

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
SEPTEMBER SESSION, 1996

FILED

March 4, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee

vs.

LEON BARNETT COLLIER,

Appellant

No. 03C01-9602-CR-00072

HAMILTON COUNTY

Hon. Douglas A. Meyer, Judge

(First Degree Murder;
Attempted First Degree Murder)

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Leon Barnett Collier, was convicted by a Hamilton County jury of the first degree murder of Marketta Green and the attempted first degree murder of Eric Young. Following these convictions, the jury sentenced the appellant to life imprisonment without the possibility of parole for the first degree murder of Ms. Green. The trial court imposed a twenty year sentence for the attempted first degree murder conviction and ordered this sentence to run consecutively with the sentence of life without parole. On appeal, the appellant raises three issues for our determination: (1) whether the evidence was sufficient to support a conviction for first degree murder and a sentence of life without the possibility of parole; (2) whether the admission of prior bad acts of the appellant was error; and (3) whether consecutive sentences were proper.

After reviewing the record and applicable case law, we conclude that the trial court did not commit error. Accordingly, we affirm.

I. BACKGROUND

The proof developed at trial revealed that the appellant and Marketta Green had been involved in a relationship, but had ultimately separated. Prior to occurrence of the instant offenses, Green began dating Eric Young. On December 30, 1993, Green, Young, and Kristy McConnell, Green's ten year old niece, left the residence of Green's sister in order to take Young to his home. Before taking Young home, Green decided to drive to her house to exchange cars, because her windshield was cracked and appeared to be nearing collapse. Reaching her residence at 4301 Tennessee Avenue, Chattanooga, between 11:20 and 11:30 p.m, she parked her vehicle at the side of the house, on 43rd

Street. Green, Young, and McConnell exited the vehicle and started "walking up the hill across the street to Sonia's car."¹

Halfway across the street, the group spotted "[the appellant] . . . running out from behind the house." The appellant, glancing at Young, stated, "Oh, you're the one." The appellant produced a gun and fired the weapon three times in Young's direction. Two of the bullets struck Young and he fell to the ground. After the shooting, the appellant gazed at Young's body before moving toward Marketta Green.

Green ran onto the porch of her house imploring Kristy McConnell to run to the house. While McConnell was running toward Green, the appellant intercepted her and pushed her into a tree. The appellant approached Green on the porch and "held the gun looking at Marketta [Green]." Green frantically attempted to unlock the front door of the house. The appellant continued to hold the gun on Green and then shot her in the back. After firing the weapon, the appellant "started laughing and ran off." Although she had been shot, Green managed to unlock the door and enter the house before collapsing in the doorway. McConnell called 911 and her mother.

Officer Charles Wells of the Chattanooga Police Department responded to the call. Upon arriving at 4301 Tennessee Avenue, Wells observed Young lying on the sidewalk. Young told Wells that he had been shot three times in the back. Wells noticed McConnell, who was screaming "she's in here." Responding to these calls, Wells entered the house and found Green lying inside the doorway. "She was conscious when I got there. She was real hot, she was real sweaty, she was crying, she said she was in a lot of pain . . . she kept telling me . . . that

¹Green intended to use her sister, Sonia McConnell's, vehicle to take Young home. Green and McConnell resided at 4301 Tennessee Avenue.

she didn't want to die." Wells asked Green "Who shot you?" She answered, "Leon . . . Leon Collier. . . ." She also informed Wells that the appellant was her "ex-boyfriend and father of her baby." Both victims were transported to the hospital. At the hospital, Sergeant Jeff Francis spoke with Young. Young told Francis that "Leon, the father of Green's baby, had shot him."

Meanwhile, after fleeing the crime scene, the appellant appeared at the house of Matt Stoddard, around 11:30 p.m. The appellant informed Stoddard that he had shot his ex-girlfriend and her boyfriend with a ".357." The appellant agreed to turn himself in to the police. Stoddard left the appellant at his house shortly after that because Stoddard had to pick up his roommate, Chris Balthrop from work. Stoddard and Balthrop returned to find the appellant still at their residence. The appellant told Balthrop that he had shot his ex-girlfriend and her boyfriend with a ".357" earlier that evening. He explained that he had been upset because Young had informed him that he would never see his child again.

