

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JUNE SESSION, 1995

**FILED**  
June 21, 1996  
Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE, )  
 )  
 Appellee, )  
 )  
 v. )  
 )  
 TIM FOX, )  
 )  
 Appellant. )

No. 03C01-9503-CR-00061  
Cocke County  
Hon. William Holt, Jr., Judge  
(Attempted First Degree Murder)

For the Appellant:

Susanna Laws Thomas  
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For the Appellee:

Charles W. Burson  
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and  
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OPINION FILED: \_\_\_\_\_

**AFFIRMED**

J. S. Daniel  
Special Judge

## OPINION

\_\_\_\_\_The appellant was convicted by a jury of attempted first degree murder. A timely Motion for New Trial was filed and overruled. Thereafter, this conviction was appealed as a matter of right. Rule 3(b), Tenn. R. App. P. This appeal advances two grounds as error by the trial court justifying a new trial. First, the appellant contends that the evidence adduced at trial is insufficient on the issue of premeditation and deliberation to support a conviction of attempted first degree murder. Second, the appellant contends that the trial judge improperly weighed the aggravating and mitigating factors in imposing a twenty year Range I Standard Offender sentence.

After carefully considering the record of the trial and the sentencing hearing, we conclude that the issues presented are without merit and that the judgment of the trial court as well as the sentence should be affirmed.

In order to address the appellant's claim that insufficient evidence exists to support a conviction in this case, we will briefly recount the facts as established by the record. Mrs. Betty Weston Fox, the wife of the appellant, testified that Mrs. Ball, who is the appellant's sister, had solicited the appellant's assistance in the killing of her husband. The motive behind the act was to collect insurance proceeds on Mr. Ball's life and to resolve marital difficulties that she and Mr. Ball were having. Mrs. Fox recounted in her testimony that she had overheard several conversations by Kathy Ball and the appellant about killing or having Harlan Ball killed. Part of these conversations centered around the fact that Mr. Ball had a \$20,000.00 insurance policy on his life through his employer and an agreement

was made whereby Mrs. Ball promised to pay the appellant \$4,500.00 of these insurance proceeds and to provide a car if the appellant was successful in this endeavor. In furtherance of this plan, the appellant procured a weapon, a hunting knife, that was used in the stabbing from a mutual friend. This weapon was obtained two days before the assault. After the stabbing the appellant was picked up by Mrs. Fox in the family automobile and driven back to the home of the owner of the knife where the weapon was hidden. Prior to the actual stabbing Kathy Ball had advanced the appellant \$500.00 for an automobile down payment in furtherance of the murder plot.

The original plan for this murder provided that at Mrs. Ball's insistence Mr. Ball was to stop at a local store for Pepsi on the return trip from Morristown and a visit to Mrs. Ball's parents' home. The appellant was to precede Mr. Ball to the store and be waiting for him. When Ball stopped, the appellant was to assault and kill him and take his body to a nearby river where the body was to be dumped and Mr. Ball's automobile hidden. Mrs. Fox was to follow in the family vehicle in order to provide transportation from the scene of the disposition of the body.

Although the appellant was waiting at the appointed location this plan went awry when Mr. Ball failed to stop at the market. The appellant then proceeded to the Ball residence in Cocke County. There, in order to get Mr. Ball away from the residence, Mrs. Ball asked Mr. Ball to go to the store and purchase Pepsi. Mr. Ball did this and the appellant accompanied him. Upon returning to the residence and without any conversation or provocation, the appellant grabbed Mr. Ball's arm, struck him in the back and stabbed him in the heart.

A week prior to the assault Mr. Ball had found that his automobile had been tampered with. On this occasion he found that a wire had been run to his fuel tank from a running light on the vehicle. Prior to starting the vehicle Mr. Ball had recognized the hazard and disabled the wire. He had not seen the culprit who had booby trapped his automobile but after the stabbing incident, recalled that he had seen both his wife and the appellant in the automobile working on the running lights prior to the incident.

The appellant asserts that there was not sufficient evidence to support his conviction of attempt to commit murder in the first degree, and that he should have been convicted of attempt to commit murder in the second degree. This basically constitutes an assertion that the proof was insufficient as to the culpable mental state necessary for a conviction of murder in the first degree had a death resulted from this assault.

If a death had occurred in this case it would have been presumed to be second degree murder. Witt v. State, 46 Tenn. 5, 8 (1868). The state must prove both premeditation and deliberation in order to elevate the offense from second to first degree murder. Bailey v. State, 479 S.W.2d 829, 833 (Tenn. Crim. App. 1972). The mens rea elements of first degree murder must be established beyond a reasonable doubt for a conviction to stand for the offense of an attempt to commit first degree murder as these elements are incorporated in the criminal attempt statute, Tenn. Code Ann. § 39-12-101(a)(2):

"A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense. . . (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's

part; . . ."

