IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 10, 2002 Session

STATE OF TENNESSEE v. THOMAS GATEWOOD

Direct Appeal from the Criminal Court for Davidson County
No. 99-C-1698 Seth Norman, Judge

No. M2001-01871-CCA-R3-CD - Filed June 5, 2002

The defendant, Thomas Gatewood, was indicted for first degree murder but convicted of second degree murder, for which he was sentenced as a violent offender to twenty-three years imprisonment. In his appeal, the defendant argues that the trial court erred in not granting a continuance because of a missing witness, in not instructing as to the lesser-included offenses of reckless homicide and criminally negligent homicide and that his sentence was excessive. Although issues one and three are without merit, we agree that the jury should have been instructed as to the lesser offenses of reckless homicide and criminally negligent homicide. Accordingly, we reverse the conviction and remand for a new trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed and Remanded for a New Trial

ALAN E. GLENN, J., delivered the opinion of the court, in which JOE G. RILEY and NORMA MCGEE OGLE, JJ., joined.

Ross E. Alderman, District Public Defender; C. Dawn Deaner, Assistant Public Defender (on appeal); Jerrilyn R. Manning, Assistant Public Defender (at trial); and Jeffery L. Warfield, Assistant Public Defender (at trial), for the appellant, Thomas Gatewood.

Paul G. Summers, Attorney General and Reporter; Helena Walton Yarbrough, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Lisa A. Naylor, Assistant District Attorney General; and Jason W. Lawless, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant was indicted on July 27, 1999, for first degree murder. The arraignment occurred on August 25, 1999, and the defendant entered a plea of not guilty to the charge. The matter was set for trial on several occasions, but continued each time. On March 2, 2001, the defendant filed a motion to continue the trial setting of March 5, 2001. The State opposed the

motion, which was denied. The trial then proceeded as scheduled, resulting in the defendant's conviction for second degree murder. Subsequently, he was sentenced to twenty-three years as a violent offender, and timely appealed, presenting the following issues:

I. Did the trial court err by refusing to grant the defendant's request for a continuance?

II. Did the trial court commit plain error in failing to instruct the jury on the lesser-included offenses of reckless homicide and criminally negligent homicide?

III. Did the trial court err by imposing an excessive sentence?

Following our review, we agree that the jury should have been instructed as to the lesser-included offenses, and, therefore, reverse the conviction and remand for a new trial. Although the other issues are moot as the result of this reversal, we conclude that they are without merit.

STATE'S PROOF

The three witnesses to the shooting of which the defendant was convicted were brothers Cordney, Charmdone, and Carlos Taylor, ages 22, 20, and 19 at the time of trial, who lived with their grandmother, Caroline Gibson, near where the shooting occurred.[1] Although the three were together when they witnessed the killing of the victim, their recollections diverge in a number of instances.

Cordney Taylor testified that he and his brothers, Charmdone and Carlos Taylor, were living with their grandmother, Caroline Gibson, at 868 South Eighth Street in Nashville in January of 1999. Between 8:30 and 9:00 p.m. on January 1, 1999, Cordney heard a gunshot while he and his brothers were walking down the sidewalk from their uncle's house back to their grandmother's house. Cordney testified, "I turned around and I seen Thomas Gatewood shoot [the victim] and [the victim] fell trying to make it to his truck." Cordney said he was standing about thirty to thirty-five feet from the shooting and that the defendant was "probably about five feet, six feet" from the victim when the shot was fired. The defendant ran past the Taylor brothers and said he had just shot someone. The defendant was wearing a black or gray hooded sweatshirt, black jogging pants, and blue and white shoes. Taylor said that the hood on the defendant's sweatshirt was down, with nothing covering the defendant's face as he ran past them. The defendant was carrying a black handgun.

