IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1996 SESSION

STATE OF TENNESSEE, * C.C.A. NO. 02C01-9502-CC-00032

APPELLEE, * FAYETTE COUNTY

VS. * Hon. Jon Kerry Blackwood, Judge

THOMAS EDWARD MURPHY, JR., * (Second Degree Murder)

APPELLANT. *

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Thomas E. Murphy, Jr., was convicted of the second degree murder of his daughter, Latashia Murphy. The trial court imposed an eighteen-year sentence. In addition to his challenge to the sufficiency of the evidence, the defendant submits the following issues for review:

> (1) whether the trial court erred by refusing to grant a mistrial because of the jury's exposure to a newspaper article published on the first day of the trial;
>
> (2) whether the trial court erred by refusing to grant a mistrial due to a reference to a prior arrest of the defendant; and
>
> (3) whether the sentence was excessive.

We affirm the judgment of the trial court.

The partially-decomposed body of the eighteen-year-old victim was discovered on February 6, 1994, in an abandoned graveyard in Fayette County. There were two bullet holes through her chest and one through her head. A nine millimeter shell casing was found beside her body. At trial, the pathologist who examined the body testified that any of these three wounds would have caused the instantaneous death of the victim.

The defendant's half-brother, Douglas Murphy (referred to as Murphy), was a key witness for the state. He testified that the defendant had learned some six years earlier that the victim, known as Tashia, was his daughter. Murphy related that he was with his girlfriend, Tonya Cornelius, at the defendant's residence in Oakland, Tennessee, on December 23, 1993, the last day that the victim was seen alive. He testified that the victim had an argument with the defendant about her boyfriend, Mickey Gansman, and threatened her: "Well, I can just put an end to

that[;] I can take care of Mickey and you'll never have to worry about going to his house again."

During this argument, the defendant and his daughter pushed each other; and the defendant called her a whore and threatened her life. When the defendant continued his threats, the victim, visibly upset, locked herself in the bathroom and responded, "Well if you do, I'll see you in Hell." Meanwhile, the defendant, while holding his nine millimeter gun and pulling the slide back, again threatened to kill the victim. The defendant then told Murphy and Ms. Cornelius, "[Y]'all haven't seen and y'all don't know nothing."

On their ride to their residence, Murphy and Ms. Cornelius saw Nathan Blackard, the defendant's stepson, and Nathan's stepbrother, Mark Seasongood. They told Nathan and Mark of the argument and warned them not to go to the defendant's residence. All four then proceeded to the home of Murphy's ex-wife, Vickie Murphy, in Bartlett, Tennessee. About forty-five minutes later, the defendant arrived; he was armed with the nine millimeter weapon and had mud on his boots and pants legs. The defendant claimed that he had dropped the victim off at her boyfriend's house in Memphis and then returned to Bartlett.

A few days later, however, during a trip to Florida, the defendant acknowledged to his half-brother that he had killed the victim; Murphy testified that the defendant, who had been drinking, was crying as he confessed the crime. Murphy also testified about another prior conversation in which the defendant asked Murphy and his stepson, Nathan, if they had ever seen a decomposed body; the defendant then said, "Somebody y'all know and that y'all love and will never see again is not far from here."

Police recovered the Czechoslovakian-made nine millimeter semi-automatic gun owned by the defendant. At the trial, Mr. George Jeram, recalled that the defendant had come into his liquor store around New Year's Day, shortly after the victim's disappearance, wanting to sell the gun and all of his other belongings so that he would have cash to move out west.

Steve Scott, a forensic scientist with the Tennessee Bureau of Investigation, conducted tests on the defendant's weapon and upon the cartridges found near the body and just outside the defendant's residence. Scott concluded that a number of these cartridge cases, including the one found beside the body, were fired from the defendant's nine millimeter gun.

Tonya Cornelius corroborated Doug Murphy's account of the events of December 23, 1993. She added that the defendant appeared to be "hyper," red, and sweaty by the time he arrived at Vickie Murphy's house. Ms. Cornelius testified that the victim's belongings, except her purse, were still at the defendant's residence. She specifically recalled seeing the victim's makeup, because the victim had always taken her makeup when she left home on earlier occasions.

Ms. Cornelius testified that the defendant and victim had bickered but that it was very unusual for them to engage in a physical altercation. She claimed that she would never have left the defendant's house had she any idea that "any of this would happen[]." Ms. Cornelius recalled that the defendant had called his daughter "whore" because she had recently slept with her stepbrother, Nathan Blackard, who did in fact, have a sexual encounter with the victim a week before her disappearance.

