

IN THE TENNESSEE COURT OF CRIMINAL APPEALS

AT KNOXVILLE

MAY 1995 SESSION

<p>FILED</p> <p>January 21, 1997</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

STATE OF TENNESSEE,)

Appellee,)

v.)

BILLY JOE SISK,)

Appellant.)

No. 03C01-9410-CR- 00367

Cocke County

Honorable Kenneth Porter, Judge

(Second Degree Murder; Aggravated Assault)

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OPINION FILED: _____

AFFIRMED

Joseph M. Tipton
Judge

OPINION

The defendant, Billy Joe Sisk, was convicted in a jury trial in the Coker County Circuit Court of second degree murder, a Class B felony, and aggravated assault, a Class C felony. As a Range I, standard offender, he was sentenced to eighteen years for murder and three years for aggravated assault with the sentences to be served concurrently. In this appeal as of right, the defendant presents the following issues:

1. Whether the evidence in the record is sufficient to support the defendant's convictions for second degree murder and aggravated assault.
2. Whether the trial court committed plain error in not charging the presumption of law about self-defense when force is used in a defendant's home.
3. Whether the trial court erred by refusing to admit evidence of the victim's violent character.
4. Whether the trial court improperly sentenced the defendant pursuant to T.C.A. § 40-35-114.

We have reviewed the record and the law, and we affirm the trial court's actions.

A grand jury indicted the defendant for first degree murder in the shooting death of Joseph Ronnie Jones and for the aggravated assault of Doris Cline. The murder and assault arose out of a domestic dispute between Sisk and his ex-wife, Doris Cline.¹

According to Ms. Cline, just before sunset on the evening of May 29, 1992, she parked her car in the driveway of the defendant's home. She intended to ask him for the key to her place because another woman, Janet Brooks, was living with him. She found no one at home. While she was standing in the driveway, Ronnie Jones, the other victim, arrived. Jones was the defendant's landlord and his friend of several years. Ms. Cline and Jones spoke briefly. As Ms. Cline got into her Bronco, she

¹ Ms. Cline and the defendant were divorced in 1987 after a short marriage. She and the defendant continued to see each other after their divorce.

noticed the defendant and Brooks coming out of the woods. The defendant started hollering at her. Because she wanted to avoid a confrontation, she rolled up the window on the driver's side. The defendant kicked the side of the Bronco and then threw a full bottle of beer at the window. The window shattered and the unbroken bottle struck Ms. Cline in the face. The defendant, seeing that she was bleeding badly and that slivers of shattered glass were embedded in her face, pulled her from the car and took her into the house.

Ronnie Jones ran to his trailer to get ice. There he found Ricky Jones, his nephew, and Tim Driver who had come from North Carolina to visit. The men took some ice and ran down to the defendant's house. When Driver attempted to put ice on Ms. Cline's face and to remove the glass shards, the defendant became angry and ordered him to let his ex-wife alone, saying that he would do whatever was necessary. When Ronnie Jones said something to the defendant, the defendant gave Jones a shove.

In the meantime, Ms. Cline was begging to leave, and Brooks helped her out of the house and led her to the Bronco. The men followed. When Ms. Cline was unable to close the car door because of the broken glass, the defendant pushed the door shut. She then drove to her daughter's house. Her daughter took her to the emergency room where she was treated and released.

Tim Driver testified that after Ms. Cline departed, the defendant was very upset and behaved belligerently toward Ronnie and Ricky Jones.² According to Driver's testimony, he wrestled the defendant to the ground and held him there until he settled down. At one point, Driver may have hit the defendant on the back of the head with his fist. Ricky and Ronnie Jones followed the defendant into the house while Driver waited outside. The defendant grabbed his shotgun and pointed it at Driver and told him not to come inside or he would kill him. He turned the gun toward Ricky Jones and told him to leave. Ronnie Jones grabbed the shotgun out of the defendant's hands and smashed it against the stone wall of the fireplace. The stock broke off, and Jones broke the gun open and threw it onto the bed. Then the two men joined Driver in the yard.

At this point, we note that Janet Brooks, who testified for the defense, described the events differently. She said that she saw the victim and the two other men beat and kick the defendant who was lying on the ground in the yard. When the defendant finally got up and entered the house, the other three followed him inside. Brooks and the defendant asked them to leave several times. When they refused, the defendant picked up the shotgun and ordered them out. Another struggle followed in which the men threw the defendant onto the bed with the gun under him. According to Brooks, the stock was broken during this struggle. Eventually the victim and his two companions went out into the yard.

