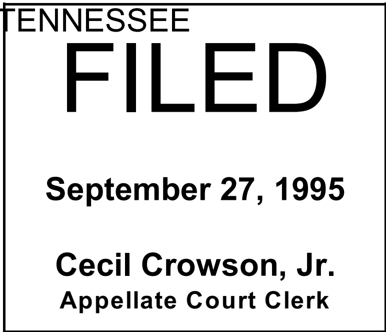
IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1994 SESSION



STATE OF TENNESSEE,	)	
	)	
APPELLEE,	)	
	)	No. 01-C-01-9308-CR-00269
	)	
	)	Davidson County
v.	)	
	)	J. Randall Wyatt, Judge
	)	
	)	(Murder Second Degree and Aggravated Robbery)
ROBERT E. SANDERSON,	)	
	)	
APPELLANT.	)	

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OPINION FILED:____________________________________

AFFIRMED

Joe B. Jones, Judge

O P I N I O N

The appellant, Robert E. Sanderson, was convicted of murder in the second degree, a Class A felony, and aggravated robbery, a Class B felony, by a jury of his peers. The trial court found that the appellant was a standard offender in the second degree murder case, and the court imposed a Range I sentence of confinement for twenty-five (25) years in the Department of Correction. In the aggravated robbery case, the trial court found that the appellant was a multiple offender, and the court imposed a Range II sentence of twenty (20) years in the Department of Correction. The sentences are to be served consecutively for an effective sentence of forty-five (45) years.

Six issues are presented for review. The appellant contends that the evidence contained in the record is insufficient, as a matter of law, to support a finding by a rational trier of fact that he was guilty of murder in the second degree and aggravated robbery beyond a reasonable doubt. He also contends that the trial court committed error of prejudicial dimensions by (a) denying his motion for judgment of acquittal at the conclusion of the state's case in chief, (b) denying his motion to suppress the statements he made to a police officer, (c) failing to properly instruct the jury on the element of premeditation, (d) imposing excessive sentences, and (e) ordering the sentences to be served consecutively.

The judgment of the trial court is affirmed.

The victim, Lydia N. Cox, employed the appellant to paint the interior of her house. When the appellant finished painting the house, he gave the victim a bill for $508. On the morning of March 19, 1991, the appellant went to the victim's residence to seek payment. The victim balked and refused to pay the statement because she thought the amount was too high. She paid the appellant $400, the amount she thought was fair. The appellant wanted to split the difference as to the balance, and asked the victim to pay him $58. The victim refused to pay any amount in excess of $400. The appellant left.

According to the appellant, the victim talked to someone after he left; and the person apparently told the victim she should pay the appellant the additional $58. The victim called the appellant on the afternoon of March 19th and told him to come to her residence. The appellant went with the expectation of receiving the $58. In his statement to the police, he stated that he and the victim argued, the argument graduated to a physical affray

when the victim pushed him, and he struck the victim two or three times. Thereafter, the appellant ransacked the victim's residence. He left with the victim's pistol.

A person in the neighborhood saw the appellant running down the street at approximately 5:00 p.m. The appellant entered the home of his mother, located a few houses from the victim's residence. He walked to a nearby K-Mart and called his sisters to come and get him. He spent that night with a sister in Nashville. The next day he went to the home of a sister in Greenbrier, Robertson County, Tennessee.

When a friend could not reach the victim on the morning of March 20th, she went to the victim's residence. The friend and a neighbor discovered the victim lying on the floor of her bedroom face down, and they called 911 to report what they found. The victim was dead when officers arrived at the residence. Dr. Charles W. Harlan went to the scene and examined the body. The officers conducted an investigation. Two palm prints and one fingerprint that matched the appellant's prints were found at the scene. One palm print was found on the bedroom dresser. Another palm print was found on a kitchen cabinet. A fingerprint was found on a piece of paper that was lying on the den floor. The appellant became the prime suspect.

An autopsy performed on the body of the victim revealed that the cause of death was blunt trauma to the chest. There were nineteen rib fractures. There was a separation of the cartilage from the rib bones in four distinct areas of the chest. The ribs punctured the victim's left lung causing the air to escape into the cavity surrounding the lung. The lung became compressed and could not expand and contract. In addition, the severe damage to the chest prevented the chest from expanding and contracting normally. The autopsy also revealed numerous abrasions, contusions, and lacerations to the victim's head, neck, and chest. Contusions to the victim's back were consistent with the heel of a shoe. Dr. Harlan testified that the victim had died within a twenty-four hour period prior to his examination at the scene. He set the time at 2:15 p.m. on the afternoon of March 19th through 2:15 p.m. on the afternoon of March 20th.

