IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY 1999 SESSION

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	C.C.A. No. W1998-00487-CCA-R3-CD
	)	
vs.	)	
	)	Shelby County
COREY L. EDDINS,	)	
	)	Hon. Chris Craft, Judge
Appellant.	)	
	)	(Second Degree Murder)

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OPINION FILED:_____

AFFIRMED

JAMES CURWOOD WITT, JR., JUDGE

OPINION

The defendant, Corey Eddins, appeals his Shelby County jury conviction of second degree murder. After a sentencing hearing, the trial court imposed a sentence of 23 years, to be served in the Tennessee Department of Correction. In this appeal, the defendant raises the following issues:[1]

1. the sufficiency of the evidence;
2. whether the defendant's September 30, 1996 statement should have been suppressed; and
3. whether defense witness Tequila Kendall should have been found competent to testify.

After a review of the record, the briefs of the parties, and the applicable law, we affirm the trial court's judgment.

On the morning of September 10, 1996, Markesha Kendall woke up, got dressed, and went looking for her mother, Tracy Shavers. She found her mother lying on the living room floor, naked and bleeding from the head. She tried to wake her mother, but could not. She called her grandmother, her aunt, and 911.

The defendant had lived with the victim the year before her death. He moved out before she gave birth to the twins he had fathered. Five days after the victim's murder, the defendant gave a statement to the police. He said that he had been at home that evening and had not killed the victim. Two weeks later, the police picked up the defendant just before his lunch break at work. The police questioned the defendant and he finally gave a statement late that evening. In his second statement, the defendant confessed to killing the victim. He said that at around eleven that night he went to the victim's house seeking sex. He and the victim argued about him and another woman, and she slapped him. He struck her and knocked her down. He picked up a gold statue and repeatedly hit her in the head until she stopped struggling. He then had sex with her. He said that he drove

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[1] Eddins is represented by counsel in this appeal. Nevertheless, he lodged a *pro se* brief, styled as a supplemental brief. The supplemental brief was filed in support of a motion for consideration of post-judgment facts, a motion which raised additional issues, but did not recite any post-judgment facts. His attorney filed a brief, as well. The briefs of the petitioner and his attorney do not raise the same issues. In this court, a litigant has no right to proceed simultaneously through counsel and *pro se.* See, e.g., State v. Burkhart, 541 S.W.2d 365, 371 (Tenn. 1976). Only those issues presented in counsel's brief are properly before the court.

to a nearby lake and threw the statue into the water. He arrived at his home around three o'clock in the morning.

After taking his statement, the police arrested the defendant. The police searched for, but never found, the murder weapon. At the trial, the defendant's step-brother testified that he had seen the defendant and victim argue. He said that the victim picked up a knife and the defendant picked up an iron and he had to step between them to break it up.

The defendant was found guilty of second degree murder by a jury. The trial court found that enhancement factors (5), exceptional cruelty, and (6), great personal injuries, applied. The trial court sentenced the defendant to 23 years in the Department of Correction.

I. Sufficiency of the Evidence

The defendant claims that the evidence is insufficient to support his conviction for second degree murder. He argues that he was guilty of no more than voluntary manslaughter because the evidence showed that he acted out of anger and such a showing has the effect of reducing second degree murder to voluntary homicide. The state responds that any provocation from the victim was not sufficient to lead a reasonable person to act in an irrational manner. The state argues that the provocation was inadequate because, according to the defendant, the victim slapped him once and then he bludgeoned her to death.

When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering 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, 324, 99 S. Ct. 2781, 2791-92, (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn. R. App. P. 13(e). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and

circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this court should not reweigh or reevaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. 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 the evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956); Farmer v. State, 574 S.W.2d 49, 51 (Tenn. Crim. App. 1978). On the contrary, this court must 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. Cabbage, 571 S.W.2d at 835.

Second degree murder is the knowing killing of another. Tenn. Code Ann. § 39-13-210 (1997). A homicide, once established, is presumed to be second degree murder. State v. Brown, 836 S.W.2d 530, 543 (Tenn. 1992).

In the light most favorable to the state, the proof shows that the defendant became angry with the victim as they argued. The victim slapped the defendant. The defendant then struck the victim, knocked her to the floor, and repeatedly struck her with a heavy statue. See Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992) (finding that not all blows that excite passion will serve to reduce a homicide to manslaughter, but will support second degree murder) (quoting Rader v. State, 73 Tenn. 610 (1880)). The evidence is sufficient for a rational jury to conclude beyond a reasonable doubt that the defendant knowingly killed Tracy Shavers.

