IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER SESSION 1995

FILED

February 13, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 01C01-9503-CC-00086
Appellee,	)	
	)	Bedford County
v.	)	
	)	Hon. Charles Lee, Judge
ROBERT TERRY CROWSON,	)	
	)	(Second Degree Murder)
Appellant.	)	

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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Robert Terry Crowson, was convicted for second degree murder in a jury trial in the Circuit Court of Bedford County. He was sentenced as a Range I, standard offender to eighteen years and six months in the custody of the Department of Correction. He appeals as of right and contends (1) that the evidence is insufficient to support a second degree murder conviction and (2) that his sentence is excessive because of the trial court's failure to apply certain mitigating factors. We hold that the evidence is sufficient and that his sentence is not excessive.

The facts surrounding this offense involve an argument between the defendant and his brother, the victim, which culminated in the defendant shooting the victim three times. The defendant's mother, Hazel Crowson, testified that she, the defendant and her boyfriend, Cat Pinkston, had been drinking at a local bar earlier in the day on November 6, 1993. She stated that everyone had about two beers. She testified that the defendant and the victim began arguing upon their return home. She remembered that the argument had something to do with the defendant's tone of voice with her and stated that the victim would often get angry with the defendant because of his treatment of her. She testified that the argument escalated until the victim hit the defendant on the head with something. At that point, she told them to stop fighting and her sons complied.

Ms. Crowson testified that the victim went outside and the defendant went to the back bedroom of their trailer where her pistol was located. She recounted that the victim said, "I believe [the defendant's] going to get a gun," and that she told him that she hoped not. She stated that she called the victim back to the trailer because the defendant was bleeding badly and needed to be taken to the hospital. She said that the victim pushed open the door but never did fight with the defendant. She remembered that the victim just stood in the doorway and the defendant started

shooting at him. After the defendant had fired the gun, Mr. Pinkston removed the gun from his hand.

On cross-examination, Ms. Crowson admitted that she, the defendant and Mr. Pinkston drank a lot that day. She stated that the victim hit the defendant several times and that the victim was a lot larger than the defendant. She testified that the victim had hit the defendant before but that this was the worst beating she had ever seen the victim inflict on the defendant. She stated that the defendant came back from the bedroom with the gun and was bleeding profusely. She testified that the victim pushed the door open, startled her and the defendant pushed her out of the way and began shooting. She admitted that she too had been involved in the struggle that night and had suffered several broken ribs.

Deputy George C. Marsh, Jr., of the Bedford County Sheriff's Department testified that he arrived at the defendant's residence to find the victim's body on the floor of the living room. He stated that the defendant was sitting on the floor next to the victim and rocking back and forth when he arrived. He stated that Ms. Crowson and Mr. Pinkston were also present. He testified that he found the pistol on the kitchen table about seven or eight feet from the body after Mr. Pinkston told him where it was located. He said that the defendant's injuries did not appear to be serious and that the defendant was able to walk and respond appropriately to questions. On cross-examination, he admitted that there was a strong odor of alcohol about the defendant and that he could have been intoxicated.

Detective David C. Reed of the Moore County Sheriff's Department was Chief Detective for Bedford County on the night of the offense. He testified that he arrived at the crime scene after midnight and that the victim was found dead at the scene. He stated that the defendant was present and that his injuries were serious "in

that he was bleeding" but that the injuries were not life-threatening. He asked the defendant if he wanted to go to the hospital and the defendant told him yes. Detective Reed testified that he examined the victim at both the crime scene and at the hospital. He stated that the examination at the hospital revealed that the victim had suffered three gunshot wounds: one to the edge of his beard, one to the chest and one contact wound to the back. He stated that a search of the residence uncovered a gun holster in the bedroom and ammunition in the bathroom. He also found a blood-soaked sock in the bathroom that the defendant had wiped his face with before returning to the living room.

Detective Reed recounted the circumstances surrounding the statement given by the defendant on the morning after the killing. He stated that he advised the defendant of his rights and that the defendant responded that he was able to talk. The defendant told Detective Reed that he, his mother and Mr. Pinkston had gotten into an argument over who would drive home from the bar the night before. They were still arguing when they returned home and the victim told the defendant not to cuss their mother. The victim hit the defendant and a fight ensued that lasted about three minutes. The defendant told Detective Reed that he wanted to get his mother's pistol from her bedroom in order to scare the victim. He remembered his mother warning the victim as he walked to the back bedroom for the gun. The defendant told Detective Reed that he thought the victim had a gun in his car. The defendant went to the bathroom to wipe his face and returned to the living room. He told Detective Reed that his mother always kept the pistol loaded.

