

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

APRIL SESSION, 1996

STATE OF TENNESSEE,)	C.C.A. NO. 02C01-9508-CR-00228
)	
Appellee,)	
)	
VS.)	SHELBY COUNTY
)	
THOMAS WARE,)	HON. JOSEPH B. DAILEY
)	JUDGE
)	
Appellant.)	(Second Degree Murder)

<p>FILED</p> <p>Jan. 28, 1997</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF SHELBY COUNTY

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

A Shelby County Criminal Court jury found Appellant Thomas Ware guilty of second degree murder. As a Range I standard offender, he received a sentence of twenty-two years in the Tennessee Department of Correction. In this appeal, Appellant presents the following issues for review: (1) whether the evidence presented at trial is legally sufficient to sustain a conviction for second degree murder, and (2) whether the trial court erred in determining the length of sentence.

After a review of the record, we affirm the judgment of the trial court.

I. FACTUAL BACKGROUND

During the early morning hours of July 11, 1993, William Jennings, a seventy-one year-old retired postal worker and father of fourteen children, was shot and killed on a city street in Memphis. After initially denying any involvement, Appellant, a fifteen year-old male, confessed to the shooting, claiming self-defense.

At approximately 2:40 a.m. on the morning in question, Appellant snuck out of the home he shared with his parents. He took with him his brother's loaded .38 caliber handgun, intending to show the weapon off to his friends. Appellant walked to nearby 802 Ida Place, where several young people were gathered in both the house and the front yard. Appellant engaged in general horseplay with

the youths in the front yard. At some point in the evening, Appellant showed Donald Kirk his gun.

As the gathering began to wind down, Kirk, a close friend of Appellant, observed an unattended truck idling in the street two houses down from 802 Ida Place. He ran over to the truck and got in, with the intention of driving away. However, before he was able to pull away, Mr. Jennings, who had left the truck unattended while he was delivering newspapers, returned and twice fired his Smith & Wesson five-shot revolver through the windshield of the truck. The first bullet struck Kirk in the jaw. The second bullet struck him in the arm. Despite being seriously wounded, Kirk was able to pull away. He drove to the end of the block, turned the corner, and jumped out of the truck. While there was some discrepancy as to whether Appellant witnessed these events, he and another individual responded to the sound of gunfire by running down the street in search of Kirk. Mr. Jennings ran in the opposite direction. Appellant met Kirk as he was attempting to make his way back to the house. He then assisted him back to 802 Ida Place, where 911 was called.

During the wait for emergency medical care, Kirk told Appellant that he loved him and that he thought he was going to die. Appellant then began to cry and ran off in the same direction that Mr. Jennings had fled. Appellant began searching the streets for Mr. Jennings and soon observed him talking on a public telephone. Upon finding him, he opened fire and continued to fire until his gun was empty. He then ran back to 802 Ida Place and told Kirk that he thought that he had shot him. Before returning home, Appellant threw his weapon in a ditch.

At approximately 3:39 a.m. on the morning in question, the following 911 emergency call was recorded:

This is the paper man at McLemore and -- and Mississippi. Somebody just robbed me and took my car and took -- [sounds of gunfire].

The police were dispatched to investigate.

At approximately the same time, Reginald Flood was traveling eastbound on McLemore. As he passed through the intersection of McLemore and Mississippi, he notice a young man matching Appellant's description. In an effort to satisfy his curiosity regarding a youth roaming the streets at such a late hour, Mr. Flood reversed his direction and observed the youth turn northbound on Mississippi. However, when he returned to the intersection, the youth was not in sight. As he passed through the intersection, Mr. Flood heard gunshots that were close enough to make him duck for cover. He proceeded part way down the block and again reversed his direction. As he passed back through the area, he observed a man lying on the ground by a public telephone. Mr. Flood called 911 from a store across the street from the body. The police and Mr. Flood arrived at the body at approximately the same time. Mr. Jennings showed no signs of life. His weapon was still in the holster he wore around his stomach.

Medical evidence revealed that Mr. Jennings sustained two gunshot wounds, one to the left side of the head and one to the left side of the chest. The bullet to the head traveled through his brain stem and came to rest just under the skin on the right side of his head. The bullet to the chest traveled through his left lung and severed his spinal cord. Medical evidence established that both wounds would have caused instantaneous incapacitation.