Cordney said he and his brothers continued walking after the shooting to their grandmother's house and did not immediately tell anyone about the shooting or offer assistance to the victim. Cordney told his grandmother about the shooting the next day, January 2, 1999, and she called the police. Later that day, Cordney and his brothers met with Detective David Carrell at the police

[1] Because the brothers share the same first initial and last name, we will refer to each by his first name. We intend no disrespect by this procedure but do so to avoid having to repeatedly use the entire name of each.

station and gave statements. Cordney identified the defendant from a photographic lineup and said he was "very certain" that the defendant was the shooter. Cordney said the defendant came to his grandmother's house "[p]robably twice" that same evening, and he briefly spoke to the defendant the second time. The defendant asked Cordney if he and his brothers had been downtown to talk to the police. Cordney said he told the defendant "no" because he was nervous. The defendant was wearing the same clothes he had on the night before, and Cordney could see the "print" of a gun through the defendant's sweatshirt.

On cross-examination, Cordney admitted that he was currently on parole for an aggravated robbery conviction. Cordney thought he had a cousin nicknamed "Stink" or "Stinky" but was not certain.[2] He said he had seen the victim in the area of the shooting in a light blue pickup truck on previous occasions. Cordney said he had played softball and basketball with the defendant and had known the defendant "[f]or some years." He described his relationship with the defendant as just someone he would see on the street and denied that there was any "bad blood" between him and the defendant.

Charmdone Taylor testified that between 8:00 and 9:00 p.m. he was walking with his brothers, Cordney and Carlos, on January 1, 1999, to their grandmother's house when he heard a gunshot. He did not have to turn around when he heard the gunshot because he was already facing that direction. He saw the defendant pointing a gun at the victim who was about four or five feet away from the defendant. After he was shot, the victim started running toward his truck but fell to the ground. Charmdone said that even though he knew the victim and saw him get shot, he did not offer to help him. The defendant, wearing a gray hooded sweatshirt, black sweat pants, and Reebok tennis shoes, ran within approximately ten feet of where Charmdone and his brothers were standing but did not say anything to Charmdone. The hood on the defendant's sweatshirt was down, and there was nothing covering his face. A black gun was in the defendant's hand.

Charmdone and his brothers then walked on to their grandmother's house and, approximately thirty minutes later, he told his grandmother about the shooting. Charmdone did not immediately tell his grandmother about it because he "thought it was no big deal." He went to the police station the next day, gave a statement, and identified the defendant from a photographic lineup. He said he was "[r]eal certain, hundred percent" of his identification of the defendant as the shooter. On cross-examination, Charmdone admitted that he and his brothers did not come forward and tell the police about the shooting until after the police had come to their house and taken some clothing.

Charmdone testified that he had known the defendant for one and a half to two years and that his sister had gone to school with the defendant. He had seen the defendant on previous occasions in the James Casey housing project where the shooting occurred. He denied that he had ever had a fight or argument with the defendant. Charmdone said he had a cousin nicknamed "Stink" on his father's side of the family, but it had been over six months since he last saw him.

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[2] Edgar "Stink" Harvey was identified by another witness as being responsible for the shooting.

Carlos Taylor, who was incarcerated for a theft conviction at the time of the defendant's trial, testified that he was "[c]hilling around by [his] uncle's house at South Eighth and Seventh" with his brothers, Cordney and Charmdone, on January 1, 1999. He heard one gunshot, turned around, and saw the defendant pointing a gun at the victim. Carlos said that neither he nor his brothers were facing the direction the shot came from. The victim managed to walk back to his truck before falling to the ground. The defendant, who was wearing a dark-colored sweat suit, ran toward Carlos and his brothers and said, "I shot dude, I shot dude." Carlos said on direct examination that he could not remember whether the hood on the defendant's sweatshirt was pulled up over his head; however, on cross-examination, he said the defendant's hood was not over his head. Carlos described the gun that the defendant had as "black, like a nine."

Carlos said that he went to his uncle's house directly after the shooting, but his brothers went to their grandmother's house. Subsequently, Carlos went to his grandmother's and told her about the shooting that same night. Carlos said he talked to the police the next day after his grandmother said that the police were looking for him and had taken Charmdone's yellow and gray shirt from the house. At the police station, he identified the defendant from a photographic lineup.

