

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

AUGUST SESSION, 1999

FILED
December 17, 1999
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

VS.)

MITCHELL BOWERS,)

Appellant.)

C.C.A. NO. W1999-0008-CCA-MR-99CD

SHELBY COUNTY

HON. L.T. LAFFERTY,
JUDGE

(First Degree Murder)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF SHELBY COUNTY

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

The appellant, Mitchell L. Bowers, was convicted by a Shelby County jury of one (1) count of premeditated first degree murder and was sentenced to life imprisonment. On appeal, he contends that the evidence is insufficient to support his conviction for first degree murder and that the trial court erred in its charge to the jury regarding parole eligibility. After a thorough review of the record before this Court, we affirm the judgment of the trial court.

FACTS

In the fall of 1996, the appellant and the victim, Teresa Williams Bowers, were married but living apart. On the morning of October 14, 1996, the appellant telephoned Betty Williams, the victim's mother, and informed her that he had killed her daughter.

Upon hearing this information, the victim's brother, Jerome Williams, and her sister, Cassandra Sykes, went to the victim's apartment. They knocked on the door to her apartment, but no one answered. Jerome then kicked in the front door and walked into the victim's bedroom. There he found Teresa, lying face down. She had a rope around her neck, which was tied in a "hanging knot." The victim's hands were tied behind her back and her feet were bound as well. The victim was wearing a jacket which was fastened backwards, and a belt was secured around the victim's arms. A sock was stuffed into the victim's mouth with a scarf tied around her mouth in a "gag."

Jerome attempted to untie the ropes from the victim's neck, wrists and ankles but, because the ropes were tied too tightly, he had to cut them from the victim's body. Jerome and Cassandra attempted to revive their sister, but Teresa was already dead.

Later that morning, the appellant turned himself in to the Memphis Police Department. After advising the appellant of his constitutional rights, Sergeant Ronald Wilkinson took the appellant's statement, wherein he admitted killing his wife. The appellant stated that earlier that morning, he and the victim had gotten into a verbal argument at her apartment. The argument progressed into a physical altercation when the appellant and the victim began pushing each other. During the scuffle, the appellant grabbed a rope from the victim's dresser, wrapped it around the victim's neck and began choking her. The victim fell to her knees and, as she fell, hit her head on the dresser. The appellant loosened the rope from around the victim's neck, tied her hands behind her back and gagged her with the sock and scarf. The appellant then choked the victim again until she stopped breathing.

The appellant told Sergeant Wilkinson that he did not intend to kill his wife when he entered her apartment that morning. However, he acknowledged that after he bound and gagged the victim and began choking her for the second time, he intended to kill her because he had "been through so much."

At trial, the state presented evidence that the appellant and the victim had a tumultuous relationship, and the victim had filed for an order of protection against the appellant. The hearing date for the order of protection request was set for October 30. Regarding the crime scene, the state presented proof that the phones in the bedroom and living room had been disconnected from the wall, a telephone cord was found underneath the victim's body near the foot of the bed, and the window on the back door was broken.¹

Dr. O.C. Smith, a forensic pathologist, performed the autopsy on the victim's body. The doctor found abrasions and bruising on the sides of the

¹ In his statement, the appellant informed the officer that he entered the victim's apartment through the back door with a key.

victim's face and on the inside of her lips. Dr. Smith also found some bruising on the victim's tongue and bleeding into the whites of the victim's eyes, or petechia, which is consistent with strangulation. The victim had scratches underneath her chin, scrapes and bruising on her neck, as well as a "pattern groove" around the neck. The doctor further found evidence of heavy bleeding in the neck muscles which resulted from those muscles having been crushed. Dr. Smith testified that he found a tear to the right tonsil and a tear to the back wall of the pharynx which would be consistent with an object being forced into the victim's mouth. On the back of the victim's head, the doctor found six (6) areas of bruising which extended down through the skin to the victim's skull. There were other areas of abrasions and bruising on the victim's back, the back of her right wrist and her right knee. In addition, Dr. Smith found ligature marks on the victim's wrists and "line-like" bruising on her ankles. Dr. Smith concluded that the cause of the victim's death was suffocation and strangulation; however, the doctor could not determine whether the suffocation or the strangulation occurred first.

The appellant testified in his own behalf at trial. He stated that, on October 14, 1996, he and the victim had been married for approximately two (2) months. Their relationship was "stormy," and the victim physically attacked him on numerous occasions. Although he testified that the victim had stabbed him, spit in his face, hit him with a bottle and sprayed him with mace, the appellant denied that he ever physically abused her.