Because they had previously made plans, Balthrop and Stoddard again left their residence, leaving the appellant inside. At 5:30 a.m., Stoddard telephoned the appellant, who was still at Stoddard's house, and informed him that the "news" had just reported that Marketta Green had died and Eric Young was in critical condition. The appellant appeared upset over Green's demise, stating that he never intended to kill her and that "he wished Mr. Young had died instead of her." Moreover, he added "I shot [Young] three times with a .357 and he's still alive. I can't believe it." Because of this call, Stoddard returned to his house, where he met Officer Lyndon Atkins. Stoddard let Atkins in the house, at which time Atkins arrested the appellant.

Dr. Frank King, the medical examiner for Hamilton County, performed the autopsy of Green's body. He determined that her death resulted from the single

gunshot wound to her back. Specifically, he stated that Green died of "blood loss," caused by internal injuries to various organs. King also stated that Green's death "would not be instantaneous . . . [it would be a] minimum of minutes, possibly an hour . . ." before death would occur. Young testified that he sustained two gunshot wounds, one to his lower back and one to his leg. Because of these injuries, he remained in the hospital for twelve days. Moreover, the gunshot wounds caused Young to lose both a kidney and his spleen. One bullet remains in his leg.

At the appellant's trial, both Young and Kristy McConnell testified that, prior to the instant offenses, they were acquainted with the appellant. They then positively identified him as the perpetrator of the instant offenses. Moreover, evidence at trial proved the violent nature of the appellant and Green's relationship. Sonia McConnell, Green's sister, testified that, on November 16, 1993, the appellant telephoned Green and notified her that he was on his way to her residence. Fifteen to twenty minutes later, the appellant knocked on the door of Green's residence. Green told the appellant to leave her alone. The appellant "pulled out a gun on her in her face and he said to her, he said, 'I'll blow your [expletive deleted] brains out.'" Officer Damon Davidson spoke with Green after this incident and advised her to seek a warrant against the appellant. Ronald Durby, the Clerk and Master of Chancery Court, testified that an order of protection was issued for Green against the appellant on November 30, 1993.² Additionally, Melanie Clark, the clerk of the Hamilton County Criminal Court, testified that an aggravated assault charge, resulting from the November 16, 1993 incident, was pending against the appellant .

Officer Terrence Meadows testified regarding an incident occurring on

²The order "restrains and enjoins [the appellant] from coming about [Green] wherever she may be" and "specifically from abusing, threatening to abuse [Green], or committing any acts of violence upon [Green] upon the penalty of contempt."

December 28, 1993, two days prior to Green's murder. Meadows responded to a disorder call at 4301 Tennessee Avenue, Green's residence.³ Shortly after Meadows arrived, the telephone rang and Green answered the call. Appearing frightened, Green notified Meadows that "[t]his is Leon," and handed the telephone to Meadows. Meadows identified himself as a police officer, however, the other party continued yelling "I'll kill you and that [expletive deleted] boyfriend of yours." Meadows again identified himself as a police officer. At this time, a woman responded that she was the appellant's mother and asked to speak with Green.

Based upon this evidence, the jury returned a verdict finding the appellant guilty of first degree murder and attempted first degree murder. A sentencing hearing was held at a later date, during which the State elected not to put on any additional proof. The appellant, although electing not to testify during the guilt phase, chose to testify at the sentencing hearing. He stated that, at the time of the offenses, he was twenty-two years old and had lived in Chattanooga his entire life. The appellant graduated from Howard High School, where he was placed in special education classes. He emphasized his skill as a trumpet player while in junior high and high school, conceding that he could never achieve "1st chair" trumpet. He admitted that his abuse of alcohol and drugs began when he was thirteen years old.

Additionally, the appellant testified that he was married to Tanesha Reed Collier, who he had begun dating when he was twelve years old. The couple lived together for one year and two children were born of this union, although one child was deceased. While married to Tanesha Reed Collier, the appellant began dating Marketta Green. The appellant and Green had one child together. The appellant asserted his innocence of the first degree murder of Marketta

³The appellant allegedly threw a brick through the windshield of Green's car.

Green "because it's not premeditated, it wasn't intentional."

Pamela Price, a member of the appellant's church, testified that she has known the appellant for approximately twelve to fourteen years. She stated that the appellant attended church regularly and was active in the church's youth program. She stated that the appellant's family was close and that the appellant was a good father to his two children. Another church member, Mildred Smith, confirmed Ms. Price's observations. The appellant's band director from high school, David Sharp, testified that the appellant was a mild mannered person "who worked really hard." He added that the appellant was a follower and not a leader.