Carlos testified that he did not consider the defendant to be an enemy, that the defendant was "[j]ust a little bit" of a close friend, and that the defendant was "cool." He denied that he or his brothers had ever had words with the defendant. Carlos admitted that even though he had known the victim, who was a friend of his grandfather, for about six or seven months, neither he nor his brothers went to check on the victim after the shooting. Carlos said that he has a distant cousin nicknamed "Stink," but he did not know "Stink's" real name.

Caroline Gibson, the Taylor brothers' grandmother, testified that her grandsons were living with her at 868 South Eighth Court in January 1999. She said that she had known the defendant for about six years and that she knew of the victim. Ms. Gibson was not at the scene when the shooting occurred, but she had a conversation with Cordney, Charmdone, and Carlos about the shooting "the night after. It was the next morning they was [sic] talking to me about it."

Ms. Gibson said the police came to her house twice on January 2, 1999, the first time looking for "Stink," and the second time as a result of her telephone call to the police. She told the police that "Stink" did not live at her residence but allowed them to come inside to check. Ms. Gibson testified that she knew three people called "Stink," and one of the three was a "sixth cousin or something like that" of her grandsons. The police also asked her about her grandsons and took a yellow and light-colored shirt from Charmdone's bedroom. Ms. Gibson called her grandsons and informed them that the police had been there and wanted to talk to them. When her grandsons arrived home, she called the police who returned to her apartment and talked to her grandsons, who subsequently went to the police station to give statements.

Ms. Gibson said the defendant came to her home twice during the evening of January 2, 1999, and was wearing black or dark blue pants and a black hooded sweatshirt with the hood pulled up on his head. She lied to the defendant the first time he came when she told him that her

grandsons were not home. She explained that she had lied because the defendant had his hands in his pockets and knew the police had been to her home, and she did not know what his intentions were. During the second visit, the defendant, acting "real strange," asked for Cordney, who stepped out onto the porch and spoke briefly to the defendant. Ms. Gibson said that she stood in the doorway and heard the defendant ask Cordney if he and his brothers had turned him in to the police. Cordney then walked back inside the house.

Officer Neal Cook of the Metro Nashville Police Department testified that he arrested the defendant on January 5, 1999, at the apartment of Lonnie Freeman which was located approximately two and a half blocks from the scene of the shooting. While Cook was taking the defendant into custody, the defendant said, "I wasn't there, I was with my buddy James, but we heard the shots." Cook said that other officers searched the apartment, but no gun was recovered.

Lonnie Freeman testified that the defendant was staying with him at his apartment on Shelby Street on January 1, 1999. The defendant told Freeman that he was in trouble and that he had shot someone in the housing projects during a robbery. Freeman said he had seen the defendant with a nine-millimeter black automatic gun and thought he had seen the defendant with the victim on a previous occasion. Freeman allowed the police to search his apartment, but they did not find the defendant's gun.

Detective David Carrell of the Metro Nashville Police Department testified that, during his investigation of the shooting, he interviewed Anderson Johnson who was walking with his young child in the vicinity of the shooting when it occurred. Johnson said he had a brief conversation with the victim who wanted him to take some money to a man at a nearby playground. Johnson thought it was a drug deal and did not want to get involved, so he kept walking to get away from the victim. Shortly thereafter, Johnson heard a shot, turned around, and saw the victim fall to the ground. Carrell later determined that Johnson was standing 165 feet from the victim's truck when he witnessed the shooting. Johnson described the shooter as a male black, 30 to 40 years old, medium height, medium build, and wearing dark clothing and a yellow and white shirt or jacket.

Johnson gave conflicting statements concerning the location of the shooter: the shooter came out of the "shadows" and shot the victim; the shooter got out of a blue Honda automobile parked on the street, walked toward the victim, and shot him one time; the shooter was not in the Honda but was standing beside it; the shooter had been standing by the playground; and, as the final alternative, Johnson was walking down the sidewalk with his back to the victim and never turned around until he heard a gunshot.

