IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1997 SESSION

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 03C01-9607-CC-00261
	)	
	)	Bradley County
v.	)	
	)	Honorable Stephen Bebb, Judge
	)	
JEHIEL FIELDS,	)	(First degree murder and especially
	)	aggravated burglary)
Appellant.	)	

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OPINION FILED:_____

CONVICTION FOR FIRST DEGREE MURDER AFFIRMED; CONVICTION FOR ESPECIALLY AGGRAVATED BURGLARY REDUCED TO AGGRAVATED BURGLARY AND REMANDED FOR RESENTENCING

Joseph M. Tipton
Judge

O P I N I O N

_____The defendant, Jehiel Fields, appeals as of right from his conviction by a jury in the Bradley County Criminal Court for first degree murder and especially aggravated burglary, a Class B felony. He was sentenced to life imprisonment and to eight years in the custody of the Department of Correction as a Range I, standard offender, respectively. The sentences are to be served concurrently. The defendant contends that:

> (1) the evidence is insufficient to support his convictions;
>
> (2) the trial court erred by failing to instruct the jury that Travis Ware was an accomplice as a matter of law; and
>
> (3) the trial court erred by failing to instruct the jury regarding a missing witness.

We hold that the evidence is sufficient to support the defendant's convictions but modify the conviction for especially aggravated burglary to aggravated burglary and remand for resentencing. We also conclude that the trial court did not erroneously instruct the jury.

_____This case relates to the shooting death of Odessa Rouser. During the early morning of October 22, 1994, the victim suffered three .25 caliber gunshot wounds to her left arm, her left hand, and her chest. The shots to the victim's left arm and chest caused her death. At trial, the defense did not present any witnesses.

Travis Ware, a friend of the defendant, testified that he was with the defendant earlier in the day before the offense occurred. He said that the victim drove up while they were at Vest's Grocery and asked him whether he had any drugs. After he told the victim that he did not have any drugs, he saw the defendant get into the victim's car and stay for a few seconds. Later in the evening, he attended a party at the Corner Pocket. Ware said that the defendant came up to him and Terry Walker outside the club and told them that the victim had stabbed him. He stated that the defendant

was angry. Ware also testified that he noticed a little hole near the defendant's left shoulder blade that was not bleeding badly. According to Ware, the defendant then started walking towards the victim's house even though several people including Ware tried to tell him to come back. Ware, Walker, Essah "Brother" Whaley and a few others followed the defendant. Ware stated that the defendant had a pistol with him. At trial, he identified a pistol found in the field near the victim's house as being similar to the one the defendant was carrying.

Ware testified that when the defendant arrived at the victim's house, he kicked the door and it opened on the second try. Ware recalled hearing one shot immediately and then silence. He said that he then heard glass breaking followed by two more shots. Ware said that he, Walker, Whaley and the others started to run away but ran back towards the house when they heard cries for help, fighting and the breaking of a front window. Ware stated that he saw the victim's husband trying to pull the defendant back inside as the defendant tried to exit the house through the window. Then, they began running through a field towards the Corner Pocket. The defendant escaped through the window and followed behind them. Ware testified that when they arrived he noticed that the defendant no longer had the pistol with him. He recalled seeing the defendant make a throwing motion with his arms when he looked back at the defendant as they were running.

Ware testified that Walker asked James "BB" Brown to give them a ride. He said that he, Walker, Walker's girlfriend and the defendant rode with Brown to Walker's mother's house. Ware stated that during the ride the defendant told them about his argument with the victim. He said that the defendant stated that he had sold the victim a piece of rock cocaine in exchange for ten dollars and a marijuana cigarette. When he discovered that the marijuana cigarette was laced, he went to the victim's

house to ask her why she had given it to him. Ware testified that the defendant said that an argument ensued during which he slapped the victim and she stabbed him.

Ware stated that when they arrived at Walker's mother's house, the defendant went into a room and took his clothes off. He said that the defendant was wearing jeans and a multi-colored jacket with a Tasmanian Devil on it. According to Ware, the defendant then asked him to take his clothes. The clothes were placed into a box. Ware stated that he agreed to take the clothes because he was scared. He took the clothes to his home where he lived with his mother and grandmother. When his mother came home that night, she commented that several police officers were at the victim's house, and Ware told her what happened. He said that his mother noticed the clothes the next morning and told him to get them out of the house. His mother took the box of clothes in her car, threw them out the window and then called the police.