The appellant's mother, Mary Collier, confirmed the appellant's alcohol and drug problem. She also indicated that the appellant battled with periodic states of depression. She testified that, while in high school, the appellant had been admitted into the Green Leaf Center for detoxification. However, after one month, she and her husband discharged the appellant against the advice of the staff. The appellant's father, Leon Collier, Sr., testified that he and his wife fought frequently during the appellant's formative years.

A clinical neuropsychologist, Dr. Eric Engum, testified that the appellant exhibits signs of organic impairment, or brain damage. He explained that,

because of this impairment, the appellant is unable to reason or respond to the world rationally. He added that the appellant is unable to process information, verbally mediate, or problem solve as the average individual does. Nonetheless,

Dr. Engum concluded that the appellant was competent and sane. Dr. Thomas Jefferson Brooks, III, an obstetrician-gynecologist, testified regarding the appellant's medical conditions at birth. Specifically, he stated that the appellant's Apgar score was low and that a child born with this low score could have brain damage. In rebuttal to this testimony, the State called Dr. Thomas Ford, a psychologist, to testify regarding his examination of the appellant. Dr. Ford testified that "the results [of the appellant's evaluation] indicated that Mr. Collier was competent to aid in . . . his defense and work with his attorney, and they also found that he did not meet the criteria for [the defense of] not guilty by reason of insanity." Additionally, he indicated that, even if the appellant had any type of organic brain damage, any such damage would not affect his capacity to appreciate the wrongfulness of his conduct.

Unanimously finding the presence of one statutory aggravating factor, the jury sentenced the appellant to life imprisonment without the possibility of parole.⁴ At a later date, the trial court sentenced the appellant to twenty years incarceration for the attempted first degree murder conviction. Moreover, finding the appellant to be a "dangerous offender," the court ordered this sentence to run consecutively to his sentence of life without the possibility of parole.

II. SUFFICIENCY OF THE EVIDENCE

A. FIRST DEGREE MURDER

In his first issue, the appellant argues that "the evidence contained in the

⁴The aggravating factor found by the jury was "The murder was committed while the defendant was engaged in committing or was an accomplice in the commission of or was attempting to commit or was fleeing after committing or attempting to commit any first degree murder, arson, rape, burglary, theft, kidnaping."

record in this case is insufficient to support the jury's finding that Defendant was guilty of first degree murder." We disagree.

The appellant argues that the evidence presented fails to support the findings of both premeditation and deliberation. In support of his argument, the appellant cites to State v. Thornton, 730 S.W.2d 309 (Tenn. 1987). In this case, our supreme court reiterated the legal principle that "the encountering by a spouse of [his mate and her lover in bed] . . . constitute[s] sufficient provocation to reduce a charge of homicide from one of the degrees of murder to manslaughter." Id. at 309. The appellant's reliance on Thornton is completely unsupported by the facts. Not only was the appellant not married to Green, but he was married to another woman. Also, there is no indication that Green and Young were engaged in the behavior contemplated by Thornton. This argument is entirely without merit.

Nonetheless, when there is a challenge to the verdict based on the sufficiency of the evidence, this court must review the evidence in the light most favorable to the prosecution and determine 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, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); Tenn. R. App. P. 13(e). We do not reweigh or reevaluate the evidence; these are issues resolved by the trier of fact. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Furthermore, a guilty verdict accredits the testimony of witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). The appellant bears the burden of proving that the evidence was insufficient to support the jury verdict in his case. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

First degree murder not committed in the perpetration of a crime requires the "intentional, premeditated and deliberate killing of another." Tenn. Code Ann. §39-13-202 (a)(1) (1994 Supp.). A death caused by the intentional act of another is presumed to be second degree murder. State v. Brown, 836 S.W.2d 530, 543 (Tenn. 1992). Thus, the State must prove premeditation and deliberation to raise the offense to first degree murder. Id. Premeditation necessitates "the exercise of reflection and judgment," Tenn. Code Ann. § 39-13-201(b)(2) (1991), "includ[ing] instances of homicide committed by poison or lying in wait," and requiring "a previously formed design or intent to kill." State v. West, 844 S.W.2d 144, 147 (Tenn. 1992). Deliberation, on the other hand, is defined as a "cool purpose . . . formed in the absence of passion." Brown, 836 S.W.2d at 538 (citations and internal quotations omitted). Deliberation also requires "some period of reflection, during which the mind is free from the influence of excitement." Id.; see also Tenn. Code Ann. § 39-13-201(b)(2).