Initially, the defendant told Detective Reed that the victim returned to the trailer and began fighting with him again. Later, the defendant said that the victim was in the front doorway when a struggle began and that he shot the victim while the victim was on top of him. He told Detective Reed that he tried to revive the victim with CPR

for about twenty minutes and finally told Mr. Pinkston to call 911. When asked what happened to the gun, he reported that Mr. Pinkston took the gun away from him and hit him in the head with it after he shot the victim.

Detective Reed testified that the defendant's testimony at the preliminary hearing differed in several respects from his statement given on the night of the offense. First, the defendant testified at the preliminary hearing that no argument occurred between himself, Mr. Pinkston and his mother. Also, he testified that the initial attack by the victim was totally unprovoked. Finally, the defendant stated that Mr. Pinkston grabbed the pistol from him causing it to fire and strike the victim three times. Detective Reed testified that several items found at the scene were sent to the Tennessee Bureau of Investigation Crime Lab (TBI) for analysis. He submitted the pistol, the defendant's bloody clothing and the recovered bullets to the TBI for analysis.

On cross-examination, Detective Reed testified that the defendant told him that he thought the victim had gone to his car to retrieve a .32 caliber pistol. However, Detective Reed testified that a search of the victim's car did not uncover the pistol. Detective Reed identified a photograph taken of the defendant at the scene that shows the severity of the injuries on his face. The heater coil element was identified by Detective Reed and he testified that the TBI confirmed the presence of human blood on the element. Detective Reed stated that Ms. Crowson was understandably upset on the night of the killing but that she did not appear to be intoxicated. He testified that Mr. Pinkston was "highly intoxicated to the point where he could not walk almost." Detective Reed stated that the defendant's blood alcohol content was .28 when he was taken to the emergency room immediately after the shooting.

Special Agent Steve Scott, a forensic firearms expert with the TBI, testified that he examined the pistol and bullets recovered from the scene by Detective Reed. He stated that he was able to identify the three bullets sent to the crime lab as matches to the three fired cartridges found in the pistol. However, he was unable to make a definite match of the bullets to the pistol through standard test-firing procedures because the pistol did not produce significant marks on fired bullets.

Dr. Charles Harlan, Chief Medical Examiner for the State of Tennessee, testified regarding the results of the autopsy performed upon the victim. He identified three separate entrance wounds and no exit wounds. He testified that gunshot wound "A" entered in the victim's neck and traveled into the chest where it ultimately became lodged in the victim's spine. He stated that gunshot wound "B" entered through the right side of the victim's chest and traveled through the right lung, the aorta, the left lung and ultimately lodged in the victim's ninth rib. Dr. Harlan testified that gunshot wound "C" entered in the right upper back and traveled through muscle before resting in soft tissue. Dr. Harlan testified regarding the various distances of wounds and concluded that wounds "A" and "B" were near gunshot wounds fired from a distance between twelve and twenty-four inches and that wound "C" was a near gunshot wound with stippling fired from a distance between zero and twelve inches. He determined the victim's primary cause of death to be multiple gunshot wounds with wound "B," which severed the aorta, causing primary damage. On cross-examination, Dr. Harlan testified that he was unable to determine the order in which the shots were fired. He also stated that the victim's blood showed an alcohol content of .21 and that his urine showed an alcohol content of .27.

The defendant testified that he, his mother and Mr. Pinkston went to a local bar and drank "a lot of beer" in the evening of November 6, 1993. They arrived home and began drinking again. The defendant stated that the victim had been

arguing with him when the defendant's girlfriend arrived. He stated that they were sitting there when "the next thing I know I get hit upside the head." He testified that the victim hit him with the heating element and hit him more than once with his fist. He stated that the victim pointed his finger at him and threatened him before going outside. He testified that he went to his mother's room to get her pistol because he was scared that the victim had gone to get his .32 pistol from his car. He recalled that as he looked out the window of the door, the victim pushed the door open and began assaulting him again. He could not recall how the pistol was fired but testified that he did not intentionally pull the trigger and shoot the victim. He stated that the gun fired during the scuffle. He testified that he tried to preform CPR on the victim and finally called 911. He said that this was the worst that the victim had ever beaten him and that he was terrified of the victim.

On cross-examination, the defendant testified that they had been home about twenty or thirty minutes before the victim began arguing with him. He denied getting into an argument with his mother on the way home from the bar and testified that the last argument he and his mother had was about one week before the shooting. The defendant testified that he never saw a weapon in the victim's hands when he returned to the living room but that "[h]e could have had one." He admitted that after the victim threatened him and went outside he did not go into the bedroom and lock the door or call the police and agreed that the first thing he did was get his mother's gun. He admitted that there was no imminent threat to his safety when he went to the bedroom, the bathroom and returned to the living room. He denied testifying at the preliminary hearing that the gun discharged when Mr. Pinkston grabbed him.

