IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY SESSION, 1995

STATE OF TENNESSEE	)	
	)	
APPELLEE	)	NO. 03C01-9406-CR-00226
	)	
	)	KNOX COUNTY
	)	
V.	)	HON. MARY BETH LEIBOWITZ
	)	JUDGE
	)	
	)	(Second Degree Murder)
	)	
CHARLES N. HOWELL	)	
	)	
APPELLANT	)	

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AFFIRMED

OPINION FILED:_____

JOE B. JONES, JUDGE

O P I N I O N

The appellant, Charles N. Howell, was indicted for the first degree murder of his wife, Mozella Howell. Following a jury trial, he was convicted of the lesser included offense of second degree murder and sentenced to twenty-one years with the Tennessee Department of Correction as a Range I standard offender. In this appeal as of right, he raises the following issues:

> (1) Whether the evidence presented at trial was sufficient to support a verdict of second degree murder?
>
> (2) Whether statements made by the victim just prior to her death regarding her fear of the appellant were properly admitted at trial under the "state of mind" exception to the hearsay rule?
>
> (3) Whether the trial court properly considered the enhancement and mitigating factors in arriving at a sentence of twenty-one years?

FACTS

On Monday afternoon November 30, 1992, the appellant turned himself in to the Knoxville Police Department for shooting and killing the woman who had been his wife for twenty years. According to Tonya Ivory, the victim's daughter, her mother had driven to her apartment and honked the horn around 8:15 that morning. After Ms. Ivory got into the parked car with her mother, the victim told her daughter that the appellant planned to kill her. The victim said, "I don't know if it is going to be the end of this week, or the end of this day, I don't know, I got a feeling he didn't go into work. . . . Look, Charles is going to kill me. I am not asking you to believe it. I'm asking you to accept it. The only way that I am going to live is if Charles drops down on his knees and asks God for forgiveness, and take [sic] killing me out of his heart, but he is beyond that. " The victim made plans to go with her daughter to secure an order of protection.

After this brief conversation, Ms. Ivory heard an approaching vehicle and recognized it to be the car of her stepfather, the appellant. Ms. Ivory "said a few choice words" to the appellant, and, upon realizing that he had a gun, she urged her mother to leave. However, the victim had trouble starting her car, and as

Ms. Ivory was going inside for help, she saw the appellant shoot her mother. Several persons who lived in the apartment complex also witnessed the crime in part. One, an off-duty police officer, testified at trial that he rushed outside after being awakened by several gunshots. Upon seeing the appellant, the police officer held a gun on him and ordered him to drop the gun he had, but the appellant disobeyed and left in his car. Another witness, a maintenance worker at the apartments, looked out of his window after hearing a gunshot and saw a man at the driver's side of the victim's car. He testified that this man then got in his car, pulled forward, got out of the car, shot more times into the driver's side of the victim's car, and lastly, walked around to the passenger's side of her car before departing. Linda Minton, another neighbor noted that she saw the appellant walk from one side of the victim's car to the other and then slowly drive off as though he were not in a hurry. A final witness, James Odell, rushed out onto his sun porch when he heard the gunshots. He testified that a black man was yelling into the car, "[g]et out of the car, bitch, get out of the car, I told you, get out of this car, I want to talk to you, get out of the car." He then saw the man fire three shots into the driver's side of the victim's car before leaving.

Some time prior to Mozella Howell's death, she had become acquainted with Bruce Wright, an inmate at the Northeast Correctional Center in Mountain City, Tennessee. According to the victim's daughter, Ms. Ivory, the victim met Mr. Wright through the appellant's and her son, Janardo, who was imprisoned in the same facility. Ms. Ivory testified that the relationship began as part of the victim's prison ministry and that her mother did not actually meet Mr. Wright in person until earlier that November. Ms. Ivory said that she was only aware of two letters that her mother received from Mr. Wright which came to Ms. Ivory's address. The letters, which were admitted into evidence, indicated that the victim and Mr. Wright were romantically involved and had plans for a future together.

Apparently, the appellant first became aware of his wife's relationship with Mr. Wright when he discovered some mail that she had received from him on the Saturday morning before the murder. Prior to this time, the appellant had expressed concerned over his ever-increasing phone bill which consisted primarily of collect calls from Mountain City, Tennessee. However, he had believed that all of the calls were being made by his son Janardo. Though the appellant could not read well, his suspicions were aroused when he noticed that the letter referred to his wife as Mozella Wright and mentioned love. He found a second letter in his wife's purse in which he read the words, "I want to be your wife" and "Bruce, I love you. I am trying to get rid of Charles, but the plan is not working." The appellant testified that the letters made him "hurt on the inside." When he confronted his wife, she tore the letter into pieces and acted unconcerned.

