

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs February 27, 2013

**STATE OF TENNESSEE v. MICHAEL DEWEY ELLINGTON**

**Direct Appeal from the Criminal Court for Monroe County**

**No. 09-270 Amy Reedy, Judge**

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**No. E2012-00908-CCA-R3-CD - Filed August 13, 2013**

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The appellant, Michael Dewey Ellington, was convicted of the first degree (premeditated) murder of his girlfriend and sentenced to life in prison. On appeal, the appellant challenges the sufficiency of the evidence and claims that the trial court erred by (1) excluding photographs of the contents of the victim's purse and (2) admitting a photograph depicting the victim's wounds at trial. After carefully reviewing the record and the arguments of the parties, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.**

NORMA MCGEE OGLE, J., delivered the opinion of the Court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

C. Richard Hughes, Jr., District Public Defender, Jeanne L. Wiggins, Assistant District Public Defender, for the appellant, Michael Dewey Ellington.

Robert E. Cooper, Jr., Attorney General and Reporter, Leslie E. Price, Senior Counsel; R. Steven Bebb, District Attorney General, and James H. Stutts, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS AND PROCEDURAL BACKGROUND**

On March 17, 2009, police responding to a 911 call placed by one of the appellant's brothers entered the appellant's residence and discovered the victim, Julia Kinsey, dead on

the bedroom floor. The victim had been shot a single time through the back of the head. A single-shot, break-action shotgun was found lying on the bed with its action open, and a single spent casing was found on the floor.

On August 6, 2009, the Monroe County Grand Jury indicted the appellant on a single count of first degree (premeditated) murder in violation of Tennessee Code Annotated section 39-13-202. At his trial on May 17-18, 2011, the appellant did not deny that he had shot and killed the victim but claimed that he had done so in self-defense.

Deputy Clinton Brookshire of the Monroe County Sheriff's Office testified that he responded to a call at a specific address on Old Highway 68 at 11:10 p.m. on March 17, 2009, where he was met by the appellant's two brothers. Deputy Brookshire entered the residence and discovered the victim laying face-down on the bedroom floor between a night stand and the bed. He discovered a shotgun lying on the bed, and because its action was open, he could determine that the shotgun was unloaded. He noted that there was a spent shotgun casing lying on the ground. Deputy Brookshire testified that he secured the scene and spoke with the appellant's brothers, who indicated that they had arrived at the appellant's residence at 10:48 p.m. and had entered the premises prior to his arrival.

On cross-examination, Deputy Brookshire testified that when EMS personnel arrived at the residence he accompanied them into the bedroom, where they rolled over the victim

and attempted to find her pulse. He testified that he did not see a knife near the victim's body or anywhere else in the bedroom when EMS personnel moved the body. Deputy Brookshire testified that he went to the residence in response to a 911 call that was received at 11:06 p.m., but he did not know who had placed the call. He testified that he did not remember whether the bedroom door was open or closed when he first arrived.

Dennis Reed Hughes testified that he was employed as paramedic for Monroe County on the night of the incident. He testified that he responded to a call on Old Highway 68 on March 17, 2009. He testified that he entered the residence and discovered a female lying face down on the bedroom floor. The female had no pulse and was not breathing. Mr. Hughes testified that in his medical opinion the female was deceased.

Detective Travis Brian Jones of the Monroe County Sheriff's department testified that he arrived at the residence on the night of the incident and spent approximately three minutes at the crime scene. He testified that he was ordered by his superior, Captain Morgan, to interview the appellant, and so he placed the appellant in a patrol car and had him transported to the police station. Once there, Detective Jones read the appellant his rights and, after the appellant waived those rights, he interviewed him. Detective Jones testified that Captain Morgan and Sheriff Bivens were also present for the interview. Detective Jones authenticated a video of the appellant's interview, which was played for the jury.

Detective Jones testified that after interviewing the appellant he also spoke with the appellant's brothers. Afterward, Detective Jones transported the appellant to a hospital for the purpose of submitting to a blood test. While he was there, he witnessed a nurse withdraw a sample of the appellant's blood. This sample was sent to the Tennessee Bureau of Investigation for analysis.