I

The defendant contends that the evidence is insufficient to support a conviction for second degree murder. He argues that he shot the victim in self-defense

and that he was justified in his use of deadly force given the severe beating the victim had inflicted upon him a few minutes earlier. The state responds that it was the jury's prerogative to disbelieve the defendant's claim of self-defense and that the proof is sufficient to show an intentional and knowing killing.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, 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, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

A conviction for second degree murder requires proof that the defendant committed a knowing killing. T.C.A. § 39-13-210(a)(1). The evidence showed that the defendant and the victim were involved in a serious altercation. Once the argument had dissipated, the defendant armed himself and shot the victim while he entered their home. The victim was shot three times in the neck and chest area with one wound severing his aorta. The jury was entitled to reject the defendant's claim of self-defense and to find beyond a reasonable doubt that he unlawfully and knowingly shot and killed the victim. We hold that there is sufficient evidence that the defendant committed the offense of second degree murder.

II

The defendant contends that the trial court imposed an excessive sentence of eighteen years and six months. Second degree murder is a Class A

felony and carries a sentencing range of fifteen to twenty-five years for a Range I, standard offender. The defendant argues that the trial court should have applied the following mitigating factors, as listed in T.C.A. § 40-35-113, to arrive at the minimum sentence of fifteen years:

> (3) Substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense, and
>
> (11) The defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct.

The state responds that factor (3) does not apply because the fight between the defendant and the victim had ceased and the victim had left the trailer. The state also argues that factor (11) does not apply because the defendant testified that he and the victim often argued and because the defendant had ample time to leave the premises or seek safety but chose not to do so.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d) and -402(d). As the Sentencing Commission Comments to these sections note, the burden is now on the appealing party to show that the sentencing is improper. This means that if the trial court follows the statutory sentencing procedure, makes findings of fact that are adequately supported by the record and gives due consideration and proper application of the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). However, "the presumption of correctness which accompanies the trial court's action 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 sentence to be imposed by the trial court is presumptively the minimum in the range unless there are enhancement factors present. T.C.A. § 40-35-210 (c).[1] Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. T.C.A. § 40-35-210(d) and (e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. T.C.A. § 40-35-210, Sentencing Commission Comments; Moss, 727 S.W.2d at 237; see Ashby, 823 S.W.2d at 169. For the purpose of review, the trial court must preserve in the record the factors it found to apply and the specific findings of fact upon which it applied the sentencing principles to arrive at the sentence. See T.C.A. §§ 40-35-210(f) and -209(c).

In conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103 and -210; see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229 (Tenn. 1986).

The trial court found that the following enhancement factors as listed in T.C.A. § 40-35-114 were applicable:

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

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[1] We note that for all Class A felonies committed after July 1, 1995, the presumptive sentence is now the midpoint of the range if there are no enhancement or mitigating factors. T.C.A. § 40-35-210(c) (Supp. 1995).

> (8) the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release into the community, and
>
> (9) the defendant employed a firearm during the commission of the offense.

The trial court enhanced the defendant's sentence to twenty years based upon these factors. However, the trial court also found that the defendant acted under strong provocation as mitigation, T.C.A. § 40-35-113(2), and decreased the sentence to eighteen years and six months. In doing so, it noted that mitigating factor (3), relative to the defendant's conduct being somewhat justified, was similar to factor (2), but it declined to apply both under the evidence before it.

The presentence report reflects that the defendant has a history of misdemeanor convictions relating to driving under the influence, jail escape and reckless endangerment. Both of the reckless endangerment convictions involved a deadly weapon and occurred just five months before the present offense. Thus, the defendant was on probation from these convictions when this offense occurred. The defendant admitted to the presentence investigation officer that the exact number of his arrests was unknown "but would probably exceed twenty."

The defendant was thirty-one years old when the present offense was committed. He is a junior high drop-out and has maintained employment for the longest duration of only fifty-six days when he was twenty-nine years old. He lives with his mother, who reported that he does not contribute to expenses such as rent or food. The defendant claimed to have completed an alcohol rehabilitation program in August of 1993, yet testified at trial that he, his mother and Mr. Pinkston had had a lot to drink on the night of the offense, just three months later. All of these factors weigh heavily against the defendant's potential for rehabilitation.

Furthermore, as the state argues, the circumstances surrounding the offense do not lend themselves wholly to application of the mitigating factors the defendant wants us to apply. The evidence reflects that after the argument had ceased, the defendant obtained a weapon from his mother's bedroom and shot his unarmed brother as the brother reentered the trailer. As previously noted, the trial court's determinations, including its refusal to apply sentencing factors, are presumed to be correct. In this regard, we are unable to conclude that the evidence preponderates against the trial court's findings and determinations so as to require application of either mitigating factor (3) or (11). We conclude that the sentence of eighteen years and six months is appropriate.

In consideration of the foregoing and the record as a whole, the judgment of conviction is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

_____
Joe B. Jones, Presiding Judge

_____
Paul G. Summers, Judge