IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY 1996 SESSION

FILED

September 18, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	C.C.A. NO. 03C01-9510-CR-00331
	)	
Appellee	)	KNOX COUNTY
	)	
v.	)	HON. RAY L. JENKINS,
	)	JUDGE
HUBERT JOHNSON,	)	
	)	First-degree murder; attempted
Appellant	)	first-degree murder

FOR THE APPELLANT

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On appeal

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At trial

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OPINION FILED ________________________

AFFIRMED

JOHN K. BYERS
SENIOR JUDGE

O P I N I O N

The defendant was convicted by a jury of first-degree murder and attempted first-degree murder. On the first count, he was sentenced to life imprisonment; on the second, he was sentenced to 15 years in prison to run consecutively to his serving his sentence on count one.

The defendant appeals, raising these issues:

1. Whether it was plain error for the attorney general to improperly impeach defendant while cross-examining him by referring to his post-arrest silence, the misstatements of his counsel and to prior bad acts.

2. Whether the defendant was denied effective assistance of counsel by virtue of counsel's failure to object to the state's impeachment questions.

3. Whether the trial court erred by failing to allow the defendant rather than his attorney to cross-examine a witness.

4. Whether there is sufficient evidence to support the defendant's conviction for attempted first-degree murder.

5 Whether the trial court erred in failing to charge criminally negligent homicide and self-defense.

6. Whether the trial court erred in imposing consecutive sentences.

We affirm the judgment of the trial court.

A few weeks prior to Deborah Sligh's death, she and the defendant broke off their three-year live-in relationship and the decedent moved in with her parents, Acquilla Cantrell and Richard Jackson.

Acquaintances of the decedent, Yolanda Warren and Linda Walker, testified that on November 23, 1993, the day before decedent was shot, they were in the car with the defendant. He told them that if he were to come around and he winked his eye, they should get out of the way because "whatever is standing is going to fall." Both women gave very similar testimony concerning the circumstances in which the threat was made, the day it was made and its phrasing. The witnesses testified they

told the decedent and her parents about the defendant's threat.

On November 24, 1992, the defendant came to decedent's parents' house between 1:00 p.m. and 2:00 p.m. and visited with them and the decedent. Ms. Cantrell, decedent's mother, left for work at around 2:00 p.m., her car broke down within the view of the family's porch and Mr. Jackson, decedent's stepfather, drove his car up so that his wife could take his car to work. The decedent's parents saw defendant leave their house and either run or walk briskly to his car and drive away.

Linda Walker was sitting on a sofa in the living room near the entrance of decedent's family home. She testified the decedent, who had answered the phone, came to the door preparing to go outside at the same time the defendant, who had been on the porch, came to the door to come inside. Defendant entered, holding a gun in his right hand. He said, "Bitch, I told you," and he hit decedent in the forehead with the gun and then turned decedent around and shot her in the back of her head.

Ms. Walker testified the defendant then approached within about three feet of her, stating, "Bitch, I ought to kill you for telling it." She asked him not to shoot her. She leaned forward when he shot and lay as if she had been shot. The defendant then left the house.

The defendant testified that when he entered the house, decedent came out of the kitchen with something in her right hand. He testified she said, "I'm not going to have . . . " and she raised her right hand. He testified he pushed her right hand to the left and the gun discharged. He testified that he pushed her hand back and hit her in the head and that he then pulled her hand behind her head. He testified that while he and decedent were struggling, Ms. Walker who was standing behind decedent also grabbed the gun, and it fired. The gun then fell on the floor and, the defendant testified, he picked it up and left. He testified the decedent was still standing when he left and he did not know she had been shot.

On the following day, police officers arrested the defendant in Morristown at

the home of defendant's ex-wife. A gun was taken from his pants pocket. Later that same day, decedent, who had been in critical condition since the shooting, died.

Dr. Elizabeth Hubbard, a pathologist, performed an autopsy upon the decedent's body. She testified decedent had a contact gunshot wound from a gunshot which entered in the back of the head, traveled right and forwards and lodged adjacent to her neck and her right ear. She testified decedent died from this gunshot wound. She further testified decedent had extensive hemorrhage overlying the brain in two areas above each eye.

Gary Price, an officer with the Knoxville Police Department, testified he went with other officers to the home of the decedent's parents on November 25, 1993 to investigate the shooting. They found a bullet hole in the wall of the living room. Mr. Price testified, based on his observation of the entrance and exit holes, the bullet traveled on a slight downward angle between its entrance and exit from the wall.

