IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER 1995 SESSION

STATE OF TENNESSEE,	)	NO. 03C01-9505-CR-00131
	)	
Appellee	)	HAMILTON COUNTY
	)	
V.	)	HON. STEPHEN M. BEVIL
	)	JUDGE
ROBERT JEROME HARRIS,	)	
	)	(Voluntary Manslaughter)
Appellant	)	

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OPINION FILED: _____

CONVICTION AFFIRMED; SENTENCE MODIFIED AND REMANDED

William M. Barker, Judge

OPINION

The appellant, Robert Jerome Harris, was indicted in Hamilton County for first degree murder for the stabbing death of Henry Sims. The case was tried to a jury which found the appellant guilty of the lesser included offense of voluntary manslaughter. The appellant was sentenced as a Range I offender to five (5) years in the Tennessee Department of Correction. In this appeal he challenges the sufficiency of the convicting evidence and also argues that the trial court erred in denying him an alternative sentence and in giving a sentence above the minimum sentence within the range.

Following a review of the record on appeal, we affirm the appellant's conviction, but reduce his sentence from five (5) years to four (4) years and remand the case back to the trial court for reconsideration of alternative sentencing.

FACTS

The uncontroverted proof in this case is that the appellant did cause the death of the victim, Henry Sims, by stabbing him once in the abdomen. The Hamilton County Medical Examiner testified that the single abdominal wound passed through the victim's liver and pierced his heart.

Jeff Francis, a detective with the Hamilton County Sheriff's Department, testified that on the day of the stabbing, the appellant gave a statement in which he stated that he stabbed the victim in order to keep the victim from attacking him and to keep the victim from preventing him from leaving the apartment. The appellant told the detective that he intended only to "nick" the victim and that he did not mean to kill him. There was considerable testimony that at the time of the stabbing the victim was exceedingly drunk. The appellant asserted that moments before he stabbed the victim, the victim was wielding a chicken boning knife and threatening to kill the appellant.

Although there were no witnesses to the stabbing, the State presented the testimony of several persons who were with the victim and the appellant prior to and after the stabbing. Myrtle Lara testified that she lived in the apartment building where the stabbing occurred, and that shortly before the stabbing she heard the appellant and the victim on the porch of the apartment calling each other names. She said that after the stabbing the victim passed her in a common hallway of the apartment and that he was carrying a knife, holding his stomach, and that he said words to the effect of "He stuck me."

Clara May Crutcher testified that approximately four hours prior to the stabbing she went to the apartment where the victim lived. Shortly thereafter, she and the victim went to a neighbor's house in order to drink. As she and the victim left the apartment, the defendant cursed the victim and pulled out a knife, but she and the victim proceeded to the neighbor's home. Ms. Crutcher testified that at some point the victim left the neighbor's yard to return to his apartment in order to get money. The next thing she remembered was that Charlotte Smith told her that someone had been stabbed at the apartment. Ms. Crutcher then saw the defendant running up the street away from the crime scene.

Charlotte Smith, also a resident of the apartment building where the incident occurred, testified that shortly before the stabbing the defendant and the victim were arguing. She saw the victim leave his room with a blue-handled knife, go to the porch and say to the appellant, "I'll bet you won't call me that again."

John Mitchell lived next door to the apartment building where the killing occurred and testified that he heard the victim and the appellant arguing shortly before the stabbing, and that soon afterwards he saw the appellant leave the apartment and run down the street.

The only witness to testify for the defense was Lawrence Holmes. Mr. Holmes testified that on the day and evening prior to the stabbing, he had gone to a club with

the appellant and the victim and that there had been no arguments while he was with them.

SUFFICIENCY OF THE EVIDENCE

The appellant first complains that the evidence was insufficient as a matter of law to sustain the jury's verdict of guilt of voluntary manslaughter. We disagree.

Where the sufficiency of the evidence is challenged, the relevant question for this court is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); T.R.A.P. 13 (e).