On the morning of October 14, the appellant went to the victim's apartment to discuss repairing their marriage. He testified that he did not intend to kill his wife. However, the victim repeatedly cursed him and struck him on the head. The appellant decided to leave the apartment and, as he was about to walk out of the door, realized that he left his keys in Teresa's bedroom. He returned to the bedroom, and he and the victim began arguing again. The appellant testified that when he saw the victim preparing to strike him again, he "lost control."

The appellant grabbed a rope from the victim's dresser and began choking her. While he was choking her, her head hit the side of the dresser, and she fell to the floor. The appellant then tied her hands up and put the scarf around her mouth. He testified that he assumed his wife was dead and left the apartment. He denied choking her a second time.

On cross-examination, the appellant could not recall tying the victim's ankles or fastening the belt around her arms. He further denied tying a knot in the rope around the victim's neck. Additionally, although the appellant admitted putting a sock in the victim's mouth in his statement to the police on October 14, he denied this at trial.²

The jury found the appellant guilty of one (1) count of premeditated first degree murder, and the trial court sentenced the appellant to life imprisonment. From his conviction, the appellant brings this appeal.

SUFFICIENCY OF THE EVIDENCE

In his first issue, the appellant claims that the evidence is insufficient to support the jury's finding of guilt of premeditated first degree murder. Specifically, he argues that the state failed to present sufficient evidence of premeditation. Therefore, he contends that this Court should reduce his conviction to second degree murder or voluntary manslaughter.

When an accused challenges the sufficiency of the evidence, this Court must review the record to determine if the evidence adduced during the trial was sufficient "to support the findings by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt

² The appellant claimed that the police fabricated portions of his statement. For example, he testified that the portion of his statement where he admitted choking his wife a second time was put into the statement by the officers without his knowledge or consent.

predicated upon direct evidence, circumstantial evidence or a combination of direct and circumstantial evidence. State v. Brewer, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996).

In determining the sufficiency of the evidence, this Court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this Court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). To the contrary, this Court is required to afford the state the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Tuttle, 914 S.W.2d 926, 932 (Tenn. Crim. App. 1995). “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Questions concerning the credibility of the witnesses, the weight and value to be given the evidence as well as all factual issues raised by the evidence are resolved by the jury as the trier of fact. State v. Tuttle, 914 S.W.2d at 932.

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this Court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); State v. Grace, 493 S.W.2d at 476.

First degree murder is defined as the “premeditated and intentional killing of another.” Tenn. Code Ann. § 39-13-202(a)(1). “Premeditation” is “an act done after the exercise of reflection and judgment,” and “the intent to kill must have been formed prior to the act itself.” Tenn. Code Ann. § 39-13-202(d); State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). The element of premeditation is a

question for the jury which may be established by proof of the manner and circumstances of the killing. State v. Pike, 978 S.W.2d 904, 914 (Tenn. 1998); State v. Gentry, 881 S.W.2d 1, 3 (Tenn. Crim. App. 1993). Factors which tend to establish the existence of premeditation include “the use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime, and calmness immediately after the killing.” State v. Bland, 958 S.W.2d at 660 (citing State v. West, 844 S.W.2d 144, 148 (Tenn. 1992); State v. Brown, 836 S.W.2d 530, 541-42 (Tenn. 1992)).

The state presented proof at trial that the victim was found lying face down on the floor. Her hands and feet were bound, and a rope was tied in a “hanging knot” around her neck. The ropes were tied so tightly that Jerome Williams had to cut them from his sister’s body. A sock was stuffed into the victim’s mouth with such great force that it tore the tissues in the back of the oral cavity, and a scarf was tied around the victim’s mouth to hold the sock into place. There was considerable bruising on the victim’s body, particularly so on the back of the victim’s head in that such bruising extended through to the skull. Dr. Smith found ligature marks on the victim’s neck and wrists and “line-like” bruising on the victim’s ankles. Dr. Smith also described the heavy bleeding in the victim’s neck muscles, which resulted from these muscles having been crushed. The doctor concluded that the victim died from strangulation and suffocation. He opined that this process would have lasted at the very least from one (1) to three (3) minutes.

In his statement to the police, the appellant admitted killing his wife, but denied that he intended to kill her. He stated that he choked her with a rope during a fight and she passed out. He loosened the rope a bit and heard the victim “gagging.” He then tied her hands behind her back and began choking her again until she stopped breathing. He told the officer that, at this point, he wanted to kill his wife because he had “been through so much.”