The appellant offered an alibi. However, the alibi did not cover the entire period during which the victim could have been killed. The appellant attempted to establish that he did not have clothing matching the clothing worn by the person the neighbor saw

running on the afternoon of March 19th. Furthermore, the sisters said that the appellant called them at 4:30 p.m. and they met him at 4:45 p.m. Thus, the appellant could not have been the person the neighbor saw running from the direction of the victim's residence. The jury obviously did not believe the alibi witnesses. Furthermore, the neighbor who saw the person positively identified the appellant as the person he saw on the afternoon in question.

I.

When an accused challenges the sufficiency of the convicting evidence, this Court must review the record to determine if the evidence adduced at the trial is sufficient "to support the finding 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 based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence.

In determining the sufficiency of the evidence, this Court does not reweigh or reevaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App.), per. app. denied (Tenn. 1990). 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, cert. denied 352 U.S. 845, 77 S.Ct. 39, 1 L.Ed.2d 49 (1956). To the contrary, this Court is required to afford the State of Tennessee 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. Cabbage, 571 S.W.2d 832, 835 (Tenn.1978).

Questions concerning the credibility of the witnesses, the weight and value to be given to evidence, and all factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d at 835. In State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973), our Supreme Court said: "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."

Since 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 verdicts returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court will not disturb a verdict of guilt due to the sufficiency of the 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 accused guilty beyond a reasonable doubt.

In this case, the evidence is clearly sufficient to support a finding by a rational trier of fact that the appellant was guilty of murder in the second degree and aggravated robbery beyond a reasonable doubt. See Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979).

This issue is without merit.

II.

The appellant contends that the trial court committed error of prejudicial dimensions because the court denied his motion for judgment of acquittal on the charge of first degree murder at the conclusion of the state's case in chief. His argument regarding this issue consumes several pages of his brief.

The fallacy in the appellant's position is that he waived this issue when he opted to present evidence in support of his defense. Mathis v. State, 590 S.W.2d 449, 453 (Tenn. 1979); State v. Smith, 735 S.W.2d 859, 862 (Tenn. Crim. App. 1987); State v. Carter, 681 S.W.2d 587, 588 (Tenn. Crim. App.), per. app. denied (Tenn. 1984); State v. Copeland, 677 S.W.2d 471, 473-74 (Tenn. Crim. App.), per. app. denied (Tenn. 1984). Furthermore, the reasons advanced by the appellant as to why the trial court should have granted the motion are flawed. First, if the trial court had granted the motion as to the principal offense charged, murder in the first degree, the appellant could still be tried for murder in the second degree or any lesser included offense supported by the evidence. State v. Phipps, 883 S.W.2d 138, 143 (Tenn. Crim. App. 1994). It has long been established that an accused is tried for the principal offense as well as all lesser included offenses supported by the evidence. Strader v. State, 210 Tenn. 669, 675-76, 362 S.W.2d 224, 227 (1962);

State v. Tutton, 875 S.W.2d 295, 297 (Tenn. Crim. App. 1993), per. app. denied (Tenn. 1994). Second, this case was tried prior to the Supreme Court's decision in State v. Brown, 836 S.W.2d 530 (Tenn. 1992). This Court has repeatedly held that the Brown decision is not to be applied retroactively. Moreover, given the nature and extent of the injuries, a jury could have found premeditation; thus the evidence was sufficient to withstand the motion. Third, the arguments advanced in support of this issue are moot. The jury acquitted the appellant of murder in the first degree and convicted him of murder in the second degree.

This issue is without merit.

III.

The appellant contends that the trial court committed error of prejudicial dimensions in denying his motion to suppress the statements he made to Detective Flair of the Metropolitan Police Department. He argues that his statements should have been suppressed because the statements were (a) not knowingly and intelligently made, (b) not voluntarily made, and (c) taken "in violation of his constitutional right to counsel."

The appellant became the prime suspect immediately after the victim was murdered. The investigating officers began looking for the appellant. Someone alerted the appellant that the officers were looking for him. The appellant asked his brother-in-law, Ronnie F. Hartley, to call Detective Larry Flair to see why Flair wanted to talk to him. Detective Flair told Hartley that there was an outstanding warrant for the appellant's arrest on an unrelated charge and he wanted to serve the warrant. When Hartley asked if Detective Flair wanted to question the appellant concerning the murder of Mrs. Cox, Flair told Hartley that he also wanted to talk to the appellant about the murder. Hartley told Detective Flair where the appellant could be located.