Driver testified that as they stood in the yard, he and Ricky urged the victim to come to the trailer with them. The victim agreed to leave, but turned to speak to the defendant who was standing on the porch. Then he told them to go on, he would be along right behind them. Driver and Ricky Jones walked about thirty yards when

² Evidence in the record demonstrates that all four men had been drinking. The victim's blood alcohol level was .29, and the defendant tested .18. Ricky Jones testified that he had drunk six or seven beers and that Driver had consumed about the same amount.

they realized the victim had not followed. As they turned back, they heard a gun shot. They saw Brooks running toward them and crying that Ronnie had been shot. Driver ran into the house and found the victim on his hands and knees with a gun shot wound to his chest. The defendant was standing next to the victim. After getting the address from Brooks, Driver ran to the trailer and called 911.

When the police arrived, the victim was dead and the defendant was sitting on the step between the living room and the kitchen. The victim was now lying on his back.³ The police arrested the defendant at the scene. After placing him in a patrol car and reading him his rights, the officer took the defendant's statement which the officer wrote and the defendant signed. In his statement, the defendant claimed that he shot the victim with his shotgun during a struggle over the weapon. He said that he did not know how the shotgun had been broken and that he and Ronnie Jones were best friends.

Brooks corroborated the defendant's statement that the two men were struggling over the gun. She, however, was not present when the shot was fired. She testified that she went to the yard because she was afraid that the gun would go off. After she heard the shot, she looked in the front door and saw Ronnie Jones on his hands and knees.

³ Brooks testified that she and the defendant had raised the victim from his knees and laid him on his back.

Sufficiency of the Evidence

After a one-day trial, the jury found the defendant guilty of second degree murder and aggravated assault. The defendant contends that the evidence presented at trial is insufficient to sustain his convictions.

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)

The defense raised two alternative theories of defense to the murder charge. Brooks' testimony tended to corroborate the defendant's statement in which he claimed that the gun had fired accidentally. On the other hand, a good portion of defense testimony attempted to show that the defendant had killed Ronnie Jones in self-defense. In his closing argument, defense counsel argued that the state had not proven the elements of either first or second degree murder. The trial court instructed the jury on first degree murder, second degree murder, voluntary manslaughter and self-defense.⁴ The jury convicted the defendant of second degree murder.

⁴ The record contains no indication that the defendant requested an instruction on criminally negligent homicide.

As demonstrated by its verdict, the jury obviously did not believe that adequate provocation existed for the defendant to shoot the victim. The issue of self-defense, as well as the degree of homicide, is for the jury to decide in light of all the circumstances of the killing. State v. Keels, 753 S.W.2d 140, 143 (Tenn. Crim. App. 1988). The self-defense statute states:

A person is justified in threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force. The person must have a reasonable belief that there is an imminent danger of death or serious bodily injury. The danger creating the belief of imminent death or serious bodily injury must be real, or honestly believed to be real at the time, and must be founded upon reasonable grounds.

T.C.A. § 39-11-611(a). The jury must determine whether (1) the defendant reasonably believed that he was threatened with imminent loss of life or serious bodily injury; (2) the danger creating the belief was real or honestly believed to be real at the time of the action; and (3) the belief was founded on reasonable grounds. State v. Blaine M. Wright, No. 03C01-9410-CR-00388, Cumberland County, slip op. at 9 (Tenn. Crim. App. Dec. 11, 1995), app. denied, (Tenn. June 3, 1996).

The jury rejected the defendant's self-defense claim, obviously having no doubt that the defendant had not "acted upon a well-founded apprehension of great bodily harm." State v. Danny Patrick, No. 02C01-9105-CC-00103, Dyer County, slip op. at 4 (Tenn. Crim. App. Dec. 11, 1991). Nor did they believe that he had acted in such a state of passion produced by adequate provocation sufficient to reduce the degree of homicide to voluntary manslaughter. See T.C.A. § 39-13-211(a). Second degree murder is defined as the unlawful "knowing killing of another." T.C.A. § 39-13-210(a). In viewing the testimony in the light most favorable to the state, we conclude that the record contains sufficient evidence to support the jury's finding that the defendant was guilty of murder in the second degree beyond a reasonable doubt.

