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

FILED

April 17, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 0301-9511-CC-00360
Appellee	)	
	)	SULLIVAN COUNTY
vs.	)	
	)	Hon. **R. JERRY BECK**, Judge
RONALD JEFFERY DAVIS,	)	
	)	(Attempted First Degree Murder)
Appellant	)	

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Ronald Jeffery Davis, was convicted by a jury in the Sullivan County Criminal Court of attempted first degree murder. Tenn. Code Ann. § 39-12-101 (1991); Tenn. Code Ann. § 39-13-202(a)(1) (1994 Supp.).[1] On appeal, he challenges the trial court's admission at trial of a tape-recorded message, the trial court's admission of testimony concerning a prior altercation between the appellant and the victim, and the sufficiency of the evidence supporting the jury's verdict.

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

I. Factual Background

The appellant's trial commenced on May 10, 1995. The testimony at trial revealed that, on the morning of July 11, 1994, *en route* to work, Warren Watkins observed in the rearview mirror of his pick-up truck the appellant's maroon Oldsmobile Cutlass. Mr. Watkins was familiar with the appellant's car, as he had known the appellant for fifteen years and had previously seen the appellant's car. As the appellant's car drew alongside Mr. Watkin's truck, Mr. Watkins observed the appellant pointing a shotgun in his direction. As the appellant fired his weapon, Mr. Watkins leaned back in his seat, avoiding the line of fire by approximately four to six inches. The victim then applied his brakes, stopping his car at the side of the road. He bent down in his seat, because he was experiencing considerable pain as a result of fragments of glass from the shattered window of his truck that were embedded in his arm. The appellant

[1]The trial court sentenced the appellant to sixteen years incarceration in the Department of Correction.

again drove past the victim's truck. Watkins remained in an inclined position until the appellant had departed.

Watkins then drove to the Mt. Carmel Police Department, where he reported the shooting. The Mt. Carmel police notified the Washington County Sheriff's Department. Deputy Sean Franks of the Washington County Sheriff's Department testified at trial that, on the morning of the shooting, he received a "BOLO," or "Be on the Lookout," for a maroon vehicle. Subsequently, he was dispatched to the Watkins' residence. The victim's wife, Melissa Davis Watkins, had called the police, claiming that her ex-husband, armed with a shotgun, was attempting to enter her backdoor. When Deputy Franks arrived at the Watkins' residence, he observed a maroon Oldsmobile in the driveway. He walked to the corner of the house and observed the appellant standing at the backdoor, holding a shotgun, and screaming. Deputy Franks arrested the appellant and placed the appellant and the weapon in the custody of Sergeant David Quillen of the Kingsport Police Department. Franks testified that the weapon contained one spent cartridge and several "live" rounds of ammunition.

Detective David Cole of the Kingsport Police Department testified that Sergeant Quillen delivered to him the appellant's weapon. Detective Cole identified the weapon as a Remington, Model 1100, 12-gauge shotgun. The barrel of the shotgun had been sawed off. The police also transported to the Kingsport Police Department the appellant's vehicle. The police recovered from the vehicle the following items: five "live" rounds of 12-gauge shotgun ammunition; an empty box of 12-gauge ammunition; and a receipt from a Kingsport Wal-Mart for two boxes of ammunition, dated June 25, 1994, approximately three weeks prior to the shooting.

The State's proof further revealed that the appellant and the victim had been good friends since elementary school. However, following the appellant's divorce on August 3, 1993, from his wife, Melissa, she and Watkins initiated an intimate relationship and, ultimately, married on June 18, 1994. In October, 1993, as a result of Watkins' relationship with the appellant's ex-wife, the appellant assaulted and threatened to kill Watkins. Moreover, in March, 1994, the appellant left a rambling message, suffused with obscenities, for Watkins on his ex-wife's answering machine. The message included the following excerpted portion:

> You're going to look in your goddamn car, and you can expect the goddamn worst. Warren Watkins, you're a goddamn, low-life, son-of-a-bitch pussy, buddy. You m__ -f__, back stabbing son-of-a-bitch. Anytime, any place, boy, you name it, son. Your ass, boy. Your goddamn ass. ... You'll live to regret this ... . Write it down, boy, it will come to a head. ... By god, if you're afraid, you better be f__ afraid, boy. ... your used to be best friend has become your worst goddamn enemy, son. ... I give you the opportunity to shoot me ... I'm going to make you wish you had ... . I hope you enjoy ... her ... Your goddamn days is numbered ... .

