IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER SESSION, l994

FILED

September20, 1995

STATE OF TENNESSEE	)	
	)	NO. 0lC0l-9407-CC-00236
APPELLEE	)	
	)	WAYNE COUNTY
	)	
V.	)	HON. WILLIAM B. CAIN, JUDGE
	)	
	)	(Murder in the Second Degree)
LARRY GARRISON	)	
	)	
APPELLANT	)	

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AFFIRMED

OPINION FILED:_____

JERRY SCOTT, PRESIDING JUDGE

O P I N I O N

The appellant, Larry N. Garrison, appeals from his conviction of murder in the second degree.[1] He was sentenced to eighteen years for the murder and two years for the aggravated assault to be served in the Tennessee Department of Correction. He was designated a Range I standard offender and the sentences are to be served concurrently. The appellant raises three issues on appeal: whether the evidence was sufficient to warrant a conviction of murder in the second degree; whether the jury instructions gave a full and complete charge concerning the law applicable to this case; and whether the sentence was excessive in light of the relevant mitigating factors.

We affirm the holding of the trial court as to all three issues.

FACTS

The facts and circumstances surrounding the murder are largely undisputed. On the afternoon of October l0, l992, the appellant watched the University of Tennessee v. University of Arkansas football game with a friend and local banker, Autry Gobbell. Throughout the course of the day, the appellant consumed from six to eight cans of beer. At approximately 5:30 or 6:00 P.M., he joined several friends and former co-workers at a deer lodge in the woods. The majority of the people present were employees of the Corrections Corporation of America, which operates a prison in Clifton, Tennessee.[2] The men in the cabin had been playing poker and drinking beer and whiskey throughout the day. The appellant brought two beers with him to the lodge,

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[1]Charged with murder in the first degree and aggravated assault, he was convicted of murder in the second degree and aggravated assault. He does not contest the assault conviction.

[2]The appellant had been fired from his position as a shift supervisor at the prison on September 24, l992, for using excessive force on an inmate. He had previously resigned from a similar position with the Texas Department of Correction.

where he drank those two and one additional beer. The appellant described himself as having "a buzz," but denied being drunk.

The appellant played poker that evening with the men, among whom was Jim Parsons. Mr. Parsons commented during the game that he was going to take his money out of Mr. Gobbell's bank because he disliked Mr. Gobbell. The appellant stated that if Mr. Parsons did not like Mr. Gobbell, he should remove his money from that bank. Mr. Parsons also said that he did not like the appellant either. At that point, the appellant got up and the two men "got into it." They wrestled until the other players broke up the fight.

After the fight ended, the appellant and Mr. Parsons continued "mouthing" at each other. At one point, Mr. Parsons declared that he "ought to go get (his) gun." The appellant responded that he had his gun and quickly went out the back door, followed by two of the other players. The appellant went to his truck, pulled out his pistol and fired it toward the occupied portion of the cabin. The bullet penetrated the center of a cabin window. The appellant then fired two shots into the back of Mr. Parsons' truck, got into his car and drove away.

The bullet that entered the cabin struck Mr. Parsons, passing through his arm and through his torso. The bullet damaged several vital organs, including his liver and his right kidney. More importantly, it caused massive injury to the inferior vena cava, the large vein which returns blood to the heart from the lower half of the body. Mr. Parsons died as a result of the "massive bleeding" from the vein. After the bullet left Mr. Parsons' body, it struck and penetrated the wrist of another guest, David Brewer, the victim of the aggravated assault.

A short time after he departed, the appellant returned to the cabin and screamed for someone to bring out his Tennessee Volunteer cap. Several people tending Mr. Parsons in the cabin called out to the appellant to inform him

that he had killed Mr. Parsons. The appellant responded "I ain't shot no m____ f____." The appellant refused to enter the cabin, but continued to request his cap. Eventually, he drove away from the cabin.

The appellant returned to the scene later with his cousin, Troy Garrison, to find out if he had actually killed Mr. Parsons. His cousin went into the cabin and returned to inform the appellant that he had indeed killed Mr. Parsons. The appellant then surrendered to a deputy sheriff at the scene.