Carrell said that Johnson could not read or write, "seemed to be slow mentally," "seemed to be confused a lot," and was not taking his prescribed medication for "his emotions." Carrell showed Johnson two photographic lineups and, after some hesitation, Johnson identified Edgar "Stink" Harvey in the second lineup. Because Johnson's version of the events of the shooting were inconsistent and "changed over and over," Carrell did not take out a warrant for Edgar Harvey even though Johnson had identified him from the lineup. Carrell testified, "I think Mr. Johnson saw the

shooting. I do not think Mr. Johnson saw Mr. Harvey that night. He said that [ ] he thought it was him. Very unsure of himself. If I thought it was Mr. Harvey I would have arrested him." Harvey was never located or arrested.

Carrell said that he interviewed Harvey's girlfriend, mother, and friends, as well as residents who lived on the street where the shooting occurred. None of them had seen Harvey for at least a day prior to the shooting. Harvey had had a fight with his girlfriend, Rhonda Jennings, and was apparently avoiding the area because he knew Jennings would come there to look for him. Harvey's mother lived a few blocks from the scene and had not seen him on January 1, 1999. Carrell said that everyone he interviewed knew Harvey because he dealt drugs in the area. Harvey's street nickname was "Stink," but there were several other "Stinks" who frequented that area.

Carrell discovered that the owner of the blue Honda automobile was Shelita Campbell and was told that she had loaned the car to her boyfriend and another man the night of the shooting. Subsequently, the Honda was impounded and checked for fingerprints. The only viable fingerprints obtained belonged to Jason Jennings, a friend of Campbell's and a regular driver of the car.

Carrell returned to the scene of the shooting on January 2, 1999, and was informed that Caroline Gibson had told the police that her grandsons had witnessed the shooting but were afraid to come forward. He went to Ms. Gibson's home during the early morning hours of January 2, but her grandsons were not home. While there, he saw a white and yellow T-shirt and asked Ms. Gibson about "Stink." Carrell took the shirt because Anderson Johnson had said something about the shooter wearing a yellow and white jacket. Although Carrell later determined that there was no significance to the shirt, he did not know that at the time he took it.

Later that day, Cordney, Charmdone, and Carlos Taylor came to the police station to give statements. They were separated, interviewed one at a time, and each was shown a photographic lineup which included the defendant because his name "had surfaced." Each of the brothers "instantly" identified the defendant as the shooter and gave a taped statement.

Carrell testified that he was present during the autopsy on the victim's body. The victim had a single gunshot wound to the chest which went straight through the heart and exited in the back. No projectile was recovered from the victim's body, at the scene, or from the victim's truck.

Carrell arrested the defendant at the apartment of Lonnie Freeman where the defendant was staying. After being advised of his rights, the defendant started talking and said, "Man I didn't shoot that dude, I heard the shot, but I was with my dogs [slang for friends]." However, the defendant never gave him any specific names of the friends. No gun was recovered during the search at Freeman's apartment. Carrell took a taped statement from Freeman which related that the defendant had admitted to Freeman that he shot the victim.

At the conclusion of the State's proof, the defendant moved for a judgment of acquittal as to first degree murder, which the trial court granted. The trial then proceeded as to murder second degree.

DEFENSE PROOF

Captain Leonard Michael Miller of the Metro Police Department testified that he met with the victim's family and girlfriend the day after the shooting. Miller said that Edgar "Stink" Harvey's name "had come up somehow," and a photographic lineup was prepared and shown to the family. The victim's girlfriend, Linda Beckman, identified Harvey from the lineup as someone the victim had bought drugs from in the past. Miller returned to the scene of the shooting where Harvey's mother approached him and told him that Harvey had nothing to do with the murder.

Sergeant David Imhof of the Metro Police Department testified that Captain Miller asked him to compile a photographic lineup with the defendant's photograph to show to Linda Beckman. Imhof showed the lineup to Beckman to see if she could identify anyone who regularly sold drugs to the victim. Beckman said that one of the photographs in the lineup looked "very familiar," and two photographs were "somewhat familiar." However, she did not say that the defendant looked familiar.

The defendant elected not to testify.

