IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 03C01-9601-CR-00036**
	)	
Appellee,	)	
	)	**HAMILTON COUNTY**
V.	)	
	)	**HON. DOUGLAS A. MEYER, JUDGE**
JOSEPH LEBRON DERRICK,	)	
	)	
Appellant.	)	**(SECOND DEGREE MURDER)**

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF HAMILTON COUNTY

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

The Appellant appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure from his conviction for second degree murder. The Appellant was indicted for first degree murder in Hamilton County. A jury found him guilty of second degree murder. The trial court sentenced the Appellant to twenty (20) years as a Range I Standard Offender. The Appellant argues three issues in his appeal: (1) The trial court abused its discretion by not allowing a State witness to be fully cross-examined regarding inconsistent statements; (2) the evidence was insufficient to support a conviction for second degree murder; (3) the Appellant's sentence was excessive. We affirm the judgment of the trial court.

The Appellant and the victim were patrons at a nightclub in Chattanooga the night of the incident, June 11, 1994. The two became involved in an altercation. The bouncers at the club separated the two men, and they made the Appellant leave the club. The victim soon decided to leave the club as well. The Appellant was waiting outside the club. The Appellant either was handed a gun or picked one up off of the ground, and began chasing the victim through a parking area while shooting at him. The victim was shot and killed in the parking area. The Appellant left the scene in a car, and he turned himself in when he heard his name in connection with the victim's death on the television.

I.

The Appellant's first issue is whether the trial court abused its discretion by not allowing examination of a police detective, concerning prior inconsistent statements of a witness, David Wilson. At trial, the Appellant attempted to ask the investigating detective about some notes he took during an interview with Mr. Wilson. The Appellant felt that Wilson's testimony in the State's case did not match up with the detective's notes. The trial court did not allow the Appellant to ask questions concerning the notes of the witness interview in front of the jury, but did allow the Appellant to enter an offer of proof into the record.

The detective had been the first witness called by the State. He was not asked questions concerning the witness interview at that time. Mr. Wilson was also presented in the State's case. On cross-examination by the Appellant, the following exchange occurred between Mr. Wilson and Appellant's counsel:

> A. Detective Swafford came to my house.
> Q. Oh, okay. When he came to your house, did you not tell him then that Red was firing the gun wildly?
> A. Yes. I told him he was firing like on them video rap things, he was firing sideways.
> Q. Did you not use the word "wildly"?
> A. Probably did, I don't remember, but probably did.

In his brief, the Appellant argues that the trial court erred by not allowing the Appellant to examine the detective concerning a prior inconsistent statement of David Wilson. During the Appellant's case, he called the detective to testify. In the Appellant's offer of proof, he had the detective read from his notes. The contradictory statement from the notes is, "He didn't see the male give the gun to Red but saw Red pull the slide action back on what appeared to be a semi-automatic nine-millimeter then start firing wildly." Appellant's counsel then

questioned the detective and asked, "Q. And do you recall [the witness] telling you that Red started firing wildly? A. Yes." The Appellant argues that the detective's notes contradicted the testimony of the witness and, therefore, should come in as prior inconsistent statements.

We do not find that the testimony of the detective contradicts the testimony of the witness. Therefore, there was no prior inconsistent statement. The witness testified that he probably told the detective that the Appellant was firing the gun wildly. The witness did not deny that he had stated that the Appellant fired the gun wildly.

Therefore, the trial court did not abuse its discretion in not allowing the Appellant to question the detective concerning this issue. This evidence was already in front of the jury through the testimony of the witness.

This issue is without merit.

II.

The Appellant's second issue is whether there was sufficient evidence to support a conviction of second degree murder. When an accused challenges the sufficiency of the convicting evidence, the standard is whether, after reviewing 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 (1979). Questions concerning the credibility of the witnesses, 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, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). Nor may this court reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. Cabbage, 571 S.W.2d at 835. Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Grace, 493 S.W.2d at 476.

Second degree murder is defined as, "a knowing killing of another." Tenn. Code Ann. § 39-13-210.

> "Knowing" refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

Tenn. Code Ann. § 39-11-106(20).

The Appellant testified at trial that he shot the victim. The Appellant states in his brief that the incident should have resulted in a conviction for voluntary

manslaughter as opposed to a conviction for second degree murder. Voluntary manslaughter is defined as, "the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Tenn. Code Ann. § 39-13-211.

The Appellant argues in his brief that, when a homicide occurs from mutual combat, it is voluntary manslaughter and not second degree murder. Hunt v. State, 202 Tenn. 227, 231-32, 303 S.W.2d 740, 742 (1957); Mosley v. State, 477 S.W.2d 246, 248-49 (Tenn. Crim. App. 1971). There must have been a mutual intention to fight and a deadly weapon or weapons must have been used. Hunt, 202 Tenn. at 232 , 303 S.W.2d at 742 (quoting C.J.S. Homicide § 48, Subsec. (b), p. 912).