Subsequent to his discovery, the appellant and the victim spent Saturday afternoon shopping for some items to send their son and for a ring for the victim's upcoming birthday. According to the appellant, his wife did not stay in their home on Saturday night nor did he see her at all on Sunday. On Sunday, the appellant attended church and talked with two pastors about his marital problems. On Monday, the appellant drove to work as usual, but because he was ill with a cold, he soon returned home. As his wife was not at home, he decided to go to Ms. Ivory's to find her. He said that he took his gun because he "didn't take no chances on Tonya [Ivory]" who had cut the appellant in the past. The state pointed out that this incident had occurred over ten years earlier when Ms. Ivory was thirteen years old. Also, the appellant admitted on cross-examination that he did not always carry a gun when he visited Ms. Ivory.

The appellant testified that he remembered very little about the shooting. He did recall that, when he got out of the car and began walking over to talk with the victim, Ms. Ivory ran toward him with her hands up as though she were going

to attack him. He did not remember if he shot at Ms. Ivory. He did not even remember shooting the gun. A specialist from the Knoxville Police Department testified that he recovered two bullets from the driver's side of the car in which the victim was killed. The doctor who performed the autopsy on the victim opined that she died from a single gunshot which entered her left side and passed through her stomach and heart.

I.

In his first issue, the appellant contends that the evidence presented at trial was insufficient to prove second degree murder but, rather, it showed that he killed his wife while in a state of passion. He argues that, though he proceeded as usual after he discovered the letters, he was suppressing his anger and emotional turmoil which "all came together in one short catastrophic moment when the passion overcame [his] ability to act rationally." When sufficiency of the evidence is an issue, our task is not to determine whether the evidence adduced at trial would support a different verdict, but whether it is sufficient to support the verdict actually returned by the jury.

In making the sufficiency determination, 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. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 314-24 (1979).

Second degree murder is defined as the "knowing killing of another." Tenn. Code Ann. § 39-13-210 (Supp. 1995). "Knowing refers to a person who 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." Tenn. Code Ann. § 39-11-302(b) (1991). Voluntary manslaughter can also be a knowing killing, but it is one which is committed "in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Tenn. Code Ann. § 39-13-211(a) (1991). In arguing that his conviction should be reduced to manslaughter, the appellant relies upon Whitsett v. State, 210 Tenn. 317, 299 S.W.2d 2, 6-7 (1957), and Drye v. State, 181 Tenn. 637, 184 S.W.2d 10, 13 (1944), to support his contention that suppressed anger may accompany passion. In those cases, the court focussed on the fact that each defendant's passion had not cooled since he received the information that first provoked his passion and the ensuing murder. As our Supreme Court more recently noted in a case similar to this one, "if there [is] sufficient time for the passion or emotion of the defendant to cool before the shooting, then a verdict of murder [rather than voluntary manslaughter] might be sustained." State v. Thornton, 730 S.W.2d 309, 313 (Tenn. 1987).

In this case, at least two days and two nights passed after the appellant discovered the letters between his wife and her paramour. While we note that the time interval between the provocation and the shooting is a consideration, State v. Brown, No. 1195, 1989 WL 3177, at *2 (Tenn. Crim. App. Jan. 19, 1989, at Knoxville), we think it much more significant, even determinative, that the appellant did not appear to be in a state of passion during the entire time period. Indeed, his own testimony revealed that he proceeded as usual. He went shopping with his wife on Saturday to purchase a birthday ring for her as well as

some items for them to send to their son. He went to work on Monday morning and soon returned home only because he was ill with a cold. The appellant did speak with two pastors regarding his marital problems on the day before the murder. While that fact indicates that the appellant was upset, it is insufficient to support a conclusion that the appellant murdered his wife the following day in the heat of passion. The degree of homicide is an issue which is within the jury's province. State v. Shepherd, 862 S.W.2d 557, 565 (Tenn. Crim. App. 1992); State v. Shelton, 854 S.W.2d 116, 119 (Tenn. Crim. App. 1992). Based upon the evidence presented at trial, we find that the jury's finding of guilt of second degree murder was amply supported.

II.

Just moments before her murder, the victim drove up to the home of her daughter, Tonya Ivory, and told her daughter that she believed that the appellant planned to kill her. As stated above, the victim said, "I don't know if it is going to be the end of this week, or the end of this day, I don't know . . . Look, Charles is going to kill me." The trial court allowed Ms. Ivory to testify as to the victim's statements rationalizing that the statements showed the victim's state of mind and, therefore, fell within the hearsay exception embodied in Tenn. R. Evid. 803(3).[1]

The appellant asserts that the statements are inadmissible under the hearsay exception of 803(3) because the state intended that they prove the appellant's state of mind and future conforming conduct, not the victim-declarant's.[2] The state, on the other hand, argues that the victim's statements

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[1]Rule 803(3) provides, in pertinent part, that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" may be admitted as an exception to the hearsay rule. Advisory Commission Comment to Tenn.R.Evid. 803(3).