Nathan Blackard testified that he had left the defendant's residence early on the morning of the victim's disappearance. At about 11:00 a.m. he saw Murphy and Ms. Cornelius; after some conversation, he decided not to go back to the defendant's house, and instead, was at Vickie Murphy's house when the defendant arrived.

Blackard also testified about his trip to Cocoa Beach, Florida, with the defendant. During that month and a half to two months period, the defendant expressed concern about his daughter being missing. While acting normally during most of the Florida trip, the defendant, according to Blackard, eventually began to act paranoid and pick fights.

Vickie Murphy confirmed that on December 23, 1992, Doug Murphy and Tonya Cornelius arrived at her house with Nathan Blackard and Mark Seasongood. She testified that the defendant arrived about and hour or so later and tracked mud into her house; the defendant then contacted Michael Gansman, telling him that he had left the victim at his doorstep. Ms. Murphy claimed that the defendant had a nine millimeter Czechoslovakian semi-automatic in his possession and asserted that he always carried the weapon. She stated that several days later the defendant told her that the victim was in Florida.

Michael Gansman testified that the victim had been his girlfriend for about a year and a half at the time of her disappearance. He claimed that he last saw her on December 21st or 22nd and that, on December 23, the victim was supposed to beep him at his job. Gansman testified that he received three or four beeper messages at about 1:00 p.m. on that date. The beeper display indicated the calls were made from the defendant's residence and also contained the victim's

usual message followed by “911.” Gansman explained that he could not answer the call because he was working on a roof at that time. Later in the day, Gansman was beeped again, the beeper display indicating the call was being made from Vickie Murphy’s house. Gansman did return this call and spoke with the defendant, who told him he had dropped the victim off at Gansman’s residence.

I.

The defendant first contends that the evidence was insufficient to support the verdict of second degree murder. When sufficiency is at issue, of course, 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." Tenn. R. App. P. 13(e). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). This court may not reweigh the evidence, re-evaluate the evidence, or substitute its evidentiary inferences for those reached by the jury. State v. Carey, 914 S.W.2d 93, 95 (Tenn. Crim. App. 1995).

Furthermore, the credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in that testimony are matters entrusted exclusively to the jury as the trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). The relevant question for this court 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. Jackson v. Virginia, 443 U.S. 307, 314-24 (1979); State v. Evans, 838 S.W.2d 185, 190-91 (Tenn. 1992), cert. denied, 114 S. Ct. 740 (1994).

In order to satisfy the elements of second degree murder, the state must have proven that the defendant (1) unlawfully killed the victim and (2) that the killing was knowing. Tenn. Code Ann. § 39-13-210(a)(1). Knowing is defined as, "... act[ing] 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." Tenn. Code Ann. § 39-11-106(20). In our assessment, that has been shown. This record is replete with evidence, primarily circumstantial, that the defendant shot and killed his daughter and that he did so in a knowing manner. The two witnesses who last saw the victim alive testified that the defendant had ordered them to leave during a heated argument with the victim. The defendant was armed with a cocked gun at that moment, threatening his daughter's life. Doug Murphy and Tonya Cornelius testified that the defendant claimed that he had dropped the victim off at Michael Gansman's house; Gansman, however, never found her there and had his last communication from her in a beeper message at the same time the defendant had argued with the victim. Further, the defendant sold his gun only days after the victim disappeared and he lied about his reasons for doing it. The cartridge found near the body matched with his weapon. Finally, the defendant confessed his crime to his half-brother.

The defendant claims that the conviction was based upon mere inference from circumstantial evidence only. In this state, however, a crime may be established by the use of circumstantial evidence only. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987); State v. Bordis, 905 S.W.2d 214, 220 (Tenn. Crim. App. 1995). If based entirely upon circumstantial evidence alone, the proof "must be so strong and cogent as to exclude [beyond a reasonable doubt] every other reasonable hypothesis save the guilt of the defendant." Bordis, 905 S.W.2d at 220 (citing State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971)). Here the jury so

found. We would concur in that assessment. In our view, the jury had sufficient evidence to conclude that the proof excluded every other "reasonable hypothesis" excepting only the guilt of the defendant to second degree murder.

II.

