FILED

December 12, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1996 SESSION

STATE OF TENNESSEE	)	NO. 03C01-9503-CR-00060
	)	
Appellee,	)	COCKE COUNTY
	)	
VS.	)	HON. WILLIAM R. HOLT, JR.,
	)	JUDGE
	)	
EDWARD THOMPSON	)	(Attempted Second Degree Murder;
	)	Aggravated Kidnapping; Theft of
Appellant.	)	Property over $1,000)

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OPINION FILED:_____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Edward Thompson, appeals as of right his convictions in the Cocke County Circuit Court of attempted second degree murder, aggravated kidnapping, and theft of property over $1,000.00. As a Range II offender, appellant received respective sentences of twenty (20) years, twelve (12) years, and four (4) years. The latter two sentences were ordered to be served consecutively to the twenty (20) year sentence, but concurrent with each other. Appellant's effective sentence, therefore, is thirty-two (32) years.

On appeal, appellant argues that the evidence was insufficient to support any of the guilty verdicts and that he should not have received consecutive sentences. As a part of his sufficiency issue, the appellant also contends that the trial court erred in failing to instruct the jury on the lesser offense of attempt to commit voluntary manslaughter. Finding no error, we affirm appellant's convictions and consecutive sentences.

On October 20, 1993, appellant and the victim, Kevin Hall, went to the Woodzo Drive-In in Newport to see a showing of the Beverly Hillbillies. Appellant and Hall were friends and traveled to the movie in Hall's car. Hall testified that both he and appellant were sniffing toluene that evening. Toluene is a paint thinning substance commonly called "tuleo." Admittedly, this is an illegal activity and according to Hall, "messes you up. . . it makes you crazy." En route to the movie, the friends stopped at a liquor store and purchased vodka and orange juice, which they both drank during the movie. Testimony also reflects that appellant was taking pills of an unknown nature prior to the drive-in visit.

During the movie, appellant spilled his container of tuleo in Hall's car and asked Hall to take him home to get more tuleo. Hall refused to leave the movie and a brief argument ensued. Appellant left the vehicle, but shortly returned and sat down in the passenger's seat of the car. Hall continued to watch the movie. Moments later, he

heard a gunshot and realized that blood was running down the side of his face. Hall had been shot in the head by appellant. Appellant quickly exited the car, entered the driver's side and shoved Hall into the passenger's side floorboard. He drove the car from the drive-in, at which time Hall said that he "begged him to take me to the hospital."

Appellant sped through town running red lights and began traveling on the Asheville Highway. He opened the passenger side door and tried to shove Hall out of the door while the car was still moving. Hall's foot got caught under the dashboard and his body was partially hanging out of the car. His buttocks were dragging the pavement when appellant stated that he was going to kill him and fired another shot. The second shot missed Hall. Appellant finally stopped the car near the French Broad Tavern, where Mr. Bill Loveday came to Hall's aid.

Mr. Loveday testified that while sitting at the door of the French Broad Tavern, he saw a car go by that was dragging a person out the passenger's side door. The car stopped and he rushed to help the person. Mr. Loveday stated that he immediately recognized the appellant and asked him what was wrong. The appellant stated that he had shot this man and was going to shoot him again. Mr. Loveday told appellant not to shoot again and dragged Hall from the car. Appellant drove off from the tavern and Loveday sought medical assistance for Hall.

Later that evening, the car and appellant were discovered by Deputy Benny Shelton of the Cocke County Police Department. While investigating a report of a car accident on Highway 160, Shelton recognized that the car matched the description of the one involved in a shooting reported earlier at the Woodzo Drive-In. The deputy found appellant inside the car, along with a .22 caliber revolver. Deputy Shelton also testified that the license plate on the car had been bent around to obscure the numbers and prevent identification.

