution style murder were improper. In his opening statement, the prosecutor stated that he wanted the jury to think about one word while hearing the proof in this case, "and that word is execution. Because that's what this case is." A few minutes later, the prosecutor mentioned the abrasions found on the victim's left knee and stated that the abrasions were consistent with "falling while running from the defendant or falling to his knees in that gravel parking lot begging for his life[.]" At this point, the defendant objected to the prosecutor's comment. The trial court responded, "General, it is an opening statement.

You are supposed to outline what your evidence is going to be so –." The prosecutor responded, "Very well, Your Honor, I would only say that the wounds to the knees are wounds to the knees and the jury will have to just make of those what they think those wounds show." The defendant argues that the prosecutor's remarks had no basis in fact and were prejudicial to him.

We first note that all parties have the right to make an opening statement "setting forth their respective contentions, views of the facts and theories of the lawsuit." T.C.A. § 20-9-301. In addition, trial judges have wide discretion in controlling the opening arguments of counsel, and their decisions with regard to those arguments will not be reversed on appeal absent an abuse of that discretion. State v. Leach, 684 S.W.2d 655, 659 (Tenn. Crim. App. 1984).

In the case at bar, even assuming, arguendo, that the prosecutor's statements were improper, it was clearly harmless error as the defendant was not prejudiced by such remarks. See Tenn. R. App. P. 36(b). First, the prosecutor's statements were somewhat supported by the testimony of Dr. Charles Harlan, the medical examiner who performed the victim's autopsy, who stated that the abrasions on the victim's knee were consistent with falling to the ground and striking a hard surface. The evidence also established that the gunshot wounds to the forehead and chest were fired at a distance of two to four feet from the victim. The prosecutor's remarks were merely an attempt to project the facts that the prosecutor intended to prove - a first-degree murder accomplished by an execution style shooting. In addition, in the charge to the jury, the trial court admonished that "[s]tatements, arguments, and remarks of counsel . . . are not evidence. If any statements were made that you believe are not supported by the evidence, you should disregard them." The jurors are presumed to have heard and followed this instruction. See State v. Williams, 690 S.W.2d 517, 523 (Tenn. 1985). As such, we find this issue is without merit.

The defendant further contends that the prosecutor's cross-examination of the defendant was improper. The questions and testimony at issue consist of the following:

Q: Did [the victim] get down on his knees, Mr. Murray?

A: No, sir.

Q: Did [the victim] fall down on his knees and say something to you?

A: No.

Q: [The victim] didn't get down on his knees and ask you please to stop shooting him?

At this point, defense counsel objected on the grounds that there was no factual basis for the prosecutor's line of questioning. The trial court overruled the objection because the defendant had already answered "no." The defendant argues that this line of questioning was improper and the trial court took no curative measures to prevent prejudice. The defendant further contends that the prosecutor had no facts upon which to base his theory that the victim dropped to his knees and pleaded for his life. The defendant asserts that this line of questioning was not harmless error because he had entered a plea of guilty to voluntary manslaughter, and these questions were an attempt by the prosecution to discredit his theory of adequate provocation.

When arguing improper conduct on appeal, the defendant is required to show that the conduct was so improper that it affected the verdict to his detriment. Harrington v. State, 385 S.W.2d 758, 759 (Tenn. 1965). In reviewing an allegation of improper conduct, this Court should consider several factors, including the intent of the prosecutor, the curative measures which were undertaken by the court, the improper conduct viewed in context and in light of the facts and circumstances of the case, the cumulative effect of the remarks with any other errors in the record, and the relative strength or weakness of the case. Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976).

The record reveals that the prosecutor based this line of questioning on the evidence of fresh abrasions on the victim's left knee consistent with falling to the ground. Even if improper, in reviewing the course of the entire trial, we cannot conclude that the prosecutor's conduct prejudiced the defendant to such an extent as to deprive him of a fair trial. The evidence established that the defendant chased the victim for three-tenths of a mile while shooting at him. The evidence further established that the defendant shot the victim in the chest and forehead at a distance of two to four feet. Viewed in the

context of cross-examination, in light of the facts and circumstances of the case, and taking into account the strength of the State's evidence, we do not think that the cumulative effect of the prosecutor's line of questioning affected the verdict to the defendant's detriment. As such, this issue is without merit.

The defendant next contends that the imposed sentence is excessive. Specifically, he argues that the trial court erroneously applied several enhancement factors when determining his sentence and failed to give the appropriate weight to applicable mitigating factors.

When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "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).

The Sentencing Reform Act of 1989 established a number of specific procedures to be followed in sentencing. This section mandates the court's consideration of the following:

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

T.C.A. § 40-35-210.

In addition, this section provides that for Class A felonies, the presumptive sentence is the mid-point within the range. T.C.A. § 40-35-210(c). If there are enhancing and mitigating factors, the court must start at the mid-point in the range and enhance the sentence as appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating

factors. If there are no mitigating factors, the court may set the sentence above the mid-point in that range but still within the range. The weight to be given to each factor is left to the discretion of the trial judge and is accorded a presumption of correctness unless the trial court applies inappropriate factors or otherwise fails to follow the purposes and principles of the 1989 Sentencing Act. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). As the record reveals that the trial court erred in its application of enhancement factors, our review is simply de novo.

