IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, l994

FILED

January 31, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE	)	
	)	
APPELLEE	)	NO. 03C0l-9406-CR-002l3
	)	
	)	KNOX COUNTY
	)	
V.	)	HON. RICHARD R. BAUMGARTNER, JUDGE
	)	
	)	(Voluntary Manslaughter)
	)	
MARTHA L. WHICKER	)	
	)	
APPELLANT	)	

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AFFIRMED

OPINION FILED:_____

JERRY SCOTT, PRESIDING JUDGE

O P I N I O N

The appellant, Martha L. Whicker, appeals as of right from a judgment entered against her in the Criminal Court of Knox County. Although the appellant was charged with first degree murder, the jury returned a verdict of guilty against the appellant for the offense of voluntary manslaughter, a Class C felony. Tenn. Code Ann. § 39-13-211(b). After a sentencing hearing, the appellant was sentenced as a Range I standard offender to a term of four years to be served in the Tennessee Department of Correction.

On appeal, the appellant presents three issues for review by this Court: (a) whether the trial judge improperly sentenced her due to his erroneous determinations concerning the applicability of certain enhancement factors; (b) whether he erroneously rejected certain mitigating factors; and (c) whether the trial judge abused his discretion in denying her probation. We affirm.

FACTS

The proof showed that Kenneth Lusby, the victim, and the appellant met in 1985 and thereafter began dating intermittently. From its inception, their relationship was often stormy. The appellant testified that the victim had displayed violence toward her during their relationship. She also admitted, however, that she frequently threatened to kill the victim, but would never have hurt him.

In the early evening of January 2, 1993, the victim and an ex-wife of his, Janice Tarling, were in the den of the victim's home eating dinner and watching television. The telephone rang. Through his caller identification machine, the victim knew it was the appellant and asked Ms. Tarling to answer the phone. At his request, Ms. Tarling told the appellant that the victim did not wish to speak

with her. Ms. Tarling identified herself to the appellant upon request, and then agreed to give the victim a message to call the appellant.

A short time later, the appellant drove to the victim's house and entered, setting off its alarm system. Ms. Tarling thought it was the victim's son coming in until she saw the appellant walk into the den. The appellant questioned the victim and Ms. Tarling about their relationship and their intentions. She then threatened to embarrass the victim at his workplace and to "blow his guts away." After the appellant repeated the threats, the victim asked the appellant to leave and threatened to call the police if she did not comply. The appellant then grabbed Ms. Tarling around the head and neck and forcefully shoved her. When Ms. Tarling looked up, she saw the appellant had taken a gun from her purse and had it pointed at the victim. The victim was asking the appellant to put the gun down. The gun fired and a bullet penetrated through the victim's right eye, killing him instantaneously.[1] Ms. Tarling yelled at the appellant that she had killed the victim, but she received no response at all. Ms. Tarling then called 911 twice to alert the police. The appellant, apparently in a state of shock, remained in the house until the police arrived.

The appellant had been carrying the gun that killed the victim in her purse for a considerable period of time prior to the fatal incident. She testified that her son had given it to her for protection after a number of violent attacks against women occurred in July of 1990 near her place of employment.

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[1]The appellant related a somewhat different account. She testified that when she was asked to leave, she shoved Ms. Tarling. Ms. Tarling then shoved her back, causing her to drop her purse. At the same time, her gun fell out of her purse and onto the floor. She stated that the victim came rushing toward her. In response, she grabbed her gun and aimed it toward the ceiling to fire a warning shot to scare him. When the gun discharged, the bullet accidentally hit the victim.

DISCUSSION

Appellate review of a sentence imposed upon a criminal defendant is a *de novo* examination based on the record. Tenn. Code Ann. § 40-35-401(d). However, this Court must presume that the determinations made by the trial court are correct. Id. Therefore, if our review reveals that the trial court imposed a lawful sentence pursuant to the Tennessee Criminal Sentencing Reform Act of 1989 after having given proper consideration and weight to the relevant sentencing factors under the Act and the sentence is based on findings of fact which are adequately supported by the record, then we must not disturb the sentence imposed by the trial court. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). Furthermore, the appellant has the burden of establishing that the sentence rendered by the trial court was erroneous. Tenn. Code Ann. § 40-35-401(d)(sentencing commission comments); State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); State v. Anderson, 880 S.W.2d 720, 727 (Tenn. Crim. App. 1994).