Detective Flair and Sergeant Robert Moore went to Hartley's residence located in Greenbrier, Robertson County, Tennessee. The officers arrested the appellant. Detective Flair immediately gave the appellant the Miranda warnings. He asked the appellant if he could obtain the clothing that he was wearing on March 19th, the date the victim was

murdered. The appellant readily consented. His sister, Betty Hartley, obtained the clothes. She asked the appellant if he had agreed to give his clothing to the officers. The appellant told her to give the clothing to Detective Flair. Thereafter, Detective Flair, Sergeant Moore, and the appellant began the trip back to Nashville.

While en route to Nashville, Detective Flair told the appellant that he wanted to talk with him about Mrs. Cox's murder. The appellant was quiet at first. Later, the appellant agreed to discuss the matter with Detective Flair. Before the appellant made any incriminating statements, Detective Flair again gave the appellant the Miranda warnings. The appellant stated that he understood these rights.

The appellant told Detective Flair that on March 19th he went to the victim's residence on two separate occasions. Initially, he gave the victim a bill for $508 for painting the victim's residence. The victim told him that she was not going to pay him that amount. She paid the appellant $400. He wanted to split the difference and asked her to pay him an additional $58. The victim refused to negotiate. The appellant left. On the second visit, the appellant stated that he and the victim engaged in an argument, the argument escalated to a physical scuffle, and he struck the victim. He then ransacked the bedroom and kitchen and left the residence with the victim's property. The appellant subsequently asked Detective Flair about bail. Detective Flair told the appellant that bail would eventually be set by a judicial officer. He specifically told the appellant that he, Flair, did not have any control over the amount of the bond.

When they arrived at the police station, the appellant agreed to give Detective Flair a statement that would be recorded on an audio tape. The appellant was again given the Miranda warnings. He signed a written waiver of the right to counsel form. He then gave a full statement. Detective Flair subsequently went before a commissioner and obtained a warrant charging the appellant with killing the victim.

The state presented Detective Flair as a witness during the suppression hearing. The appellant presented the Hartleys, his sister and brother-in-law. The appellant did not testify at the hearing. Neither Betty Hartley nor Ronnie Hartley were present when the appellant was questioned by Detective Flair. The testimony of Detective Flair, which the trial court accredited, made it crystal clear that the Miranda warnings were given, the

appellant was not threatened, coerced, or made any promise. In addition, Detective Flair testified that the appellant acknowledged he understood his rights; the appellant knew exactly what he was saying; he never attempted to terminate the questioning; and he did not request the assistance of an attorney. Thus, the record is devoid of evidence supporting the appellant's contention that the statements were anything but knowingly, intelligently or voluntarily given. The only question is whether the appellant was denied his Sixth Amendment right to the assistance of counsel.

The Metropolitan Public Defender was appointed to represent the appellant in a previous, unrelated case. The appellant argues that since he was represented by counsel, and counsel was not notified or permitted to represent him, he was denied his Sixth Amendment right to counsel. The fallacy with this argument is the fact that adversarial proceedings had not been commenced before the appellant gave the statements to the police. Consequently, the Sixth Amendment right to counsel had not attached. State v. Teel, 693 S.W.2d 236, 244 (Tenn), cert. denied 498 U.S. 1007, 111 S.Ct. 571, 112 L.Ed.2d 577 (1990); State v. Mitchell, 593 S.W.2d 280, 286 (Tenn.), cert. denied 449 U.S. 845, 101 S.Ct. 128, 66 L.Ed.2d 53 (1980). The appellant's right to counsel in this case was guaranteed by the Fifth Amendment. Miranda v. Arizona, 384 U.S. 436, 469-70, 86 S.Ct. 1602, 1625, 16 L.Ed.2d 694, 721 (1966). He waived this right. Furthermore, the waiver has not been questioned.

This issue is without merit.

IV.

The appellant contends that the trial court committed prejudicial error when instructing the jury on the elements of murder in the first degree. He argues that the instruction violated the teachings of State v. Brown, 836 S.W.2d 530 (Tenn. 1992) regarding the element of premeditation.