A guilty verdict, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves any conflicts in favor of the State's theory. 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 to all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978). A verdict against the defendant removes the presumption of innocence and replaces it with a presumption of guilt on appeal. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). The defendant has the burden of overcoming the presumption of guilt. State v. Brown, 551 S.W.2d 329, 331 (Tenn. 1977).

The appellant claims that the jury improperly rejected his self-defense theory of the case. It is well settled that whether an individual acted in self-defense is a factual determination to be made by the jury as the sole trier of fact. State v. Ivy, 868 S.W.2d 724, 727 (Tenn. Crim. App. 1993); State v. Williams, 784 S.W.2d 660, 663 (Tenn. Crim. App. 1989); State v. Fugate, 776 S.W.2d 541, 545 (Tenn. Crim. App.

1988). By its verdict the jury obviously rejected the appellant's claim of self-defense. That was the jury's prerogative.

We hold that the evidence was sufficient as a matter of law to support the jury's verdict.

SENTENCING

Next, the appellant contends that the trial court erred when it imposed a five-year sentence and refused to order probation or other sentencing alternative in lieu of incarceration in the Tennessee Department of Correction.

When a defendant complains of his or her sentence, we conduct a de novo review with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d) (1990 Repl.). 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). However, the burden of showing that the sentence is improper is upon the appealing party. Tenn. Code Ann. § 40-35-401(d) Sentencing Commission Comments.

In determining an appropriate sentence, the Court shall consider the following: (1) any evidence from the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing; (4) the nature and characteristics of the offense; (5) information offered by the parties concerning enhancing and mitigating factors as found in Tennessee Code Annotated sections 40-35-113 and 114, and (6) the defendant's statement in his or her own behalf concerning sentencing. Tenn. Code Ann. § 40-35-210(b) (1995 Supp.). Additionally section 210 provides that the minimum sentence within the range is the presumptive sentence. Tenn. Code Ann. § 40-35-210(c) (1995 Supp.). If there are enhancing and mitigating factors, the Court must start at the minimum sentence in the range and enhance the sentence as

appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors.

Voluntary manslaughter is a class C felony. The Range I sentence for a class C felony is not less than three (3) nor more than six (6) years. Tenn. Code Ann. § 40-35-112(a)(3) (1990 Repl.). The trial court found no mitigating factors and ordered the appellant to serve a five-year sentence based on the following enhancement factors:

> (1) the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
>
> (9) the defendant possessed or employed... a deadly weapon during the commission of the offense; and
>
> (10) the defendant had no hesitation about committing a crime when the risk to human life was high;

Tenn. Code Ann. § 40-35-114 (1995 Supp.).

The appellant agrees that the trial court properly applied enhancement factor one (1). The appellant has a criminal record which includes several misdemeanor convictions but apparently no felony convictions. It was therefore appropriate for the trial court to enhance the sentence using the appellant's record of prior criminal convictions. However, the appellant argues that the use of a deadly weapon is an element of voluntary manslaughter and therefore it was improper for the court to enhance on this basis. We disagree. Voluntary manslaughter can be committed without the use of a deadly weapon. Accordingly, use of a deadly weapon is not an essential element of the crime. See State v. N. C. Jones, No. 01-C01-9207-CC-00237 (Tenn. Crim. App., at Nashville, May 13, 1993); see also State v. Raines, 882 S.W.2d 376, 385 (Tenn. Crim. App. 1994); State v. Shelton, 854 S.W.2d 116,123 (Tenn. Crim. App. 1992). Therefore, it was not error for the trial court to enhance the appellant's sentence based upon this factor.

The appellant is correct that the trial court erred when it applied enhancement factor ten (10) to enhance the sentence. This factor contemplates the situation where

because of the particular circumstances of the case, the proof establishes a high "risk to the life of or potential bodily injury to persons other than the victim." State v. Johnny Parker, No. 03C01-9307-CR-00214 (Tenn. Crim. App., at Knoxville, November 22, 1994), perm. to appeal denied (Tenn. 1995); see also State v. Hicks, 868 S.W.2d 729, 732 (Tenn. Crim. App. 1993). The appellant and the victim were alone on the porch of a private residence when the stabbing occurred. There simply was no evidence upon which the trial court could have concluded that there was a high risk to the safety of persons other than the victim.