Appellant's first argument is that his conduct did not justify a conviction for attempted second degree murder. Although couched in terms of a sufficiency of the

evidence issue, the crux of this argument is that the trial court erred in failing to instruct the jury on the lesser offense of attempt to commit voluntary manslaughter. We note, however, that appellant failed to raise this issue in his motion for new trial. Thus, the issue is waived. Tenn. R. App. P. 3(e). See State v. Clinton, 754 S.W.2d 100, 103 (Tenn. Crim. App. 1988). Nevertheless, as an exercise of our discretion, we will address the merits of the issue.

The indictment charged appellant with attempted first degree murder. At trial, the jury was given instructions on attempted first degree and second degree murder. Appellant contends that an instruction on attempted voluntary manslaughter was mandatory as a lesser offense of the crime charged. He argues that the proof at trial supported the key element, a state of passion produced by adequate provocation. Appellant asserts that Hall's testimony that they engaged in an argument over the spilled tuleo and leaving the movie was enough to support such an instruction. We disagree.

It is incumbent upon a trial court to give the jury a complete charge of the law applicable to the facts of the case. State v. Harbison, 704 S.W.2d 314, 319 (Tenn.), cert. denied, 476 U.S. 1145, 106 S.Ct. 2261, 90 L.Ed.2d 706 (1986) (citation omitted). This duty upon a trial court is mandatory "where there are any facts that are susceptible of inferring guilt of any lesser included offense or offenses." State v. Wright, 618 S.W.2d 310, 315 (Tenn. Crim. App. 1981) (citations omitted). However, it is not reversible error for the trial court to fail to instruct on a lesser degree of an offense or on a lesser included offense where there is evidence of neither in the record. State v. Mellons, 557 S.W.2d 497, 499 (Tenn. 1977) (citations omitted). Furthermore, our courts have stated that it is unnecessary to charge a jury where "the charge would be a mere abstraction upon hypothetical questions not suggested by the proof." State v. Wright, 618 S.W.2d 310, 315 (Tenn. Crim. App. 1981) (quoting Strader v. State, 362 S.W.2d 224 (Tenn. 1962)). Appellant fails to demonstrate any evidence in the record to substantiate the elements of voluntary manslaughter.

Voluntary manslaughter is the "intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Tenn. Code Ann. §39-13-211(a) (1991).[1] The state of passion produced by adequate provocation is the distinctive element in this offense. It distinguishes this type of homicide from both first and second degree murder. Compare Tenn. Code Ann. §39-13-202 (Supp. 1996) and Tenn. Code Ann. §39-13-210 (Supp. 1996) with Tenn. Code Ann. §39-13-211(1991). In order to be entitled to an instruction on the offense of attempted voluntary manslaughter, appellant must demonstrate that some evidence in the record supported this distinguishing element. However, the proof adduced at trial does not support a claim that appellant was in a state of passion, nor does the proof sustain a reasonable inference of adequate provocation.

Hall testified that he and the appellant briefly argued after the tuleo was spilled in the car. Appellant wanted to leave the movie to get more tuleo, but Hall refused to leave. Hall testified that his refusal "upset" the appellant. He further testified that appellant became "belligerent and angry" when he refused to take him home. However, appellant exited the car, walked towards the concession stand, and returned in a few minutes. There was no further argument; nevertheless, shortly thereafter appellant shot Hall in the head. Such evidence does not support a claim that appellant was in a state of passion when he shot Hall. See State v. Brown, 836 S.W.2d 530, 543 n.10 (Tenn. 1992) (passion may be any emotions of the mind reflecting anger, rage, sudden resentment or terror, *rendering the mind incapable of cool reflection*) (emphasis added) (citations omitted). A trivial argument over whether to leave a movie simply would not have caused any reasonable person to become so

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[1]Our discussion focuses on the elements of first and second degree murder, as well as voluntary manslaughter. We recognize that appellant was indicted and convicted of attempted homicide; however, the principles on required jury instructions apply equally to the lesser offenses that were allegedly attempted. See State v. Trusty, 919 S.W.2d 305, 312 (Tenn. 1996) and State v. Ruane, 912 S.W.2d 766, 783 (Tenn. Crim. App. 1995).

angry as to be incapable of cool reflection. Furthermore, Hall was merely watching the movie when he was shot. The argument, whatever its proportions, was over and appellant's anger, if any, should have passed. The walk to the concession stand gave appellant time for cool reflection, thereby negating any inference that he was acting in a state of passion.

