IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1996 SESSION

FILED

November 15, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)
	) C.C.A. No. 01C01-9508-CC-00269
Appellee,	)
	) Wayne County
V.	)
	) Honorable James L. Weatherford, Judge
	)
TIMOTHY JENKINS,	) (Attempted Second Degree Murder)
	)
Appellant.	)

FOR THE APPELLANT:

Curtis F. Hopper
Attorney at Law
404 West Main Street
P.O. Box 220
Savannah, TN 38372

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter

Darian B. Taylor
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Mike Bottoms
District Attorney General

Robert C. Sanders
Asst. Dist. Attorney General
P.O. Box 459
Lawrenceburg, TN 38464

OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

O P I N I O N

The appellant, Timothy Jenkins, was convicted of attempted second degree murder. He was sentenced to twelve years incarceration and fined $25,000.00. He raises five issues on appeal and argues:

1. The trial court erred in not allowing state of mind evidence;
2. The evidence was insufficient to support his conviction;
3. The trial judge failed to properly perform his duty as thirteenth juror;
4. His sentence was excessive; and
5. His fine was excessive.

We affirm.

FACTS

In July of 1994, the victim summoned the police to remove the appellant from his home. As he was being escorted from the victim's residence, the appellant informed the victim that he "would get him back for this."

Karen Wagner testified at trial. She stated that in September of 1994, she, the appellant, Terry Dixon, and Tina Vines were together in an automobile driven by Ms. Vines. They made plans to go to a fair. Ms. Vines told the appellant that they could get money from the victim. She headed toward the victim's house. The appellant responded, "I'd like to kick his butt for calling the law on [me]." Prior to arriving at the victim's house, Ms. Vines stopped at an underpass. Both the appellant and Mr. Dixon exited the car.

Ms. Vines and Ms. Wagner drove to the victim's home. When they arrived, Ms. Vines honked her horn until the victim walked outside. She urged the victim to accompany them to a fair. He acquiesced.

The victim got in the car with Ms. Vines. They then proceeded back to the underpass where Ms. Vines had previously dropped off the appellant and Mr. Dixon. The victim asked Ms. Vines where she was going. Ms. Vines responded that they were going to pick up the appellant and Mr. Dixon. The victim stated "[n]o, don't take me back down there, just take me home . . . I don't want to be around them." Ms. Vines then assured the victim that everything was fine. The victim responded, "I just don't want no trouble."

Ms. Vines, Ms. Wagner, and the victim arrived at the underpass. The appellant and Mr. Dixon got into the back seat with the victim. After approximately five to ten minutes, the appellant began asking the victim why he had called the law on him. The appellant then elbowed the victim in the face and instructed Ms. Vines to stop the car.

When the car stopped, the appellant and the victim exchanged words. Ms. Wagner testified that the victim indicated he did not want to get out of the car. The appellant then forcefully removed the victim from the car. The appellant picked up a rock and began beating the victim with the rock. Ms. Wagner heard the appellant yell "[d]ie" and saw blood "going everywhere." She thought the victim was dead.

The victim suffered massive trauma to his face and head. He sustained a broken nose and a cracked forehead. His teeth were jammed down into his throat. He had to be airlifted by helicopter to Nashville.

STATE OF MIND EVIDENCE

At trial, the appellant attempted to establish a self-defense theory. He testified as to his version of the events as they transpired. He stated that the victim was drunk, overbearing, and attracted to his girlfriend, Ms. Vines. He stated that the victim told him "[y]ou ain't no good for her" and made comments

about his family. The victim called him an SOB several times. Later, the victim pulled out a knife. The appellant stated that the victim swung the knife toward him and said "I'll cut off your head off." The appellant claimed that he told the victim to put the knife away before he accidentally cut someone.

The appellant testified that Ms. Vines stopped the car. She then told them to get out of the car if they wanted to fight. The appellant, however, exited the car only to relieve his bladder. He alleged that while he was urinating, the victim jumped him and knocked him to the ground. He stated that the victim then choked him and attempted to stab him. During the ensuing struggle, the appellant maintained that he grabbed a rock and struck the victim in self-defense.