This issue is moot. State v. Bennett, 798 S.W.2d 783, 786-87 (Tenn. Crim. App. 1990), cert. denied, 500 U.S. 915, 111 S.Ct. 2009, 114 L.Ed.2d 98 (1991); see State v. Hicks, 835 S.W.2d 32, 39 (Tenn. Crim. App.), per. app. denied (Tenn. 1992). The jury

acquitted the appellant of murder in the first degree. Premeditation is not an element of murder in the second degree, the offense the jury found the appellant committed. Tenn. Code Ann. § 39-13-210(a).

This issue is without merit.

V.

The appellant contends that the trial court committed error of prejudicial dimensions in setting the length of the two sentences and ordering that the two sentences be served consecutively. He argues that the trial court erroneously applied one enhancement factor. He also argues that the trial court was not permitted to use his prior convictions to enhance his sentence within the range and order the sentences to be served consecutively. Furthermore, he argues that his criminal history was not extensive.

A.

When the accused challenges the length of a sentence, it is the duty of this Court to conduct a de novo review on the record "with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d). However, there are exceptions to this requirement. First, the requirement that this Court presume the determinations made by the trial court are correct 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). Second, the presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused. State v. Keel, 882 S.W.2d 410, 418 (Tenn. Crim. App.), per. app. denied (Tenn. 1994). Third, the presumption does not apply when the determinations made by the trial court are predicated upon uncontroverted facts or a document, such as a presentence report. State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993).

In conducting a de novo review of a sentence, this Court must consider (a) any

evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating and enhancing factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation. Tenn. Code Ann. §§ 40-35-103 and -210(b); State v. Scott, 735 S.W.2d 825, 829 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).

When the accused, as the appellant and aggrieved party, raises sentencing issues, the accused has the burden of establishing that the sentences imposed were erroneous. Sentencing Commission Comments to Tenn. Code Ann. § 40-35-401(d); State v. Raines, 882 S.W.2d 376, 384 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); Keel, 882 S.W.2d at 418.

B.

The trial court found that the record supported four enhancement factors. These factors included: (a) the appellant has a previous history of prior criminal convictions and criminal behavior, Tenn. Code Ann. § 40-35-114(1); (b) the victim was particularly vulnerable due to her age and physical stature, Tenn. Code Ann. § 40-35-114(4); (c) the appellant treated the victim with exceptional cruelty during the commission of the two offenses, Tenn. Code Ann. § 40-35-114(5); and (d) the appellant has a previous history of unwillingness to comply with the conditions of a sentence involving release into the community. Tenn. Code Ann. § 40-35-114(8).

The appellant does not contest the trial court's application of factor (1) to enhance his sentence within the appropriate range. The record reflects that the appellant has an extensive history of prior criminal convictions and criminal behavior. The appellant has three prior convictions for burglary and two prior convictions for driving while under the influence. In addition, the appellant admitted that he has ingested cocaine and taken quaaludes for twenty years. Since the possession of cocaine constitutes a criminal offense, this reflected a past history of criminal behavior. See State v. Keel, 882 S.W.2d 410, 419 (Tenn. Crim. App.), per. app. denied (Tenn. 1994). It is clear that factor (1) was

properly used to enhance the appellant's sentence.

The appellant also does not contest the trial court's use of factor (4) to enhance his sentence within the appropriate range. The victim was sixty-nine years of age when she was murdered. She was a widow and lived alone in her residence. She was five feet and five inches tall. She weighed 107 pounds. The appellant was approximately thirty-nine years of age when he murdered the victim. He weighed 185 pounds. The brutal beating administered by the appellant illustrates just how vulnerable the victim was in her own surroundings. It is apparent that the appellant was able to beat the victim with exceptional ease. Thus, the trial court properly enhanced the appellant's sentence by using this factor.

The appellant does not contest the trial court's use of factor (8) to enhance his sentence within the appropriate range. This factor is supported by the record. When the appellant was granted probation for a previous offense, his probation was revoked because he committed another offense.

The appellant contends that the trial court should not have used factor (5) to enhance his sentence within the appropriate range. His argument is two-fold. First, he argues that this factor, treating the victim with exceptional cruelty, is an element of murder in the second degree. Second, he argues that this factor "was encompassed by the jury's verdict" and the use of this factor to enhance his sentence "amounts to double jeopardy, cruel and unusual punishment, and the denial of [his] right to due process of law." These arguments are not supported by the evidence or the law.