We deem it appropriate to modify the sentence to four years because we conclude that enhancement factor ten (10) should not have been applied in this case but that the other factors were appropriately applied.

In addition to challenging the length of his sentence, the appellant also complains that the trial court refused to order probation or some other form of alternative sentencing. As a defendant with no significant criminal history convicted of a class C felony, the appellant was "presumed to be a favorable candidate for alternative sentencing." Tenn. Code Ann. § 40-35-102(6) (1995 Supp.). However, this presumption can be overcome by "evidence to the contrary." Id.

Tennessee Code Annotated section 40-35-103(1) sets forth the sentencing considerations for determining whether or not a defendant should be incarcerated. These include the need "to protect society by restraining a defendant who has a long history of criminal conduct," the need to "avoid depreciating the seriousness of the offense," the determination that "confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses," or the determination that "measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." Id.

The trial court imposed total confinement in this case in order to avoid depreciating the seriousness of the offense and to deter others who mix alcohol with

weapons. The trial court was understandably reluctant to order an alternative sentence in a case where the appellant's intentional criminal conduct resulted in the death of a fellow human being.

In order to deny probation on the basis that incarceration is necessary to avoid depreciating the seriousness of the offense, the court must find that the circumstances of the offense as committed must be "especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree..." and the nature of the offense, as committed, must outweigh all factors favoring probation. State v. Travis, 622 S.W.2d 529, 534 (Tenn. 1981); see also State v. Hartley, 818 S.W. 2d 370, 374-75 (Tenn. Crim. App. 1991).

The trial court relied heavily on the fact that a death occurred to justify its refusal to order alternative sentencing. However, the court did not find that the circumstances of the offense were "especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an exaggerated degree" as required by Travis and Hartley. In State v. McKenzie Monroe Black, No. 01C01-9401-CC-00006 (Tenn. Crim. App., at Nashville, July 14, 1995), we held that "in cases where the defendant is entitled to the statutory presumption of alternative sentencing, the existence of a death by itself cannot justify a sentence of total confinement under the provisions of the Sentencing Act." As in Black, we understand and sympathize with the trial court's unwillingness to sentence one who has taken the life of another to anything less than total confinement. However, the legislature has made it clear that in the absence of "evidence to the contrary," a defendant convicted of voluntary manslaughter is presumed entitled to precisely that. Accordingly, we are constrained to conclude that the trial court's refusal to order an alternative sentence on grounds that to do so would depreciate the seriousness of the offense was error.

The other reason given by the trial court in ordering total confinement was that an alternative sentence "would not be a deterrent for others who are similarly inclined

to party and drink and then pull out deadly weapons on one another." In order for general deterrence to provide a sufficient basis to overcome the presumption for alternative sentencing, there must be proof in the record that total confinement will have a deterring effect on similar crimes in the community. State v. Dowdy, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). There is no evidence in the record that appellant's confinement would have a deterring effect in the community beyond that inherent in the punishment for any criminal offense. As in Dowdy, the trial court's comments concerning crime in the community resulting from drunken arguments do not constitute evidence. Id. at 305.

As a result of the absence of evidence in the record from the trial, sentencing hearing or the pre-sentence report, we hold that the state failed to overcome the presumption that the appellant was a favorable candidate for alternative sentencing. Therefore, we remand this case to the trial court with instructions to consider the sentencing alternatives contained in Tennessee Code Annotated section 40-35-104. We remind the trial court that although the appellant is a favorable candidate for alternative sentencing, he has the burden of showing his suitability for probation. See Tenn. Code Ann. § 40-35-303(b) (1995 Supp.); see also State v. Bingham, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995).

In accordance with the foregoing, the judgment of conviction is affirmed. The sentence is modified to four years and the case is remanded to the trial court for reconsideration of alternative sentencing.

WILLIAM M. BARKER, JUDGE

CONCUR:

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DAVID G. HAYES, JUDGE

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JERRY L. SMITH, JUDGE