[2]When this hearsay exception is used to show subsequent conduct, the Advisory Commission does "contemplate[ ] that only the declarant's conduct, not some third party's conduct, is provable by this hearsay exception." Advisory

are admissible non-hearsay because they were not admitted to prove "the truth of the matter asserted." Tenn. R. Evid. 801(c). Applicable case law supports the trial court's ruling-- that testimony of a victim's expressed fear of the defendant is not only hearsay but is admissible under the "state of mind" hearsay exception. State v. Smith, 868 S.W.2d 561, 573 (Tenn. 1993) (holding that evidence of a victim's expressed fear of the Defendant was admissible under Rule 803(3) to show the victim's state of mind), cert. denied, 115 S. Ct. 417 (1995); see also State v. Cravens, 764 S.W.2d 754, 755 (Tenn. 1989) (finding the victim's statement, "[w]ell, I'm a dead man then," admissible to show his state of mind shortly prior to his death).

Because hearsay exceptions must be viewed in conjunction with principles of relevancy,[3] the greater issue in this case is whether or not the victim's fear was relevant. In State v. Smith, the court stated that "[w]hile the evidence [of the victim's fear] was admissible to show the declarant's state of mind, . . . [the victim's] state of mind was not directly probative on the issue of whether the Defendant had murdered her and her sons." Smith, 868 S.W.2d at 573; see also State v. Bragan, No. 03CO1-9403-CR-00121, 1995 WL 390739, at *14 (Tenn. Crim. App. July 5, 1995) (holding that the victim's statement that he believed the defendant was going to kill him for insurance proceeds was not relevant on the issue of whether the defendant murdered the victim). On the other hand, the Supreme Court found that the victim's fearful state of mind was relevant in State v. Cravens "in view of the claim of the accused that the victim was the aggressor and that the homicide was justifiable." Cravens, 764 S.W.2d at 755.

Commission Comment to Tenn.R.Evid. 803(3).

[3]The Advisory Commission Comments include the following statement: "Combining the hearsay exception with relevancy principles, declarations of mental state will be admissible to prove mental state at issue or subsequent conduct consistent with that mental state." Advisory Commission Comment to Tenn.R.Evid. 803(3).

In allowing Ms. Ivory's testimony under the state of mind hearsay exception, the trial court reasoned that the victim's state of mind was relevant if "she had some grounds to believe that [the appellant] had premeditated intent to kill her, premeditation is a major issue in this case, considering that [the appellant] is charged with first degree murder." We agree with this rationale. This case is distinguishable from Smith and Bragan in that, here, the victim's statement of her belief that the appellant planned to kill her was not admitted into evidence to show that the appellant did kill her. Rather, as the trial judge stated, the victim's statement showed her state of mind which, in turn, was relevant to show that the appellant had given her a reason to believe he was considering killing her. This evidence was properly admitted.

Furthermore, given the fact that the jury found the appellant guilty of second degree murder rather than first degree murder, the worst that can be said of the admission of this evidence was that it was harmless error.

III.

The appellant's final issue relates to his twenty-one year sentence with the Tennessee Department of Correction which he claims was excessive in view of his circumstances. In reviewing the length of a sentence, this Court must conduct a de novo review with a presumption that the sentence imposed by the trial court is correct. Tenn. Code Ann. § 40-35-401(d)(1990). However, 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 burden of showing that a sentence is improper lies with the appellant. Tenn. Code Ann. § 40-35-401 (1990) sentencing commission comments. In determining whether the appellant has carried this burden, we must consider (1) the evidence, if any, received at the trial and sentencing hearing; (2) the

presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-210 (1990); see also Tenn. Code Ann. §§ 40-35-102-103 (1990); State v. Anderson, 880 S.W.2d 720, 727 (Tenn. Crim. App. 1994).

Second degree murder is a Class A felony, Tenn. Code Ann. § 39-13-210(b) (1990), which carries a range I sentence of fifteen to twenty-five years. Tenn. Code Ann. § 40-35-112(1) (1990). Procedurally, the trial court is to start with the statutory minimum, enhance the sentence within the applicable range for enhancement factors found to be present, and then reduce the sentence when appropriate mitigating factors are found. Tenn. Code Ann. § 40-35-210(e) (1990). In imposing the twenty-one year sentence, the trial judge in this case based her decision on the following four enhancement factors:

> (3) The offense involved more than one (1) victim; . . .
> (5) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense; . . .
> (9) The defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense;
> (10) The defendant had no hesitation about committing a crime when the risk to human life was high . . . .

Tenn. Code Ann. § 40-35-114 (3), (5), (9), (10) (1990).