Investigating officers developed Appellant as a suspect from interviews conducted at 802 Ida Place. Later that same morning, the officers conducted an interview with Appellant at police headquarters. Appellant was informed of his rights and, joined by his parents, voluntarily signed a waiver of those rights. Appellant first stated that he was home by 11:30 p.m. and knew nothing about the shooting. He later admitted that he had snuck out of the house to be with friends. According to Appellant, one of the friends was an individual named Stony, who had a .38 caliber weapon and a .25 caliber weapon. Before the two of them set off after Mr. Jennings, Appellant was given the .25 caliber weapon. The two of them then tracked and opened fire upon Mr. Jennings in retribution for his shooting of Kirk. When confronted with eyewitness testimony, Appellant rescinded his story and admitted that he had acted alone in shooting Mr. Jennings.

Following his confession, Appellant was arrested. In a juvenile court hearing on August 18, 1993, probable cause was established, and Appellant was held for prosecution as an adult. On May 10, 1994, the Shelby County Grand Jury indicted Appellant for first degree murder in violation of Tennessee Code Annotated § 39-13-202(a)(1). From February 7, 1995 through February 10, 1995, Appellant was tried before a jury in the Shelby County Criminal Court. At the conclusion of the trial, the jury found Appellant guilty of second degree murder in violation of Tennessee Code Annotated § 39-13-210(a)(1). On March 14, 1995, Appellant was sentenced as a Range I standard offender to twenty-two years in the Tennessee Department of Correction.

II. SUFFICIENCY OF THE EVIDENCE

Appellant first alleges that the evidence presented at trial is legally insufficient to sustain a conviction for second degree murder. When an appeal challenges the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the State, 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, 318 (1979); State v. Evans, 838 S.W.2d 185, 190-91 (Tenn. 1992); Tenn. R. App. P. 13(e). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). This Court will not reweigh the evidence, re-evaluate the evidence, or substitute its evidentiary inferences for those reached by the jury. State v. Carey, 914 S.W.2d 93, 95 (Tenn. Crim. App. 1995). Furthermore, in a criminal trial, great weight is given to the result reached by the jury. State v. Johnson, 910 S.W.2d 897, 899 (Tenn. Crim. App. 1995).

Once approved by the trial court, a jury verdict accredits the witnesses presented by the State and resolves all conflicts in favor of the State. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). The credibility of witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury as trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). A jury's guilty verdict removes the presumption of innocence enjoyed by the defendant at trial and raises a presumption of guilt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant then bears the burden of overcoming this presumption of guilt on appeal. State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991).

In order to sustain a conviction for second degree murder in this case, the State had to prove beyond a reasonable doubt that Appellant knowingly killed Mr. Jennings. See Tenn. Code Ann. § 39-13-210(a)(1) (Supp. 1995). Rather than alleging that the State failed to establish a specific element of the offense, Appellant argues that the evidence presented at trial was insufficient to allow a rational trier of fact to reject his theory of self-defense. In support of this theory, Appellant testified that he only tracked Mr. Jennings in an effort to better identify him to the police. However, when he found Mr. Jennings, he feared that he would be shot just like his friend. Appellant maintains that he fired upon Mr. Jennings solely because he feared for his life. He further maintains that he did not aim at Mr. Jennings but instead fired in his general direction as he retreated for cover. Appellant testified that, when he made the decision to shoot, his only choice was “to live or die.”

Tennessee Code Annotated § 39-11-611(a) provides the following:

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 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. There is no duty to retreat before a person threatens or uses force.

Thus, the test for self defense is three-fold: (1) the defendant must reasonably believe he or she is threatened with imminent loss of life or serious bodily injury; (2) the danger creating the belief must be real or honestly believed to be real at the time of the action; and (3) the belief must be founded on reasonable grounds. See id. sentencing commission comments. Whether a defendant's actions are

justified as self-defense involves factual determinations to be resolved by the jury. State v. Clifton, 880 S.W.2d 737, 743 (Tenn. Crim. App. 1994).

It is evident from the verdict of guilt that, based upon the facts and circumstances leading up to and surrounding the shooting, the jury determined that the actions taken by Appellant against Mr. Jennings failed to meet the three-fold test for self-defense. This Court has consistently held that such a factual determination lies exclusively within the province of the jury. See State v. Bunting, No 03C01-9506-CR-00182, 1996 WL 224789, at *2 (Tenn. Crim. App. May 6, 1996); State v. McCormick, No. 01C01-9502-CC-00027, 1995 WL 580854, at *3 (Tenn. Crim. App. Oct. 4 1995); State v. Mize, No. 03C01-9405-CR-00163, 1995 WL 562243, at *4 (Tenn. Crim. App. Sept. 22, 1995). In light of the evidence that Appellant tracked down Mr. Jennings and shot him in the side of the head and chest, that Mr. Jennings' weapon was holstered at the time of his death, and that Appellant offered a number of fabricated accounts of the incident in an effort to conceal his guilt, the decision of the jury is adequately supported by the record. Thus, we find that, when viewed in a light most favorable to the State, the evidence presented at trial is legally sufficient both to sustain Appellant's conviction for second degree murder and to reject Appellant's theory of justified self-defense.