(B)

The defendant was also convicted of aggravated assault. A person is guilty of aggravated assault when he causes "serious bodily injury" in the assault of another. T.C.A. § 39-13-102(a)(1)(A) (1991). Serious bodily injury is defined as a bodily injury involving any of the following:

- (A) a substantial risk of death;
- (B) protracted unconsciousness;
- (C) extreme physical pain;
- (D) protracted or obvious disfigurement; or
- (E) protracted loss or substantial impairment of a function of a bodily member, organ, or mental faculty.

T.C.A. § 39-11-106(33). The defendant concedes that he is guilty of assault but argues that the evidence presented at trial does not prove beyond a reasonable doubt that Ms. Cline's injuries satisfy the statutory definition of serious bodily injury.

Specifically, the defendant contends that the loss of teeth does not constitute "protracted loss or substantial impairment of a function of a bodily member," noting that teeth are not included in the list of bodily members found in T.C.A. § 50-6-207, a part of Tennessee's Workers' Compensation law. However, Section 207 and those following it do not purport to define what is or what is not a bodily member. As part of the workers' compensation law, this statute relates to the degree of disability which may be assessed for loss of a bodily member for the purpose of compensating workers for work-related injuries. T.C.A. § 39-11-106(33) serves an entirely different purpose. An ordinary dictionary definition of a bodily member is "a part or organ of the animal body, especially a limb or other separable part." Webster's New International Dictionary of the English Language 1533 (2d ed. Unabridged 1958). Teeth do not readily fall within this definition of a bodily member, but the loss of thirteen teeth could result in the substantial impairment of a bodily function or protracted or obvious disfigurement.

We must still consider, though, whether the evidence in the record proves that the defendant's assault caused the loss of Ms. Cline's teeth. Ms. Cline testified that she suffered a broken nose, a split lip, a concussion, and had numerous cuts on her face. She also said that the blow broke her teeth and that she had thirteen teeth removed after the assault, requiring the use of dentures.⁵

The defendant contends that her testimony elicited upon cross-examination contradicts her assertion that the assault caused the loss of her teeth. However, although she admitted having some problems with her teeth before and that her teeth had been "deteriorating," she denied that her loss of teeth was caused by her previous condition. In this respect, it was the jury's function to resolve all conflicts in testimony and to decide the credibility of witnesses. A conviction requires that we draw all reasonable inferences in favor of the state, and we cannot reweigh the evidence or supplant the jury's rational inferences with our own. A loss of thirteen teeth in addition to a broken nose, a concussion and other injuries to the face are evidence of serious bodily injury under T.C.A. § 39-11-106(33)(D) or (F). The evidence supports a conviction for aggravated assault.

II

Jury Instruction on "Use of Force in a Residence"

In his next issue, the defendant contends that the trial court committed plain error by refusing to instruct the jury that:

Any person using force intended or likely to cause death or serious bodily injury within their own residence is presumed to have held a reasonable fear of imminent peril of death or serious bodily injury to self, family or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence, and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred.

⁵ The defendant did not object to Ms. Cline testifying about the injuries she received that day.

T.C.A. § 39-11-611(b). The state contends that the failure to give the instruction is not sufficiently egregious to be considered plain error. T.R.A.P. 36(b); Tenn. R. Crim. P. 52(b)

During the conference on jury instructions, the following discussion took place:

Mr. Hill: On the self-defense charge under the new law there is a presumption that force was reasonable when it's used in one's home.

The Court: It's -- the (indiscernible) is "unlawfully."

Mr. Hill: Well, Your Honor, they were told not to come in the home, I believe, by the proof. They were asked to leave while they were in the yard.

The Court: Unlawfully forcibly enters or who has unlawfully and forcibly entered the residence. That was not shown. That is refused.

The defendant did not raise the issue in his motion for new trial and did not include a copy of the requested instruction in the record on appeal. An issue predicated on a trial court's refusal to give a requested instruction is waived unless the issue was first specifically raised in a motion for new trial. T.R.A.P. 3(e). Therefore, the issue is waived.

Even if properly preserved, however, the defendant would not be entitled to relief. The trial court found that the evidence did not show that the victim entered the defendant's home "unlawfully and forcibly." We agree. Although Brooks testified that

she and the defendant asked the men to leave when they entered the house after the struggle between Sisk and Driver, nothing suggests that the victim, defendant's long-time friend and landlord, forcibly and unlawfully entered the defendant's house after Driver had left the premises. The trial court did not err in refusing to give the requested instruction.