On cross-examination, the prosecutor asked the following questions of the defendant:

> Q. Okay. Now, you mentioned that you practiced law in New Jersey, and I believe Mississippi, Federal District Court here, et cetera?
> A. Yes, sir.
> Q. In fact, sir, you pretty much--when you came to Knoxville, you were--your license had been suspended in New Jersey for approximately, I believe, seven years between 1982 and--
> Mr. Hill: Objection, your Honor. Relevance.
> The Court: Overruled.
> Q. --and--1982 and--and I believe it was re-instated in 1991?
> A. It was suspended for three years.
>
> * * *
>
> Q. Mr. Johnson, the order went down April of 1991, and you were taking cases in 1989 down here and other federal courts around the country.
> A, No, that's not correct.
> Q, You were committing fraud about--on these courts, weren't you?
> A. That was--that's not correct. There is not one case that I have ever accepted until after I was re-instated.
>
> * * *
>
> Q. Okay. And you moved--isn't it right, sir, you moved into a hotel with a couple of women?
> A. No, of course not.

Q. That's not right?
A. No.
Q. Because you were partying with them?
A. No, that's not right.
Q. That's not right?
A. No, sir.

* * *

Q. You keep trying to say Debbie did--did drugs. What did you do?
A. I didn't do anything, counselor. I don't even drink.
Q. You don't even drink?
A. Except wine.
Q. What about the marijuana you had growing in the back yard?
A. I have no marijuana growing in the back of my house.
Q. You didn't?
A. No, sir. Nor did Debbie.
Q. You're denying that?
A. Yes, sir, I am.
Q. Okay. You didn't sell any marijuana or any cocaine?
A. No, sir, never did. Didn't have to. I made enough money practicing law, counselor.

These remarks by the State couched in question form, but not shown by any previous or subsequent evidence to be true or relevant, were gratuitous interjections that should have been stricken *sua sponte* by the judge and should have elicited a curative instruction to the jury. Further, though there was no objection made by the defendant at the time, this conduct could call for a reversal of this case because the conduct exceeds the boundary that hard blows but not foul ones may be struck by the state. *See Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935); *see also* EC 7-13; TENN. SUP. CT. R. 8, Code of Professional Responsibility. . If the evidence of guilt was not so overwhelming, we would reverse this case because of this conduct. However, we are not inclined to punish the people unnecessarily for this conduct. We assume our admonition will be sufficient to show to the state that these types of testimonial interrogations are not permissible under the guise of cross-examination.

The prosecutor also improperly commented on the defendant's failure to make a statement following arrest:

Q. And you--sir, is there any particular reason when the police asked you, as your lawyer I believe asked you pursuant to direct examination, what happened here, Mr. Johnson, did you tell them what you're telling this jury today?

A. The police?

Q. Yes. Did you tell them--

A. I have a right not to make any statement, and I chose to elect not to make any statement. I have that right as a person accused of a crime, and I chose not to--make that right as stated.

Q. Well, I understand you have that right, Mr. Johnson.

A. Well, I exercised it.

Q. I understand that you have that right, but that--that day when the police came and got you--after all, you hadn't done anything, right?

A. Right.

Q. Deborah Sligh attacked you with a gun, right?

A. Right.

Q. You didn't shoot her?

A. Right.

Q. Right?

A. Right.

Evidence of pretrial silence should be admitted with caution and only where such silence is patently inconsistent with the defendant's testimony. *Braden v. State*, 534 S.W.2d 657, 660 (Tenn. 1976). In so stating, the Court in *Braden* referred to a prior decision in which the prosecutor was allowed to show defendant's silence while in police custody after he had testified that "`he was bent upon reporting the facts of this burglary as soon as he could get in touch with certain other officers.'" *Id.* In this case, defendant specifically testified that he invoked his Fifth Amendment right not to make a statement. The defendant did not object to these questions; therefore, the issue is waived.

On re-cross examination of the defendant, the following exchange took place:

Q. Okay. Sir, but you've worked very closely with your--with your attorney in the preparation of this case, have you not?

A. I've worked with him as I would any attorney, yes, sir. That's correct.

Q. And as you would any attorney?

A. Yes, sir.

Q. This is your case, Mr. Johnson.

A. That's right.

Q. And you've worked closely with him, because it's--it's yourself that's on the line here, is it not?

A. Oh, I'm not denying that. You're right, counselor. You're right.

> Q. Okay. You worked closely together with him in the defense of your case?
>
> A. Obviously, that's correct.
>
> Q. From the beginning?
>
> A. Yes, sir.
>
> Q. Not as you would any other attorney, right?
>
> A. On a case that I was involved in, it would be the same, I would think.
>
> Q. Okay. All right. Now--and he has filed some documents pursuant to you all discussing the case together, and one of those documents, sir, is the motion for expedited bond reduction hearing, is it not?
>
> A. That's right.
>
> Q. He has filed that motion. Okay. In that motion he was complaining that your bond was too high, right?
>
> A. Right.
>
> Q. And he was trying to complain that in some other cases here in Knox County, you said in the motion that was filed, "A white female was recently charged with murder in the second degree, having caused the death of a white male by battering him in the head repeatedly with a tire iron, and her bond was set at $10,000. The instant defendant"--assuming the instant defendant is you--"caused the death of the decedent in this instant matter by gunshot, either in a state of temporary insanity or in the course of the commission of an assaultive act."
>
> Now, at that time your theory was that you did this while you were suffering from temporary insanity.
>
> A. No, sir, that is not my theory. Those are not my words. That's an application filed by the attorney. Those are not my words, those are not my theories, and they never were my words and never were my theories.