The elements of premeditation and deliberation are questions for the jury and may be inferred from the circumstances surrounding the killing. State v. Gentry, 881 S.W.2d 1, 3 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994). Although there are no strict standards governing what constitutes proof of premeditation and deliberation, several relevant circumstances are helpful in the inquiry, including: the use of a deadly weapon upon an unarmed victim; the fact that the killing was particularly cruel; declarations by the defendant of his intent to kill; and the making of preparations before the killing for the purpose of concealing the crime. State v. Bland, No. 02C01-9412-CR-0028 (Tenn. Crim. App. at Jackson, Mar. 27, 1996), reh'g denied, (Tenn. Crim. App. May 1, 1996) (citing Brown, 836 S.W.2d at 541-42)). Additional factors from which the jury may infer premeditation and deliberation include planning activities by the appellant prior to the killing, the appellant's prior relationship with the victim, and the nature of the killing. Id. (citing State v. Bordis, No. 01C01-9305-

CR-00157 (Tenn. Crim. App. at Nashville, Feb. 24, 1995), perm. to appeal denied, (Tenn. July 10, 1995) (quoting 2 W. LaFave and A. Scott, Jr., Substantive Criminal Law §7.7 (1986)); Gentry, 881 S.W.2d at 4-5 (citation omitted).

Reviewing the present case in the light most favorable to the State, Green, Young, and McConnell were in the middle of the street before the appellant came running from the side of Green's house. Thus, the jury could reasonably infer premeditation on behalf of the appellant due to his lying in wait for the arrival of his victims. Upon greeting his victims, the appellant calmly approached Young, shot him three times, and stared at his first victim before turning toward Green. Upon approaching Green, the appellant held the gun on her for about a minute while she frantically attempted to unlock her front door. The appellant then shot Green in her back. After accomplishing his deed, the appellant began to laugh. The manner in which the crimes were committed is sufficient to show the cool and deliberate intent of the appellant. Additionally, after the shootings, the appellant proceeded to the home of Matt Stoddard and Chris Balthrop, although his own home was on 45th Street, a few blocks from the incident. The appellant's journey to Stoddard's residence evidences a plan to evade the police by not going to his own home. Furthermore, the appellant made a deal with Stoddard that he would turn himself in at a later time and for Stoddard not to turn him in to the police. "Calmness immediately after a killing may be evidence of a cool, dispassionate, premeditated murder." West, 844 S.W.2d at 148. Also, the weapon was never recovered. Although the concealment of evidence after the fact is not probative of the appellant's state of mind before the murder, the fact that the concealment occurred immediately after the killing supports the theory that the appellant committed the killing "in the absence of passion." Id. Additionally, the appellant's prior statements to his victim clearly demonstrated his intentions, i.e., "I'll kill you and your [expletive

deleted] boyfriend." and "I'll blow your [expletive deleted] brains out."

Accordingly, we conclude that there is sufficient evidence including the appellant's lying in wait, his relationship to the victim, the nature of the killing, the appellant's behavior during the killing, and the appellant's actions following the murder to support the jury's finding of premeditation and deliberation. This issue is without merit.

B. LIFE WITHOUT POSSIBILITY OF PAROLE

The appellant also challenges the evidence supporting his sentence of life without the possibility of parole. In order to impose a sentence of life without the possibility of parole, a jury must unanimously find that the State has proven beyond a reasonable doubt the existence of at least one statutory aggravating circumstance. Tenn. Code Ann. §39-13-204(l), -207(c) (1994 Supp.). In the present case, the jury found that "the murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnaping." See Tenn. Code Ann. § 39-13-204(l)(7). The appellant contends that, "[g]iven [the appellant's] convictions for both offenses, the use of the conviction for the attempted murder of Eric Young as an enhancing factor unfairly constitutes double enhancement."