III

Admissibility of First Aggressor Testimony

Next, the defendant argues that the trial court's failure to admit evidence of the victim's violent character was prejudicial error. The trial court excluded the evidence because it was irrelevant. For the reasons discussed below, we agree that the evidence was properly excluded.

Tennessee law distinguishes between evidence of a victim's prior acts of violence used to corroborate the defense theory that the victim was the first aggressor and evidence used to establish that the defendant feared the victim. See State v. Ruane, 912 S.W.2d 766, 779 (Tenn. Crim. App. 1995). If the defendant knew of the victim's violent acts at the time the crime was committed, those acts may be admitted through the testimony of the defendant and only to show that the defendant feared the victim. Ruane, 912 S.W.2d at 779; State v. Hill, 885 S.W.2d 357, 361 n.1 (Tenn. Crim. App. 1994); State v. Furlough, 797 S.W.2d 631, 649 (Tenn. Crim. App. 1990). If the defendant is unaware of the prior violent acts, the evidence is admissible only to

corroborate the defendant's claim that the victim was the first aggressor. Hill, 885 S.W.2d at 362; Furlough, 797 S.W.2d at 649.⁶

Evidence that the victim was the first aggressor may be admitted on the direct testimony of any witness to corroborate that the victim was the first aggressor. Ruane, 912 S.W.2d at 779; Hill, 885 S.W.2d at 362; Furlough, 797 S.W.2d at 649. Before proof of first aggression is admitted, certain conditions must be satisfied. First, the question of self-defense must be raised by evidence in the record. Words and statements of counsel are not sufficient. Ruane, 912 S.W.2d at 781. The trial court must then determine if there is a factual basis underlying the proffered testimony. Id. Finally, the probative value of the evidence must outweigh any prejudicial effect. Id.

Neither the purpose of the proffered testimony nor the reason for its exclusion is entirely clear in the record. The defense attempted to elicit testimony from Michael Richardson about the victim's prior violent acts. The trial court allowed Richardson to testify that the victim told the defendant "I'll kick your butt," but refused to admit testimony about an incident that took place at the witness' residence in 1985. During a bench conference, defense counsel told the trial court that the reason for admitting the testimony was to show that the defendant had reason to fear because of Jones' violence and that the defendant had been told about the former incident. The trial court explained that it was not certain that the self-defense theory had been adequately raised. The testimony would be irrelevant if the defense was that the victim was shot accidentally. If self-defense were raised in the rest of the proof, the defense could recall the witness. On direct examination, Richardson testified that shortly after the shooting, Tim Driver told him that they had "Billy down on the ground and beat the

⁶ The Tennessee Rules of Evidence govern the admissibility of character evidence; however, the type of evidence governed by the rules of evidence is substantive in nature rather than corroborative. Ruane, 912 S.W.2d at 779; Hill, 885 S.W.2d at 361; State v. Ray, 880 S.W.2d 700, 705 (Tenn. Crim. App. 1993). Rule 405 provides that specific instances of a victim's violent conduct may be admitted as substantive evidence only after application to the court and during cross-examination. So-called "first-aggressor" evidence is corroborative and may not be admitted for substantive purposes.

hell out of him." Two guards at the Coker County Jail testified that the defendant had a knot the size of a small hen egg on his head when he was taken to the jail. Apparently, the trial court believed that this testimony sufficiently raised the issue of self-defense because he gave the self-defense instruction to the jury. The defendant did not testify, and the defense did not recall Richardson to the stand.

As a nonparty witness, Richardson's testimony was obviously inadmissible as evidence to show that the defendant had a reasonable belief that there was an imminent danger of death or serious bodily injury when the fatal shot was fired. Richardson's testimony was admissible to corroborate the defendant's claim that the victim was the first aggressor only if the issue of self-defense had been raised by the proof. When the defense proffered his testimony, both the defendant's statement and Janet Brook's testimony raised the possibility of an accidental death, not self-defense. Defense counsel never recalled Richardson to testify after further testimony more clearly established the issue of self-defense. A party who fails to take whatever steps that are reasonably available to avoid or to cure an error is not entitled to relief. T.R.A.P. 36(a), Advisory Commission Comments. The trial court did not err in refusing to admit Richardson's testimony at the time it was proffered. The testimony was irrelevant to a defense of accident. It was inadmissible as evidence of the defendant's state of mind, and when it arguably became relevant as corroborative evidence, the defense did not offer the testimony. Moreover, even if the defense had recalled Richardson, his testimony regarding a 1985 shooting incident may well have been of minimal value given the remoteness of the event. The trial court's refusal to admit Richardson's testimony of the victim's prior violent acts was not prejudicial error.