The defendant first challenges the trial court's application of enhancing factor (5), that the defendant treated the victim with exceptional cruelty during the commission of the offense. T.C.A. § 40-35-114(5). As the State concedes, this factor is inapplicable to the case at bar. See State v. Harold Wayne Shaw, No. 01C01-9707-CR-00259, Davidson County (Tenn. Crim. App. filed October 21, 1998, at Nashville) (holding that "[a]lthough it was undoubtedly cruel to shoot the victim multiple times at close range, this case involved no extended length of torture, nor any unusual type of abuse that would uphold [factor (5)]"); see also State v. Poole, 945 S.W.2d 93, 98 (Tenn. 1997) (holding that a finding of exceptional cruelty is appropriate only where there is a culpability distinct from and appreciably greater than that incident to the crime). As such, factor (5) was erroneously applied by the trial court in the case at bar.

The trial court also applied enhancement factor (9), that the defendant possessed or employed a firearm during the commission of the offense. T.C.A. § 40-35-114(9). Although the defendant does not contest the applicability of this factor, he contends that it should have been accorded "little weight" by the trial court. However, the weight to be given to each factor is within the discretion of the trial judge, and the defendant has failed to cite any authority that would indicate that the trial judge abused his discretion in weighing this factor. As such, this issue is without merit.

The defendant next challenges the trial court's application of enhancing factor (20), that he was adjudicated to have committed a delinquent act

or acts as a juvenile that would constitute a felony if committed by an adult. T.C.A. § 40-35-114(20). The trial court based the application of this factor on the defendant's juvenile conviction for reckless endangerment. The defendant claims that the presentence report failed to indicate whether his reckless endangerment conviction was found to have been committed with a deadly weapon, thereby upgrading the offense from a misdemeanor to a felony as is required for application of T.C.A. § 40-35-114(20). However, the evidence presented at the sentencing hearing established that the defendant was convicted of reckless endangerment after a gun in his possession discharged and injured a five-year-old child. Since a deadly weapon was involved, the defendant's conviction for reckless endangerment, had he been an adult, would have been a Class E felony. T.C.A. § 39-13-103(b). As such, the trial court properly applied enhancement factor (20).

While enhancing factor (5) was misapplied, another enhancing factor, not considered by the trial court, is applicable in the case at bar. We note that this Court is allowed, in conducting its de novo review, to consider any enhancing or mitigating factors supported by the record, even if not relied upon by the trial court. State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993); State v. Smith, 910 S.W.2d 457, 460 (Tenn. Crim. App. 1995). As the State points out, the trial court failed to apply enhancing factor (10), that the defendant had no hesitation about committing a crime when the risk to human life was high. T.C.A. § 40-35-114(10). This factor applies where persons other than the intended victim are present and placed at risk of harm by way of the defendant's actions. See State v. Harold Wayne Shaw, No. 01C01-9707-CR-00259, Davidson County (Tenn. Crim. App. filed October 21, 1998, at Nashville) (citing State v. Ruane, 912 S.W.2d 766, 784 (Tenn. Crim. App. 1995); State v. Makoka, 885 S.W.2d 366, 373 (Tenn. Crim. App. 1994)). In the case at bar, the first shot fired by the defendant was fired near a car wash stall when a large group of people was standing nearby. At least one witness stated that the defendant fired this shot "into the crowd." Upon hearing this shot, the crowd scrambled for cover as the defendant began to chase and fire his gun at the victim. In light of the foregoing facts, factor (10) is an applicable enhancement factor in the case at bar. See State v. Jones, 883 S.W.2d 597, 603 (Tenn. 1994).

The defendant next contends that the trial court failed to apply several applicable mitigating factors. The record reflects that the trial court considered the defendant's youth and remorse as mitigating factors when determining his sentence. See T.C.A. § 40-35-113(6), (13). The record supports the application of these factors. However, the defendant argues that the trial court should have applied mitigating factors (2), that he acted under strong provocation, (3) that substantial grounds exist tending to excuse or justify his criminal conduct, and (11), that he committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct. T.C.A. § 40-35-113(2), (3), (11). We note that the facts of this case militate against the application of any of these three factors.

On the night of the murder, the defendant carried a loaded, illegal weapon to a local teenage gathering point. He proceeded to use that weapon against an unarmed victim. The defendant chased the victim, shooting at him several times while running after him, then shot the victim in the chest and forehead from no more than four feet away. The fact that the victim struck the defendant in the course of an argument does not constitute "strong provocation" or in any way tend to justify the defendant's conduct. The fact that the defendant, after the victim tried to escape, chased the victim for three-tenths of a mile while shooting at him and only stopped shooting the victim after the victim fell to the ground, indicates that the defendant did have a sustained intent to violate the law. As such, mitigating factors (2), (3), and (11) are not applicable in the case at bar.

As a Range I standard offender convicted of a Class A felony, the defendant's presumptive sentence was twenty years. See T.C.A. § 40-35-112(a)(1); -210(c). In light of the foregoing applicable enhancement and mitigating factors, we find the trial court did not err in sentencing the defendant to a term of twenty-four years.

Accordingly, we find the trial court properly overruled the defendant's motion for a new trial. The defendant's conviction and sentence are affirmed.

_____
JOHN H. PEAY, Judge

CONCUR:

_____
DAVID H. WELLES, Judge

_____
JOHN EVERETT WILLIAMS, Judge