On cross-examination, Detective Jones testified that while he was at the crime scene he saw a knife that had been discovered by another officer. He further testified that the total amount of time that elapsed between when the crime scene was sealed to the public and when the crime scene was released to the family was approximately four hours. Detective Jones testified that the police did not discover fingerprints on the shotgun shells or the knife and that no DNA analysis was performed on those items. Detective Jones testified that the appellant was generally cooperative during his police interview.

Dr. Stephen Coswell, the Deputy Chief of the Regional Forensic Center at the University of Tennessee Medical Center, testified that he performed an autopsy on the victim and determined that the victim had died as a result of a gunshot wound to the head. Dr. Coswell testified that he was able to determine that the victim had received two different types of injuries from that gunshot. First, a single projectile slug had entered the victim's body just behind and below her right ear. This slug severed the victim's spine at the top two vertebrae before exiting the victim's body through the front of her chin. In addition to this

mortal wound, the victim had suffered some additional, less serious wounds caused by two gray plastic pieces of sabot that had entangled in her hair, causing lacerations and abrasions.<sup>1</sup> Dr. Coswell testified that he was able to match the victim's injuries to two halves of sabot that were recovered from the crime scene. From this evidence, he was able to conclude that the two sabot halves had separated from the metal slug "right before it impacted [the victim]." Based upon this information, he was able to estimate that the victim had been shot from a distance of between two and ten feet away. Dr. Coswell's full autopsy report was entered into evidence.

Dr. Coswell testified that he took blood, urine, and vitreous samples from the victim and sent them to the lab for analysis. The results revealed that the victim had a significant amount of methamphetamine, prozac, and alcohol in her system. A comparison between the victim's blood sample and vitreous sample revealed that the victim's body was still absorbing additional alcohol at the time of her death. On cross-examination, Dr. Coswell testified that the victim had some additional bruises on her body that could potentially have been caused by another person.

Prior to continuing to present its case on the second day of the appellant's trial, the

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<sup>1</sup> A sabot round is a specially shaped two-stage cartridge containing both: (1) an inner metal slug (or other projectile), and (2) an outer jacket designed to help the projectile contained inside to travel longer distances. The outer jacket is designed to break away from the slug during flight after a certain distance. In this case, it appears that the plastic outer jacket separated into two halves, each of which struck the victim after separating from the slug.

State attempted to move several photographs into evidence in conjunction with the testimony of its next witness, Detective Douglas Brannon. The appellant objected to two of the photographs — both of which displayed the deceased victim’s exit wound — on the grounds that they were: (1) extremely prejudicial, and (2) of little probative value in light of the testimony already supplied by the State’s medical examiner concerning the slug’s trajectory. The State responded that the pictures were necessary to prove the position of the victim’s body when she was shot and that they were the two least graphic pictures available that displayed the relevant wound. The trial court found that the pictures were “obviously . . . relevant” and that their potential for prejudice did not outweigh their probative value. However, the trial court requested that the State present only one of the two pictures.

Detective Douglas Brannon of the Monroe County Sheriff’s Office testified that he responded to a call on old Highway 68 on the date in question and that he processed and handled the crime scene. He testified that when he arrived, he discovered the victim in the bedroom floor surrounded by blood. Detective Brannon authenticated several photographs, which were entered into evidence. Using these photographs, Detective Brannon pointed out items of evidence discovered at the crime scene such as a spent shotgun shell, an unfired shotgun shell, and an open shotgun. Detective Brannon testified that (in his experience as a law enforcement officer) the shotgun found at the crime scene could not be fired without the shooter first physically loading the gun, a process that required several steps—opening the shotgun’s action, putting a projectile into the tube, closing the barrel, manually cocking

the hammer, and pulling the trigger. Detective Brannon testified that a five-pack box of Sabot rounds recovered at the crime scene still contained three unspent rounds, and a spent shell and an unspent shell were found on the floor, for a total of five rounds. Detective Brannon testified that a knife was found near the victim, but that “you couldn’t see it from back [t]here, you had to be literally on top of it. . . .” Detective Brannon testified that he inventoried the contents of the victim’s purse and discovered prescription bottles inside, which contained Hydrocodone<sup>2</sup> and Alprazolam.<sup>3</sup> Detective Brannon also testified in detail concerning the location of the victim’s body relative to the bed and the dresser.