It is settled law in this state that the aggravating circumstance set forth in Tenn. Code Ann. § 39-13-207(l)(7) cannot be used to enhance a sentence for felony murder to death. State v. Middlebrooks, 840 S.W.2d 317, 323 (Tenn. 1992) (emphasis added). Specifically, the use of circumstance (l)(7) to aggravate a conviction for felony murder is "a duplication of the crime itself and does not narrow the class of death-eligible defendants as is constitutionally required." State v. Bigbee, 885 S.W.2d 797, 814-15 (Tenn. 1994) (emphasis

added). However, the present case does not present a Middlebrooks issue. The appellant was convicted of first degree murder, not felony murder, resulting in a sentence other than death. Application of aggravating circumstance (l)(7) to the offense of first degree murder has been approved by this court. See State v. Smith, 868 S.W.2d 561, 581 (Tenn. 1993), cert. denied, -- U.S. --, 115 S.Ct. 417 (1994); State v. Hodges, No. 01C01-9212-CR-00382 (Tenn. Crim. App. at Nashville, May 18, 1995). Hence, the retention of this aggravating circumstance, in light of the decision in Middlebrooks, remains applicable to first degree murder committed in connection with one of the specially enumerated felonies. This issue is without merit.

Next, the appellant contends that the trial court erred in refusing to instruct the jury as to mitigating factors (1), (3), and (6). See Tenn. Code Ann. § 39-13-204(j).⁵ Specifically, he argues that the court's failure to provide the jury with these instructions, prejudiced him and therefore mandates a new sentencing hearing. At the conclusion of the sentencing hearing, the trial court instructed the jury as to mitigating circumstances (j) (2), (7), and (8), in addition to factor (9), "any other mitigating factor which is raised by the evidence."⁶

Tenn. Code Ann. §39-13-204(e) requires the trial judge to instruct the jury to "weigh and consider any [statutory] mitigating circumstances raised by the evidence at either the guilt or sentencing hearing or both. . . ." (Emphasis added). See also State v. Odom, 928 S.W.2d 18, 29 (Tenn. 1996) ("[T]he only

⁵Tenn. Code Ann. § 39-13-204(j)(1) provides "The defendant has no significant history of prior criminal history." Tenn. Code Ann. § 39-13-204(j)(3) provides "The victim was a participant in the defendant's conduct or consented to the act." Tenn. Code Ann. § 39-13-204(j)(6) provides "The defendant acted under extreme duress or under the substantial domination of another person."

⁶Tenn. Code Ann. §39-13-204(j)(2) provides "The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;" (j)(7) provides "The youth or advanced age of the defendant at the time of the crime;" and (j)(8) provides "The capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected the defendant's judgment."

mandatory instructions with respect to mitigating circumstances are that those statutory circumstances which are raised by the evidence shall be expressly charged.") (quoting State v. Hartman, 703 S.W.2d 106, 118 (Tenn. 1985); accord Cazes, 875 S.W.2d at 268; State v. Smith, 857 S.W.2d 1, 15 (Tenn. 1993); State v. Wright, 756 S.W.2d 669, 674 (Tenn. 1988); State v. King, 718 S.W.2d 241, 249 (Tenn. 1986)). In fact, it is error for the trial court "to charge any statutory mitigating circumstances that were not raised by the evidence at the guilt or sentencing hearing." Hartman, 703 S.W.2d at 118 (citing State v. Buck, 670 S.W.2d 600 (Tenn. 1984)). Thus, the question is whether mitigating circumstances (1), (3), and (6) were raised by the evidence.

Tenn. Code Ann. § 39-13-204(j)(1) provides "[t]he defendant has no significant history of prior criminal activity." The trial court concluded that this factor was not applicable and we agree. The evidence overwhelmingly demonstrates the prior criminal behavior of the appellant, i.e., a pending charge for the November 16, 1993, aggravated assault of Marketta Green; the issuance of an order of protection for Green on November 22, 1993; and verbal threats against Green on December 28, 1993. This is sufficient to show a "significant history of prior criminal activity." See State v. Matson, 666 S.W.2d 41, 44 (Tenn. 1984) ("'[P]rior criminal history' is not limited to prior criminal convictions."). Thus, the court properly denied the appellant's request to instruct this mitigating circumstance.

The appellant also contends that Tenn. Code Ann. § 39-13-204(j)(3), "the victim was a participant in the defendant's conduct or consented to the act," applies. Specifically, he argues that the testimony of Chris Balthrop, indicating that he had been provoked by Eric Young's assertion that he would never see his son again, warrants an instruction on this mitigating factor. These facts simply do not support any "participation" or "consent" on behalf of Marketta Green.

Furthermore, no other proof in the record suggests implication of this factor.