At trial, Ms. Watkins testified that, although she and the appellant had agreed to the divorce, the appellant had harbored hopes of a reconciliation. Following the divorce the appellant suffered episodes of depression and, during the months preceding the shooting, exhibited considerable anger toward his ex-wife. On the morning of the shooting, the appellant arrived at her home, armed with a shotgun, and began kicking on her back door. She called the police, who arrested the appellant.

The appellant did not testify at trial. He introduced the testimony of Regina Flanary, a friend of the appellant, who confirmed that the appellant had suffered depression following his divorce. Again, at the conclusion of the trial, the jury found the appellant guilty of attempted first degree murder.

II. Analysis

a. The Tape-Recorded Message

The appellant first contests the admissibility at trial of the message left by the appellant for the victim on his ex-wife's answering machine. The appellant, citing Tenn. R. Evid. 802, argues that the tape-recorded message is hearsay. We initially note that "[a] videotape or audiotape recording may effectively be a 'witness,'" i.e., the person who is in court and relates the declarant's statement to the trier of fact. Cohen, Sheppeard, and Paine, Tennessee Law of Evidence (1995) §801.3, p. 493. The recording is admissible if testimony concerning the appellant's statements would be admissible.[2] Id. The State correctly notes that the hearsay statements at issue in the instant case qualify as admissions by a party-opponent and are, therefore, admissible pursuant to Tenn. R. Evid. 803(1.2). See also, e.g., State v. Keeley, No. 01C01-9403-CR-00095 (Tenn. Crim. App. at Nashville, August 25, 1995), perm. to appeal denied, (Tenn. 1996)(the defendant's prior threat to kill the victim was admissible as an admission by a party opponent).

The appellant also asserts that, because the message was irrelevant and prejudicial, it was inadmissible pursuant to Tenn. R. Evid. 402 and Tenn. R. Evid. 403. The determination of whether proffered evidence is relevant in accordance with Tenn. R. Evid. 402 is left to the discretion of the trial judge, State v. Forbes, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995), as is the determination, pursuant to Tenn. R. Evid. 403, of whether the probative value of evidence is substantially outweighed by the possibility of prejudice. State v. Burlison, 868 S.W.2d 713, 720-721 (Tenn. Crim. App. 1993). See also State v. Williamson, 919 S.W.2d 69, 78 (Tenn. Crim. App. 1995). "In deciding these issues, the trial court must

[2]The appellant is not alleging that the tape-recorded message was improperly authenticated according to Tenn. R. Evid. 901, nor would the record support such a contention.

consider among other things, the questions of fact that the jury will have to consider in determining the accused's guilt as well as other evidence that has been introduced during the course of the trial." Williamson, 919 S.W.2d at 78. This court will not interfere with the trial court's exercise of discretion absent a clear abuse appearing upon the face of the record. Id. at 79.

"'Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.'" Huddleston v. United States, 485 U.S. 681, 689, 108 S.Ct. 1496, 1501 (1988)(citation omitted). In other words, evidence is only relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. See also State v. Hayes, 899 S.W.2d 175, 183 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995). Whether or not the appellant, although ultimately unsuccessful, premeditated and deliberated the murder of the victim in this case was a question of fact central to the jury's determination of the appellant's guilt. Clearly, the appellant's threatening message to the victim, delivered approximately four or five months prior to the shooting, was relevant to the issue of premeditation and deliberation. The appellant nevertheless contends that the tape-recorded message was too remote in time from the offense. We have previously observed that, "while 'a lapse of time may, of course, affect [the relevance of evidence], it is the rational connection between events, not the temporal one, that determines whether the evidence has probative value.'" State v. Gentry, 881 S.W.2d 1, 7 (Tenn. Crim. App. 1993)(citation omitted). We conclude that the tape-recorded message possessed probative value.