On cross-examination, Detective Brannon testified that photographs of the crime scene depicted some black scuff marks on the floor. He testified that the victim was wearing tennis shoes. He testified that he did not know what type of shoes had been worn by law enforcement officers during the investigation. Detective Brannon testified that he measured the distance between the bedroom wall and the edge of the bed in the room where the victim’s body was found, and he had noted the distance in his notes, which he did not have with him. However, he estimated that distance to be between fourteen and sixteen inches based on the photographs taken during the investigation. He testified that the appellant’s bed

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<sup>2</sup> Hydrocodone, or Dihydrocodeinone, is a powerful and addictive semi-synthetic opioid prescription pain killer derived from codeine. Depending on the precise dose or compound of Hydrocodone at issue, it is either a schedule II or schedule III controlled substance in Tennessee. *See* T.C.A. §39-17-408(c)(7); T.C.A. § 39-17-410 (e) (1);

<sup>3</sup> Alprazolam, more commonly known by the trade name Xanax, is a potent benzodiazepine commonly used to treat anxiety. Alprazolam is classified as a schedule IV controlled substance in Tennessee. *See* T.C.A. § 39-17-412 (c)(1).

was eight feet long.

Detective Brannon further testified that during the investigation no one ever tested the shotgun that was found at the crime scene to determine if it was operable. He also testified that as far as he knew, no one had checked the victim's prescription bottles to determine if they contained the proper number of pills. Detective Brannon testified that he collected some items—such as a cell phone found in victim's back pocket—which were later returned to the family rather than entered into evidence. Detective Brannon also testified that he did not test the knife found at the crime scene for gunpowder residue, even though he had the ability to do so.

During Detective Brannon's cross-examination, the appellant sought to introduce a photograph displaying the contents of the victim's purse, including some prescription pill bottles and a green material that appeared to be marijuana. The State objected. During a jury out hearing, the appellant urged that the photograph was relevant to establishing that the police had failed to conduct a thorough investigation into the case, because they had failed to test the contents of the victim's purse for drugs or perform a pill count on the victim's prescriptions. The State responded that it was conducting a murder investigation, not a drug investigation, and there was no evidence to support the idea that drugs played any role in the killing. The trial court held that the photograph was not probative with respect to any material issue in dispute at the trial and that it was potentially unfairly prejudicial, because

there was no proof that the substance that appeared to be marijuana in the photograph was in fact marijuana. Consequently, the trial court excluded the picture.

Detective Brannon continued by testifying that he had been instructed in defensive tactics as part of his law enforcement training. He testified that during this training he learned about the concept of a “reactionary gap,” a concept that was taught to law enforcement officers in conjunction with confronting an individual armed with an edged weapon. He testified that the “reactionary gap” referred in part to how long it takes the average police officer to draw and fire a weapon. He testified that during this training, he had heard that “a person with an edged weapon within 21 feet is considered a dangerous threat.”

On redirect examination, Detective Brannon testified that the “21 foot rule” was taught to officers for purposes of avoiding the need to use a deadly weapon. He testified that officers were taught to stay out of that zone, so that they had the option to backup, escape, step out of the room, or use a nonlethal weapon rather than a firearm with confronted by a potential assailant. He testified that the “reactionary gap” provided no grounds for creating a zone that could be used to justify the killing of another human being.

Mr. Adam Gray testified that he was employed as a forensic scientist at the Tennessee Bureau of Investigation crime lab. He testified that he performed a toxicological

examination of a blood sample represented to him as coming from the appellant. After testifying concerning the chain of custody and the laboratory's protocols for tracking and storing evidence, he testified that he examined the appellant's blood sample and determined that methamphetamine was present in an amount of less than .1 micrograms per milliliter. On cross-examination, Mr. Gray testified that there were no other drugs found in the appellant's blood.

Ms. Margaret Massengale testified that she was a special agent forensic scientist employed by the Tennessee Bureau of Investigation crime lab. She testified that she performed a blood alcohol test on a blood sample that was represented to her as coming from the appellant. She testified that this test was negative.