The appellant argues that he "acted under extreme duress or under the substantial domination of another person," Tenn. Code Ann. §39-13-204(j)(6). He contends that, because of his "volatile" relationship with Green combined with Young's threat that he would never again see his son, he was under extreme duress at the time of the instant offenses. There was no credible proof that these circumstances caused the appellant to be under "extreme duress," which is defined as a threat "of such a character as to overcome the mind and will and destroy the free agency of a person of ordinary firmness." State v. Roberts, No. 01C01-9110-CC-00296 (Tenn. Crim. App. at Nashville, July 15, 1993), perm. to appeal denied, (Tenn. Nov. 15, 1993) (citing Johnson v. Roland, 61 Tenn. (2 Baxt.) 203, 206 (1872)). The trial court did not err by refusing to instruct this circumstance.

Finally, the appellant contends that the "jury did not properly weigh mitigating and enhancing factors." He reasons that, if the jury did weigh the applicable factors properly, the appellant would have received a sentence of life imprisonment rather than a sentence of life without parole. First, questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this court nor the appellant. State v. Moss, No. 02C01-9404-CR-00072 (Tenn. Crim. App. at Jackson, Nov. 2, 1994). Thus, it was the jury's prerogative as to what factors warranted greater weight. The record amply supports their conclusion. Moreover, Tenn. Code Ann. § 39-13-207(g) provides that "a sentence of life without possibility of parole shall be considered appropriate if the state has proved beyond a reasonable doubt at least one statutory aggravating circumstance contained in Tenn. Code Ann. § 39-13-

204(I). . . ." The jury found the presence of one aggravating circumstance, Tenn. Code Ann. § 39-13-204(I)(7). We have determined that this factor is applicable to the present case. Accordingly, we conclude that the evidence is sufficient to sustain the appellant's sentence of life without the possibility of parole.

III. PRIOR BAD ACTS

At trial, Sonia McConnell testified that, on November 16, 1993, the appellant came to their home at 4301 Tennessee Avenue, pulled out a gun, and told Marketta Green "I'll blow your brains out." Other testimony confirmed the issuance of an order of protection and pending aggravated assault charge resulting from this incident. Officer Terrence Meadows testified that, on December 28, 1993, while responding to a disorder call at 4301 Tennessee Avenue, the telephone rang and was subsequently answered by Marketta

Green. Green relayed the telephone to Meadows, who heard the caller, identified as the appellant, yelling, "I'll kill you and that [expletive deleted] boyfriend of yours." The appellant insists that the trial court improperly admitted this evidence at trial. We disagree.

Generally, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait." Tenn. R. Evid. 404(b). Nonetheless, such evidence may be admissible for other purposes.⁷ Id. Before evidence of other crimes, wrongs, or

⁷Other acts may be admitted to prove such issues as motive, intent, knowledge, absence of mistake or accident, common scheme or plan, identity, completion of the story, opportunity, and preparation. NEIL P. COHEN ET AL., TENNESSEE LAW OF EVIDENCE §404.6 (3rd ed.1995).

acts may be admitted for other purposes, the following conditions must be satisfied:

- (1) The court upon request must hold a hearing outside the jury's presence;
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and
- (3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Id.

Prior to trial, the appellant filed a motion in limine asking the court to prevent the State from introducing prior instances of misconduct by the appellant. The court permitted the State to introduce testimony regarding the appellant's prior incidents of misconduct toward Marketta Green. The court reasoned that the State could "use the prior bad acts to prove motive and intent." Additionally, the court found that the probative value, as to the appellant's motive, outweighs any unfair prejudice resulting from the introduction of such testimony.

The trial court complied with the requirements of Rule 404(b)(1), (2), and (3). Specifically, the court found that the evidence of the appellant's prior violent episodes with Green were relevant to establish the appellant's motive and intent. "Violent acts indicative of the relationship between the victim of a violent crime and the defendant prior to the commission of the offense are relevant to show intent." State v. Clayborne, No. 02C01-9507-CR-00185 (Tenn. Crim. App. at Jackson, June 10, 1996) (citing Smith, 868 S.W.2d at 574.). Moreover, we conclude that the probative value of the collective testimony outweighed any prejudicial effect. Accordingly, the evidence was properly admitted.

IV. CONSECUTIVE SENTENCES

In his final issue, the appellant contends that the trial court erred by ordering his sentence for attempted first degree murder to run consecutively to his sentence for first degree murder. We conclude otherwise.