III. SENTENCING

Appellant next alleges that the trial court erred in determining the length of sentence. When an appeal challenges the length, range, or manner of service of a sentence, this Court conducts a de novo review with a presumption that the determination of the trial court was correct. Tenn. Code Ann. § 40-35-401(d)

(1990). However, this presumption of correctness is “conditioned upon the affirmative showing 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). In the event that the record fails to demonstrate such consideration, review of the sentence is purely de novo. Id. If appellate review reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this Court must affirm the sentence, “even if we would have preferred a different result.” State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In conducting a review, this Court must consider the evidence, the presentence report, the sentencing principles, the arguments of counsel, the nature and character of the offense, mitigating and enhancement factors, any statements made by the defendant, and the potential for rehabilitation or treatment. State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993). The defendant bears the burden of showing the impropriety of the sentence imposed. State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993).

We note initially that, because the record demonstrates that the trial court adequately considered the sentencing principles and all relevant facts and circumstances, our review of Appellant’s sentence will be de novo with a presumption of correctness.

At the time sentence was imposed in this case the presumptive length of sentence for a Class A felony was the minimum sentence in the statutory range if no enhancement or mitigating factors were present. Tenn. Code Ann. § 40-35-

210(c) (1990).¹ Where both enhancement and mitigating factors apply, the trial court must start at the minimum sentence, enhance the sentence within the range as appropriate to the enhancement factors, and then reduce the sentence within the range as appropriate to the mitigating factors. Id. § 40-35-210(e). The weight afforded an enhancement or mitigating factor is left to the discretion of the trial court so long as the trial court complies with the purposes and principles of the Tennessee Criminal Sentencing Reform Act of 1989 and its findings are supported by the record. State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995).

Appellant was convicted of second degree murder, a Class A felony. See Tenn. Code Ann. § 39-13-210(b). As a Range I standard offender convicted of a Class A felony, Appellant's statutory sentencing range was fifteen to twenty-five years. See id. § 40-35-112(a)(1). The trial court found the following enhancement factors: (1) "[a] victim of the offense was particularly vulnerable because of age or physical or mental disability . . . ," id. § 40-35-114(4); (2) "[t]he defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense," id. § 40-35-114(9); and (3) the killing was motivated by revenge. The trial court found the following mitigating factors: (1) "[t]he defendant, because of his youth or old age, lacked substantial judgment in committing the offense," id. § 40-35-113(6); (2) "[t]he defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct," id. § 40-35-113(11); and (3) although only applied marginally, "[t]he

¹In 1995 the legislature amended Tenn. Code Ann. Sec. 40-35-210(c) to create a presumptive sentence of the midpoint in the statutory range for a Class A felony where no enhancement or mitigating factors are present

defendant assisted the authorities in uncovering offenses committed by other persons or in detecting or apprehending other persons who had committed the offense.” Id. § 40-35-113(9) Based upon the foregoing enhancement and mitigating factors and relevant sentencing principles, the trial court imposed a sentence of twenty-two years. Both Appellant and the State take issue with the trial court’s application of certain enhancement and mitigating factors and its failure to apply others. We will address each contested factor in turn.

A. PARTICULAR VULNERABILITY

Appellant first argues that the trial court improperly applied enhancement factor (4), concerning the particular vulnerability of the victim due to his advanced age. At the time of the shooting, Jennings was seventy-one years of age. In applying this enhancement factor, the trial court reasoned that often times the elderly are targeted for criminal activity specifically because of their age.

When applying enhancement factor (4), the relevant inquiry is whether the victim was particularly vulnerable because of age, physical disability, or mental disability. State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993). A victim is particularly vulnerable within the meaning of this enhancement factor when the victim lacks the ability to resist the commission of the crime, when the victim’s ability to summon assistance is impaired, or when the victim does not have the capacity to testify against the perpetrator of the crime. State v. Butler, 900 S.W.2d 305, 313 (Tenn. Crim. App. 1994). Standing alone, proof of the victim’s age is not sufficient to establish particular vulnerability. State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995). Instead, the State must show the natural physical or mental limitations that rendered the victim particularly

vulnerable. Adams, 864 S.W.2d at 35. The State must also show that such limitations were a factor in the commission of the offense. Butler, 900 S.W.2d at 313.