Following this testimony, the State rested. The appellant moved for a judgment of acquittal, which was denied. The appellant was advised of and waived his right to testify in his own defense pursuant to the procedures established in *Momon v. State*, 18 S.W.3d 152, 162-64 (Tenn. 1999). The defense rested without submitting proof. The case was submitted to the jury, which returned with a verdict finding the appellant guilty of first degree murder. The State having dropped a previously-filed notice of sentence enhancement, the appellant was sentenced by default to life in prison with the possibility of parole. The appellant filed a timely notice of appeal.

## ANALYSIS

The appellant claims that the evidence is insufficient to support his conviction and that the trial court erred by: (1) excluding a photograph of the contents of the victim's purse depicting bottles of prescription medication and a green substance with the appearance of marijuana, and (2) admitting a photograph of the victim's body depicting the exit wound caused by the slug. For the reasons that follow, we deny each of the appellant's claims for relief and affirm the judgment of the trial court.

### I.

The appellant claims that the evidence is insufficient to support his conviction of first degree premeditated murder. "When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing 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." *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979); Tenn. R. App. P. 13(e). "Because a guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, on appeal a defendant bears the burden of showing why the evidence is insufficient to support the conviction." *State v. Wagner*, 382 S.W.3d 289, 297 (Tenn. 2012); *see also State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The State must be afforded the strongest legitimate view

of the evidence and all reasonable inferences that may be drawn therefrom. *See Wagner*, 382 S.W.3d at 297; *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). The jury, as the finder of fact, is responsible for assessing the credibility of the witnesses, deciding the weight to accord their testimony, and reconciling any conflicts in the proof. *See Wagner*, 382 S.W.3d at 297; *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). On appeal, this court cannot re-weigh the evidence or draw any inferences from it other than those drawn by the jury. *See Wagner*, 382 S.W.3d at 297; *Cabbage*, 571 S.W.2d at 835. A guilty verdict can be based upon direct evidence, circumstantial evidence, or a combination of both. “The standard of review ‘is the same whether the conviction is based upon direct or circumstantial evidence.’” *Dorantes*, 331 S.W.3d at 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

The appellant in this case was convicted of first degree premeditated murder. First degree premeditated murder is the “premeditated and intentional killing of another.” T.C.A. § 39-13-202(a)(1). Premeditation involves “an act done after the exercise of reflection and judgment” and “means that the intent to kill must have been formed prior to the act itself.” T.C.A. 39-13-202(d) “It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time.” *Id.* “Premeditation may be proved by circumstantial evidence.” *State v. Brooks*, 249 S.W.3d 323, 329 (Tenn. 2008). “Premeditation may be established by any evidence from which a rational trier of fact may infer that the killing was done ‘after the exercise of reflection and judgment’ . . .” *State v.*

*Leach*, 148 S.W.3d 42, 53 (Tenn. 2004) (quoting T.C.A. § 39-13-202(d)). A defendant's use of a deadly weapon against an unarmed victim, a lack of provocation on the part of the victim, a defendant's failure to provide aid or assistance to the victim, and a defendant's calmness soon after the killing are all established factors from which a jury may infer premeditation. *See Brooks*, 249 S.W.3d at 329; *Leach*, 148 S.W.3d at 53-54.

Tennessee's self-defense statute provides in pertinent part:

. . . a person who is not engaged in unlawful activity and is in a place where the person has a right to be has no duty to retreat before threatening or using force intended or likely to cause death or serious bodily injury, if:

(A) The person has a reasonable belief that there is an imminent danger of death or serious bodily injury;

(B) The danger creating the belief of imminent death or serious bodily injury is real, or honestly believed to be real at the time; and

(C) The belief of danger is founded upon reasonable grounds.