Review, by this court, of the length, range, or manner of service of a sentence is *de novo* with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d)(1990). This presumption only applies, however, if the record demonstrates that the trial court properly considered relevant sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In the case before us, the trial court considered relevant sentencing principles and pronounced his reasons for imposing the appellant's sentence. Thus, the presumption applies. Moreover, this court may modify a sentence only if, in the court's opinion, the sentence is excessive or the manner of service is inappropriate. State v. Russell, 773 S.W.2d 913, 915 (Tenn. 1989).

In making our review, this court must consider the evidence heard at trial and at sentencing, the presentence report, the arguments of counsel, the nature and characteristics of the offense, any mitigating and enhancement factors, the defendant's statements, and the defendant's potential for rehabilitation. Tenn. Code Ann. §§ 40-35-102, -103(5), -210(b) (1990); see also State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993) (citing Ashby, 923 S.W.2d at 168). The burden is on the appellant to show that the sentence imposed was improper. Sentencing Commission Comments, Tenn. Code Ann. § 40-35-401(d).

If a defendant is convicted of more than one criminal offense, the court may order the sentences to run consecutively. Tenn. Code Ann. § 40-35-115 (1990). In the present case, the trial court imposed consecutive sentences

based upon the appellant's classification as a dangerous offender. Thus, the only determination is whether the appellant qualifies as a "dangerous offender." Tenn. Code Ann. § 40-35-115(b)(4).

In Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976), our supreme court held that "[a] defendant may be classified as a dangerous offender if the crimes for which he is convicted indicate that he has little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." (Emphasis added). See also Tenn. Code Ann. § 40-35-115(b)(4); State v. Wilkerson, 905 S.W.2d 933, 937 (Tenn. 1995). If a court decides to impose consecutive sentences based upon the inherently dangerous nature of the instant offenses, the court should base its decision upon the presence of aggravating circumstances and not merely on the fact that two or more dangerous crimes were committed. Gray, 538 S.W.2d at 393. In the present case, the trial court found the following aggravating circumstances: the appellant has a previous history of criminal behavior, the offense involved more than one victim, the appellant treated the victim with exceptional cruelty, a firearm was used in the commission of the offenses, and the appellant was on bond at the time the offenses were committed. Additionally, we find it necessary to recount the circumstances of these offenses. The appellant first armed himself with a .357 caliber pistol and, in direct violation of an order of protection, proceeded to Green's residence. At the house concealed by the darkness of the night, he waited for his victims, ambushing them as they returned home. After shooting Young twice from behind, the appellant stared at Young's motionless body before turning to his next victim. Finding her on the porch, he watched Green struggle to unlock her front door. He listened to her pleas for mercy. He then fired the fatal blow to her back. Despite the horror he had just inflicted upon this family, the appellant began to laugh. McConnell, Green's ten year old niece, was forced to observe the entire episode, which resulted in the death of her aunt.

Clearly, the circumstances of these offenses are aggravated. We conclude that the proof before us establishes that the appellant had no hesitation about committing a crime when the risk to human life was high. Thus, the offenses committed by the appellant are sufficient to qualify him as a "dangerous offender."

However, this classification alone will not justify consecutive sentencing. Wilkerson, 905 S.W.2d at 938. "The proof must also establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender." Id. In the present case, we find that the sentences are reasonably related to the severity of the offenses and are necessary to protect the public from further criminal acts of the appellant.⁸ We are unable to conclude that the trial court abused its discretion in ordering consecutive sentences. This issue is without merit.

V. CONCLUSION

After a thorough review of the record and the applicable law, we find no error in the judgment of the trial court. Additionally, in accordance with Tenn. Code Ann. § 39-13-207(g), we conclude that the jury appropriately found the presence of one statutory aggravating factor and did not arbitrarily impose a sentence of life without the possibility of parole. Accordingly, the judgments of conviction and sentences are affirmed.

⁸The appellant contends that "a sentence of life without parole achieves all the purposes necessary for which the sentence was imposed," and, essentially, that any sentence in addition to a sentence of life without parole is excessive. We find no merit to this argument. Consecutive sentencing ensures that a defendant "committing separate and distinct violations of the law will receive separate and distinct sentences." State v. Robinson, No. 02C01-9501-CC-00024 (Tenn. Crim. App. at Jackson, Dec. 13, 1995). Accordingly, "[a] defendant [is] not . . . able to escape consecutive sentencing simply because one of the crimes was so heinous as to warrant life without parole." Id.

DAVID G. HAYES, Judge

CONCUR:

JOHN H. PEAY, Judge

WILLIAM M. BARKER, Judge