

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER SESSION, 1994

**FILED**

**November 30, 1995**

**Cecil Crowson, Jr.  
Appellate Court Clerk**

STATE OF TENNESSEE )  
 )  
 APPELLEE )  
 )  
 V. )  
 )  
 FRANK HOLIDAY )  
 )  
 APPELLANT )

NO. 01C01-9402-CR-00067  
DAVIDSON COUNTY  
HON. SETH NORMAN, JUDGE  
(Murder in the First Degree)

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AFFIRMED

OPINION FILED: \_\_\_\_\_

JERRY SCOTT, PRESIDING JUDGE

## OPINION

The appellant appeals as of right his conviction of first degree murder. He is presently serving a life sentence with the Tennessee Department of Correction. In this appeal, he asserts that the evidence adduced at trial was insufficient to support his conviction. Also, he contends that the trial court erred in admitting into evidence testimony of a prior assault on the victim by the appellant. We disagree with both contentions.

### I.

In addressing the sufficiency issue, we note that there was an abundance of evidence presented at trial to support the verdict. The state's proof began with the victim's mother, Anna Wilson, who testified that her daughter, Kim Hayes, had been dating the appellant for six years prior to the murder and that they had two small children together. Ms. Wilson said that the victim had been trying for over a year to break off her relationship with the appellant, which had become "real stormy." When Ms. Wilson saw her daughter for the last time on September 13, 1992, the day of the murder, the appellant was present and the victim appeared "upset and scared." Later that day, Ms. Wilson telephoned her daughter at work at Vanderbilt Hospital where a co-worker explained that the appellant had visited the victim at the hospital and had upset her. When the victim and Ms. Wilson talked later by phone, Ms. Wilson suggested that her daughter take precautions and contact security when she left work in order to get safely to her car.

The victim's twelve year old daughter, Quanita Marie Hayes, was a witness for the state. She said that on August 23, 1992, three weeks before her mother was killed, she witnessed a verbal and physical altercation between her mother and the appellant, after which her mother went to the hospital. She said that "[the appellant] pushed her onto the back porch. And he beat her with some kind of glass, because I saw glass and blood." She also saw the appellant on

top of her mother who was lying on the floor.

The victim's sister, Tracy Burns, also testified at trial, confirming earlier testimony that the victim was unhappy with the appellant and that their relationship was not stable. She said that she had seen the appellant a week before the murder when he showed her two photographs, one of which was a photo of the victim and her current boyfriend, Tony Evans. The appellant told Ms. Burns to tell her sister: "you tell her I'm going to get her and I'm going to get that...you tell her I'm going to get her and that nigger, and I'm going to get her first." Mr. Evans, who was living with and planning to marry the victim at the time of her murder, took the stand and said that in a telephone conversation the appellant had threatened to kill him. He also said that he had sensed the victim's fear when he phoned her at work on the day of the murder and the appellant was present.

Maria Thompson is a registered nurse at Vanderbilt, who worked with the victim. At trial she testified that she was working with the victim on the night of September 13. She overheard part of the victim's phone conversation between 9:30 and 10:00 that evening. In particular, Ms. Thompson remembered the victim saying: "You're really pissing me off Frank. Can't you just take no for an answer?"

Perhaps most significant was the state's eyewitness proof, which included the testimony of three persons who saw the victim's automobile wreck, followed by her running exit from the car and subsequent murder. Pat Merrill witnessed the crash from her front porch. She said that after the victim ran from the car, she collapsed in the street and then "picked herself up off the ground." She heard the victim say to the man who had followed her, "Please, Frank, don't hurt me. I'll be good" and continued "begging for her life" down on her knees. Ms. Merrill then watched a man, whom she identified at trial as the appellant, shoot

the victim in the head, "like she was just some kind of a dog or something." She saw and/or heard a total of five shots. Indeed, Ms. Merrill testified that as she tried to flee for her own safety, she ran right into the appellant viewing him "like eye-to-eye."<sup>1</sup> She said that he appeared to be trying to hide the murder weapon in his pants. She said that she knew the victim because she was a friend of her aunt's; however, she did not recognize the victim until she saw her body after the appellant fled.

Mark Kyle, who lived near the scene of the murder, also witnessed the events of that night. He went to the window of his apartment when he heard a car crash outside. He saw a man shoot a woman "about four times" and then run away. Mr. Kyle first recognized the appellant as the murderer when he saw the news three days after the murder. He then contacted the police. At trial he identified the appellant as the man whom he had seen shoot the victim.

A third eyewitness, Robert Bowman, was sitting outside when he witnessed the collision of two cars. He, too, testified that he saw a woman get out of one of the cars and run from a man. He, too, testified that he heard the woman twice say, "I'll be good, Frank," and "begging for her life." He then saw the man shoot the woman four times. Mr. Bowman did not tell the police that night because he did not want to get involved. Later, however, Mr. Bowman recognized the appellant from a six-person photographic line-up as someone he had seen before. At trial he identified the appellant as the murderer. It was shown that Mr. Bowman had consumed about four 24 ounce cans of beer during the evening. He also testified that prior to his in-court identification, a police detective told him which photograph was Frank Holiday and that the man in the photograph would be on trial for this murder.