T.C.A. 39-11-611(b)(2). If a defendant raises facts sufficient to support a finding of self-defense, the "[S]tate has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense." *State v. Beazer*, 945 S.W.2d 776, 782 (Tenn. Crim. App. 1996). Self-defense is generally a fact question decided by the jury. *State v. Clifton*, 880 S.W.2d 737, 743 (Tenn. Crim. App. 1994); *State v. Ivy*, 868 S.W.2d 724, 727 (Tenn. Crim. App. 1993). "[I]n the context of judicial review of the jury verdict, in order to prevail, the [appellant] must show that the evidence relative to justification, such as self-defense, raises,

as a matter of law, a reasonable doubt as to his conduct being criminal.” *Clifton*, 880 S.W.2d at 743.

The State provided sufficient evidence to support the jury’s findings with respect to the necessary elements of first degree premeditated murder. The appellant’s statement to the police and certain forensic evidence discussed by various State witnesses established that the appellant intentionally shot the victim with a shotgun. That the victim died as a result of being shot by the appellant is a conclusion well-supported by testimony from the first responders and the State’s medical examiner. In short, the evidence fully supports the jury’s conclusion that the appellant intentionally killed the victim.

The appellant claims, however, that the State presented no evidence whatsoever with respect to premeditation and that the State failed to present sufficient evidence to negate his claim of self-defense. In this regard, the appellant directs our attention to the content of his statement to police, in which he acknowledged shooting the victim but claimed that he had only done so after the victim suddenly “snapped” and repeatedly came at him—unprovoked—wielding a knife. The appellant claims that the State presented nothing beyond “pure conjecture” that was inconsistent with the somewhat convoluted series of events that was relayed by the appellant in his police statement.

However, we do not agree. The jury was not required to credit the version of events

relayed by the appellant in his unsworn statement to the police. With respect to presenting evidence sufficient to negate the appellant's self-defense claim, the undisputed fact that the appellant shot the victim in the back of the head carries with it a certain degree of *res ipsa loquitur*. It is the province of the jury to assess the evidence and the credibility of the witnesses, and we do not revisit the jury's determinations with respect to these issues on appeal. *See, e.g., Wagner*, 382 S.W.3d at 297.

With respect to the issue of premeditation, the testimony presented at trial provided several circumstances from which premeditation might be inferred: (1) failure to provide aid or assistance to the victim; (2) calmness immediately after the killing; (3) a lack of provocation on the part of the victim; and (4) the use of a deadly weapon against an unarmed victim. The first two of these four circumstances were established at trial by uncontroverted evidence. It is undisputed that the appellant left the scene after shooting the victim without bothering to call 911. Witnesses testified that the only attempt to secure medical aid for the victim was a 911 call placed by one of the appellant's brothers, long after the appellant had fled the crime scene. The appellant, himself, did nothing. In addition, review of the video of the appellant's statement to police reveals that the appellant was remarkably calm and composed after the killing, especially given that, according to the appellant, he had been the victim of a life-threatening knife attack by his girlfriend just a few short hours before. The appellant's demeanor on this video is simply inconsistent with that of a fearful and distraught man who, faced with the ultimate Catch-22, had just survived a near brush with death and

lost his love interest as a result.

The jury was not required to close its eyes and ignore the appellant's actions and demeanor following the killing. Rather, the jury was free to consider them in reaching the conclusion that the appellant had, in fact, killed the victim after spending some amount of time reflecting upon his desire to do so. Although consideration of additional factors is unnecessary to support the jury's finding with respect to premeditation, we observe that the jury was also free based, on the evidence presented, to determine that the appellant killed the victim without provocation and that the appellant used a deadly weapon against an unarmed victim. While the appellant claimed in his unsworn police statement that the victim attacked him with a knife, and a knife was indeed found at the crime scene, the jury was free to reject the appellant's claim. Undisputed testimony and evidence established that the appellant fled the scene after shooting the victim, called his brothers rather than 911, and that the brothers entered the residence alone and stayed there for almost twenty minutes before calling 911 themselves. None of those facts are consistent with the appellant having shot the victim out of necessity in the course of defending himself against repeated knife attacks. All of those facts, however, are consistent with the State's theory that the appellant executed the unarmed victim *via* a single shot to the back of her head and then fled the location before calling his brothers to assist him by cleaning the crime scene, planting a knife, and calling 911 on his behalf when they were finished. Consequently, based on the evidence presented at trial, a reasonable jury was free to find that the appellant used a deadly weapon against an unarmed

victim and did so without provocation. Based on these and the other circumstances discussed, the jury was free to infer that the appellant murdered the victim in a premeditated fashion.