Here, the State established that the victim was advanced in age but failed to establish how his advanced age was a factor in the commission of the murder. Indeed, no degree of physical strength, dexterity, or ability would have enabled Mr. Jennings to have avoided being shot from a distance. See, e.g., Butler, 900 S.W.2d at 313. Before the shooting, Mr. Jennings, despite his advanced age, was able to defend himself from the initial theft, to flee the scene, and to notify authorities by means of a 911 call. Furthermore, there was no evidence in the record that Mr. Jennings was singled out to be the victim of criminal conduct because of his age. The words of Tennessee Code Annotated § 40-35-114(4) and applicable precedent compel the conclusion that the trial court's application of this enhancement factor was erroneous.

B. REVENGE KILLING

Appellant also argues that the trial court improperly applied as an enhancement factor the fact that the killing was motivated by revenge. Appellant correctly points out that such an enhancement factor is not provided for by statute. A sentencing court may not use non-statutory factors to enhance a sentence. State v. Strickland, 885 S.W.2d 85, 89 (Tenn. Crim. App. 1995). Thus, we conclude that the trial court's application of revenge as an enhancement factor was improper.²

² Appellant argues that, because the trial court considered as an enhancement factor the fact that the murder was motivated by revenge, the presumption of correctness is lost. This argument is without merit. As stated previously, the presumption of correctness is "conditioned upon the

C. STRONG PROVOCATION

Appellant next argues that the trial court should have applied mitigating factor (2) to his sentence. Mitigating factor (2) states that “[t]he defendant acted under strong provocation.” Tenn. Code Ann. § 40-35-113(2). The trial court determined that, as applied to this case, the enhancement factors dealing with strong provocation, substantial grounds tending to excuse the criminal conduct, and lack of a sustained intent to violate the law were very similar and arose from the same set of facts. The trial court chose to apply only enhancement factor (11), lack of a sustained intent to violate the law.

Following the shooting of his friend, Appellant, a fifteen-year-old boy carrying a loaded weapon, took it upon himself to track down the presumed shooter. The injury to his friend may have precipitated Appellant’s actions, but Mr. Jennings had retreated from the scene and posed no threat, thereby extinguishing any strong provocation for Appellant to act. See State v. Hembree, No. 03C01-9402-CR-00066, 1995 WL 300737, at *5 (Tenn. Crim. App. May 18, 1995). Moreover, the jury rejected Appellant’s claim of self-defense, further weakening any argument that Appellant acted under strong provocation when he opened fire on Mr. Jennings. The nature and circumstances of this offense do not demonstrate the kind of strong provocation required to mitigate the sentence. See State v. Galbreath, No. 01C01-9406-CC-0204, 1995 WL 518878, at *5 (Tenn. Crim. App. Sept. 1, 1995). Thus, we agree with the trial court that mitigating factor (2) is inapplicable.

affirmative showing 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). Correctly applying enhancement and mitigating factors is not a prerequisite. This does not mean, however, that a reviewing court cannot find inapplicable certain enhancement and mitigating factors in the face of the presumption should the record fail to adequately establish the applicability of the factors.

D. SUBSTANTIAL GROUNDS TENDING TO EXCUSE OR JUSTIFY CRIMINAL CONDUCT

Finally, Appellant argues that the trial court should have applied mitigating factor (3) to his sentence. Mitigating factor (3) states that “[s]ubstantial grounds exist tending to excuse or justify the defendant’s conduct, though failing to establish a defense.” Tenn. Code Ann. § 40-35-113(3). The trial court did not apply this mitigating factor.

The facts and circumstances of this case do not excuse or justify the actions taken by Appellant on the morning in question. Upon finding his injured friend, Appellant’s more reasonable and proper response would have been to obtain medical assistance and to have left the investigation of this incident and the punishment of the shooter to the proper authorities. Thus, we agree with the finding of the trial court that mitigating factor (3) is inapplicable.

E. LACK OF SUBSTANTIAL JUDGMENT

The State first argues that the trial court improperly applied mitigating factor (6), concerning Appellant’s lack of substantial judgment in committing the offense due to his young age. When considering the applicability of mitigating factor (6), the sentencing court should consider “the defendant’s age, education, maturity, experience, mental capacity or development, and any other pertinent circumstance tending to demonstrate the defendant’s ability or inability to appreciate the nature of his conduct.” State v. Adams, 864 S.W.2d 31, 33 (Tenn. 1993). At the time of the shooting, Appellant was fifteen years of age and had completed the ninth grade. There is no evidence that he is particularly mature,

experienced, or intelligent. Indeed, his actions indicate otherwise. Under these circumstances, we must affirm the trial court's application of this mitigating factor.

