IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER SESSION, l994

FILED

October 31, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE	)	
	)	
APPELLEE	)	NO. 0lC0l-9409-CR-00308
	)	
	)	DAVIDSON COUNTY
	)	
V.	)	HON. SETH NORMAN, JUDGE
	)	
	)	(First Degree Murder)
	)	
	)	
RICHARD STANLEY RUSSELL, SR.	)	
	)	
APPELLANT	)	

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AFFIRMED

OPINION FILED:_____

JERRY SCOTT, PRESIDING JUDGE

O P I N I O N

The appellant, Richard Stanley Russell, convicted by a Davidson County Criminal Court jury of first-degree murder and sentenced to life in prison, appeals as of right presenting the following issues:

(1) Whether the trial court erred in excluding evidence of the victim's character?

(2) Whether the trial court erred in overruling the appellant's objection to the State's reference during the voir dire to a higher power?

(3) Whether the evidence presented at trial is sufficient to support the jury's finding that the appellant was guilty of first-degree murder?

FACTS

On February 25, 1993, Melissa Johnson Russell was stabbed to death in her apartment in Madison, Tennessee. When police officers arrived on the scene, the victim was lying on the floor in a pool of blood. The appellant, her husband, was sitting on the couch with blood covering his hands, the abdomen area of his pants and shirt and splattered on the lenses of his glasses. Photographs of the blood-covered appellant were presented to the jury as part of the State's case. According to the testimony of James Arendall of the Metro Police Department, the appellant was "crying and mumbling" when he arrived at the scene of the crime. According to Mr. Arendall, he said:

> I hurt her. I hurt her. I didn't mean to hurt her. I hope I didn't hurt her bad, but I couldn't take any more. I couldn't take any more. She'd done stated she'd done been out out fucking niggers all night and when she got through arguing with [me] she was going to go out and fuck another one. I couldn't stand any more. I couldn't stand any more. She fucked her last nigger.

The primary detective on the case, E. J. Bernard, testified regarding a similar conversation that he had with the appellant after arriving at the scene of the crime. He testified that the appellant told him:

> (T)here was an altercation between himself and his wife; that he did not mean to hurt her; that he didn't think that he hurt her that bad; that she had had a knife that was always close to her; that he had taken the knife and hurt her; that after this, he was going to

> take his own life, but he did not have enough courage to do so. And then he wrote the letter that was there on the kitchen table.
>
> Then he told me some of the background concerning his wife, what his wife had said to him, that she wouldn't shut up, quote, and that she kept, apparently, taunting him, is the reason he stabbed her.

Detective Bernard said that the appellant indicated he and the victim were arguing about her "sexual preferences."[1]

The state presented as part of its evidence a handwritten letter which was found on the kitchen table in the victim's apartment. During the appellant's testimony at trial, he acknowledged that he went into the kitchen to write this letter after the victim insisted on telling him of her general sexual preference for black men as well as telling him about certain recent sexual encounters. The letter, which was addressed "to whom it may concern", began by stating that the appellant had taken care of the victim over the past months. It then detailed the victim's recent sexual encounters with black men as she had revealed them to the appellant that night. In closing, the appellant wrote, "I could not set [sic] and listen to her. She broke up my family and now [she is] telling me she was lying all the time."

Testimony from the medical examiner who performed the autopsy on the victim revealed that she had six piercing wounds and five incisions to her chest and to her back. Three of the stab wounds penetrated various body cavities and each of the three would have been fatal. The doctor also testified about the incisions found on the victim's hands which are characteristic of wounds one would receive while attempting to defend herself from injury. A long butcher knife, which was found in the apartment beside the letter, was identified as the murder weapon.

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[1] It is noteworthy that the detective testified that the appellant never mentioned that he had stabbed the victim in self-defense.

Another police officer testified that the objects surrounding the victim's body did not appear to have been disturbed, but were for the most part properly positioned, indicating that there had not been a struggle between the victim and the appellant before the murder. Additionally, though there was a large pool of blood under the victim's body, there was none on the furniture nearby. As stated above, the appellant was covered with blood; however, he had sustained no injuries at all.

The victim's mother, Teresa East, testified that the appellant had met her daughter in 1991 at a truck stop where the victim was prostituting herself. The appellant was a "customer" of hers and an unstable relationship ensued. Later, when the victim was sent to prison, the appellant visited her often. The appellant ultimately married her late in 1992 while she was in prison. Ms. East testified that she received a telephone call from her daughter two days prior to the murder in which her daughter said that the appellant had been violent toward her and that she was afraid of him. However, at a family gathering on February 20, 1993, the victim told her mother that she "loved" and "respected" the appellant but could not sleep with him.