The appellant claims that the State failed to present any evidence beyond pure conjecture that established premeditation and negated his claim of self defense. However, availing oneself of simple common sense is a far cry from engaging in pure conjecture. Where the evidence presented at trial established that the appellant shot the victim in the back of the head while she was rising from a prone position, that he fled the scene afterward without notifying authorities or summoning aid, and that he was calm and unemotional following the killing, the jury was free to exercise its discretion and conclude that the appellant committed premeditated murder, not justifiable homicide. The appellant's claim that the evidence is insufficient to support his conviction is denied.

## II.

The appellant claims that the trial court erred by excluding a photograph of the contents of the victim's purse, which included some prescription pill bottles and a green substance appearing to be marijuana. Decisions concerning the admissibility of evidence at trial are entrusted to the discretion of the trial court. *See State v. Robinson*, 146 S.W.3d 469, 490 (Tenn. 2004). A trial court's exercise of discretion will not be reversed on appeal unless

the court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.” *Id.* (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)); *see also State v. Dickerson*, 885 S.W.2d 90, 92 (Tenn. Crim. App. 1993). In this case, the appellant has failed to establish that the trial court abused its discretion by excluding the photograph at issue.

In determining the admissibility of photographs, trial courts must evaluate them in light of Tennessee Rules of Evidence 401 and 403. *See State v. Banks*, 564 S.W.2d 947 (Tenn. 1978). In order to be admissible, any photographs must be relevant and their probative value must outweigh their potential to cause unfair prejudice. *See* Tenn. R. Evid. 403. Relevance is broadly defined as “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Tenn. R. Evid. 401. In considering whether photographs are relevant, trial courts must consider the questions of fact that the jury will have to consider in determining the accused’s guilt, as well as other evidence that has been introduced during the course of the trial. *State v. Williamson*, 919 S.W.2d 69, 78 (Tenn. Crim. App. 1995). When deciding whether photographs pose a risk of unfair prejudice, trial courts must consider whether the photographs have “[a]n undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” *Banks*, 564 S.W.2d at 951.

The picture at issue did have some potential probative value in the sense that the

victim's ongoing drug use was an issue of consequence to the litigation. The appellant's self-defense claim hinged on his assertion that the victim simply "lost it" and "just went off" on him in an episode that culminated with her repeatedly charging him with a knife. It is commonly known that the ingestion of significant quantities of Xanax, hydrocodone, and methamphetamine, especially in combination, can cause a significant change in an individual's behavior. Methamphetamine usage in particular has been linked to unpredictable and sometimes violent behavior. Consequently, any proof that the victim was actively engaged in heavy usage of behavior-altering drugs, especially those often associated with violent behavior, could make the appellant's version of events more likely than it would be without such proof.

However, considered within the specific context of the appellant's trial, the probative value of the excluded photograph was very limited. The State's toxicology report on the victim and the associated testimony from Dr. Cogswell had already provided far more direct and compelling evidence that Xanax, hydrocodone, and methamphetamine were all present in the victim's system at unhealthy, even toxic, levels. The excluded picture had little additional probative value in terms of establishing that the victim had not been safe in terms of her prescription and non-prescription use of potentially behavioral-altering drugs. Indeed, the excluded picture had at least some potential to be counter-productive in this regard, in the sense that the prescription bottles that are depicted in the picture prominently display the victim's name upon them, and therefore the photograph's admission could have had the

potential to persuade the jury that the victim had a physician's permission and supervision with respect to her consumption of at least two of the three problematic drugs found in her system. Even more importantly, because there was no methamphetamine found in the victim's purse, the picture had no probative value whatsoever with respect to the victim's use of the drug whose potential link to violent and antisocial behavior is most well-known. In short, the picture was probative, but not overly so.