We reject the defendant's argument that the proof is adequate only to convict him of voluntary manslaughter. Testimony showed that he was angry and the victim slapped him. The jury did not conclude that this was "a state of passion

produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Tenn. Code Ann. § 39-13-211 (1997). As was its prerogative, the jury obviously found that slapping the defendant was not sufficient provocation to justify a killing.

II. Defendant's Statement

The defendant claims that the trial court erred by not suppressing his statement of September 30, 1996. He argues that the trial court improperly decided the statement was admissible because the trial court stated that it did not have to decide the credibility of the witnesses or the weight of evidence, but only admissibility. The defendant contends that a combination of threats and promises of leniency made by the questioning police officers overwhelmed his will to resist and tainted his confession. The state responds that the evidence proved at the suppression hearing does not preponderate against the trial court's denial of the defendant's motion to suppress his confession. The state argues that the trial court impliedly found the officers' testimony more credible than the defendant's because it ruled the statement admissible.

At an evidentiary hearing, the State has the burden of demonstrating by a preponderance of the evidence that the defendant's statements were voluntary, knowing and intelligent. State v. Kelly, 603 S.W.2d 726, 728 (Tenn. 1980). A trial court's determination at a suppression hearing is presumptively correct on appeal, State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994), and the findings are binding upon this court unless the evidence contained in the record preponderates against them. State v. Odom, 928 S.W.2d 18, 22 (Tenn. 1996); Stephenson, 878 S.W.2d at 544; State v. Aucoin, 756 S.W.2d 705, 710 (Tenn. Crim. App. 1988).

Under this standard, matters regarding the credibility of witnesses, the weight and value to be afforded the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial court as the trier of fact. Odom, 928 S.W.2d at 23. On appeal, the defendant has the burden of showing that the

evidence preponderates against a finding that a confession was, in fact, knowingly and voluntarily given. State v. Nakdimen, 735 S.W.2d 799, 800 (Tenn. Crim. App. 1987). In determining whether a statement is made voluntarily, this court must look to the totality of the circumstances surrounding the confession, and the standard is whether "the behavior of the state's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." Kelly, 603 S.W.2d at 728.

In the case at bar, the defendant testified at the suppression hearing that on September 30, 1996 the interrogating officers offered him a choice between four years incarceration or either the death penalty or life imprisonment. He said he made up the confession because he was afraid of getting the death penalty or life imprisonment by being charged with first degree murder. Sergeant Stewart of the Memphis Police Department testified that he read the defendant his Miranda rights and the defendant read and signed an advice and waiver of rights form which also contained the Miranda rights. He testified that after interviewing the defendant for six hours, which included numerous breaks to verify parts of his statement, the defendant signed a written statement. The written statement spelled out the defendant's Miranda rights, and Sergeant Stewart testified that the defendant read the statement before he signed it. He also testified that he told the defendant the possible charges against him and their accompanying punishments. Sergeant Cash was called as a rebuttal witness, and he corroborated Sergeant Stewart's testimony.

We note that the record of the suppression hearing indicates that both officers testified on cross-examination that they could not remember anything other than what they had testified on direct, and in general, they provided very evasive, non-informative answers. However, it is the province of the trial court to make determinations of credibility, and we defer to the trial court's determinations of witness credibility. See State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996) ("Questions of credibility of witnesses, the weight and value of the evidence and resolution of conflicts in evidence are matters entrusted to the trial judge as the trier of fact.").

At the conclusion of the suppression hearing, the trial court noted that the testimony of the defendant and the officers was contradictory. The trial court resolved the question of credibility of the witnesses in the state's favor. The trial court found that the defendant was not unduly influenced by any offer of leniency. Thus, it found that the state had met its burden of proving the statement should be admitted.

It is undisputed that the defendant was advised fully and completely of his Miranda rights and signed written waivers of his constitutional rights before making the statements to the investigators. He raised no questions about the waivers, nor did he indicate that he did not understand any of them. As in State v. Smith, the defendant was not compelled to confess because "the tactics of the state" were not "so coercive as to overbear the defendant's will." 933 S.W.2d 450, 456 (Tenn. 1996) (affirming admissibility of statements made to a Tennessee Department of Human Services mental health counselor after she told the defendant that if he sought treatment, the prosecutor would most likely not prosecute, but she could not make any promises; however, if he did not seek treatment, then he would definitely be prosecuted).[2]

Thus, the record clearly supports the trial court's findings, and the defendant has failed to carry his appellate burden. We conclude that, under the totality of the circumstances, the defendant understood his rights, voluntarily and effectively waived those rights, and voluntarily, intelligently, and understandingly gave his statement. Accordingly, we conclude that the trial court's denial of defendant's motion to suppress was proper.