DISCUSSION

1. Sufficiency of the evidence.

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the state in determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Rule l3(e), Tenn.R.App.P., Jackson v. Virginia,. 443 U.S. 307, 3l4-324, 99 S.Ct. 278l, 2786-2792, 6l L.Ed.2d 560 (l979). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 57l S.W.2d 832, 835 (Tenn. l978). A jury verdict of guilty, approved by the trial judge, accredits the testimony of the state's witnesses and resolves all conflicts in favor of the theory of the state. Sanders v. State, 467 S.W.2d 82l, 824 (Tenn.Crim.App. l97l). The verdict will not be "disturbed on the facts" unless "the evidence clearly preponderates against it and in favor of the innocence of the accused." Id.

Tennessee law defines "criminal homicide" as "the unlawful killing of another person." Tenn. Code Ann. § 39-l-20l(a). The term "criminal homicide" includes murder in the first degree, murder in the second degree, voluntary manslaughter, criminally negligent homicide and vehicular homicide. Id.

Second degree murder is now defined as a "knowing killing of another." Tenn. Code Ann. § 39-l-2l0(a)(l).[3] Voluntary manslaughter is the "intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Tenn. Code Ann. § 39-l-2ll(a).

The appellant argues that the facts in this case support a finding that he acted under the influence of passion and not of malice and that, at most, he would be guilty of voluntary manslaughter. To support this contention, he put forth evidence of his anger with Mr. Parsons and the brief period of time that elapsed between the fight and the shooting. However, the standard for a manslaughter conviction is not simply whether the accused acted under passion, but whether the passion was produced by adequate provocation such that a "reasonable person" in like circumstances would act in an "irrational manner." Sentencing Commission Comments to Tenn. Code Ann. § 39-l-2ll. Of course, it is the function of the jury to determine how a "reasonable person" would act "in like circumstances." The jury here obviously believed that a fight over one's professed dislike of a friend to be insufficient provocation for the appellant's actions, and, thus, the crime was murder not manslaughter. The evidence was clearly sufficient to support that finding and this issue has no merit.

II. Jury Instructions.

The appellant next argues that the pattern jury instructions for murder in the second degree, found at T.P.I.--Crim. 7.04, are misleading because they instruct the jury to convict an accused of murder in the second degree if the jury finds the accused intended to commit the act causing the murder and not the death of the victim. As previously noted, murder in the second degree is defined as the "knowing killing of another." Tenn. Code Ann. § 39-l-2l0(a)(l). A person

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[3]There is another type of reckless second degree murder, which is not germane to this case. Tenn. Code Ann. § 39-l-2l0(a)(2).

acts "knowingly" when he is "aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." Tenn. Code Ann. § 39-ll-302(b). Stated differently, a defendant acts knowingly "when he or she is aware of the conduct or is practically certain that the conduct will cause the result, irrespective of his or her desire that the conduct or result will occur." State v. Rutherford, 876 S.W.2d ll8, l20-2l (Tenn.Crim.App. l993) (emphasis in original), citing Sentencing Commission Comments to Tenn. Code Ann. § 39-ll-302. In short, it was not necessary for the appellant to have the intention or desire to kill Mr. Parsons to be convicted of murder in the second degree; he only needed to be aware of his conduct which resulted in Mr. Parsons' death. Thus, the pattern jury instructions accurately reflect the definition of second degree murder set out in the statute.

The appellant also charges that the trial court erred by refusing to instruct the jury pursuant to one of his requests for special instructions.

The proposed instruction was as follows:

> Criminal liability cannot be predicated upon every careless act merely because the carelessness resulted in an injury to another.
>
> State v. Davis 798 S.W.2d 268, 272 (Tenn. Cr. App. l990)

The appellant contends that the jury charge given by the trial judge allowed the jury to find that because he shot his gun, the appellant intended or intentionally caused the result. He says that the charge is an incorrect statement of the law since "it creates a presumption or inference of intent solely from the doing of an act or engaging in conduct without any proof direct or circumstantial as to the actual intent of the party."

