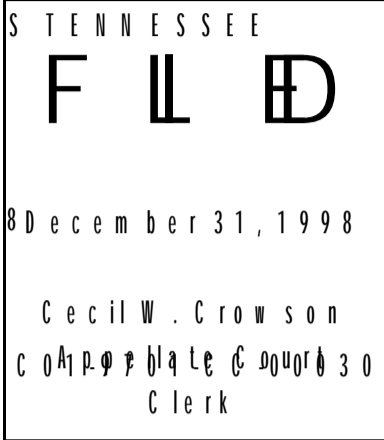


IN THE COURT OF CRIMINAL APPEALS TENNESSEE

AT NASHVILLE

JANUARY SESSION, 1998 December 31, 1998



STATE OF TENNESSEE,)

Appellee,)

V S.)

DIMARKO BOJERE WILLIAMS,)

Appellant.)

Degree)

C.C.A. NO. 01)

MAURY COUNTY)

HON. JIM T. HAMILTON)

JUDGE)

(Direct Appeal - Second)

Murder))

FOR THE APPELLANT:

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O P I N I O N F I L E D -----

A F F I R M E D ; S E N T E N C E M O D I F I E D

J E R R Y L . S M I T H , J U D G E

O P I N I O N

On April 16, 1996, a Maury County jury found Appellant, Dimarko Williams, guilty of second degree murder in the death of Shawn Woodard. As a standard Range I offender convicted of a Class A felony, the trial court sentenced Appellant to twenty-five years incarceration in the Tennessee Department of Correction. Appellant appeals from the verdict and the sentence, raising three issues:

- 1) whether the evidence is sufficient to support a verdict of second degree murder;
- 2) whether the trial court properly admitted testimony regarding the funeral and burial of the victim; and
- 3) whether the trial court erred in sentencing Appellant to twenty-five years in prison.

After a review of the record, the conviction is affirmed but for the reasons stated infra, the sentence is modified to twenty years in the Tennessee Department of Correction.

F A C T S

On the morning of September 7, 1995, Travis Lawrie and Appellant rode around in a car for three or four hours. Appellant told Mr. Lawrie that Shawn Woodard had broken out Appellant's car windows, and that Appellant would have to do something about this affront. Mr. Lawrie dropped Appellant off at a friend's house. Later in the day, Mr. Lawrie saw Appellant seated in a car with a friend named James. Mr. Lawrie told Appellant that he was going to the store, and left the house where the three were. Appellant and James also left the house, in the other car. In driving from the house to the store, the two cars necessarily passed by Mr. Woodard's house on Magnolia Street. Mr. Lawrie stopped his car at a stop sign in front of Mr. Woodard's house. James stopped his car behind Mr. Lawrie's. Mr. Woodard was standing in Magnolia Street washing his mother's car. Appellant got out of James' car, sensing that there was to be a fight, Mr. Lawrie also got out of his car to watch. Appellant walked toward Mr. Woodard as if to talk with him, and the two began to argue. Mr. Woodard pulled a knife and swung at Appellant. Appellant pulled a gun and shot Mr. Woodard three times, once in the front and twice in the back. Mr. Woodard's body was found forty to fifty

yards from his house, lying face down on the ground. Mr. Woodard died as a result of the gunshot wounds.

Appellant made a statement to law enforcement officers which was introduced at trial. In the statement, Appellant confessed to killing Mr. Woodard, but claimed that he did so in self-defense. Appellant related that as the two cars stopped in front of Mr. Woodard's house, Mr. Woodard called Appellant a "motherf***ing punk" and pulled a knife. Appellant then got out of the car, tucking his revolver into the waistband of his shorts. As Appellant approached Mr. Woodard, Mr. Woodard advanced making cutting motions with the knife. Appellant then pulled his gun. Appellant stated that Mr. Woodard grabbed his shirt and was swinging the knife, and at that point he shot Mr. Woodard. Appellant was unsure if his first shot hit Mr. Woodard. Mr. Woodard turned, but continued to hold onto Appellant's shirt, so Appellant shot him in the back. Mr. Woodard turned loose of the shirt and began to run. Appellant stated that he might have shot Mr. Woodard again.

I. SUFFICIENCY OF THE EVIDENCE

Appellant argues that the evidence presented at trial was insufficient to convict him of murder in the second degree, maintaining that, even when viewed in the light most favorable to the State, the facts demonstrate that Appellant acted under provocation sufficient to lead a reasonable person to act in an irrational manner. Thus, Appellant argues that at most the jury could only rationally find him guilty of voluntary manslaughter. See, Tenn. Code Ann. Sec. 39-13-211.