Moreover, with respect to Tenn. R. Evid. 403, although the introduction of the message at trial was certainly prejudicial, we have previously observed that

any evidence is prejudicial. Id. ("the mere fact that evidence is particularly damaging does not make it unfairly prejudicial"). See also State v. Hunter, No. 01C01-9411-CC-00391 (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1996). The issue is one of simple fairness. Hunter, No. 01C01-9411-CC-00391. We cannot say that the introduction of the message was unfairly prejudicial to the appellant so as to constitute an abuse of discretion by the trial court. This issue is without merit.

b. Testimony Concerning the Prior Altercation Between the Appellant and the Victim

The appellant next contends that the trial court erred in admitting testimony by the victim and Melissa Watkins concerning the appellant's physical assault of the victim in October, 1993. On the occasion of the assault, the appellant threatened to kill the victim, stating, "I'll blow you away." We agree with the State that the appellant's statement is admissible pursuant to the party-opponent and state of mind exceptions to the hearsay rule. See Tenn. R. Evid. 803(1.2) and 803(3).[3] Moreover, we conclude that the trial court properly found, following a jury-out hearing, that testimony concerning the physical assault was admissible pursuant to Tenn. R. Evid. 404(b), as it was highly relevant to the issue of intent and its probative value outweighed the danger of unfair prejudice.[4] Again, in the instant case, the rational connection between the events, despite the lapse of time, is determinative. Gentry, 881 S.W.2d at 7. This issue is without merit.

c. Sufficiency of the Evidence

The appellant next challenges the sufficiency of the evidence supporting

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[3]The appellant's threat is also sufficiently relevant to justify any prejudice flowing from its admission at trial. See Tenn. R. Evid. 402 and Tenn. R. Evid. 403.

[4]As we have already concluded that the testimony is admissible pursuant to the more restrictive balancing test of Tenn. R. Evid. 404(b), the testimony is necessarily admissible pursuant to Tenn. R. Evid. 402 and Tenn. R. Evid. 403.

his conviction. A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant must establish that the evidence presented at trial was so deficient that no "reasonable trier of fact" could have found the essential elements of the offense 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).

Moreover, an appellate court may neither reweigh nor reevaluate the evidence when determining its sufficiency. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990). "A jury verdict approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory." State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). The State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. Id. See also State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992).

The State may prove a criminal offense by direct evidence, circumstantial evidence, or a combination of the two. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987). See also State v. Brown, 836 S.W.2d 530, 541 (Tenn. 1992)("the cases have long recognized that the necessary elements of first-degree murder may be shown by circumstantial evidence"). Before a jury may convict a defendant of a criminal offense based upon circumstantial evidence alone, the facts and circumstances "must be so strong and cogent as to exclude

every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971). See also State v. Gregory, 862 S.W.2d 574, 577 (Tenn. Crim. App. 1993). As in the case of direct evidence, the weight to be given circumstantial evidence and "'[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.'" Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958)(citation omitted).

At the time of this offense, the relevant statute defined first degree murder as "[a]n intentional, premeditated and deliberate killing of another." Tenn. Code Ann. § 39-13-202(a)(1). Additionally,

> A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:
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> (1) Intentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;
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> (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
>
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

Tenn. Code Ann. §39-12-101(a)(3). As to the requisite culpability, a person acts intentionally "with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result." Tenn. Code Ann. § 39-11-106(a)(18) (1991). Additionally, premeditation necessitates "a previously formed design or intent to kill," State v. West, 844 S.W.2d 144, 147 (Tenn. 1992), and "the exercise of reflection and judgment," Tenn. Code Ann. § 39-13-201(b)(2) (1991). Deliberation requires a "cool purpose" and the absence of "passion or

provocation." Tenn. Code Ann. § 39-13-201(b)(1) and Sentencing Commission Comments.[5]