The state did not respond to this argument in its brief, contending the

issue was waived because the appellant failed to include the jury charge in the record.

The charge is in the record and the trial judge charged the jury as to this issue as follows:

> Any person who commits second degree murder is guilty of a crime.
>
> For you to find the defendant guilty of this offense, the state must have proven, beyond a reasonable doubt, the existence of the following essential elements:
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> (I) that the defendant unlawfully killed the alleged victim; and
> (2) that the killing was knowing.
>
> The requirement of "knowing" is also established if it is shown that the defendant acted intentionally.
>
> "Intentional" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.
>
> "Knowing" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

Special requests need not be granted where the jury instructions "fully and fairly" state the applicable law. State v. Middlebrooks, 840 S.W.2d 3l7, 335 (Tenn. l992). The instructions given, taken from T.P.I.--Crim. 7.04, "fully and fairly" state the law and adequately define "knowing" and "intentional." This issue has no merit.

III. Sentencing

Finally, the appellant contends that the trial court erred in sentencing him by failing to find four mitigating factors and by sentencing him to a period greater than the minimum sentence of fifteen years. On appeal, the standard of review of the length of a sentence is *de novo* with the presumption that the trial court's

determinations are correct. Tenn. Code Ann. § 40-35-103; State v. Adams, 859 S.W.2d 359, 363 (Tenn.Crim.App. 1992). The weight afforded an enhancement or mitigating factor is left to the trial judge's discretion based on the record before the court. State v. Shelton, 854 S.W.2d 116, 123 (Tenn.Crim.App. 1992). The burden of showing that the sentence is improper is on the appellant. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991), citing Sentencing Commission Comments to Tenn. Code Ann. § 40-35-401(d).

In this case, the trial court found one enhancement and one mitigating factor. The enhancement factor was that the crime was committed by the use of a firearm. Tenn. Code Ann. § 40-35-114(9). This factor weighed heavily in the trial court's decision in light of the appellant's experience with firearms, his training and the practice he had had with firearms during his ten year tenure as a correctional officer. The sole mitigating factor considered by the trial court was that the appellant assisted authorities upon his return to the cabin. Tenn. Code Ann. § 40-35-113(10). The appellant argues that the trial court failed to consider four additional relevant mitigating factors; i.e., that he committed the crime while under strong provocation, Tenn. Code Ann. § 40-35-113(2); the appellant was remorseful for his actions, Tenn. Code Ann. § 40-35-113(13); the appellant had no prior criminal history, Tenn. Code Ann. § 40-35-113(13); and the appellant met all conditions while released on bond. Tenn. Code Ann. § 40-35-113(13).

As to the first proposed factor, we find the trial court properly rejected it on the basis that the appellant was under no provocation when he fired at an unarmed group of victims who were inside the lodge. We further note that the jury rejected the appellant's contention that he acted under strong provocation when he was convicted of murder in the second degree and not voluntary manslaughter. Similarly, we agree with the trial judge's rejection of remorse as a mitigating factor. As the trial judge noted, most persons facing a lengthy prison sentence feel or express remorse for their actions.

We do not find the absence of a criminal record to be a mitigating factor under the catch-all provision of Tenn. Code Ann. § 40-35-ll3(l3). As we stated in State v. Derrick, l990 WL l92698, at *5 (Tenn.Crim.App. l990), the legislature did not intend the absence of a prior criminal record to be a mitigating factor because citizens are not expected to have a criminal record. Likewise, the legislature did not intend the compliance with bond requirements to be a mitigating factor because a defendant released on bond is not expected to violate the terms and conditions of his bond.

The sentence was entirely appropriate for this appellant for this offense. This issue has no merit.

The judgment is affirmed.

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JERRY SCOTT, PRESIDING JUDGE

CONCUR:

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JOSEPH B. JONES, JUDGE

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PAUL G. SUMMERS, JUDGE