ANALYSIS

Because our resolution of the defendant's issue as to lesser-included offenses is dispositive of this appeal, we will review it first.

I. Instruction as to Lesser-Included Offenses

The defendant was charged and tried for first degree murder, which is "[a] premeditated and intentional killing of another." Tenn. Code Ann. § 39-13-202(a)(1). At the conclusion of the State's proof, the trial court granted the defendant's motion to dismiss as to that charge, and the trial continued on the lesser-included offense of second degree murder, which is "[a] knowing killing of another." Id. § 39-13-210(a)(1). The defendant argues on appeal that the trial court erred in also not instructing as to criminally negligent homicide, which is "[c]riminally negligent conduct which results in death, id. § 39-13-212(a), and reckless homicide, which is a "reckless killing of another," id. § 39-13-215(a).

Procedurally, our consideration of this issue is somewhat more complex because it was not raised in the motion for new trial. See Tenn. R. App. P. 3(e). Therefore, we must make several determinations: (1) whether reckless homicide and criminally negligent homicide are lesser-included offenses of first degree murder, (2) whether the fact that this issue was not raised in the motion for new trial precludes our review of it, and (3) whether, even if error occurred, it was harmless.

In State v. Burns, 6 S.W.3d 453, 466-67 (Tenn. 1999), our supreme court adopted the following test for determining what constitutes a lesser-included offense:

> An offense is a lesser-included offense if:
>
> (a) all of its statutory elements are included within the statutory elements of the offense charged; or
>
> (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing
>
> (1) a different mental state indicating a lesser kind of culpability; and/or
>
> (2) a less serious harm or risk of harm to the same person, property or public interest; or
>
> (c) it consists of
>
> (1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
>
> (2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
>
> (3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b).

Our supreme court concluded in State v. Ely, 48 S.W.3d 710, 722-23 (Tenn. 2001), that murder second degree, criminally negligent homicide, and reckless homicide are lesser-included offenses of felony murder, under part (b) of the Burns test. The State agrees on appeal that these offenses are lesser-included offenses, as well, of first degree murder, for which the defendant was indicted. Accordingly, we must now determine whether the jury should have been instructed as to these lesser offenses, and, if so, the consequences of this not having been done.

In State v. Allen, 69 S.W.3d 181 (Tenn. 2002), our supreme court clarified an issue upon which there has been some disagreement in this court, namely, the circumstances under which lesser-included offenses must be instructed. As to this issue, the court stated: "The trial court must provide an instruction on a lesser-included offense supported by the evidence even if such instruction is not

consistent with the theory of the State or of the defense. The evidence, not the theories of the parties, controls whether an instruction is required." Id. at 187-88.

In response as to whether the trial court should have charged criminally negligent homicide and reckless homicide, the State argues that "there is absolutely no evidence here that the killing resulted accidentally, negligently or recklessly." The State reviews the evidence in support of this argument:

> Here, there was no evidence whatsoever that the crime was committed with anything less than knowledge that death was imminent. There was uncontroverted testimony that the victim was unarmed and shot at a relatively close range through the heart. This was obviously a fatal shot with a clear intent to kill the victim. The defendant left the victim where he fell to die. There was no evidence of any struggle. The only issue at trial, as the defendant has conceded, was identification of the killer. . . . Neither [the State nor the defense] accounts are consistent with the commission of the lesser-included crimes of recklessness or negligence. The issue of the defendant's mental state or culpability–reckless or negligent–is irrelevant.

Although we agree with much of the State's recitation of facts, our application of the law to the facts leads to a different conclusion. Since the attention of the Taylor brothers was first attracted by the sound of the gunshot, none related what had occurred before that sound. Likewise, the varying statements of Anderson Johnson, as related by Detective Carrell, were not illuminating as to the reason or cause of the homicide. Thus, the paucity of testimony as to what had occurred immediately before the shooting would appear to leave open the possibility that the slaying did result from recklessness or negligence.

In our calculus, we must remember, additionally, that in making its determination regarding instructions as to lesser-included offenses, the trial court "must view the evidence liberally in the light most favorable to the existence of the lesser-included offense without making any judgments on the credibility of such evidence." Burns, 6 S.W.3d at 469.