The appellant argues that the evidence adduced at trial did not establish the requisite culpability. Generally, the State has the burden of establishing premeditation and deliberation. Brown, 836 S.W.2d at 543. Again, although the jury may not engage in speculation, State v. Bordis, 905 S.W.2d 214, 222 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995), the jury may infer premeditation and deliberation from the circumstances surrounding the killing or, as in the instant case, the attempted killing. Gentry, 881 S.W.2d at 3. Our supreme court has delineated several circumstances which may be indicative of premeditation and deliberation, 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 the victim, and the making of preparations before the killing for the purpose of concealing the crime. Brown, 836 S.W.2d at 541-542. This court has also recently noted several factors from which the jury may infer the two elements, including planning activity by the defendant before the killing, evidence concerning the defendant's motive, and the nature of the killing. Bordis, 905 S.W.2d at 222 (quoting 2 W. LaFave and A. Scott, Jr., Substantive Criminal Law § 7.7 (1986)).

We conclude that the record supports the jury's findings of premeditation and deliberation. The record reflects that the appellant was angry with the victim due to the victim's relationship with the appellant's ex-wife. The appellant threatened the victim on at least two occasions and physically assaulted the victim on one occasion. The appellant purchased ammunition three weeks

[5]However, with respect to deliberation, we note that, in Gentry, 881 S.W.2d at 5, this court stated, "The [mere] presence of agitation or even anger, in our view, does not necessarily mean that the murder could not have occurred with the requisite degree of deliberation."

before the shooting. He employed a 12-gauge, sawed-off shotgun to accomplish his purpose, aiming his weapon directly at the victim. The victim was unarmed.[6]

The appellant also argues that, not only did the proof at trial fail to establish premeditation and deliberation, but the proof failed even to establish the appellant's presence at the scene of the shooting. Specifically, the appellant contends that, according to the testimony of the victim and Melissa Watkins, he would not have had enough time to drive from the location of the shooting to the victim's residence, where he was identified by his ex-wife and, finally, arrested. We reject this contention. The victim positively identified both the appellant and his vehicle. Moreover, neither the victim nor Melissa Watkins could provide more than an approximate timetable of events. Additionally, viewing the evidence in a light most favorable to the State, Watkins testified that the shooting occurred at approximately 6:05 a.m. He then called his wife at approximately 6:20 a.m. Melissa Watkins testified that she called her father within five minutes of receiving her husband's phone call. Following her phone call to her father, Ms. Watkins sat at a window in a spare bedroom of her house, watching the street and awaiting her father's arrival. Thus, she arguably began watching the street at 6:25 a.m. or 6:30 a.m. She testified that the appellant must have arrived before she began her surveillance of the street. Therefore, the appellant would have had approximately twenty minutes to drive from the location of the shooting to the Watkins' residence. The victim testified that his home is approximately twenty miles from the location of the shooting. Clearly, the appellant's arrival at the Watkins' residence within twenty minutes was not beyond the realm of possibilities.[7] We note that the appellant's timetable of events, set forth in his

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[6]We agree with the State that the appellant's failure to fire his weapon more than once at the victim does not preclude a conviction for attempted first degree murder.

[7]Melissa Watkins further testified that her father arrived within ten or fifteen minutes of their telephone conversation. When he arrived, he informed her that the appellant was already at the house. They then called the police. Deputy Franks testified that he was dispatched to the Watkins' residence between 7:00 a.m. and 7:30 a.m. Franks' testimony is more consistent with a later sequence of events than that suggested by the appellant.

brief, requires that this court view the evidence in a light most favorable to the appellant. This we decline to do pursuant to the aforementioned principles of appellate review.

We conclude that the evidence is sufficient to support a conviction for attempted first degree murder. Accordingly, in light of the foregoing analysis, we affirm the judgment of the trial court.

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DAVID G. HAYES, Judge

CONCUR:

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JOHN H. PEAY, Judge

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WILLIAM M. BARKER, Judge