Ware admitted that he did not help the police recover the clothes but stated that his mother told them where they were located. He said that he told the police that he thought the gun might be in the field because everybody was saying that he committed the crimes.

Ware also conceded that he entered guilty pleas to two counts of possession with the intent to sell crack cocaine, Class C felonies. He received concurrent, six-year sentences suspended after the service of six months in the county jail. Pursuant to the agreement, he agreed to testify against the defendant.

Ware testified that while in jail on the night before the preliminary hearing, the defendant came up to him during a church service and asked him why he told on him. He said that the defendant told him to testify that he was drunk and was mistaken

in believing that the defendant committed the offenses, but that he refused. Ware admitted that he had been drinking but denied being drunk on the night of the offenses.

On cross-examination, Ware acknowledged that he did not tell the police during a statement on October 22, 1994, that the defendant gave him his clothing. He also admitted that he testified at the preliminary hearing that the defendant gave him the jacket but that he did not mention the jeans. He claimed that he told the district attorney's office about the jeans. Ware also stated that he was the one who took the clothes and threw them out his car window. He conceded that Walker owned a pistol like the one introduced at trial and that Walker had it with him during the day. He also testified that the defendant was known as "Jay" and that Walker was often called "Jap." According to Ware, Detective Dailey told him that he could be charged with accessory to murder if he did not testify. He claimed that he rode with the defendant after the offenses because he was scared and wanted to hear what happened.

On redirect examination, Ware asserted that he had no other contact with the victim after she asked him for drugs. He also said that he had no reason to be upset with her.

Twynette Ware, Travis Ware's mother, testified that Ware was standing at the door waiting on her when she came home. She said that he appeared upset. When she asked him what was wrong and commented about seeing officers at the victim's house, they had a conversation about what happened at the victim's house. She said that the next morning she noticed a box that contained jeans and a jacket in her living room and told Ware to get the clothes out of the house. Ms. Ware stated that they drove a few blocks and disposed of the clothes along a street near her grandmother's house. She then called the police and showed them where to locate the clothes. Ms. Ware recalled seeing the defendant wearing the jeans and jacket the day

before the offense when she was walking back from the store. She said that the jeans were not Ware's. On cross-examination, Ms. Ware acknowledged that her statement to the officers only reflects that she told them that she earlier saw the defendant wearing the jacket. She claimed that she also told the officers about the jeans the defendant was wearing.

Kimberly Pugh, the victim's neighbor who lived across a field from the victim, testified that around 1:00 a.m. she heard four intermittent shots and then glass breaking and people cussing. She said that she then saw a motion light connected to the back corner of her house turn on and stepped outside to investigate. She stated that she saw three black men running across the field approximately twenty yards away. Ms. Pugh recalled seeing one of the men fall in the field after they came off the victim's porch. She said that she recognized the man as the defendant because he had his hair slicked back and was wearing a Tasmanian Devil jacket. She stated that the defendant was dressed similarly the day before the offense when she saw him as she was walking along the street. Ms. Pugh testified that before trial she identified the defendant from a photo lineup as the person she saw fall in the field. On cross-examination, she conceded that she knew one of the men in the lineup.

James Brown testified that he was driving around the Corner Pocket when Walker walked up and asked him for a ride to his mother's house. He said that Ware and the defendant were with Walker. Brown stated that when he dropped them off, everyone told him not to tell anyone where he let them out. He identified the defendant from the photo lineup as one of the persons whom he gave a ride. On cross-examination, Brown acknowledged that when he gave a statement to the officers, he told them that Ware and Walker acted real nervous when asking for a ride. He stated that he failed to tell the officers that his passengers told him not to tell anyone where he dropped them off. Brown also conceded that he told defense counsel that he gave

Ware, Walker and “Brother” a ride without mentioning the defendant or a girl. He said that the passengers did not discuss a shooting.