Tenn. Code Ann. § 39-13-202(a)(1) provides that "the intentional, premeditated and deliberate killing of another" makes out the offense of first degree murder. Tenn. Code Ann § 39-13-201(b)(1) and (2) defines these terms. A "deliberate act" is one performed with a cool purpose and a "premeditated act" is one done after the exercise of reflection and judgment. In State v. Brown, 836 S.W.2d 530 (Tenn. 1992), the Supreme Court held that deliberation requires some time interval between the decision to kill and the act itself.

Where a complaint is raised concerning the sufficiency of evidence to support a conviction, our standard of review requires us to view the evidence in the light most favorable to the state and to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, setting aside a conviction only if the evidence is insufficient to support the jury's finding. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L. Ed. 2d 560 (1979). Once the defendant is found guilty of the crime with which he is charged, the presumption of innocence is replaced with a presumption of guilt on appeal, State v. Grace, 493 S.W.2d 474 (Tenn. 1973), which the appellant has the burden to overcome. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); State v. Tuggle, 639 S.W.2d 913 (Tenn. 1982); State v. Brown, 551 S.W.2d 329 (Tenn. 1977).

On appeal from a conviction, the State is entitled to have the appellate court take the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from it in its favor. State v. Gregory, 862 S.W.2d 574 (Tenn. Crim. App. 1993); State v. Kinnaird, 823 S.W.2d 571

(Tenn.Crim.App. 1991); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Applying the existing law on the subject to the facts of this case results in the conclusion that sufficient evidence exists in this record to establish premeditation and deliberation beyond a reasonable doubt. Here the appellant is shown to have plotted the act with his sister more than a week before the incident. A weapon was coolly procured from a third source and after the stabbing, hidden. An escape plan was established by the use of a separate vehicle and the aid of the appellant's wife. Finally, the original plan for the assault included the lying in wait for the victim of the offense. Unquestionably proof exists of an intentional, deliberate and premeditated attempted murder. This assignment of error is overruled.

The crime of attempted first degree murder is punishable by imprisonment as a Class A Felony. Tenn. Code Ann. § 39-11-117 (a)(2). The trial court held a separate sentencing hearing in accordance with Tenn. Code Ann. § 40-35-209 and -210 and at that time determined that the appropriate range for punishment would be as a Range I Standard Offender. Therefore, the complete range of punishment for sentencing was not less than fifteen (15) years nor more than twenty-five (25) years in the Department of Corrections. Tenn. Code Ann. § 40-35-112(a)(1). After conducting a sentencing hearing, a mid-range sentence of twenty (20) years was assessed. The appellant appeals the trial court's sentencing determination and contends that the court inappropriately weighed the enhancement and mitigating sentencing factors. It is the position of the appellant that the trial court's enhancement findings are implicit in the crime itself and, therefore, were inappropriate for enhancement. Therefore, it is

contended that the sentence should not exceed the minimum fifteen (15) years authorized in the range.

In imposing a sentence, the trial court is required to impose a determinative sentence with a presumptive sentence being the minimum sentence in the Range. Tenn. Code Ann. § 40-35-210 (c)<sup>1</sup>. The court, in making sentencing decisions, must begin the sentencing inquiry at the minimum sentence in the range, and then may increase the sentence within the range as appropriate enhancement factors are established by the proof, and then must reduce the sentence within the range as appropriate mitigating factors are established by the proof. Tenn. Code Ann. § 40-35-210(e) and (f).

When a defendant complains of his sentence, we must conduct a de novo review of the record with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments. This presumption, however, is conditioned upon an 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 present record reflects that the trial court found two enhancement factors and one mitigating factor after conducting a sentencing hearing. As

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The sentence imposed in this case for the Class A felony of Attempted First Degree Murder must follow the prior sentencing law. An amendment to this code section which became effective July 1, 1995 now authorizes a presumptive midpoint sentence for Class A felonies.

enhancement factors the trial court found that the appellant employed a deadly weapon during the commission of the offense and that the appellant had no hesitation about committing a crime when the risk to human life was high. Tenn. Code Ann. § 40-35-114 (9) and (10). As a mitigating factor the court found that the appellant assisted the authorities and told the truth in his statements to the authorities. Therefore, mitigating factor Tenn. Code Ann. § 40-35-113 (9) and/or (13) applied.

In reaching its conclusions about sentencing the trial court described the conduct of the appellant as similar to a “sucker punch” where the victim was completely defenseless and without any warning of the impending assault. The court concluded that had death ensued from the assault that the offense would have been “cold blooded” murder and that the taking of another human life was the most egregious offense under the law.