F. PROVIDING ASSISTANCE TO THE AUTHORITIES

The State also argues the trial court improperly applied mitigating factor (9), concerning Appellant's assistance of the authorities. While recognizing that Appellant did little to assist the authorities immediately following the shooting, the trial court determined that this factor should apply to the sentence, although only marginally, because Appellant ultimately made a confession. However, the fact that Appellant confessed to the shooting has no bearing on the application of mitigating factor (9). See State v. Nunley, No. 01C01-9309-CC-00316, 1995 WL 45803, at *6 (Tenn. Crim. App. Feb. 2, 1995), perm. app. denied (May 8, 1995) (concurring in results only). Moreover, there is no evidence in the record that Appellant assisted authorities with their investigation of the shooting, if anything Appellant hampered law enforcement efforts by providing multiple fabricated accounts of the incident in an effort to hide his own guilt. Thus, we conclude the trial court's application of mitigating factor (9) was improper.

G. LACK OF A SUSTAINED INTENT TO VIOLATE THE LAW

The State argues that the trial court improperly applied mitigating factor (11), concerning the lack of a sustained intent to violate the law. The trial court determined that this factor should apply because Appellant's actions closely followed the shooting of his friend. The relevant inquiry here is whether the circumstances leading up to the murder were sufficiently unique to make it unlikely that Appellant was motivated by a sustained intent to violate the law. While the circumstances leading up to the murder were unique, Appellant, having

previously armed himself, made the decision to track down the individual who shot his friend. By taking it upon himself to search the city streets of Memphis for Mr. Jennings and then opening fire, Appellant displayed a sustained intent to violate the law. Thus, we conclude that the trial court's application of mitigating factor (11) was improper.

H. PREVIOUS CRIMINAL HISTORY

The State next argues that the trial court should have applied enhancement factor (1) to the sentence. Enhancement factor (1) states that “[t]he defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range.” Tenn. Code Ann § 40-35-114(1). The trial court discussed this enhancement factor, but it is unclear from the record whether it was applied to Appellant's sentence.

According to his pre-sentence report, Appellant has a 1993 conviction for unlawful possession of a weapon. Because Appellant is classified as a Range I standard offender, this conviction represents a sufficient criminal history for consideration under enhancement factor (1). The weapons offense is especially noteworthy given the circumstances of this case. Thus, we find that the application of enhancement factor (1) is proper.

I. HIGH RISK TO HUMAN LIFE

Finally, the State argues that the trial court should have applied enhancement factor (10) to the sentence. Enhancement factor (10) states that “[t]he defendant had no hesitation about committing a crime when the risk to human life was high.” Tenn. Code Ann. § 40-35-114(10). The trial court

determined that this enhancement factor was not applicable to Appellant's sentence because high risk to human life is inherent in any homicide and, therefore, could not be used to enhance the sentence.

While enhancement factor (10) is inapplicable when the only person subject to injury is the victim, this Court has consistently held that it is applicable when other individuals are subject to a high risk of injury. See State v. Johnson, 909 S.W.2d 461, 464 n.1 (Tenn. Crim. App. 1995); State v. Makoka, 885 S.W.2d 366, 373 (Tenn. Crim. App. 1994). Here, the record reveals that there were others in the vicinity of the shooting. One of the witnesses at trial testified that, as he was driving through the area, he ducked at the sound of nearby gunfire. He also testified that there were other vehicles on the road at the time of the shooting. Furthermore, the record shows that a store was also open and doing business just across the street from where the victim was shot. Appellant himself testified that he shot at his victim from across the street and continued to shoot until there were no more bullets in his gun, striking the victim only twice. Thus, because there were other individuals besides the victim subject to a high risk of injury, we conclude that enhancement factor (10) is applicable.

J. CONCLUSION

In sum, we find that the following enhancement factors apply to Appellant's sentence: (1) "[t]he defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range," Tenn. Code Ann. § 40-35-114(1); (2) "[t]he defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense," id. § 40-35-114(9), and (3) "[t]he defendant had no

hesitation about committing a crime when the risk to human life was high.” Id. § 40-35-114(10). We further find that the following mitigating factors apply to Appellant’s sentence: (1) “[t]he defendant, because of his youth or old age, lacked substantial judgment in committing the offense,” id. § 40-35-113(6). In light of the existence of three enhancement factors and only one mitigating factor, we conclude that the trial court’s imposition of a twenty-two year sentence is justified and reasonable.

Accordingly, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

JOSEPH M. TIPTON, JUDGE