The initial issue presented on appeal is that the trial court improperly sentenced the appellant to a term of four years due to erroneous findings concerning the applicability of enhancement and mitigating factors. At the sentencing hearing, the trial court found three enhancement factors and two mitigating factors. After weighing those respective factors, the court fixed the appellant's sentence within the range to a term of four years, one year above the minimum sentence.[2] The appellant challenges each enhancement factor found

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[2]In sentencing a criminal defendant, the presumptive sentence shall be the minimum sentence in the range if no enhancement or mitigating factors exist. Tenn. Code Ann. § 40-35-210(c). If enhancement factors exist but there are no mitigating factors, then the trial court may set the sentence above the minimum in that range but still within the range. Id. at § 40-35-210(d). Should both enhancement and mitigating factors exist, which is the situation in the present case, the court must begin at the minimum sentence in the range and enhance the sentence within the range as appropriate for the enhancement factors. Id. at § 40-35-210(e). The trial judge shall then reduce the sentence within the range as appropriate for the mitigating factors. Id.; see State v. McMurry, No. 01C01- 9311-CR-00405, 1994 WL 179776, at *1 (Tenn. Crim. App. May 12, 1994).

by the trial judge and argues that other statutory mitigating factors are applicable in this case.

The first of the three enhancement factors applied by the trial court was that the appellant employed a firearm or deadly weapon in the commission of the offense." Tenn. Code Ann. § 40-35-114(9). Although the appellant concedes that use of a deadly weapon is not necessarily an essential element of the offense of voluntary manslaughter, see State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992), she argues that the "element was included in the indictment and [thus] is part of the offense." This contention is premised upon a misapprehension of the facts. Review of the indictment reveals that it contains the standard charge of first degree murder with no reference to a deadly weapon or firearm.[3] Even if the indictment so alleged, that would not, of necessity, make the use of the firearm an element of the offense. The trial judge properly applied that enhancement factor.

The second enhancement factor applied by the trial court is that the appellant abused a position of private trust in a manner which significantly facilitated the commission of the offense. Tenn. Code Ann. § 40-35-114(15). The appellant asserts that she was welcome in the victim's home, and had come and gone freely on a daily basis, up until the incident. It logically follows, according to the appellant, that there could not have been any abuse of that trust or relationship in the commission of the offense. We disagree. The record clearly shows that the victim did not want to speak with the appellant when she called and that the appellant was aware of this fact. Common sense dictates that when one does not wish to even speak to a particular person, one almost certainly does not wish to see that person or to welcome that person into their

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[3]The appellant alternatively contends that reference to a pistol in the arresting warrant establishes the use of the pistol as an essential element of the offense. However, she fails to cite any authority in support of this argument. Failure to cite authority for a position taken on appeal constitutes waiver of the issue. Tenn. Ct. Crim.App. R. 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988).

home. Disregarding this reality, the appellant entered the victim's home without knocking or otherwise communicating her intent to enter, a privilege maintained solely because of her romantic relationship with the victim. Had it not been for that established trust, it is unlikely that the appellant would have ever entered the house that evening. How this abuse of trust facilitated the commission of the offense is self-evident. The factor was properly applied.[4]

The final enhancement factor applied by the trial court was that the offense involved more than one victim. Tenn. Code Ann. §40-35-114(3). The State concedes the inapplicability of this factor. Given the definition of a "victim" recently promulgated by this Court in State v. Raines, 882 S.W.2d 376, 384 (Tenn. Crim. App. 1994),[5] we concur.

In addition, the State urges this Court to exercise its authority under State v. Pearson, 858 S.W.2d 879, 884-85 (Tenn. 1993) to find enhancement factors not relied upon by the trial court. Pursuant to this request, we find that the record supports application of enhancement factor (10), that the appellant had no hesitation about committing a crime when the risk to human life was high. Tenn. Code Ann. § 40-35-114(10). "While this Court has consistently held that this factor should not be applied when the only person subject to being injured is the victim, this factor is not inherent . . . when other people present could have

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[4]Although we find no case factually on point, numerous cases illustrate the breadth of application of enhancement factor (15) outside of familial relationships. See e.g., State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993)(applied where a live-in boyfriend raped two of his girlfriend's children); State v. Harris, 866 S.W.2d 583, 588 (Tenn. Crim. App. 1992)(applied where the victim/employee would not have been alone on a floor of a building with rapist if he had not been her supervisor); State v. Bennett, No. 03C01-9403-CR-00104, 1994 WL 683373, at *2 (Tenn. Crim. App. Dec. 8, 1994)(applied where a husband convinced his wife who he was separated from to enter his vehicle; he ultimately restrained and kidnapped her); State v. Hatfield, No. 03C01-9307-CR-00233, 1994 WL 102072, at *5 (Tenn. Crim. App. Mar. 29, 1994)(applied where a man used his relationship with the victim to enter the victim's residence, and then robbed the victim).