III. Competency of Witness

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[2] Justice White dissented in Smith, claiming that the position of trust engendered by the counselor showed that the defendant's confession was not the product of a voluntary, free will. 933 S.W.2d at 460. Justice Reid also dissented. He agreed with the trial court, even though it ruled the statements admissible, when the trial court said that the state "mouse-trapped him." Id. at 45. However, in the case at bar, the police officers were not in a position of trust relative to the defendant, and there was no evidence that the officers attempted to trap or trick the defendant into making his statement.

The defendant claims that Tequila Kendall, who was six years old at the time of the trial, knew the difference between a lie and the truth and should have been permitted to testify. He argues that there is no requirement that the witness have sufficient knowledge or experience to define an oath or articulate its obligations. He contends that Miss Kendall would have testified that she saw another man in the victim's home the night the victim was murdered. The state responds that Miss Kendall's answers to the trial court's questions did not show that she could understand the oath. The state argues that in order to find a child competent to testify, she must have a due sense of the obligation and sanctity of the oath.

In the case at bar, the defendant wished to have Tequila Kendall testify. Miss Kendall was six years old at the time of the trial. The following colloquy occurred:

> THE COURT: Do you know the difference between telling the truth and telling something that's not true.
>
> [WITNESS]: Yes, sir.
>
> THE COURT: What's the difference? What's the difference between telling something true and something that's not true? (Long Pause)
> I've had to ask my little girl the same questions. What does it mean to tell the truth?
>
> [WITNESS]: I don't know.
>
> THE COURT: You don't? Okay. Well, do you know what a lie is? Do you know what telling a lie is?
>
> [WITNESS]: Yes, sir.
>
> THE COURT: What's telling a lie? What do you do?
>
> (Pause)
>
> The reason I'm asking you that is because we're going to ask you some questions with these people sitting in this box and we want to make sure that you tell us something that's true and not something you made up.
>
> Do you know the difference between telling something that's true and telling something that you made up? Or not?
>
> (Pause)

Well, for the record, she's not saying anything. [DEFENSE COUNSEL], do you want to talk to her?

. . .

[DEFENSE COUNSEL]: Okay. Now what the Judge was asking you here is about whether you're going to be telling us the truth or a story that you made up. You know what the truth is? Hmm?

[WITNESS]: No, sir.

[DEFENSE COUNSEL]: Please?

[WITNESS]: No, sir.

[DEFENSE COUNSEL]: Well, is that – you know, what the Judge asked you if you knew what it meant to tell a story. You know what telling a story is?

[WITNESS]: Yes, sir.

[DEFENSE COUNSEL]: What is that?

(Pause)

What do you do when you tell a story?

(Long Pause)

You want to ask – talk to your aunt? Huh?

[WITNESS]: Yes, sir.

[DEFENSE COUNSEL]: Okay.

[AUNT]: You know when you tell a story?

THE COURT: Ma'am, you're going to have to speak up because we're taking this down.

[AUNT]: Okay, Tequila, you know what a lie is, don't you? Tell them what a lie is, If you tell a lie, what do you do?

[WITNESS]: You get in trouble.

[AUNT]: You get in trouble. Is that loud –

THE COURT: Yeah, I heard her.

[AUNT]: Okay. You get in trouble. But if you're telling the truth, what are you telling?

[WITNESS]: You don't get in trouble.

. . .

[DEFENSE COUNSEL]: When you tell a story, you told your aunt that you get in trouble, and that if you tell the truth, do you get in trouble.

[WITNESS]: No, sir.

[DEFENSE COUNSEL]: Huh?

[WITNESS]: No, sir.

[DEFENSE COUNSEL]: So what's the difference between – Is there a difference between telling the truth and telling a story?

[WITNESS]: I don't know.

[DEFENSE COUNSEL]: Huh?

[WITNESS]: I don't know.

THE COURT: She said, "I don't know."

[WITNESS]: I don't know.