IV

Sentencing

The trial court conducted a sentencing hearing immediately after the jury returned its guilty verdicts. Defense counsel at first asked that the sentencing hearing be held at a later date, but at the urging of the trial court, the defendant agreed to an immediate hearing.

The trial court questioned the defendant about his personal history, his educational background, and his work history.⁷ He asked the defendant about his drinking problems and about his relationship with the victim. The trial court discussed in a general way the enhancement factors recommended by the state, concluded that consecutive sentencing was not warranted, and sentenced the defendant to an enhanced sentence of eighteen years for second degree murder and to the minimum three-year sentence for aggravated assault.⁸ On appeal, the defendant contends that the trial court improperly enhanced his sentence.

When there is a challenge to the length, range or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. T.C.A. § 40-35-401, Sentencing Commission Comments. Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing

⁷ The defendant reported that he was a life-long resident of Cocke County, that he had an eighth grade education, but that he did not read and write well. He stated that he had worked for the past eight years as an equipment operator for the same employer. His brief marriage to Doris Cline produced no children.

⁸ For a Range I offender, the sentencing range for second degree murder is fifteen to twenty-five years, and for aggravated assault three to six years. T.C.A. § 40-35-112(a)(1), (3).

hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103 and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

Although the trial court made some references to the enhancement factors, it made no findings of fact. Because the record does not demonstrate that the trial court either considered the statutory sentencing principles or made specific findings of fact, we do not apply the presumption of correctness in this instance.⁹ Given that the trial court sentenced the defendant to the minimum for the aggravated assault conviction, we consider the enhancement factors only in relation to his conviction for second degree murder.

At the sentencing hearing, the assistant district attorney contended that the state had proven the following enhancement factors:

- (3) The offense involved more than one (1) victim.
- (6) The personal injuries inflicted upon the victim were particularly great.
- (9) The defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense.
- (10) The defendant had no hesitation about committing a crime when the risk to human life was high.
- (16) The crime was committed under circumstances under which the potential for bodily injury to a victim was great.

T.C.A. § 40-35-114(3), (6), (9), (10), (16). On appeal, the state concedes that factor (3) is inappropriate because the defendant was charged with and convicted of two crimes,

⁹ When a defendant is convicted of multiple offenses, the trial court must insure that the record shows which factors are applicable to each offense. No such findings were made in this case.

each relating to a separate victim. We agree. Also, factors (6) and (16) are necessarily included in any murder because the death of the victim is an element of the crime and the personal injuries inflicted are necessarily great. State v. Lambert, 741 S.W.2d 127, 134 (Tenn. Crim. App. 1987); State v. Benjamin Moss, No. 02C01-9404-CR-00072, Shelby County, slip op. at 13 (Tenn. Crim. App. Nov. 2, 1994). See also State v. Jones, 883 S.W.2d 597, 602 (Tenn. 1994). Factor (10) could apply if others were present and subject to harm when the defendant shot the victim. See State v. Hicks, 868 S.W.2d 729, 732 (Tenn. Crim. App. 1993); State v. Tim Fox, No. 03C01-9503-CR-00061, Cocke County, slip op. at 10 (Tenn. Crim. App. June 21, 1996). In this case, though, Brooks left the house before the shot was fired, and the other two men had left the property. Other than the victim, there was no threat to human life. The defendant, however, used a firearm in the commission of the crime. Therefore the trial court properly enhanced the sentence on that basis. See T.C.A. § 40-35-114(9).

A single enhancement factor is sufficient to support defendant's eighteen-year sentence for second degree murder. Also, we agree with the trial court that concurrent sentences are appropriate in this instance. The defendant's sentences are proper as imposed.

In consideration of the foregoing and the record as a whole, the judgments of conviction are affirmed.

Joseph M. Tipton, Judge

CONCUR:

Gary R. Wade, Judge

Cornelia A. Clark, Special Judge