Danny Chastain, a lieutenant with the Cleveland Police Department, discovered the victim lying in the doorway in the living room. He testified that a blue baseball cap was lying in the corner near the victim’s feet. A window in the living room overlooking the front porch was broken and a set of venetian blinds that had blood on them had been torn down. During the investigation, four bullets and casings were recovered. Lieutenant Chastain stated that no weapons were found in the living room but a paring knife was discovered on the front porch. He also testified that a wallet containing identification of Larry Hickey was located near the porch steps.

Kenneth Simpson, an officer with the Cleveland Police Department, testified that he located the pants and the jacket near a street based on information provided to the officers. He also found a Raven .25 caliber semi-automatic pistol in the field across from the victim’s house after talking to Ware.

Dewey Woody, Jr., an officer with the Cleveland Police Department, testified that while on patrol at approximately 10:00 p.m on October 21, 1994, he saw the defendant and Ware at a McDonald’s restaurant. He stated that the defendant was wearing a multi-colored, Tasmanian Devil jacket and a blue baseball cap with a Mickey Mouse insignia on it.

Deane Johnson, a forensic serologist with the TBI, testified that the venetian blinds had human blood on them and that blood on the jeans was consistent with the blood type of the victim. She admitted that DNA testing was not conducted and that she had not been given blood samples from anyone other than the victim and the

defendant. Agent Johnson stated that a drug and alcohol screen performed on the victim revealed that the victim tested positive for cocaine and other drugs.

David Wilson, an agent with the FBI, examined hair samples taken from the blue baseball cap, compared them to samples taken from the defendant, and expressed the opinion that the samples matched. He said that he also conducted a comparison of a hair fragment taken from the finger of the victim. Although Agent Wilson noted that the hair fragment was not suitable for a full analysis, he opined that it was not consistent with the defendant's hair. He stated that he did not compare the hair samples to anyone other than the defendant.

Matthew Tylman, a firearms toolmark examiner for the FBI, examined the .25 caliber semi-automatic pistol and magazine, bullets and shell casings. He testified that he performed tests on the pistol to determine if the pistol fired the bullets by comparing marks on the bullets left by the pistol's barrel grooves. He said that he could not determine conclusively whether or not the pistol fired the bullets although he remarked that inconclusive results often occur. Agent Tylman stated that he conclusively determined from another test that the shell casings were extracted from the pistol.

The parties stipulated that no fingerprints of value were found on the pistol or the casings. They also stipulated that James Thomas Rouser, the victim's husband, died of natural causes on November 17, 1994.

Detective Don Price of the Cleveland Police Department testified that while he was filling out paperwork before reading the defendant his rights, the defendant told him, "Can I just go ahead and plead guilty and let them execute

me. . . . I don't want to go to prison and come out an old man." He stated that he asked the defendant what he said and the defendant repeated the statement. Detective Price said that he had not questioned the defendant before he made the statements. He did not notice any cuts or lacerations near the defendant's face.

Detective Steve Bennett of the Cleveland Police Department testified that he heard the statements made by the defendant to Detective Price. He also testified that other than a small hole around the defendant's neck, he did not notice any cuts or lacerations on the defendant. Detective Bennett admitted that neither a paraffin test nor a gunshot residue test was performed on the defendant. He explained that his department no longer used the paraffin test and that a gunshot residue analysis is not effective once a person washes their hands.

I. SUFFICIENCY OF THE EVIDENCE

The defendant contends that the evidence is insufficient to convict him of either first degree murder or especially aggravated burglary. He asserts that the only reliable evidence in this case was circumstantial in nature. The state argues that the evidence is not entirely circumstantial and that circumstantial evidence may nonetheless be used to support his convictions. We agree.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, 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). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield,

676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

A. FIRST DEGREE MURDER

First, the defendant challenges the sufficiency of the evidence for his conviction of first degree murder. Essentially, he argues that the state failed to exclude Ware as the killer. He also contends that Ware's testimony was not reliable because he had prior convictions, had given prior inconsistent statements, and had been threatened with charges of accessory to murder. However, questions concerning the credibility of witnesses and the weight and value to be given to their testimony are resolved by the trier of fact. See State v. Cabbage, 571 S.W.2d at 835. We conclude that the evidence was sufficient to convict the defendant of first degree murder.