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<sup>1</sup>Ms. Merrill testified that she feared for her safety that night because "bullets don't have no eyes."

The appellant presented an alibi defense, with his mother and his wife testifying that he was with them at the time of the murder.

The principles which govern this Court's review of a conviction by a jury are well established. This Court must review the record to determine if the evidence adduced at trial was sufficient "to support the finding of the trier of fact of guilt beyond a reasonable doubt." Rule 13(e), Tenn.R.App.P. This rule is applicable to determinations of guilt predicated upon direct evidence, circumstantial evidence or a combination thereof. State v. Matthews, 805 S.W.2d 776, 779 (Tenn.Crim.App. 1990).

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. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978). 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, 578 S.W.2d 832, 835 (Tenn. 1978). Moreover, a verdict against the appellant removes the presumption of innocence and raises a presumption of guilt on appeal, State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973), which the appellant has the burden of overcoming. State v. Brown, 551 S.W.2d 329, 330 (Tenn. 1977).

In examining the sufficiency of the evidence, this Court does not reevaluate the weight or credibility of the witnesses' testimony, as these are matters entrusted exclusively to the jury as the trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Wright, 836 S.W.2d 130, 134 (Tenn.Crim.App. 1992). Nor may this Court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). The relevant question on appeal is whether, after viewing the evidence in the light most favorable to the state, any

rational trier of fact could have determined that the essential elements of the crime were established beyond a reasonable doubt. Rule 13(e), Tenn.R.App.P., Jackson v. Virginia, 443 U.S. 307, 314-324, 99 S.Ct. 2781, 2786-2792, 61 L.Ed.2d 560 (1979).

The thrust of the appellant's sufficiency argument is that the three eyewitnesses gave contradictory and unreliable testimony. Initially, we note that all three witnesses gave very similar accounts of the events surrounding the crime. The appellant seems to be referring to the fact that there was impeaching evidence for each eyewitness. While it is true that the evidence showed that one witness knew the victim, another was told which picture was the appellant, and the third eyewitness had been drinking, such facts do not matter on the question of the sufficiency of the evidence. Rather, the appellant's contention calls into question the weight and credibility that was given to the trial testimony and, as we have stated above, that determination rests solely within the jury's purview. The jury verdict was supported by not only three eyewitness accounts, but also by an overwhelming amount of circumstantial proof that the appellant had malicious feelings toward the victim. Thus, there was absolutely overwhelming evidence of the appellant's guilt of the murder beyond a reasonable doubt. This issue has no merit.

## II.

The appellant's second issue involved the state's witness, Quanita Hayes, who testified over the appellant's objection about the appellant's assault upon her mother three weeks prior to the murder. He contends this evidence was improperly admitted. The state proposed that the testimony showed the full relationship between the victim and the appellant, as well as his intent to harm her. The appellant countered that the state's true goal in admitting this evidence was to prove the appellant committed this crime by showing conforming prior conduct. Following a jury-out hearing, the trial judge permitted the testimony of

Ms. Hayes, finding that the purpose of the testimony was to demonstrate the entire relationship between the parties. Prior to Ms. Hayes' testimony, the trial judge instructed the jury as follows:

During the testimony of Quanita Hayes there might be some testimony with regard to a prior incident that occurred between the deceased and the defendant. Normally prior acts are not admissible. This is being offered by the state merely for the purpose of showing the whole relationship between the parties, as well as the intent of the defendant in this cause. The defendant is not charged with any other offense, other than that of first degree murder, and it raises no inference.

Rule 404(b), Tenn. R. Evid., provides that evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show action in conformity with the character trait, but that it may come in for other purposes. The appellant acknowledges that the court complied with 404(b)(1) and (b)(2), Tenn.R.Evid., in holding a jury-out hearing and in determining the appropriate material issue upon which to admit this evidence. However, the appellant submits that the trial judge erred by allowing the evidence to be heard by the jury since 404(b)(3), Tenn.R.Evid., requires the court to exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Here, the victim's daughter testified regarding a recent assaultive episode where the appellant had beaten and cut her mother with glass. She testified that she saw glass and blood and her mother lying in the floor. It is certainly a tenable contention that the probative value of this evidence was outweighed by danger of unfair prejudice. There was other proof which showed the turbulent nature of this relationship, thereby decreasing the probative value of Ms. Hayes' testimony. However, we do not find that it is necessary to resolve this issue. Improper admission of evidence is not grounds for reversal "unless it shall affirmatively appear that the alleged error affected the result of the trial." State v. Edwards, 868 S.W.2d 682, 699 (Tenn.Crim.App. 1993); see also McBee v. State, 213 Tenn. 15, 372 S.W.2d 173, 180 (1963). In light of the overwhelming

evidence presented at trial, we find that, even if the trial judge erred by admitting the testimony of Ms. Hayes, it was harmless error beyond a reasonable doubt. This issue has no merit.

Finding no merit to either issue, the judgment is affirmed.

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JERRY SCOTT, PRESIDING JUDGE

CONCUR:

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JOE B. JONES, JUDGE

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PAUL G. SUMMERS, JUDGE