[5]In Raines, this Court defined "the word 'victim,' as used in Tenn. Code Ann. § 40-35-114(3), [as] a person or entity that is injured, killed, had property stolen, or had property destroyed by the perpetrator of the crime." 882 S.W.2d 376, 384 (Tenn. Crim. App. 1994)(footnote omitted).

been injured." State v. Makoka, 885 S.W.2d 366, 373 (Tenn. Crim. App. 1994).[6] Moreover, in State v. Jones, 883 S.W.2d 597, 602 (Tenn. 1994), the leading case on the applicability of this factor, our Supreme Court held that the determinative language with regard to this factor is that "the risk to human life was high."

When this offense occurred, the appellant, the victim, and Ms. Tarling were all in the den of the victim's residence. The record indicates that all three individuals were within a few feet of each other at the time the appellant fired the gun. When a firearm is discharged in such close proximity to others, each person's life inextricably teeters on the seesaw of chance. Since the risks to the life of Ms. Tarling were obviously unrelated to any essential element of the offense for which the appellant was convicted, the factor may be properly applied under Makoka, 885 S.W.2d at 373. Furthermore, the appellant testified that she fired the gun only one or two seconds after she picked it up. In short, the risk to Ms. Tarling's life, as well as the appellant's lack of hesitation, cannot be questioned. The trial court erred in not applying this enhancement factor.

The trial court also found two mitigating factors present: (a) that the defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated her conduct, Tenn. Code Ann. § 40-35-113(11), and (b) other factors consistent with the purposes of the Tennessee Criminal Sentencing Reform Act.

Id. § 40-35-113(13). On appeal, the appellant contends that five additional mitigating factors were applicable. As grounds for the contention, the appellant proffers merely a conclusory statement that the record supports each factor.

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[6]Other recent cases recognizing this principle include State v. Hill, 885 S.W.2d 357, 363 (Tenn. Crim. App. 1994) and State v. Hicks, 868 S.W.2d 729, 732 (Tenn. Crim. App. 1993).

She neither makes references to the record, nor cites any authority pertaining to the issue. Therefore, this issue is waived. Tenn. Ct. Crim. App. R. 10(b); State v, Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988); see also Tenn. R. App. P. 27(a)(7).

In a related issue, the appellant argues that sufficient weight was not afforded to the fifteen factors she submitted pursuant to the catch-all provision codified at Tenn. Code Ann. § 40-35-113(l3). It appears from the record that the trial judge found those factors applicable, and that he considered them in determining the appellant's sentence.[7] Therefore, no relief is available to the appellant. In State v. Moss, 727 S.W.2d 229, 238 (Tenn. 1986),[8] our Supreme Court stated:

> In calculating the specific sentence, whether it should be in the upper or lower end of the range, mitigating or enhancement factors are weighed, but the Act does not attribute any particular value vis-a-vis how many years should be added or subtracted based on the presence of any of these factors. That no inherent value has been assigned to these factors is a further indication that the Legislature contemplated the exercise of guided but not fettered discretion on the part of the sentencing court. The weight afforded mitigating and enhancement factors derives from balancing relative degrees of culpability within the totality of the circumstances of the case involved.

In other words, the weight assigned to any existing mitigating or enhancement factor resides in the discretion of the trial court so long as the court "complies with the purposes and principles of sentencing and its findings are adequately supported by the record." State v. Shropshire, 874 S.W.2d 634, 642 (Tenn. Crim. App. 1993); State v. Marshall, 870 S.W.2d 532, 541 (Tenn. Crim. App. 1993). In the present case, the appellant does not contend that the trial court failed to follow any principle or purpose embodied in the sentencing act.

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[7]The State challenges the applicability of the majority of these factors. However, in light of our other findings, it is unnecessary to address that argument.

[8]Although Moss was decided prior to the enactment of the Tennessee Criminal Sentencing Reform Act of 1989, the principles promulgated in Moss have been utilized by this Court in interpreting the 1989 Act. State v. Shropshire, 874 S.W.2d 634, 642 (Tenn. Crim. App. 1993); State v. Marshall, 870 S.W.2d 532, 541 (Tenn. Crim. App. 1993).

Moreover, we find that the record supports the rulings of the trial court. Accordingly, the appellant is not entitled to relief.

In summary, this Court finds three enhancement factors, having stricken one factor the trial court erroneously applied and having found an additional factor supported by the record, and two mitigating factors. We further find that the totality of the circumstances surrounding the offense justify the imposition of a sentence of four years. See Moss, 727 S.W.2d at 238. The appellant clearly has not met her burden of proof with respect to this issue and, therefore, it is without merit.