When an appellant challenges the sufficiency of the evidence, this Court is obliged to review that challenge according to certain well-settled principles. A verdict of guilty by the jury, approved by the trial judge, accredits the testimony of the State's witnesses and resolves all conflicts in the testimony in favor of the State. State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). Although an accused is originally cloaked with a presumption of innocence, a jury verdict removes this presumption and replaces it with one of guilt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with Appellant to demonstrate the

insufficiency of the convicting evidence. Id. On appeal, "the [S]tate is entitled to the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." Id. (citing State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978)). Where the sufficiency of the evidence is contested on appeal, the relevant question for the reviewing court is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. Harris, 839 S.W.2d 54, 75; Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). In conducting our evaluation of the convicting evidence, this Court is precluded from reweighing or reconsidering the evidence. State v. Morgan, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, this Court may not substitute its own inferences "for those drawn by the trier of fact from circumstantial evidence." Id. at 779. Finally, the Tennessee Rules of Appellate Procedure, Rule 13(e) provides, "findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact

beyond a reasonable doubt." See also State v. Mathews, 805 S.W.2d at 780.

Appellant was convicted of second degree murder, defined at Tennessee Code Annotated Section 39-13-210(a)(1) as the knowing killing of another. However, if a knowing killing is committed while the defendant is acting in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act irrationally, then the offense is voluntary manslaughter.

In the instant case the proof showed that although Mr. Woodard did swing a knife at Appellant, he did so only after the Appellant armed himself, approached Mr. Woodard and confronted him. Appellant, despite at least two opportunities to do so, did not break off the conflict but chose instead to shoot Mr. Woodard at least twice in the back. The proof is more than sufficient to show that Appellant knowingly killed Woodard in a confrontation Appellant provoked.

In other words, the proof was sufficient for a rational juror to conclude that this was not an irrational act produced by passion, but rather a confrontation engineered by Appellant that resulted in Mr. Woodard's death. Under the circumstances the proof is sufficient to establish second degree murder.

II. EVIDENCE REGARDING VICTIM'S DEATH AND BURIAL

Appellant further contends that the trial court erred in admitting the testimony of the victim's mother regarding seeing her son at the funeral home and at his burial. Appellant argues that such testimony should have been excluded as unfairly prejudicial and cumulative under Rule 403 of the Tennessee Rules of Evidence which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

If a trial court in the exercise of its discretion finds that evidence is relevant within the meaning of Rule 401, and the accused is not entitled to have the evidence excluded for one of the grounds set forth in Rule 403, this Court will not interfere with the exercise of this discretion unless it appears on the face of the record that the trial court clearly abused its discretion. State v. Williamson, 919 S.W.2d 69,79 (Tenn. Crim. App. 1995) (*citing* State v. Hayes, 899 S.W.2d 175, 183 (Tenn. Crim. App. 1995), per. app. denied (Tenn. 1995)). Relevant evidence is evidence having any tendency to make a fact in issue more or less probable than it would be without the evidence. Tenn. R. Evid. 401.

The testimony by Ms. Woodard that she buried her son was undoubtedly cumulative to the testimony presented by the State's witness regarding the autopsy of Mr. Woodard. The State maintained at trial that such testimony was necessary to prevent any argument that the State failed to produce Ms. Woodard as a witness. We find this argument a bit disingenuous. However, despite the fact that such testimony undoubtedly had an emotional impact upon the jury, in light of the strong evidence

against Appellant, we must find that any error in admitting this testimony was at most harmless. This issue is without merit.

III. SENTENCING

Finally Appellant contends that the trial court improperly applied enhancement factors, did not give weight to mitigating factors, and therefore ordered an excessive sentence. When a defendant complains of his or her sentence, we must conduct a *de novo* review with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. Tenn. Code Ann. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, is conditioned upon an affirmative showing in the record that the trial court considered the sentencing principles and all the relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

Tennessee Code Annotated § 40-35-103 sets out sentencing considerations which are guidelines for determining whether or not a defendant should be incarcerated. These include the need

"to protect society by restraining a defendant having a long history of criminal conduct," the need "to avoid depreciating the seriousness of the offense," the determination that "confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses," or the determination that "measures less restrictive than confinement have frequently been applied unsuccessfully to the defendant." Tenn. Code Ann. § 40-35-103(1). In determining the specific sentence and the possible combination of sentencing alternatives, the court shall consider the following:

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

Tenn. Code Ann. § 40-35-210(b). The Sentencing Reform Act also provides that the trial court shall place on the record either orally or in writing what enhancement or mitigating factors it found, if

any. These findings are crucial for review of the trial court's decision upon appeal.