While the appellant concedes the appropriate application of the enhancement factor (9), that he used a firearm, he takes issue with the other three factors which the court applied. First, he argues that factor (3), that the offense involved more than one victim, was misapplied in this case. Here, the trial judge relied on the evidence of the impact of the murder on Ms. Ivory and her son (the victim's daughter and grandson) to satisfy this enhancement factor. As the state indicated, this Court recently held,

> that the word "victim," as used in Tenn. Code Ann. [§] 40-35-114(3), is limited in scope to a person or entity that is injured, killed, had property stolen, or had property destroyed by the perpetrator of the crime. The term does not include a person who has lost a loved one or a means of support because the perpetrator of the crime killed a relative.

State v. Raines, 882 S.W.2d 376, 384 (Tenn. Crim. App. 1994). In so holding, the court reasoned that "giving the term a generic meaning would deprecate this factor and render it meaningless. Every time a person is murdered, a spouse, child, parent, sibling or collateral relative loses a loved one. Thus, this enhancement factor would be applied by operation of law . . . ." Id. Despite the state's urging for us to reconsider this ruling, we feel that this issue has been thoroughly addressed and accurately decided in the interests of justice. It follows that enhancement factor (9) was improperly applied in sentencing this appellant.

Next, we address the appellant's contention that the trial court wrongly applied enhancement factor (10), that he did not hesitate to commit a crime when the risk to human life was high. The appellant argues that he actually did hesitate, that he first attempted to talk to his wife and fired at her only after his effort failed. Our Supreme Court has held that "[t]he more logical interpretation of this enhancement factor places the emphasis on "risk to human life was high."[4] State v. Jones, 883 S.W.2d 597, 602 (Tenn. 1994). The defendant in Jones snatched his victim's purse and pushed her to the ground. Id. at 598. Finding that the defendant's actions did not cause or increase the risk either to human life in general or to this particular victim, the court ruled that factor (10) was not applicable. Id. at 603; see State v. Wilkerson, 905 S.W.2d 933, 937-38 (Tenn. 1995) (comparing enhancement factor (10) to the dangerous offender statute and finding high risk to human life when defendant "drove in the wrong direction on a heavily travelled divided highway while intoxicated"); State v. Makoka, 885 S.W.2d 366, 373 (Tenn. Crim. App. 1994) (holding that factor (10)

[4] In so holding, the court reasoned that "[i]n homicide cases, hesitation or slowness in acting may indicate premeditation and deliberation and thereby increase culpability rather than decrease it." Jones, 883 S.W.2d. at 602.

was appropriately applied to a defendant who fired two shots outside a police station during a shift change with a dispatcher and two policemen nearby). In this case the record does not support a finding that the appellant's actions created a high risk to any life but that of the victim. We, therefore, find that this enhancement factor should not have been applied to this appellant.

Lastly, the appellant contests the trial judge's finding that he acted with exceptional cruelty toward his victim. We agree with the application of this enhancement factor. Tenn. Code Ann. § 40-35-114(5). The judge focussed on the testimony which indicated that after the appellant first shot his gun, a period of time followed in which he walked around the victim's vehicle yelling at the victim and during which the victim feared for her life. The cruelty of this situation was perhaps best illustrated by Ms. Ivory's testimony that the panic-stricken victim, upon realizing that the appellant was there to kill her, made several unsuccessful attempts to start her car.

In conclusion the record does not support the application of enhancement factors (3) and (10) in this case; however, factors (5) and (9) were properly considered.

As for the mitigating evidence, the trial judge stated that she viewed certain mitigating factors together-- that the appellant acted under strong provocation, that there were substantial grounds which tended to excuse the appellant's conduct though not establishing a defense, and, lastly, that the appellant acted under duress although also insufficient to establish a defense. The judge noted that the appellant was a man of little education who lacked some judgment in what he was doing. She also considered that the appellant was in an extreme emotional state. However, the judge refused to consider the appellant's age because she felt that age sixty-two was not sufficiently old and also because she had already factored in the appellant's lack of judgment. See

Tenn. Code Ann. § 40-35-113 (6) (1990). We find that the judge carefully and properly considered the mitigating evidence in this case.

The remaining issue is the propriety of the length of the appellant's sentence. See Tenn. Code Ann. § 40-35-401(c) (1990). As previously stated, the range I sentence for second degree murder is between fifteen and twenty-five years in the Department of Correction. Tenn. Code Ann. § 40-35-112(1) (1990). In light of the fact that two enhancement factors remain as well as no significant mitigating evidence, we are compelled to affirm the appellant's sentence.

The judgment of the trial court finding the appellant guilty of second degree murder and setting his sentence at twenty-one years in the state penitentiary is affirmed.

_____
JOE B. JONES, JUDGE

CONCUR:

(Not Participating)_____
JERRY SCOTT, PRESIDING JUDGE

_____
WALTER C. KURTZ, SPECIAL JUDGE