The preceding questions are obviously aimed at weakening defendant's credibility by challenging his version of the events surrounding the shooting of the decedent. Under TENN. R. CRIM. P. 12.2(e), "Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention." Subdivisions (a) and (b) set forth the requirement that a defendant provide timely written, pre-trial notice of an intent to rely on the defense of insanity and to introduce expert testimony relating to a mental condition of the defendant bearing upon the issue of guilt. No such notice was provided in this case. However, we find that the rationale behind the prohibition also prohibits the line of questioning presented above. This protection against references to defenses considered and discarded by the defendant applies under these circumstances. No objection was made to this line of inquiry.

The general test to be applied to any prosecutorial misconduct is "whether the improper conduct could have affected the verdict to the prejudice of the defendant." *Harrington v. State*, 215 Tenn. 338, 340, 385 S.W.2d 758, 759 (1965). We find that the areas of cross-examination of which we do not approve, in the face of the evidence of guilt, could not have affected the verdict to the prejudice of the defendant.

The defendant argues that his counsel was ineffective, and his Sixth Amendment right to counsel was violated. The appropriate test for determining whether counsel provided effective assistance at trial is whether his or her performance was within the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1974). In *Strickland v. Washington*, the United States Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show, first, that counsel's performance was deficient and second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. 466 U.S. 668, 687 (1984). In order to show prejudice, the defendant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. Even if counsel was not competent, which we do not find, the evidence of guilt is so overwhelming in this case that any alleged incompetency did not affect the result of the proceeding.

The defendant argues the trial court should have instructed the jury on criminal negligence and self-defense, although he did not request either instruction at the trial. Generally, the trial judge must charge the jury on lesser included and lesser grade offenses even where there is no request for such an instruction. TENN. CODE ANN. § 40-18-110(a). However, where the record shows that the defendant was guilty of the greater offense and there is no evidence permitting an inference of guilt of the lesser offense, failure to charge on the lesser offense is not error. *State*

v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990). Here there is no evidence in the record that defendant acted with criminal negligence as it is defined by TENN. CODE ANN. § 39-11-302. His version of the facts was that decedent had the gun, and his actions were only aimed at preventing the decedent from "coming up toward" him with the "object" and then to make decedent release the gun.

The evidence in this case is not sufficient to raise an inference which would require an instruction on self-defense. The defendant specifically testified that the shooting was an accident. Further, he did not testify that he believed that he was in imminent danger of death or serious bodily injury at the time the shooting occurred. This coupled with the failure of the defendant to request an instruction on self-defense, leads us to determine there was no error in the trial court's not giving such a charge. TENN. CODE ANN. § 39-11-611(a).

The defendant challenges the sufficiency of the evidence to support the conviction for attempted first-degree murder. A jury verdict of guilty, when supported by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State. *State v. Williams,* 657 S.W.2d 405, 410 (Tenn. 1983). This Court does not reweigh or re-evaluate the evidence and is required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1985). The evidence in the record is certainly sufficient for a rational trier of fact to find the essential elements of the offense beyond a reasonable doubt.

We find that the trial court did not err in not allowing defendant to cross-examine the eye-witness, Linda Walker, rather than his counsel.

The defendant challenges the action of the trial court in running his 15-year sentence for attempting to commit first-degree murder consecutively with his life imprisonment for first-degree murder. When a defendant challenges a sentence, this Court must conduct a *de novo* review with a presumption that the trial court's

determinations are correct. TENN. CODE ANN. § 40-33-401(d). The defendant in this case was clearly a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing a crime when the risk to human life was high. TENN. CODE ANN. § 40-35-115. The sentence he received reasonably relates to the severity of the offenses committed and an extended sentence is necessary to protect society from further serious criminal conduct. *State v. Wilkerson*, 905 S.W.2d 933 (Tenn. 1995). This defendant shot a woman with premeditation and deliberation and then shot at the friend who had warned the decedent of defendant's threats and who had witnessed the shooting.

We affirm the judgment of the trial court, with costs to the defendant.

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John K. Byers, Senior Judge

CONCUR:

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John H. Peay, Judge

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Jerry L. Smith, Judge