Moreover, after the appellant committed this crime, he left her home and went to the home of Eddie Wiggins. He informed Wiggins that he had killed his wife and made arrangements for Wiggins to deliver some personal property to members of the appellant's family. On his way to turn himself in to the Memphis Police Department, he stopped to telephone his mother-in-law and advise her of the incident. Then, he went to a restaurant to eat something before he surrendered to the police.

After viewing the evidence in the light most favorable to the state, we believe that the nature of the killing coupled with the appellant's calmness following the killing provide sufficient evidence of premeditation. Although the appellant testified that he merely "lost control" in the midst of a physical altercation with his wife, the jury was free to discredit this testimony in light of the nature and circumstances surrounding the murder. Thus, we conclude that a rational trier of fact could have found beyond a reasonable doubt that the appellant intentionally killed his wife "after the exercise of reflection and judgment." Tenn. Code Ann. § 39-13-202(d).

This issue is without merit.

PAROLE ELIGIBILITY JURY INSTRUCTION

In his final issue, the appellant contends that the trial court erred in instructing the jury regarding parole eligibility pursuant to Tenn. Code Ann. § 40-35-201(b) (1997). First, he alleges that his right to due process was violated when the trial court charged the jury that they could “weigh and consider the meaning of a sentence of imprisonment.” Secondly, he asserts that the trial court erred in instructing the jury that the appellant would be eligible for parole after serving twenty-five (25) years in prison.

The state responds that this issue is waived for failure to include it in the motion for new trial. We agree. Rule 3(e) of the Tennessee Rules of Appellate Procedure provides, in part:

in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.

Because the appellant failed to include this issue in the motion for new trial, we conclude that such issue is waived. See State v. West, 844 S.W.2d at 151; State v. Kendricks, 947 S.W.2d 875, 885 (Tenn. Crim. App. 1996); State v. Keel, 882 S.W.2d 410, 417-18 (Tenn. Crim. App. 1994).

The appellant concedes that this issue was not presented in the motion for new trial but urges this Court to find plain error. Under Tenn. R. Crim. P. 52(b), where “necessary to do substantial justice,” this Court has the discretion to notice any error which has affected the substantial rights of a defendant even though the issue was not raised in the motion for new trial. In order for this Court to recognize error pursuant to Tenn. R. Crim. P. 52(b), the error must be “plain” and must affect a substantial right of the defendant. State v. Adkisson, 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994). As this Court stated in Adkisson:

The word “plain” “is synonymous with ‘clear’ or, equivalently ‘obvious’.” A “substantial right” is a right of “fundamental proportions in the indictment process, a right to the proof of every element of the offense, and is constitutional in nature.” In short, a plain error is not just an error that is conspicuous. Rather, it is an especially egregious error that strikes at “the fairness, integrity or public reputation of judicial proceedings.”

899 S.W.2d at 639.

We do not believe that the error alleged by the appellant rises to the level of plain error.³ Various panels of this Court have disagreed as to whether instructing a jury that they may “weigh and consider” parole eligibility information would violate due process. See State v. Raymond Hale, C.C.A. No. 01C01-9712-CR-00564, Davidson County (Tenn. Crim. App. filed May 6, 1999, at Nashville); State v. Jason M. Weiskopf, C.C.A. No. 02C01-9611-CR-00381, Shelby County (Tenn. Crim. App. filed December 4, 1998, at Jackson); *but see* State v. Lewis L. Bell, C.C.A. No. 01C01-9807-CR-00279, Davidson County (Tenn. Crim. App. filed May 26, 1999, at Nashville); State v. Rachel Marie Green, C.C.A. No. 01C01-9706-CR-00223, Davidson County (Tenn. Crim. App. filed October 12, 1998, at Nashville), *perm. to app. denied* (Tenn. April 12, 1999). Thus, we decline to find plain error under Tenn. R. Crim. P. 52(b). The issue is, therefore, waived.

³ Our Supreme Court has held that a jury instruction under Tenn. Code Ann. § 40-35-201(b) (1997) is not unconstitutional where the jury is instructed that the parole eligibility information is “for your information only.” State v. King, 973 S.W.2d 586 (Tenn. 1998).

CONCLUSION

After viewing the evidence in the light most favorable to the state, we conclude that the evidence is sufficient to support the appellant's conviction for premeditated first degree murder. Additionally, the appellant has waived his issue regarding parole eligibility by failing to raise it in the motion for new trial. Accordingly, we affirm the judgment of the trial court.

JERRY L. SMITH, JUDGE

CONCUR:

DAVID H. WELLES, JUDGE

JAMES CURWOOD WITT, JR., JUDGE