On direct examination, the appellant attempted to offer evidence of the victim's reputation for violence. Initially, he testified that the victim had pulled a knife on a deputy. Then the appellant stated:

> A. I've heard people say that he's pulled a knife on them out there at the beer joint he goes to.
>
> Mr. Sanders: Objection to what he's heard people say, Your Honor.
>
> The Court: Sustain the objection, jury will disregard that last statement.
>
> . . .
>
> Q. Your Honor, believed he can testify as to what he knows.
>
> The Court: Well, what he knows, yeah, but not what somebody told him and the threats that were made to him about himself, he can do that. Go [a]head.

The trial judge apparently sustained the objection on the basis of hearsay.

Evidence of the victim's reputation for violence, in this context, is not offered for the truth of the matter asserted. Whether the victim actually

brandished a knife at a beer joint was irrelevant.[1] The statement was offered to show the appellant's state of mind or his apprehension of imminent danger. Accordingly, the excluded testimony was neither hearsay nor inadmissible.

Upon review of the entire record, we find that the error did not affect the jury's verdict. The appellant developed a self-defense theory. He proffered evidence that the victim: (1) carried a knife, (2) on occasion used a knife in a combative manner, and (3) was the first aggressor. Overwhelming evidence, however, suggested that the appellant was the aggressor. Both the victim and a co-defendant testified that the appellant was the aggressor. The jury apparently accredited their testimony over that of the appellant's. The error was, therefore, harmless.

SUFFICIENCY

The appellant alleges that the evidence was insufficient to support his conviction. The appellant was indicted for attempted first degree murder. The jury, however, acquitted him of attempted first degree murder and found him guilty of attempted second degree murder. He fallaciously argues that his acquittal of first degree murder negated the finding of the requisite mental elements of second degree murder.[2] He argues this negation of mental elements precluded the jury from finding him guilty of attempted second degree murder.

Great weight is accorded jury verdicts in criminal trials. Jury verdicts accredit state's witnesses and resolve all evidentiary conflicts in the state's favor. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); State v. Banes, 874 S.W.2d 73, 78 (Tenn. Crim. App. 1993). On appeal, the state is entitled to both

---

[1] Had the statement been offered to prove that the victim brandished a knife, then a hearsay problem would have attached.

[2] The appellant's brief argues "[b]y finding [the appellant] not guilty of attempted first degree murder, [sic] that discredited the [s]tate's theory that this was ever a plan, or that the act was premeditated."

the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832 (Tenn. 1978). Moreover, guilty verdicts remove the presumption of innocence, enjoyed by defendants at trial, and replace it with a presumption of guilt. State v. Grace, 493 S.W.2d 474 (Tenn. 1973). Appellants, therefore, carry the burden of overcoming a presumption of guilt when appealing jury convictions. Id.

When appellants challenge the sufficiency of the evidence, this Court must determine whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); State v. Duncan, 698 S.W.2d 63 (Tenn. 1985); Tenn. R. App. P. 13(e). The weight and credibility of a witness' testimony are matters entrusted exclusively to the jury as the triers of fact. State v. Sheffield, 676 S.W.2d 542 (Tenn. 1984); Byrge v. State, 575 S.W.2d 292 (Tenn. Crim. App. 1978).

One intending an act that would constitute second degree murder, if accomplished, but fails to accomplish the intended act is guilty of attempted second degree murder.[3] Tenn. Code Ann. § 39-12-101 (1991 Repl.); State v. Kimbrough, 924 S.W.2d 888, 890 (Tenn. 1996). Second degree murder is "a knowing killing of another." Tenn. Code Ann. § 39-12-101 (1991 Repl.); see State v. Estes, 655 S.W.2d 179, 193 (Tenn. Crim. App. 1983) (holding "willful and malicious, unlawful killing of a person upon a sudden impulse of passion, without adequate provocation, and disconnected with any previous formed design to kill is murder in the second degree."). Second degree murder requires malice. Capps v. State, 478 S.W.2d 905 (Tenn. Crim. App. 1972). Malice may be inferred from the use of a deadly weapon. State v. Caldwell, 671 S.W.2d