Here, the fact that little evidence exists to ascertain the type of homicide committed presents a variant of the more common situation. However, we conclude that the trial evidence would support convictions for criminally negligent homicide or reckless homicide. That being the case, we conclude that the jury should have been instructed as to these offenses.

However, this matter is not resolved, for we next must determine whether the issue of incomplete jury instructions may be raised for the first time on appeal. Anticipating this issue, the defendant argues that the trial court committed "plain error," Tenn. R. Crim. P. 52(b), in not so instructing, thus making the matter ripe for appeal even though it was not raised in the motion for

new trial. The State, however, argues that the claim was waived and, even if not, does not constitute "plain error."

In State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994), this court set out the considerations for determining whether a matter not objected to at trial may be objected to on appeal:

> a) the record must clearly establish what occurred in the trial court;
>
> b) a clear and unequivocal rule of law must have been breached;
>
> c) a substantial right of the accused must have been adversely affected;
>
> d) the accused did not waive the issue for tactical reasons; and
>
> e) consideration of the error is necessary to do "substantial justice."

Id. (footnotes omitted).

We now will apply these considerations to the instant appeal. First, as to consideration (a), the clarity of the record, the trial transcript "clearly establishes" that there was no discussion as to whether any lesser-included offenses would be charged and that, as far as the record shows, defense counsel learned of the contents of the charge as it was being read to the jury. Because a defendant has the right, afforded by Article I, section 6 of the Tennessee Constitution, for the jury "to consider all offenses supported by the evidence," Ely, 48 S.W.3d at 727, failure to instruct as to lesser-included offenses breaches a "clear and unequivocal rule of law," consideration (b), and, also, violates a "substantial right of the accused," consideration (c). See Tenn. Code Ann. § 40-18-110(a) (1997). Since the record provides no basis for our concluding that defense counsel, "for tactical reasons," wished the jury to be instructed only as to murder second degree, consideration (d), likewise, is resolved in favor of the defendant.

Our final determination is whether we must review this issue as to lesser-included offenses to do "substantial justice." If the error in not instructing as to criminally negligent homicide and reckless homicide was harmless, it would not appear, as a practical matter, that justice would require our reviewing it. Thus, as to consideration(e), we will ascertain the effect of the error.

Our supreme court, in State v. Allen, 69 S.W.3d 181 (Tenn. 2002), clarified the considerations for ascertaining whether the failure to instruct as to lesser-included offenses was harmless:

> When a lesser-included offense instruction is improperly omitted, we conclude that the harmless error inquiry is the same as for other constitutional errors: whether it appears beyond a reasonable doubt that the error did not affect the outcome of the trial. In making this determination, a reviewing court should conduct a thorough examination of the record, including the evidence presented at trial, the defendant's theory of defense, and the verdict returned by the jury. A reviewing court may find the error harmless because the jury, by finding the defendant guilty of the highest offense to the exclusion of the immediately lesser offense, necessarily rejected all other lesser-included offenses. Harmless error is not limited, however, to such cases.

Id. at 191 (citations omitted).

Here, the cross-examination of the State's witnesses and direct examination of the witnesses presented by the defense were intended to create a reasonable doubt that the defendant was the shooter. Thus, rather than committing itself to a theory for the shooting, the defense, instead, was that the wrong person was being prosecuted. That fact, combined with the inability of the State's witnesses to testify as to what had occurred prior to the shooting, leaves a myriad of possibilities for the killing. Accordingly, we conclude that reversible error occurred when the jury was not instructed as to criminally negligent homicide and reckless homicide. For this reason, we determine that to do "substantial justice," we must treat as plain error the jurors' not having been instructed as to these offenses.

We reverse the judgment of conviction and remand for a new trial. Because of the possibility of further appellate review, however, we will review the remaining issues on appeal.

II. Denial of Continuance

The defendant argues that the trial court erred in continuing the trial because his counsel were unable to contact, and thus produce for trial, a witness whose testimony was material to the defense. As to this assignment, we conclude that the trial court acted properly in denying the continuance request.