In her second issue on appeal, the appellant contends that the trial court erroneously refused her request to be placed on probation. In this regard, the appellant bears the burden of establishing that probation will "subserve the ends of justice and the best interest of both the public and the [appellant]," State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990); Hooper v. State, 201 Tenn. 156, 161, 297 S.W.2d 78, 81 (1956); State v. Huff, 760 S.W.2d 633, 636 (Tenn. Crim. App. 1988). This principle is specifically preserved in the Tennessee Criminal Sentencing Reform Act of l989, since "nothing in this chapter (the sentencing act) shall be construed as altering any provision of present statutory or case law requiring that the burden of establishing suitability for probation rests with the defendant." Tenn. Code Ann. § 40-35-303(b).

Our ruling as to whether the appellant should have been placed on probation necessarily begins with a determination of whether she is entitled to the statutory presumption that she is a favorable candidate for alternative sentencing. State v. Bonestel, 871 S.W.2d 163, 167 (Tenn. Crim. App. 1993). Three requirements must be met in order for the appellant to be entitled to the statutory presumption: (1) the appellant must be an especially mitigated or standard offender, Tenn. Code Ann. § 40-35-102(6); (2) the appellant must be convicted of a Class C, D, or E felony, Id.;

and (3) the appellant must not have a criminal history evincing either a "clear disregard for the laws and morals of society" or a "failure of past efforts at rehabilitation." Id. at §40-35-102(5). Given the appellant's status as a first time offender who committed a Class C felony, she is entitled to the presumption.

The next step is to determine whether there is sufficient "evidence to the contrary" to rebut the statutory presumption. Tenn. Code Ann. § 40-35-102(6). Guidance as to what constitutes "evidence to the contrary" may be found in Tenn. Code Ann. § 40-35-103. To this end, the trial court found that confinement of the appellant is necessary in order to provide an effective deterrence to others likely to commit similar offenses and to avoid depreciating the seriousness of the offense committed by the appellant.[9] Id. at § 40-35-103(1)(B). Both grounds merit individual discussion.

In order for a trial court to deny an alternative sentence based on deterrence, the record must contain some evidence that incarceration of the criminal defendant will have a deterrent effect within the jurisdiction. Bonestel, 871 S.W.2d at 169; State v. Horne, 612 S.W.2d 186, 187 (Tenn. Crim. App. 1980). Conclusory statements by counsel or the trial court are insufficient. See State v. Ashby, 823 S.W.2d 166, 170 (Tenn. 1991). The record in this case is devoid of any evidence to support the conclusion that incarceration of the appellant would serve as a deterrent to others likely to commit similar offenses. Therefore, the appellant cannot be denied alternative sentencing on the ground of deterrence.

Probation was also denied on the ground that confinement is necessary in order to avoid depreciating the seriousness of the appellant's offense. For this ground to be properly used as a basis for denying probation, "the circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree," and

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[9]The appellant incorrectly argues on appeal that deterrence was the only basis relied upon by the trial court in denying probation to the appellant.

the nature of the offense must outweigh all factors favoring a sentence other than confinement. State v. Hartley, 818 S.W.2d 370, 374-75 (Tenn. Crim. App. 1991)(citations omitted).

During his discussion of the propriety of incarceration versus certain alternative sentences, the trial judge summarized the circumstances surrounding the offense as follows:

> Miss Whicker, it was you that took Mr. Lusby's life. And I would observe that it was you who carried this weapon. It was you that got into the automobile and drove from your home to [the victim's] home knowing that you were not welcome in that home on that Sunday night.
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> You went into that home without his permission, and as he sat on the couch watching T.V. with Miss Tarling you provoked a fight.
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> You declined to leave when you were asked to leave and then provoked a confrontation with Miss Tarling which led to the ultimate act in this case which was the death of Mr. Lusby.

The law and this Court cannot minimize such egregious resolutions to domestic conflicts. Based on the record before us, we have no difficulty in finding the circumstances surrounding the offense to be particularly violent, horrifying, shocking, reprehensible and offensive, and that the nature of the offense outweighs all other factors favoring alternative sentencing. Moreover, the appellant omitted any discussion of this ground in her brief. Thus, she clearly has failed to rebut the presumption that the trial court correctly sentenced her. Tenn. Code Ann. § 40-35-401(d).[10]

In conclusion, there is no reversible error in the sentencing of this appellant. Accordingly, the judgment is affirmed.

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JERRY SCOTT, PRESIDING JUDGE

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[10]In its brief, the State additionally argues that death is a proper circumstance on which to deny probation. This Court's disagreement with this proposition is thoroughly explained in the recent unpublished case of State v. Bingham, No. 03C01-9404-CR-00127, 1995 WL 60003 (Tenn. Crim. App. Feb. 14, 1995).

CONCUR:

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JOHN H. PEAY, JUDGE

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JOSEPH M. TIPTON, JUDGE