The trial court did not find that the child was competent because it did not think that her testimony would be reliable. The trial court said that it could not determine whether she knew the difference between telling something that happened and something that she made up. The defendant then made the following offer of proof:

[DEFENSE COUNSEL]: Tequila, let me ask you, do you remember talking to the police officers right after you mother died?

[WITNESS]: No, sir.

[DEFENSE COUNSEL]: Huh?

[WITNESS]: No, sir.

[DEFENSE COUNSEL]: You don't remember them coming down here, you coming down here and talking to you?

[WITNESS]: No, sir.

[DEFENSE COUNSEL]: Huh?

[WITNESS]: No, sir.

[DEFENSE COUNSEL]: Come down here in this building before?

[WITNESS]: No, sir.

[DEFENSE COUNSEL]: You didn't?

[WITNESS]: No, sir.

[DEFENSE COUNSEL]: And you don't remember talking to and having Tasha and Lakesha present with you when you talked to these men?

[WITNESS]: No, sir.

[DEFENSE COUNSEL]: Huh?

[WITNESS]: No, sir.

[DEFENSE COUNSEL]: No, sir. Okay. You don't remember saying that you saw a man in a black mask, and a black shirt, and black pants?

[WITNESS]: No, sir.

[DEFENSE COUNSEL]: Huh?

[WITNESS]: No, sir.

[DEFENSE COUNSEL]: You don't remember saying that. Didn't you tell me yesterday that you remembered saying that?

[WITNESS]: No, sir.

[DEFENSE COUNSEL]: Okay. Do you remember telling me this man looked kind of like Greg?

[WITNESS]: Yes, sir.

[DEFENSE COUNSEL]: You told me he looked like Greg.

[WITNESS]: Yes, sir.

. . .

[DEFENSE COUNSEL]: And do you remember – you don't remember telling those people there that you saw him in a black mask, a black shirt, and the black pants?

[WITNESS]: No, sir.

[DEFENSE COUNSEL]: You don't remember that. Okay. You remember telling that the doorknob, you looked through the doorknob in your room, the hole in the door?

[WITNESS]: No, sir.

[DEFENSE COUNSEL]: You don't remember that either. You don't remember telling me yesterday that you did?

[WITNESS]: No, sir.

[DEFENSE COUNSEL]: Your Honor, obviously she's changed her story from then and from yesterday. I don't know whether it's through coaching or what. But she's changed it.

Rule 601, Tennessee Rules of Evidence, provides that "every person is presumed competent to be a witness." No one is automatically prohibited from testifying because of age or mental status. State v. Caughron, 855 S.W.2d 526,

537-38 (Tenn. 1993). "So long as a witness is of sufficient capacity to understand the obligation of an oath or affirmation, and some rule does not provide otherwise, the witness is competent." Id. at 538. The question of competency is a matter within the discretion of the trial court. Id. The trial court's determination on competency will not be overturned absent a showing of an abuse of discretion. State v. Howard, 926 S.W.2d 579, 584 (Tenn. Crim. App. 1996).

In State v. Griffis, 964 S.W.2d 577 (Tenn. Crim. App. 1997), the victim of the rape and attempted murder, who was four years old at the time of her abuse, testified at the trial. Id. at 584, 591-92. The trial court determined that "the child understood the difference between a true statement and an untrue statement as well as the importance of telling the truth during the course of the trial." Id. at 592. The trial court found the child-victim to be a competent witness because, in addition to taking the oath, she told the trial court that she was required to tell the truth in court and she promised to do so. Id. This court affirmed Griffis because the child-victim's testimony was cogent and responsive to the questions asked of her. Id. at 592.

The trial court in the case at bar found the child was not competent to testify. The record supports this determination. Unlike the child-victim in Griffis, the child in this case was not responsive to either the trial court's or defense counsel's

questions. The child's testimony during the defendant's offer of proof further substantiates the trial court's finding. The child answered every question in the negative except for those about her brother's father, Greg. She did not remember what she had told the police after the killing or defense counsel the previous day. Her testimony was not what the defendant expected and did nothing to establish that another committed the crime. Accordingly, we conclude that the trial court did not abuse its discretion in finding that the child was not competent.

The judgment of the trial court is affirmed.

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JAMES CURWOOD WITT, JR., JUDGE

CONCUR:

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JOSEPH M. TIPTON, JUDGE

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JOHN EVERETT WILLIAMS, JUDGE