The matter arose when, on March 2, 2001, defense counsel filed a motion to continue the trial, which was scheduled to begin on March 5, 2001. This motion was supplemented by the affidavit of defense counsel which stated, as to the expected testimony of Anderson Johnson, the missing witness:

> (1) that he was an eye-witness to the incident; (2) that he was the first one to notify the police of the shooting; (3) that he gave a statement to the police at the scene of the incident giving details of the crime

> including a physical description of the suspect, as well as a clothing description; (4) that he was able to identify the vehicle that was being used by the suspect; (5) that he gave a follow-up statement at police headquarters during which he was shown a photo line-up; (6) that he identified Edgar Harvey as the person who shot Timothy King.

Counsel's affidavit further stated that she had maintained contact with the witness during the fall of 2000 and had last spoken to him, by telephone, in February 2001, learning that he may have become homeless. He advised defense counsel of the address and telephone number of a relative, and counsel was to meet with him at that address on February 16, 2001. However, he was not present at that location, and counsel was unable subsequently to contact him.

In opposition to the defendant's continuance request, the State filed a written response, which stated in part:

> This matter has previously been set for trial on four occasions. The murder is alleged to have occurred on January 1, 1999. The first trial date was on April 24, 2000. That date was continued at the defendant's request and was reset on August 21, 2000. The trial was reset a third time at the defendant's request and was reset on November 6, 2000. The matter was reset a fourth time at the request of defendant's counsel due to health reasons for Monday, March 5, 2001. Each continuance in this matter has been at the defendant's request. The defendant now seeks a fifth continuance based upon his inability to locate Anderson Johnson, who does not have a permanent residence. The State respectfully asks the Court to deny the motion because the defendant has failed to show that he will be able to produce Anderson Johnson at the fifth trial date.

Attached to the State's response was an affidavit of counsel which, in pertinent part, explained the terminal condition of a prosecution witness:

> On March 1, 2001, Detective David Carrell and I met with Mr. [Lonnie] Freeman at his daughter's home. Family members told me that he is dying from bone cancer and is only expected to live a few more weeks. I anticipate calling this pertinent witness, who will describe the defendant's statements, actions, and behavior after the murder was committed. I anticipate Mr. Freeman will testify that the defendant had a black automatic weapon with him after the murder. I also anticipate that this witness will testify that the defendant told him he took $19.00 dollars from Mr. King. Police officers will testify that the defendant was arrested at the defendant's [sic] home.

Following the defendant's request for a continuance from the March 5, 2001, trial setting, the trial court ordered that the witness, Anderson Johnson, be taken into custody pursuant to a material witness bond.

On the morning of trial, the State presented the testimony of Detective David Carrell of the Metro Police Department and Eddie Simmons, an investigator with the prosecutor's office. Both testified as to their extensive independent efforts the prior weekend to locate Anderson Johnson at any of his known residences or places of employment. However, neither was able to locate the witness.

Following this testimony, the trial court explained why the trial would proceed on that day:

> Well, the difficulty the Court has in this case is the fact that this is an old case, it was been set a number of times and I am forced to get technical in the matter and I don't have a subpoena issued for this witness. It's a situation, I mean, I know that's hard on the defense because the defense relied on this individual, his word. But still I am required, whether or not, there's [a] subpoena issue[d] for the individual. There is no subpoena. I have a State's witness[] that is close to death in this matter. The Court [doesn't] have any alternative other than go forward with the trial in this matter. That's all I can do.

The decision to grant or deny a request for a trial continuance rests within the sole discretion of the trial court. State v. Mann, 959 S.W.2d 503, 524 (Tenn. 1997) (citing State v. Morgan, 825 S.W.2d 113, 117 (Tenn. Crim. App. 1991)). We will reverse the trial court's denial of a continuance only upon a showing that the denial was an abuse of discretion, and the defendant was prejudiced by the denial, in that there is a reasonable probability that, had the continuance been granted, the result of the proceeding would have been different. Id. (citing State v. Dykes, 803 S.W.2d 250, 257 (Tenn. Crim. App. 1990)); State v. Cazes, 875 S.W.2d 253, 261 (Tenn. 1994).