The potential for unfair prejudice posed by the photograph, however, was very high. Although the picture at issue does depict two prescription pill bottles and some other contents of the victim's purse, the primary focus of the picture is on a plastic bag containing a green substance having the appearance of marijuana. Possession of marijuana by the victim—whether real or imagined—was not relevant to any fact of consequence to the appellant's case. There is no commonly known linkage or association between marijuana use and sudden acts of violence; nor did the appellant proffer any scientific or other specialized evidence that might have been used to establish such a link. Even if such an association could have been established, there is no evidence in the record that the green substance depicted in the photograph was indeed marijuana, and, even if it was, there is no evidence whatsoever that the victim ever consumed any of it, much less consumed it to whatever degree would be necessary to transform her into a deranged assailant. The victim's toxicology screens were all negative with respect to the presence of cannabinoids.

In light of the fact that the picture's primary focus is on the substance that appears to be marijuana, there is a strong possibility that the picture, if admitted at trial, would have tempted the jury to speculate that the victim of this crime was a marijuana dealer. Succumbing to this temptation might have led the jury to view the crime committed against the victim as less serious than it otherwise would. They might perceive that the victim's life was worth less than that of the average honest citizen, the overall effect of which would be to improperly diminish the perceived gravity of the appellant's crime.

Under these circumstances, the trial court properly concluded that the probative value of the picture was outweighed by its potential for prejudice, and the picture was properly excluded. The appellant's claim that the trial court erred by excluding the photograph at issue is denied.

### **III.**

The appellant also claims that the trial court erred by admitting a photograph of the victim's body which depicted the exit wound caused by the metal slug in the center of her chin. As we have discussed, trial courts make their admissibility determination based on whether the probative value of a photograph is outweighed by its potential for prejudice, *see* Tennessee Rules of Evidence 401 and 403, and we review the trial court's decision to admit the picture under an abuse of discretion standard, *see Robinson*, 146 S.W.3d at 490. With

respect to the prosecution's use of crime scene photographs, we have specified that such photographs must be relevant to prove some part of the prosecution's case and must not be admitted solely to inflame the jury and prejudice them against the defendant. *See Banks*, 564 S.W.2d at 951.

The appellant claims that the picture at issue was of limited probative value because it was largely redundant with the testimony of the State's medical examiner and that the picture posed a great risk of prejudice because it was extremely graphic. We agree with the appellant that the picture at issue is graphic in its depiction of the victim's wounds and that this factor considered in isolation weighs in favor of the picture's exclusion.

However, we believe that the picture also had significant probative value. Photographs are not necessarily rendered inadmissible because they are cumulative with other evidence or because descriptive words could have been used instead. *Collins v. State*, 506 S.W.2d 179, 185 (Tenn. Crim. App. 1973). While the State medical examiner testified concerning the slug's trajectory (entering behind the victim's right ear and exiting through her chin), words alone cannot convey the exact path of the slug through the victim's body with anything near the precise accuracy of this single photograph.

During the police investigation and his ensuing trial, the appellant argued at various points that the slug's apparent back-to-front path through the victim's body was the

unfortunate result of the manner in which the victim was raising her body (to engage in another knife lunge at the appellant, after he had knocked her down while resisting a prior lunge) when she was shot. When contrasted solely against the relatively vague oral testimony of the medical examiner, this story does not strike an immediate chord of implausibility. Reviewing the photograph at issue in conjunction with the remaining evidence presented at trial, however, enables a much more full and complete assessment of the likelihood of a projectile striking the victim in such a manner by sheer happenstance.

Photographs depicting graphic images of a crime victim's wounds should be admitted only after the trial court has given careful consideration to the relative weight of the photographs' probative value and their potential to cause unfair prejudice. In this case, while the photograph's potential to cause prejudice to the appellant not negligible, the photograph also had strong probative value bearing on the most central issue of the case—whether the fact that the appellant's projectile struck the victim in the back of her head was intentional or a merely a stroke of misfortune. Under these circumstances, we are unwilling to hold that the trial court reached a conclusion that was contrary to logic and reason when it balanced the proper legally-relevant factors and found that the scales tipped in favor of admissibility. The appellant's claim that the trial court abused its discretion by admitting a photographic depicting the victim's exit wound is denied.

## **CONCLUSION**

For the foregoing reasons, the judgment of the trial court is affirmed.

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NORMA MCGEE OGLE, JUDGE