This record is reflective of a complexly plotted scheme which included a planned lying in wait and evidence of an earlier attempted assault. These schemes were envisioned by the appellant in collusion with his sister and were eventually carried out by the appellant. Although not a part of the trial court’s findings, we conclude as a part of our de novo review that two other enhancement factors are made out by this record. We find that the appellant

was a leader in the commission of an offense involving two (2) or more criminal actors and that the personal injuries inflicted upon the victim were particularly great. Tenn. Code Ann. § 40-35-114 (2) and (6).



The appellant contends that the enhancement factors found by the trial court are themselves essential elements of the offense and therefore cannot be used in sentencing to enhance the sentence. Tenn. Code Ann. § 40-35-114. In sentencing the trial court is limited in enhancing the sentence greater than the minimum within the range to findings of specific enhancement factors authorized by the statute. Where the proposed enhancement factor is also an essential element of the offense, that enhancement factor may not be used to increase the punishment. The obvious purpose of this limitation is to exclude enhancement factors which are based on facts which are used to prove the offense. “Facts which establish the elements of the offense charged may not also be the basis of an enhancement factor increasing punishment”. State v. Jones, 883 S.W.2d 597 (Tenn 1994).

This court has previously determined that enhancement factors Tenn. Code Ann. § 40-35-114 (6) and (9) are appropriate for consideration by trial courts in sentencing those convicted of attempted first degree murder because murder may be attempted without actually causing any injury and through means other than the use of a weapon. State v. Scott Houston Nix, No. 03C01-9406-CR-00211, Knox Co. (Tenn. Crim. App. Nov. 21, 1995). In this case we find that the trial court properly enhanced the appellant’s sentence because the personal injuries inflicted upon the victim by the use of the hunting knife were particularly great. The victim miraculously survived a stabbing into the heart only as a result of being life flighted to a major trauma center where emergency surgery was performed. The victim was hospitalized for thirteen days and would have died absent immediate care.

We also conclude as a part of our de novo review of the record that the

defendant was a leader in the commission of an offense involving two or more criminal actors. Tenn. Code Ann. § 40-35-114 (2). Here the appellant was jointly tried with his sister and the jury was unable to reach a verdict in her case. Clearly the evidence supports the conclusion that both the appellant and his sister were inextricably involved in this murder plot. The record and the trial court's findings reflect that by procuring the weapon, plotting the assault and improvising the ultimate attack, the appellant was a leader in the commission of the crime.

The trial court found that the sentence should be enhanced because the appellant "had no hesitation about committing a crime when the risk to human life was high". Tenn. Code Ann. § 40-35-114 (10). We conclude that the trial court inappropriately considered this enhancement factor. This enhancement factor is one appropriate for consideration where the conduct of the person has caused or increased risk either to human life in general or to the victim in particular and risk to human life is not an element of the offense. See State v. Jones, 883 S.W.2d 597 (Tenn. 1994); State v. Lambert, 741 S.W.2d 127, 134 (Tenn. Crim. App. 1987). Risk to human life appears to be an essential element of the offense of murder or attempted murder to such a degree that this factor would only be capable of being used in limited circumstances, such as where the attempted killing occurred in the presence of others who were exposed to

the potential of injury or death by the misdirected actions of the person being sentenced. Even though this factor was misapplied we find no basis to modify the twenty (20) year sentence based on the other enhancement factors found

by the trial court and established by the record.

Finally, the appellant contends that the trial court failed to reduce the sentence by several mitigating factors advanced by the defense or to give them their appropriate weight in mitigation to those factors that the court did find. In addition to the mitigating factor found by the court, these claims included the assertion that the appellant acted under strong provocation, believing that the victim was abusive to his sister and her children, as well as the fact that he had limited mental abilities. These were not found by the court and we conclude that the trial court did not abuse its discretion in that determination.

There is no particular value assigned to the various mitigation or enhancement factors. The weight afforded to such factors is derived from balancing relative degrees of culpability within the totality of the circumstances of the case involved. State v. Marshall, 870 S.W.2d 532, 541 (Tenn. Crim. App. 1993). The weight assigned to any existing factor is generally left to the trial judge's discretion. In this case we find that the trial judge did not abuse this discretion and that after a de novo review of the sentencing the (20) year sentence imposed is an appropriate one. This assignment of error is overruled.

**We conclude that the conviction and sentence approved by the trial court should be affirmed in its entirety for the reasons set forth herein. Costs are adjudged against the appellant, for which let execution issue, if necessary.**

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J. S. Daniel, Special Judge**

**CONCUR:**

**\_\_\_\_\_  
Joseph M. Tipton, Judge**

**(not participating) \_\_\_\_\_  
Jerry Scott, Presiding Judge**