Based upon the record on appeal, we cannot conclude that the trial court abused its discretion in refusing to continue this matter a fifth time, especially given that the missing witness was homeless and there was no certainty when, or even if, he could be located.

III. Sentencing

The defendant was sentenced to twenty-three years as a Range I, violent offender and argues that his sentence was excessive. The sentence range for second degree murder, a Class A felony, the offense of which the defendant was convicted, is fifteen to twenty-five years. Tenn. Code Ann. § 40-35-112(a)(1).

When an accused challenges the length and manner of service 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). This presumption 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 presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993). However, this court is required to give great weight to the trial court's determination of controverted facts as the trial court's determination of these facts is predicated upon the witnesses' demeanor and appearance when testifying.

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 or enhancement factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103 and -210; State v. Scott, 735 S.W.2d 825, 829 (Tenn. Crim. App. 1987).

The party challenging the sentences imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Cmts.; Ashby, 823 S.W.2d at 169. In this case, the defendant has the burden of illustrating the sentence imposed by the trial court is erroneous.

The defendant claims several errors occurred in the sentencing process. He argues that the trial court did not properly identify the enhancement factors deemed to be applicable or the facts supporting them. Thus, our review should be *de novo* without a presumption of correctness, according to the defendant. Additionally, the defendant asserts that the trial court failed to explain the weight given to the enhancement factors and misstated his sentencing range as twenty to twenty-five years, rather than fifteen to twenty-five years, and did not voice that the sentencing principles or relevant facts and circumstances were being considered and applied.

In sentencing the defendant, the trial court stated as follows:

> All right, there is proof in the record, of course, of the prior convictions and this Court remembers the facts of this case. There's no doubt but what [the defendant] must be sentenced as a Class A felon. It's agreed that he's a standard range one offender under 40-35-210(c), the Court is required to begin at the mid-range, which, in this particular case, would be 20 years. Then, of course, under the statute the Court is required to consider mitigating and enhancing factors in determining the sentence between 20 and 25 years. There have been no mitigating factors submitted to the Court. As far as the

> enhancing factors are concerned, there is proof in the record that would sustain enhancement factor number one, there is proof in the record that would sustain enhancement factor number two. Because of the nature of the death in this case, the Court will not consider enhancement factor number three in this case, out of an abundance of precaution.
>
> It is the judgment of the Court that [the defendant] be sentenced to the Department of Corrections for a period of 23 years as a violent offender at 100 percent.

We note that the State filed a notice of enhancement factors as to the defendant. In referring to enhancement factors as "one, two or three," it appears that the trial court was referring to this list, rather than to the statute. We note that the first two enhancement factors listed in the State's notice, and those determined by the trial court to be applicable, were listed, also, in the presentence report as being applicable. Thus, the trial court determined these enhancement factors to be applicable: the defendant had a previous history of criminal convictions in addition to those necessary to establish the appropriate range, Tenn. Code Ann. § 40-35-114(1), and the defendant had a previous history of unwillingness to comply with the conditions of a sentence involving release in the community, Tenn. Code Ann. § 40-35-114(8). According to the presentence report, the defendant had been convicted of criminal trespassing in 1996, 1997, and 1998, and of attempt to commit aggravated burglary in 1997. The arrest resulting in the latter conviction occurred less than two weeks after the defendant had been placed on probation for his 1997 criminal trespassing conviction. Thus, the record supports the trial court's application of enhancement factors (1) and (8). Although the trial court did not state explicitly that it was relying on the applicable sentencing principles, its reliance thereon is inherent in its ruling. Accordingly, we cannot conclude that the trial court erred in sentencing the defendant, there being no mitigating factors and the two enhancement factors utilized by the trial court clearly being applicable.

CONCLUSION

Based upon the foregoing authorities and reasoning, we reverse the judgment of the trial court and remand for a new trial.

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ALAN E. GLENN, JUDGE