[3] Attempted second degree murder, as charged in this case, is acting with the intent to commit second degree murder, "under circumstances surrounding the conduct as the defendant believed them to be, and the conduct constituted a substantial step toward commission of the offense." Tenn. Code Ann. § 39-12-101(a)(3) (1991 Repl.). Conduct does not constitute a substantial step unless one's entire course of action is corroborative of an intent to commit the offense. Tenn. Code Ann. § 39-12-101(b) (1990 Repl.).

459, 463 (Tenn. 1984); State v. Byerly, 658 S.W.2d 134, 138 (Tenn. Crim. App. 1983). A jury may also infer malice from the circumstances surrounding the killing. State v. Smith, 751 S.W.2d 851, 855 (Tenn. Crim. App. 1988).

The record reveals that the appellant waited at an underpass for approximately forty minutes for the victim. When the appellant's friends returned with the victim and the victim saw the appellant waiting at the underpass, the victim requested to be taken home. The victim's requests, however, were ignored.

The appellant entered the automobile and sat in the rear seat with the victim. The appellant asked the victim why he called the "law" on him and had him thrown out of victim's house. The appellant then began striking the victim in the face with his elbow. The car pulled over to the side of the road. The appellant then dragged the victim out of the car and beat him with a rock. He yelled "die" as he was hitting him.

The beating rendered the victim unconscious. He had lost a considerable amount of blood, and his pulse was low. His face was swollen, and his eye appeared to be hanging from its socket. His tongue was so swollen that a normal ventilation tube could not inserted into his mouth. Moreover, the victim had to be life flighted to the hospital.

Contrary to the appellant's assertions, the record amply supports the jury's findings. The jury could have found that, although the appellant lacked the requisite premeditation and deliberation for first degree murder, he intended to kill the victim as he repeatedly struck the victim with the rock. This issue is devoid of merit.

13TH JUROR

The appellant's next assignment of error argues that the trial judge failed to properly discharge his duty as thirteenth juror. The appellant argues that the court erred by "simply accepting the jury's verdict without making any particular findings of fact . . . ." The appellant maintains that the trial court's use of "accept" shows that the trial court failed to make specific findings of fact and improperly deferred to the jury's findings.

The appellant's argument is misguided. The proper inquiry is not the use of any magical verbiage, but whether the trial court unequivocally found the evidence sufficient to support the conviction. In this case, the trial judge neither equivocated on whether the evidence was sufficient nor expressed dissatisfaction with the judgment.[4] See State v. Dankworth, 919 S.W.2d 52 (Tenn. Crim. App. 1995). Accordingly, this issue is without merit.

EXCESSIVE SENTENCE

The appellant's last assignment of error challenges his sentence as being excessive. He argues: (1) the trial court erred in applying Tenn. Code Ann. § 40-35-114(1) (1995 Supp.), (2) the trial court erred in applying Tenn. Code Ann. § 40-35-114(2) (1995 Supp.), (3) the trial court erred in applying Tenn. Code Ann. § 40-35-114(4) (1995 Supp.), and (4) the trial court erred in applying Tenn. Code Ann. § 40-35-114(10) (1995 Supp.).

I

Tennessee Code Annotated § 40-35-114(1) permits enhancement for a previous history of criminal behavior in addition to that necessary to establish range. The record indicates that the appellant has had approximately forty (40)

---

[4] The trial judge stated:

> I'm satisfied with the judgment or the verdict of the jury, and I'm satisfied with the sentence that I have imposed.

criminal convictions that were not used in establishing range. This factor is amply supported.