The appellant testified that he had the knife at his own stomach when he asked the victim if she would be happy if he killed himself. She offered to help him and "jumped up out of her chair and that's all (he) remember(ed)."

I.

In the appellant's first issue, he argues that the trial court erred by excluding evidence which would have demonstrated the victim's aggressive character. The appellant claims that he attempted to introduce evidence of his fear and apprehension of the victim through the testimony of two defense witnesses, his daughter and the appellant's employer. However, the trial judge

sustained the state's objections to the admission of such testimony because it consisted of out-of-court statements made by the appellant to the defense witnesses, and was therefore hearsay. It is the appellant's position that these statements would have fallen within the state of mind hearsay exception. Rule 803(3), Tenn. R.Evid.

The appellant's first trial witness was Don Green, his employer at the time of the crime. Regarding the appellant's relationship with the victim, the defense attorney asked the following questions:

> Q: Can you give an opinion as to what [the Appellant's] feelings were towards Ms. Johnson? . . .
>
> Q: When you talked to Mr. Russell, what kind of statements did he make about Ms. Johnson? . . .
>
> Q: Did you ever try and talk Mr. Russell out of his relationship with Ms. Johnson?

The state objected to each of the questions and the trial judge sustained the objections, finding that the questions called for hearsay responses. At trial, the appellant did not argue that the testimony he sought to elicit from Mr. Green would fall within any hearsay exception, and thus the trial judge was never given the opportunity to consider the argument now raised on appeal. Rule 36(a), Tenn.R.App.P., discusses the relief granted by appellate courts and provides that "[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Because the appellant failed to argue Rule 803(3) or any other basis for the admission of the evidence to the court below, this issue was waived.

The appellant further contends that it was error for the trial court to sustain the state's objection to the testimony of his daughter, Kathy Russell, when she attempted to relate statements made to her by her father. In responding to questions about phone calls from her father, the trial judge told Ms. Russell that she could not repeat what her father had said to her but could only tell the jury what she did in response to her conversations with her father.

The defense attorney then asked Ms. Russell, "[w]ithout telling us what he said, did he express to you whether he had any concerns about his safety, whether he wanted you to . . . " After the court sustained an objection from the state, the defense attorney asserted his belief that this testimony would go to "the state of mind of the witness and Mr. Russell." The trial judge agreed with the state that the appellant would be able to testify as to his own state of mind.

First, we find nothing in the record to indicate that Ms. Russell's testimony would have been relevant to the state of mind hearsay exception. Indeed, the appellant testified that he refrained from telling his daughter about his fear of the victim because he did not want to involve his family. Even if the trial judge erroneously disallowed Ms. Russell's responses, the error was harmless beyond a reasonable doubt. Rule 36(b), Tenn. R. App. P. There was other proof showing the victim's aggressive past. The appellant testified regarding his fears of the victim.[2] In light of this testimony adduced at trial, the absence of the proffered testimony had no effect on the outcome of the trial nor was a substantial right of the appellant affected by the lack of such testimony. Rule 36(b), Tenn.R.App.P. This issue is without merit.

Next, the appellant asserts that the trial court erred in excluding evidence of the victim's prior criminal convictions. At trial, the defense argued that the nature of the victim's prior crimes was highly relevant in his case of self-defense to show just exactly what the appellant knew about the victim's violent background. The judge ruled that such testimony would not be admissible until the defense had established the appellant's state of mind at the time of the incident.

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[2]The appellant testified that the victim told him of her plans to kidnap her biological child and potentially to injure her mother in the process. He told the jury that the victim intimated that he would be hurt if he refused to cooperate telling him, "Richard . . . I can have you killed for an eight ball of cocaine." He testified that he stayed with his daughter because he was afraid to stay in the house with the victim.

Once the defense began its proof, the appellant testified that he had been required to read the victim's criminal record before their marriage. He stated that he had begun to fear the victim after she was released from jail when she told him of her plan to kidnap her youngest child whom her mother had adopted. According to the appellant, on the night of the murder, the victim offered to help him kill himself with the butcher knife she kept by her side. After this evidence was introduced, the appellant again made an unsuccessful attempt to introduce proof of the substance of the victim's prior convictions. The state contends that the record fails to show a prima facie case of self-defense, and there was, therefore, no legal basis for the admission of the victim's record. We disagree.