At the time of the offense, an unlawful, intentional, premeditated and deliberate killing of another constituted first degree murder. See T.C.A. §§ 39-13-201(a) and -202(a)(1) (1991). Our criminal code defined a deliberate act as "one performed with a cool purpose," and a premeditated act as "one done after the exercise of reflection and judgment." T.C.A. § 39-13-201(b)(1) and (2) (1991). In State v. Brown, our supreme court stated that deliberation required some period of reflection, without passion or provocation, and concluded that the "deliberation necessary to establish first degree murder cannot be formed in an instant." 836 S.W.2d 530, 539, 543 (Tenn. 1992). Premeditation requires a showing of a previously formed design or intent to kill. State v. West, 844 S.W.2d 144, 147 (Tenn. 1992). The existence of the separate and distinct elements of premeditation and deliberation is a question of fact to be decided by the jury. See State v. Brown, 836 S.W.2d at 541-42. In this respect, the determination of the state of mind necessary to establish the elements of first degree murder may be shown by circumstantial evidence. State v. Brown, 836 S.W.2d at 541; State v. Burlison, 868 S.W.2d 713, 717 (Tenn. Crim. App. 1993).

In the light most favorable to the state, the proof establishes that the defendant was angry at the victim because she gave him a laced marijuana cigarette in exchange for crack cocaine and because she stabbed him when he confronted her. He left the victim's house and went to the party at the Corner Pocket. Although several people asked the defendant not to return to the victim's house, the defendant refused to take their advice. Instead, he walked back to the victim's house, kicked in the door, and killed the victim by shooting her with the pistol he had carried with him. A neighbor identified the defendant as the person she saw fall in the field as he ran away from the victim's house. She recognized the person's jacket and hairstyle as the same worn previously by the defendant. Officer Woody saw the defendant wearing a hat earlier in the evening like one found lying near the victim's body. Comparison of hair from the hat and from the defendant showed that they were consistent with each other. Moreover, the defendant asked Detective Price whether he could go ahead and plead guilty and be executed. Under these circumstances, we hold that the jury could have found that the defendant had sufficient time to reflect, without passion or provocation, on his decision to return to the victim's home and kill her. Therefore, we conclude that the evidence is sufficient to establish beyond a reasonable doubt that the defendant killed the victim intentionally, deliberately and with premeditation.

B. ESPECIALLY AGGRAVATED BURGLARY

Next, the defendant argues that the evidence is insufficient to support his conviction for especially aggravated burglary. Especially aggravated burglary is a burglary of a habitation where the victim suffers serious bodily injury. T.C.A. § 39-14-404. A burglary is committed when a person "without the effective consent of the property owner . . . enters a building other than a habitation . . . with the intent to commit a felony . . . ." T.C.A. § 39-14-402(a)(1).

In the light most favorable to the state, the proof shows that the defendant kicked in the door to the victim's home and fired his pistol four times, shooting and killing the victim. Officers found a hat similar to one that Officer Woody testified that he had seen the defendant wearing shortly before the murder. An analysis of hair taken from the hat reflected that it was consistent with the defendant's hair. Because the defendant entered the victim's home when armed with a pistol, the jury could properly infer that he intended to kill the victim. Further, the act of killing the victim constituted serious bodily injury. See T.C.A. § 39-11-106(a)(33). Therefore, we hold that there is ample evidence to support the jury's determination of guilt beyond a reasonable doubt for the crime of especially aggravated burglary.

However, we are compelled by statute to modify the defendant's conviction for especially aggravated burglary to aggravated burglary. See State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993); State v. Oller, 851 S.W.2d 841, 843 (Tenn. Crim. App. 1992). "Acts which constitute an offense under this section may be prosecuted under this section or any other applicable section, but not both." T.C.A. § 39-14-404(d). This subsection prohibits the application of the same act to prosecute for both especially aggravated burglary and another offense. In Oller, as in this case, the act of killing the victim constituted the "serious bodily injury" that was used to enhance the burglary offense to especially aggravated burglary. 851 S.W.2d at 843. By prosecuting and convicting the defendant of first degree murder, a conviction for especially aggravated burglary is not permitted pursuant to T.C.A. § 39-14-404(d). Id. Accordingly, we modify the conviction for especially aggravated burglary to a conviction for aggravated burglary, a Class C felony. See T.C.A. § 39-14-403.