Next, the defendant asserts that a newspaper article which appeared on the front page of the Metro section of the Commercial Appeal on the morning that the trial began prejudiced his right to a fair trial. The article posed as a motive for the crime the belief of Fayette County investigators that the victim "may have threatened to expose her father as a drug dealer shortly before she disappeared on December 23." Jennifer Biggs, Dad Goes on Trial in Teen's Slaying, Commercial Appeal, August 1, 1994, at B1. The article claimed that the defendant had a "history of drug-related arrests in Shelby County." Id. The defendant contends that law enforcement officers who cooperated with the paper intended to prejudice the entire jury pool.

During the voir dire, several prospective jurors acknowledged that they had read or heard information about the case. One juror testified that his exposure was limited to this particular article; when asked, however, whether reading the article had "caused [him] to form an opinion about the guilt or innocence of the accused," the juror answered that it had. He was promptly excused. Five other prospective jurors had read either the headlines or the article that morning. All five contended that they had not formed opinions about the guilt or innocence of the defendant based upon what they had read. Each agreed to determine the merits based solely upon testimony presented during the trial. Three of these five served on the jury.

The defendant contends that the statement of the first juror prior to being excused was a basis for the others in the jury pool to infer that the newspaper article was negative. The defendant asserts that individual voir dire was warranted.

The control of voir dire rests within the sound discretion of the trial judge. State v. Stephenson, 878 S.W.2d 530, 540 (Tenn. 1994); State v. Jefferson, 529 S.W.2d 674, 682 (Tenn. 1975). While the trial court has the authority to question the prospective jurors individually, Tenn. R. Crim. P. 24(a), this is only necessary when there is a significant possibility that the juror has been exposed to "potentially prejudicial material." State v. Claybrook, 736 S.W.2d 95, 100 (Tenn. 1987) (quoting Sommerville v. State, 521 S.W.2d 792, 797 (Tenn. 1975)). Here the defendant never requested individual voir dire; that typically constitutes a procedural bar to raising the issue on appeal. Moreover, the defendant concedes that this was not a highly publicized case. This single article, had it not been for its timing, would not likely have warranted the individual examination of jurors. The judge correctly concluded that all prospective jurors, except the one who had been excluded, could base their verdicts only upon what they were to hear at trial. See State v. Howell, 868 S.W.2d 238, 248 (Tenn. 1993), cert. denied, 114 S. Ct. 1339 (1994). The contents of the article were never referred to in front of the other jurors.

There was no abuse of discretion. State v. Compton, 642 S.W.2d 745, 746 (Tenn. Crim. App. 1982); State v. Witt, 572 S.W.2d 913, 917 (Tenn. 1978). In light of the circumstances here, we find that the jury was not prejudiced by collective voir dire and that the trial court did not err in denying the defendant's motion for a mistrial.

III.

Next, the defendant claims that a statement by a state witness referring to a prior arrest of the defendant should have resulted in a mistrial. Prior to trial, defense counsel made a motion to exclude any reference to drug activity on the part of the defendant. Trial court agreed to prohibit such references. During the testimony of Reed Westbrook, the Memphis police officer who conducted the missing-person report on the victim, he referred to an arrest which occurred shortly before the victim's death. When asked "[w]hat did [defendant] say about what happened between him and Tashia," the witness responded, "[t]hen a day or so prior to that, he was arrested in Memphis and he felt that the boyfriend was the cause of him being arrested." Defense counsel immediately sought a mistrial.

The state concedes that the statement was improper; however, we reject Defendant's suggestion that the State somehow was responsible for this testimony. The statement was neither solicited by nor responsive to the State's question by the prosecutor. See State v. Smith, 893 S.W.2d 908, 923 (Tenn. 1994), cert. denied, 116 S. Ct. 99 (1995). Furthermore, the trial court instructed the jury to disregard the answer. The law presumes that the jury followed the instructions of the trial court. State v. Gregg, 874 S.W.2d 643, 644 (Tenn. Crim. App. 1993). Moreover, while the statement should have been excluded, its effect, in the context of the entire trial, was minimal. Tenn. R. App. P. 36(b). A declaration of mistrial is appropriate only when absolutely necessary. See State v. Smith, 893 S.W.2d at 923 (upholding trial court's denial of a mistrial under similar circumstances).

IV.

Finally, the defendant alleges that the eighteen-year sentence is excessive. When an appeal challenges the length, range, or manner of service of a

sentence, this court conducts a de novo review with a presumption that the determination of the trial court was correct. Tenn. Code Ann. § 40-35-401(d). The presumption of correctness, however, only applies when the record demonstrates that the trial court properly considered the relevant sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting a review of the sentence, this Court must consider the evidence, the presentence report, the sentencing principles, the arguments of counsel, the nature and character of the offense, mitigating and enhancement factors, any statements made by the defendant, and the potential for rehabilitation or treatment. State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993). The defendant bears the burden of showing the impropriety of the sentence imposed. State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993).