Were we to indulge appellant and find that he was in a state of passion, his claim still fails. The provocation was inadequate to lead a reasonable person to act irrationally. The resentment must bear a reasonable proportionality to the provocation and not every provocation will reduce killing to manslaughter. State v. Jesperson, No. 03C01-9206-CR-00212 (Tenn. Crim. App. at Knoxville, August 11, 1993) (citations omitted). Hall simply stated that he wished to remain at the drive-in and declined to take appellant home to get more tuleo. Shooting someone in the head at close range is grossly disproportionate to a mere refusal to take a person home. The facts are simply not sufficient to support an instruction on attempted voluntary manslaughter.

In contrast, the record does support appellant's conviction for attempted second degree murder. Second degree murder is "a knowing killing of another." Tenn. Code Ann. §39-13-210(a)(1) (Supp. 1996). Under our criminal attempt statute, Tennessee Code Annotated section 39-12-101, appellant must have acted intentionally in pursuing a course of conduct that would constitute the offense. The record clearly shows that appellant shot Hall in the head at point blank range, refused to take him to a hospital, attempted to push him from a moving car, voiced his intent to kill Hall, and again shot at Hall, but missed. These actions are sufficient to support the jury verdict that appellant intended to commit a knowing killing. Where, as here, the record shows the defendant is guilty of the greater offense and is devoid of any evidence to support an inference of guilt on the lesser offense, the trial court may refuse an instruction on the lesser offense. State v. Stephenson, 878 S.W.2d 530, 550 (Tenn. 1994) (citations omitted) and State v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990), cert. denied, 498 U.S. 1074, 111 S.Ct. 800, 112 L.Ed.2d 861 (1991) (trial

court's failure in homicide case to refuse to charge jury on voluntary manslaughter was not error where there was no evidence the killing was committed upon sudden heat produced by adequate provocation).

We further note that appellant was not entitled to the instruction on attempted voluntary manslaughter regardless of whether he characterized the offense as a lesser grade or class of homicide under Tennessee Code Annotated section 40-18-110(a) or whether he purports that it is a lesser included offense of attempted first degree murder.[2] Under either approach, the facts must support a conviction on the lesser offense, State v. Trusty, 919 S.W. 2d 305, 311 (Tenn. 1996), and appellant has failed to demonstrate this. An instruction on attempted voluntary manslaughter was justified only if the record contained some evidence of "a state of passion produced by adequate provocation" and the record is wholly devoid of such evidence. Appellant's claim fails.

The remaining two issues raised by the appellant pertaining to the sufficiency of the evidence are without merit. When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "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, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not re-weigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). There is ample evidence in the record to support the convictions.

Appellant argues that the evidence did not support a conviction for aggravated kidnapping because the victim voluntarily left the drive-in with appellant. Aggravated

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[2]The distinction between these two types of offenses was delineated by our supreme court in State v. Trusty, 919 S.W.2d 305 (Tenn. 1996). We note that voluntary manslaughter is no longer regarded as a lesser included offense of first degree murder, Trusty, 919 S.W.2d at 311, and appellant's claim on this basis fails for a second reason.

kidnapping occurs when a person knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty and at least one of the aggravating circumstances is present. See Tenn Code Ann. §39-13-304 (1991). Hall's testimony supported the necessary elements.