In the matter sub judice, the trial court characterized the offense as a classic first degree murder, though the court accepted the jury's verdict of second degree murder. The court indicated that it believed that Appellant sought out the victim with intent to harm him. The trial court found four enhancement factors: 1) the personal injuries inflicted upon the victim were particularly great, pursuant to Tennessee Code Annotated § 40-35-114(6); 2) Appellant possessed and employed a firearm during the commission of the offense, pursuant to Tennessee Code Annotated § 40-35-114(9); 3) Appellant had no hesitation about committing a crime where the risk to human life was high, pursuant to Tennessee Code Annotated § 40-35-114(10); and 4) the crime was committed under circumstances under which the potential for bodily injury to a victim was great, pursuant to Tennessee Code Annotated § 40-31-114(16).

It is well established that a trial court may not apply an enhancement factor if that factor is an essential element of the

offense as charged in the indictment. Tenn. Code Ann. § 40-35-114; State v. Jones, 883 S.W.2d 597 (Tenn. 1994). Our Supreme Court has held that "proof of serious bodily injury will always constitute proof of particularly great injury." State v. Jones, 883 S.W.2d 597, 602 (Tenn. 1994). This Court has further held that when death is an element of the offense, as it is in the case of second degree murder, enhancement factors (6) and (16) are inapplicable, *see* State v. Lambert, 741 S.W.2d 127, 134 (Tenn. Crim. App. 1987); State v. Belser 945 S.W.2d 776, 792 (Tenn. Crim. App. 1996), because the death of the victim is an essential element of murder. State v. Dwayne E. Robinson, Jr., No. 01C01-9209-CR-00270 (Tenn. Crim. App., Nashville, April 15, 1993); State v. Reeder Junior Robbins, No. 6 (Tenn. Crim. App., Jackson, March 27, 1991). Therefore the application of these enhancement factors was inappropriate.

Further, the trial court erred in enhancing Appellant's sentence on the basis that Appellant had no hesitation about committing a crime when the risk to human life was great under Tennessee Code Annotated § 40-35-114(10)¹. This Court has held

¹The State argues that the may have been an individual as present in the zone of danger surrounding the shooting. However, the record fails to reflect that

that this factor should not be considered in second degree murder cases. State v. Butler, 900 S.W.2d 305 (Tenn. Crim. App. 1994) (*citing* State v. John Michael Armitage, Knox County No. 03-C-01-9203-CR-0071, slip op. at 15, 1993 WL 317463 (Tenn. Crim. App., Knoxville, August 23, 1992), per. app. denied (Tenn. 1994); State v. Jeffrey Allen Partin, Franklin County No. 01-C-01-9202-CC-00054, slip op. at 7 n. 1, 1992 WL 217775 (Tenn. Crim. App., Nashville, September 11, 1992); State v. Tony Von Carruthers, Shelby County No. 02-C-01-9102-CR-00019, slip op. at 2, 1991 WL 147946 (Tenn. Crim. App., Jackson, August 7, 1991); State v. Robert Calvin Daniels, Davidson County No. 01-C-01-9007-CR-00169, slip op. at 7, 1991 WL 51430 (Tenn. Crim. App., Nashville, April 11, 1991), per. app. denied (Tenn. 1991)).

Appellant does not contest that enhancement factor (9) regarding use of a firearm in the commission of an offense applies. He does, however, argue that one mitigating circumstance should be applied to his case, namely that Appellant committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate

any other individual as we read and heard his we declined apply enhancement factor (10) on the basis of speculation.

the law motivated his conduct. We find that this factor is not supported by the record.

In light of the fact that the trial court misapplied three of the four enhancement factors used to increase Appellant's sentence beyond the presumptive twenty year sentence, See, Tenn. Code Ann. Sec. 40-35-210(c); State v. Chance, 952 S.W.2d 848, 851 (Tenn. Crim. App. 1997); it is our opinion that the use of a firearm in the commission of this felony is serious enough to warrant a two year increase beyond the presumptive sentence. Appellant's sentence is therefore modified to twenty-two years incarceration in the Tennessee Department of Correction.

JERRY L. SMITH, JUDGE

CONCUR:

J O H N H . P E A Y , J U D G E

T H O M A S T . W O O D A L L , J U D G E