II. ACCOMPLICE AS A MATTER OF LAW

The defendant argues that Travis Ware should have been declared an accomplice as a matter of law and that the trial court erred by its failure to instruct the

jury accordingly. In response, the state correctly asserts that the defendant has waived the issue by failing to include his motion for new trial in the appellate record. See T.R.A.P. 3(e).

A motion for new trial is an essential prerequisite to appellate review of the issues raised by the accused at trial that, if successful, would mandate a new trial. T.R.A.P. 3(e) and 24(a). Although the record contains an order denying the defendant's motion for new trial, it does not detail the issues raised by the defendant in the motion for new trial. Thus, we are unable to determine whether the defendant properly preserved the issue for appeal. Ordinarily, the failure to include grounds for which a new trial is sought results in waiver of the issues on appeal. T.R.A.P. 3(e) and 36(a). It is the duty of the appealing party to prepare a fair, accurate and complete record on appeal to enable meaningful appellate review. T.R.A.P. 24(b). When necessary parts of the record are not included, we presume that the trial court's ruling was correct. State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991).

In any event, the trial court correctly instructed the jury that the question of whether Ware was an accomplice was one for the jury to decide. It is a well-established rule in Tennessee that a defendant cannot be convicted of a felony on the uncorroborated testimony of an accomplice. See Sherrill v. State, 204 Tenn. 427, 321 S.W.2d 811, 814 (1959). An accomplice is defined as a person who knowingly, voluntarily and with common intent unites with the principal offender in the commission of the crime. State v. Perkinson, 867 S.W.2d 1, 7 (Tenn. Crim. App. 1992). "A common test is whether the alleged accomplice could have been indicted for the offense." Id. When it is clear and undisputed that the witness participated in the crime, the trial court decides as a question of law whether he or she is an accomplice. The question becomes one of fact for the jury to decide when the facts are in dispute or

susceptible to different inferences. Id. The jury ultimately determines whether an accomplice's testimony has been sufficiently corroborated.

Here, the record does not clearly establish that Ware knowingly, voluntarily and with common intent united with the defendant in the commission of the burglary or the murder. Although Ware admitted that he was present when the crimes took place and possessed the clothing allegedly worn by the killer, evidence presented at trial also shows that Ware attempted to prevent the defendant from going to the victim's house. Under these circumstances, the trial court properly submitted the issue to jury.

III. MISSING WITNESS JURY INSTRUCTION

The defendant contends that it was error for the trial court not to instruct the jury about the missing witness rule after the state's failure to call Terry Walker as a witness. The state argues that the defendant waived the issue by not including the motion for new trial in the record. See T.R.A.P. 3(e). We agree. Nevertheless, the defendant is not entitled to relief.

Under certain circumstances, when a party fails to call a particular person as a witness, an inference may be drawn that had the person testified, the testimony would have been unfavorable to that party. Generally, three conditions must be met before the inference is allowed: (1) the witness had knowledge of material facts, (2) the relationship between the witness and the party would naturally incline the witness to favor the party, and (3) the witness was available to the process of the court for the trial. See State v. Bigbee, 885 S.W.2d 797, 805 (Tenn. 1994).

Initially, we note that the defendant failed to request a missing witness instruction. Ordinarily, the failure to submit a special request for a jury instruction at trial

prevents a defendant from challenging an instruction that is not as thorough as desired by the defendant, but is otherwise an accurate statement of the law. See State v. Lynn, 924 S.W.2d 892, 898-99 (Tenn. 1996); State v. Haynes, 720 S.W.2d 76, 85 (Tenn. Crim. App. 1986). Regardless, the record does not reflect that the relationship between Walker and the state is one that would naturally incline Walker to favor the state. To the contrary, Walker assisted the defendant in obtaining a ride following the murder. Further, Walker was equally available as a witness to either party. The witness list provided to the defendant by the state reveals that Walker was in custody. Therefore, the defendant was not entitled to a missing witness jury instruction.

In consideration of the foregoing and the record as a whole, the defendant's conviction and sentence for first degree murder is affirmed. His conviction for especially aggravated burglary is modified to aggravated burglary and remanded for resentencing.

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Joseph M. Tipton, Judge

CONCUR:

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Gary R. Wade, Judge

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William M. Barker, Judge