II

Tennessee Code Annotated § 40-35-114(2) permits enhancement when the defendant was a leader in the commission of a crime involving two or more criminal actors.[5] The record supports a finding that Wagner, Vines, and Dixon were all aware and participated in the appellant's scheme to physically assault the victim. Moreover, the record supports a finding that the appellant was the leader in the commission of the crime. This issue is without merit.

III

Pursuant to Tenn. Code Ann. § 40-35-114(4), sentencing courts may enhance provided the victim was particularly vulnerable due to age. The victim was fifty-one years old at the time of the attack. He weighed approximately 140 pounds. The victim had consumed "a couple of six-packs [of beer]" prior to being attacked. The victim stated that he was not in "any condition to defend [himself]."

The victim's inability to defend himself due to his voluntary intoxication, under the circumstances of this case, support enhancement. See State v. Beckmeir, 902 S.W.2d 418 (Tenn. Crim. App. 1995) (holding victim's intoxication which rendered her unconscious was evidence supporting factor). However, the weight afforded this factor should be minimal. This issue is without merit.

IV

---

[5] The appellant erroneously argues that:

> In order for this [factor] to apply, it must be shown beyond a reasonable doubt that Vines, Wagner and Dixon were criminal actors in this case.

This argument does not comport with the sentencing procedure in Tennessee. The 1989 Act does not require the state to prove this factor beyond a reasonable doubt.

Tennessee Code Annotated § 40-35-114(10) permits enhancement when a defendant has no hesitation about committing a crime involving a high risk to human life. Factor (10) is an essential element of attempted second degree murder. State v. Crow, No. 01C01-9310-CR-00348 (Tenn. Crim. App. May 11, 1995). Accordingly, the factor was improperly applied.

MITIGATING FACTOR

The appellant alleges that the trial court erred in not applying Tenn. Code Ann. § 40-35-113(2) (1990 Repl.). Factor (2) permits sentence mitigation when the defendant acted under a strong provocation. The appellant asserts that a strong provocation existed because the victim "wielded a knife towards [him]." The record, however, supports the trial judge's finding that the appellant's attack was unprovoked.[6] This issue is without merit.

SENTENCES

The trial court found and the record supports application of enhancement factors (1), (2), and (4) to the appellant' sentence. Factor (10), however, was improperly applied. In addition, we find that the appellant employed a deadly weapon during commission of his offense.[7] In the absence of any mitigating factors, we cannot state that the evidence preponderates against the sentences imposed by the trial judge.

EXCESSIVE FINES

---

[6] The victim's knife was found unopened and in his pocket by a hospital attendant.

[7] Deadly weapon is defined as "[a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury." Tenn. Code Ann. § 39-11-105(a)(5)(B) (1991 Repl.); see also State v. Hicks, 835 S.W.2d 32 (Tenn. Crim. App. 1992) (finding sock filled with coins deadly weapon). Rocks have, for centuries, been utilized as deadly weapons.

The appellant's last assignment of error is that his fine was excessive. The jury assessed him the maximum fine of $ 25,000.00. He argues that he makes only $ 5.00 an hour and, therefore, the fine of $ 25,000.00 is "clearly beyond that which [he] is able to pay."

The defendant's ability to pay a fine is not necessarily a controlling factor. Oppressive fines can disrupt rehabilitation. A significant fine, however, is not automatically prohibited merely due to imposition of a financial hardship. Fines may be punitive. State v. Marshall, 870 S.W.2d 532, 542 (Tenn. Crim. App. 1993). Accordingly, other factors must be considered when assessing a fine's appropriateness.

Upon consideration of the record and the intentions of the Sentencing Reform Act, we conclude that the fine is appropriate. The appellant is a poor candidate for rehabilitation and has apparently been less than candid with the trial court. He has an extensive criminal record. His social history and background show little productivity to society. He inflicted serious and permanent injuries upon the victim. To lessen or obviate the fine may depreciate the seriousness of the offense. This issue is without merit.

AFFIRMED

_____

PAUL G. SUMMERS, Judge

CONCUR:

_____
GARY R. WADE, Judge

_____
L. T. LAFFERTY, Special Judge