This Court has previously held that factor (5) is not an element of either murder in the second degree or aggravated robbery. State v. Daniel L. Crow, Humphreys County No. 01-C-01-9110-CC-00304 (Tenn. Crim. App., Nashville, July 8, 1993). It has been used to enhance a sentence within the appropriate range in previous homicide cases. See State v. Mallory Michael Roberts, Davidson County No. 01-C-01-9309-CR-00295 (Tenn. Crim. App., Nashville, August 4, 1994) (voluntary manslaughter); State v. Terry Joseph Million, Jackson County No. 01-C-01-9303-CC-00100 (Tenn. Crim. App., Nashville, November 24, 1993) (voluntary manslaughter); State v. Russell Davis Farmer, Robert Lloyd Wiggins, and Larry Cocaine Gregory, Jr., McMinn County No. 03-C-01-9206-CR-00196 (Tenn. Crim. App., Knoxville, July 8, 1993) (murder second degree); Crow, supra (murder second

degree and aggravated robbery). Consequently, this factor is applicable to the crimes in this case if supported by the evidence.

The conduct of the appellant was meanspirited, despicable, hideous, and revolting. The beating he administered to this elderly victim was merciless, relentless, ruthless, and the handicraft of a depraved, criminal mind. He caused the victim to suffer nineteen (19) rib fractures. There was a separation of the cartilage from the bone in four distinct portions of the victim's chest. As she lay on the ground dying, the appellant struck the victim on the back with his shoe. Thereafter, the appellant took the time to rummage through the personal effects of the victim. The pathologist testified that the victim could have lived from fifteen minutes to two hours following the attack.

The trial court properly applied factor (5) to increase the appellant's sentence within the appropriate range. In Roberts this factor was established by the evidence because the accused stabbed the victim nine times. In Farmer this factor was established by the evidence because the accused severely beat the victim with a black jack. In Million this factor was established because the accused stabbed the victim several times with a hunting knife. The facts in this case equal, if not exceed, the horrible facts established in these cases.

Based upon the standard of review mandated in criminal cases, the sentences imposed by the trial court were proper considering the circumstances of the offense, the prior criminal history amassed by the appellant, and the enhancement factors established by the evidence. The weight the trial court assigned to each enhancement factor was proper. There are no mitigating factors supported by the record.

C.

The trial court ordered that the two sentences are to be served consecutively. The trial court found that the appellant's record of criminal activity is extensive, Tenn. Code Ann. § 40-35-115(b)(2), and the appellant is a dangerous offender, Tenn. Code Ann. § 40-35-115(b)(4).

The appellant challenges the trial court's decision to impose consecutive sentencing.

He argues that using the prior criminal history to enhance the sentence within the range and to impose consecutive sentencing constitutes double punishment. However, the appellant does not address or challenge the trial court's finding that he is a dangerous offender.

An accused qualifies as a dangerous offender when his "behavior indicates little or no regard for human life, and [he has] no hesitation about committing a crime in which the risk to human life is high." Tenn. Code Ann. § 40-35-115(b)(4). See Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In this case, the appellant qualifies as a "dangerous offender." However, this fact, standing alone, will not justify consecutive sentencing. State v. Timothy Michael Wilkerson, Dyer County No. 02-S-01-9406-CC-00033 (Tenn. Sup. Ct., Jackson, August 21, 1995); see State v. Taylor, 739 S.W.2d 227 (Tenn. 1987); Gray, 538 S.W.2d at 393; State v. Woods, 814 S.W.2d 378, 380 (Tenn. Crim. App.), per. app. denied (Tenn. 1991). As the Supreme Court said in Wilkerson:

> As previously stated in this opinion, the imposition of consecutive sentences on an offender found to be a dangerous offender requires, in addition to the application of general principles of sentencing, the finding that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed.

Slip op. at 14.

The trial court did not abuse its discretion in ordering the two sentences to be served consecutively. The conduct of the appellant qualifies him as a "dangerous offender." See Wilkerson, slip op. at 11-12. The appellant does not nor will he ever be able to justify the severe, ruthless beating he administered to the victim. The same is true as to why he left the victim to die. Also, the appellant has a history of criminal convictions and behavior that extends over several years. He has never maintained regular employment. In short, the appellant has been and is unwilling to lead a productive life as evidenced by his lack of employment and his resort to crime; and an extended sentence is necessary to protect the public from future criminal conduct. Finally, the aggregate length of the combined sentences reasonably relates to the offenses committed by the appellant.

This issue is without merit.

JOE B. JONES, JUDGE

CONCUR:

GARY R. WADE, JUDGE

ALLEN R. CORNELIUS, JR., SPECIAL JUDGE