At the time that the defendant committed this crime, the presumptive length of sentence for all felonies was the minimum sentence in the statutory range absent any enhancement and mitigating factors. Tenn. Code Ann. § 40-35-210(c); but see Tenn. Code Ann. § 40-35-210(c) (Supp. 1995) (amending the statute to provide that the presumptive sentence for a Class A felony is the midpoint of the range). Where one or more enhancement factors apply, but no mitigating factors exist, the trial court may properly sentence above the minimum but still within the range. Tenn Code Ann. § 40-35-210(d). Where both enhancement and mitigating factors apply, the trial court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate to the enhancement factors, and then reduce the sentence within the range as appropriate to the mitigating factors. Tenn. Code Ann. § 40-35-210(e). The weight afforded an enhancement or mitigating factor is left to the discretion of the trial court so long as the trial court complies with the purposes and principles of the Tennessee Criminal Sentencing

Reform Act of 1989 and its findings are supported by the record. State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995).

The defendant was convicted of second degree murder, a Class A felony. See Tenn. Code Ann. § 39-13-210(b). As a Range I standard offender, he was eligible for a sentence of fifteen to twenty-five years. Tenn. Code Ann. § 40-35-112(a)(1). The trial court found the following enhancement factors: the defendant employed a firearm during the commission of the offense and the defendant allowed the victim to be treated with exceptional cruelty in the concealment of the body. See Tenn. Code Ann. §§ 40-35-114(9) and (5). The trial court found no mitigating factors.

The defendant takes issue only with the application of Tenn. Code Ann. § 40-35-114(5) arguing that concealment of the body did not qualify as "exceptional cruelty." We must agree based upon our prior case law. See State v. John Dennis Rushing, No. 01C01-9501-CR-00020 (Tenn. Crim. App., at Nashville, February 13, 1996), perm, to appeal filed; State v. Robert Williams Holmes, No. 01C01-9303-CC-00090 (Tenn. Crim. App., at Nashville, August 11, 1994), perm. to appeal denied, concurring in results only, (Tenn. 1995) (limiting the application of factor (5) to the treatment of a victim during the commission of an offense). The state insists, however, that we must also consider the repeated threats to the victim and the multiple gunshot wounds found in her body as additional grounds for the application of this enhancement factor. We disagree. The expert proof was that any one of the shots would have been immediately fatal to the victim. Case law establishes that "exceptional cruelty" requires a finding of cruelty over and above that inherently attendant to the crime of which a defendant is convicted. State v. Embry, 915 S.W.2d 451, 456 (Tenn. Crim. App. 1995). Moreover, threats, while

undeniably cruel, are not always exceptional. Compare State v. Robert E. Sanderson, No. 01C019308CR-00269 (Tenn. Crim. App., at Nashville, September 27, 1995), perm. to appeal denied, (Tenn. 1996) (finding that application of factor (5) was justified).

While one factor was misapplied, another factor, not considered by the trial court, does. Clearly, the defendant abused a position of private trust. Tenn. Code Ann. § 40-35-114(15). Typically, this factor is used to enhance the sentences of defendants who are the parents or relatives of the child victims of sexually related crimes. See, e.g., State v. David E. Walton, Jr., No. 02C01-9501-CC-00007 (Tenn. Crim. App., at Jackson, August 9, 1995); State v. Andrew Johnson, Jr., No. 02C01-9304-CR-00050 (Tenn. Crim. App., at Jackson, April 20, 1994), perm. to appeal denied, (Tenn. 1994); see also State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993) (applying factor (15) to a defendant who was the live-in boyfriend of the young victims' mother and who committed the sexual offenses while living with the victims). This factor would also apply to this situation.

This factor enhanced the sentence of a defendant convicted of the aggravated assault of his estranged wife. State v. Lester Bennett, No. 03C01-9403-CR-00104 (Tenn. Crim. App., at Knoxville, December 8, 1994). The defendant owed the victim a duty of care. It is unlikely that witnesses to the argument would have left the victim with the defendant, had he not been her father. In our view, this factor applies. In light of the applicability of this enhancement factor, the eighteen-year sentence appears to be entirely appropriate.

Accordingly, the judgment is affirmed.

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Gary R. Wade, Judge

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Joe B. Jones, Presiding Judge

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Jerry L. Smith, Judge (Not Participating)