Hall testified that after appellant took control of the car, he "was begging him [appellant] to take me to the hospital." Instead of obeying Hall's request, appellant told Hall he was going to kill him and attempted to push him from the car. Then appellant took Hall to the French Broad Tavern, certainly not a hospital. From this testimony, it is reasonable for a jury to find that Hall was confined in the car against his will. In addition, the record reveals that four of the aggravating circumstances were present: (1) appellant had committed a felony by shooting Hall and was fleeing from this act; (3) appellant had the intent to inflict serious bodily injury on Hall because he shot Hall in the head and threatened to kill him; (4) Hall suffered serious bodily injury from the gunshot wound to his head; and (5) appellant possessed a deadly weapon, specifically a .22 caliber revolver. See Tenn. Code Ann. §39-13-304(a) (1991). The jury's verdict is affirmed.

Appellant also contends that the evidence is insufficient to support his conviction for theft because Hall gave him permission to take control of the vehicle. The proof is contrary to this contention. By definition, a theft occurs "if, with intent to deprive the owner of property, a person knowingly obtains or exercises control over the property without the owner's effective consent." Tenn. Code Ann. §39-14-103 (1991). The proof adduced at trial satisfies the necessary elements.

Hall testified that he and appellant went to the movies in a vehicle jointly titled in his and his mother's name. After shooting Hall and while Hall was physically incapacitated, appellant shoved him from the steering wheel and drove off in the car, thereby gaining control over the car. Appellant had the intent to deprive Hall of the car which was apparent when he pushed Hall out at the French Broad Tavern and drove away in the car. He later wrecked the car. At no time did Hall give appellant

permission to take the car. Each element is supported by the facts and this issue is without merit.

Appellant's final issue on appeal pertains to sentencing. He argues that the trial court erred in considering the factors for consecutive sentencing. We disagree and find that the trial court's order of consecutive sentencing complied with the statutory requirements.

Although consecutive sentences are not to be routinely given, the trial court may impose consecutive sentences if certain factors are present. Tenn. Code Ann. §40-35-115(b) (1990). The trial court found the following factors applicable in appellant's case: (2) appellant's record of criminal activity is extensive, (4) appellant is a dangerous offender whose behavior indicates little or no regard for human life and (6) appellant committed the offense while on probation. See id. At sentencing, the State offered proof of appellant's prior criminal history. Appellant has four prior felonies, and a host of other misdemeanor convictions, including nine counts of public drunkenness. Such a record is certainly extensive.

The trial court characterized appellant as a dangerous offender. The record supports a finding that appellant's behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high. This was demonstrated by the point blank gunshot to the head, a second shot fired at Hall, trying to push Hall from a moving car and dragging him along the pavement. However, State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995), requires that further findings be made when imposing consecutive sentences on a dangerous offender. It must be demonstrated that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences reasonably relate to the severity of the offenses committed. Id at 938-39. Although the trial court did not make such findings, under our power of de novo review, State v. Adams, 859 S.W.2d 359, 363 (Tenn. Crim. App. 1993), we hold such additional factors were present.

It is apparent that the aggregate sentences are necessary to protect the public from further criminal behavior of the appellant. He was on parole at the time of these offenses and this indicates his inability to be rehabilitated. Also, the violent nature of appellant's conduct militates against his release into the community. In addition, the aggregate sentences reasonably relate to the severity of the offenses. Appellant callously shot Hall at point blank range, denied him any medical assistance and then compounded his suffering by dragging him alongside a moving car. This conduct is reprehensible and an effective sentence of thirty-two (32) years is not disproportionate to such violent offenses. Characterization of appellant as a dangerous offender was proper.

However, we do note that the trial court erred in applying factor (6), appellant was on probation at the time of the offense. The record reflects that appellant was on parole for another crime at the time of these incidents. Although application of this factor was improper, the above stated factors were appropriately applied. The order of consecutive sentences was proper.

Our review of the record reveals no error in appellant's convictions or sentences. Therefore, they are affirmed.

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William M. Barker, Judge

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John H. Peay, Judge

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David G. Hayes, Judge