Rule 404(a), Tenn.R.Evid., generally prohibits the use of evidence of a person's character or trait of character for the purpose of proving action in conformity therewith. As an exception, Rule 404(a)(2), Tenn.R.Evid., permits an accused to offer evidence of a pertinent character trait of the victim of the crime. "If self-defense is raised in a case involving a homicide or other violent crime, the reasonableness of the accused's fear may be a critical issue." Neil P. Cohen et al., Tennessee Law of Evidence § 404.4, at 127 (2d ed. 1990). As to the permissible methods of proving character in this situation, Rule 405, Tenn. R. Evid., which addresses the methods of proving character, provides in pertinent part:

> (a) Reputation or Opinion.--In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. After application to the court, inquiry on cross-examination is allowable into relevant specific instances of conduct. . . .
> (b) Specific Instances of Conduct.--In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

In State v. Ray, 880 S.W.2d 700, 705 (Tenn. Crim. App. 1993), this court held "Rule 405(a) limits proof of specific instances of conduct to cross-examination. Thus, while the appellant may offer proof of a pertinent character trait of the victim (aggressiveness), the proof must be shown by testimony in the form of

opinion or reputation."

The trial court erred in excluding the evidence of the victim's prior criminal convictions. As outlined above, the defendant had presented evidence to support his theory that he was acting in self-defense when the victim was killed. Evidence of the victim's prior criminal record would have corroborated the appellant's assertion that the victim was the aggressor. However, in consideration of the entire record, it is clear that the admission of this evidence would not have affected the verdict. The evidence was overwhelming, particularly the appellant's letter and his statements to police officers immediately following the murder, supporting a conclusion that the appellant murdered the victim because of the information she had divulged about her sexual preferences. Evidence that the victim was stabbed six times, three of which would have been fatal, and evidence suggesting that there was no struggle before the victim's death were both inconsistent with the appellant's self-defense theory.

II.

The next issue raised by the appellant relates to the state's reference during the voir dire to a higher power. During the voir dire, the prosecuting attorney stated that:

> One thing I would like to touch upon that I touched upon earlier with the other jurors is that, do you understand that we are not here to determine whether or not Melissa Johnson-Russell was a good person? There is another forum for that. There is another person who's going to decide whether she was a good or bad person, or another entity will decide that and not this jury.

After the appellant 's attorney objected, the court told the jury that they would be instructed if they needed to consider the victim's character. The trial judge then told the jury that its purpose was only to try a homicide case.

On appeal, the appellant argues that, by making this remark, the state intimated that the responsibility of judging the character of the victim lie elsewhere. The appellant cited the syllabus of the United States Supreme Court case of Caldwell v. Mississippi, 472 U.S.320, 328-29, l05 S.Ct. 2633, 2635, 86 L.Ed.2d 23l (1985), for the proposition that "(i)t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe, ... that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." That case involved a prosecutor who "urged the jury not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court." Id., 472 U.S. at 323. Other than that Supreme Court case, the appellant cites no authority to support his contention. We find that the holding in Caldwell does not encompass remarks such as the ones complained of by the appellant. Here, the prosecutor merely directed the jury not to factor the victim's character into its determination of the appellant's guilt. In no way did this lead the members of the jury to believe that their responsibility had been diminished. Rather, it appears, as the appellant asserts in his reply brief, that the prosecutor was referring to the Lord's judgment of sinners, not the action of some higher judicial tribunal. This issue is without merit.

III.

In the appellant's final issue, he contends that evidence presented at trial is insufficient to support the jury's finding that he was guilty of first-degree 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 l3(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, 571 S.W.2d 832, 835 (Tenn. 1978). Moreover, a verdict against the defendant 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 those are matters entrusted exclusively to the jury as the triers 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 l3(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 appellant contends that the proof at trial supported his theory that the stabbing was justifiable based upon self-defense, or in the alternative, that he was guilty of voluntary manslaughter. When sufficiency of the evidence is an issue, the task of appellate judges is not to determine whether the evidence adduced at trial would support a different verdict, but whether it is sufficient to support the actual verdict returned by the jury. In this case, there was

overwhelming evidence supporting the jury's finding that the appellant was guilty of first-degree murder beyond a reasonable doubt. The appellant himself admitted to police officers at the scene of the crime that he stabbed the victim because she insisted on telling him about her sexual preferences for and sexual encounters with other men. The appellant's letter, which was written after the victim's disclosures to the appellant but before the appellant killed her, indicates that he deliberated over his decision. The fact that the defendant inflicted multiple serious stab wounds upon the victim supports a finding that this was a premeditated murder. Additionally, the evidence suggests that no struggle preceded the stabbing, thereby refuting the appellant's claim of self-defense. In light of this evidence, we find that the appellant's guilt of first-degree murder was clearly established at trial beyond a reasonable doubt. Rule l3(e), Tenn.R.App.P., Jackson v. Virginia, supra. This issue has no merit.

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

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JERRY SCOTT, PRESIDING JUDGE

CONCUR:

_____
JOE B. JONES, JUDGE

PAUL G. SUMMERS, JUDGE