Our court recently addressed the issue of mutual combat and whether a defendant should be convicted of second degree murder or voluntary manslaughter. In State v. Johnson, 909 S.W.2d 461 (Tenn. Crim. App. 1995), the defendant and the victim became involved in an altercation in the middle of the street, and the defendant shot and killed the victim. The jury found the defendant guilty of second degree murder, and the defendant appealed on the grounds that the evidence supported a conviction for voluntary manslaughter, but not second degree murder. Our court wrote:

> Mutual combat is not a statutory defense. See generally Tenn. Code Ann. §§ 39-11-203, -204, and -501 through -621. The underlying facts may qualify, however, as "adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Tenn. Code Ann. § 39-13-211(a). Whether the acts constitute a "knowing killing" (second degree murder) or a killing due to "adequate provocation" (voluntary manslaughter) is a question for the jury. Had the jury here found that the killing had resulted from a quarrel in a mutual fight, and upon equal terms, voluntary

> manslaughter would have been the likely result. Obviously, the jury did not so find. The issue for our consideration is merely whether the evidence established all of the elements of second degree murder.

Johnson, 909 S.W.2d at 464.

The case sub judice is similar in nature. The jury concluded that the Appellant is guilty of second degree murder. We merely have to consider whether the evidence established the elements of second degree murder. The Appellant chased the victim through a parking lot while he was shooting at him. We find that the element of knowing is met by the Appellant intentionally chasing the victim and shooting at him. The jury could infer that the Appellant surely knew that shooting at the victim was reasonably certain to kill him. Therefore, there was a knowing killing, and sufficient evidence for a second degree murder conviction.

This issue is without merit.

III.

The Appellant's third issue is that the sentence imposed by the trial court was excessive. The Appellant was sentenced to twenty years as a Range I Standard Offender. When a challenge is made 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 court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. There are, however, exceptions to the presumption of correctness. First, the record must demonstrate 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). Second, the presumption does not apply to the legal conclusions reached by the trial court in sentencing. Third, the presumption does not apply when the determinations made by the trial court are predicated upon uncontroverted facts. State v. Smith, 898 S.W.2d 742, 745 (Tenn. Crim. App. 1994).

In conducting a de novo review of a sentence, this court must consider: (a) The evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, & -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then

we may not modify the sentence, even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The trial court applied three enhancing factors and two mitigating factors. The enhancing factors used were that the Appellant has a previous history of criminal behavior, that the Appellant used a firearm in the commission of the offense and that the Appellant committed a crime when the risk to human life was high. Tenn. Code Ann. § 40-35-114(1), (9) & (10). The mitigating factors used were that the Appellant lacked substantial judgment because of his youth and that he was supporting his child. Tenn. Code Ann. § 40-35-113(6) & (13).

The Appellant challenges the application of the first and third enhancement factors. The first enhancement factor correctly applies. The Appellant has two prior misdemeanor convictions, and they constitute previous criminal convictions. The third enhancement factor also applies. In State v. Makoka, 885 S.W.2d 366 (Tenn. Crim. App. 1994), this court held that while this factor is inherent when the victim is the only person who is in danger of being hurt, if there are others present who could be injured, the factor applies. Makoka, 885 S.W.2d at 373. At the time of the incident, there were several people standing outside the bar. There were other individuals present who might have been injured. The Appellant argues that he was shooting and running away from the crowd and, therefore, this factor should not apply. We do not find this argument persuasive. There were other people present and it was pure luck that no one else was hurt when the Appellant chased the victim through the parking lot shooting a gun. Therefore, all three enhancement factors are applicable in this case.

The Appellant also argues that additional mitigating factors should apply in the case sub judice. These mitigating factors are that he acted under strong provocation, substantial grounds exist tending to justify his criminal conduct and he committed the crime under such unusual circumstances that it is unlikely there was a sustained intent to violate the law. Tenn. Code Ann. § 40-35-113(2), (3), & (11). He argues that these factors apply because the victim started the fight inside the bar. We disagree with the Appellant. The testimony showed that several minutes passed between the fight in the bar and the incident outside. A fist fight in a bar is not strong provocation or justification for chasing someone while shooting a gun in that person's direction. We also do not find that there was not a sustained intent to violate the law. One of Appellant's prior convictions was a weapons offense. Therefore, Appellant's use of a firearm in the commission of a criminal act is not an isolated incident. Chasing down a victim while firing multiple shots at him, after a "cooling off" period following an altercation, also weighs against application of this mitigating factor.

The Appellant also wants us to consider the Appellant's remorse as a mitigating factor under Tennessee Code Annotated section 40-35-113(13). He points out that he turned himself in the next day after learning that the victim was dead. However, in his testimony at trial the Appellant stated that he heard his own name on television in connection with the death of the victim and then turned himself in. The Appellant did not testify at his sentencing hearing. Therefore, there was no statement of remorse from the Appellant at the sentencing hearing. The Appellant testified at trial, but made no statements of remorse concerning the killing of the victim. We cannot find evidence of the Appellant's remorse from this record. We do not find that this mitigating factor should apply in this case.

Therefore, the trial court properly applied three enhancing factors and two mitigating factors. The Appellant was sentenced to twenty(20) years as a Range I offender for a conviction of second degree murder. Second degree murder is a Class A felony. At the time of this offense, the minimum sentence for a Range I Standard Offender was fifteen (15) years and the maximum sentence is twenty-five (25) years. We find that a twenty (20) year sentence is proper in this case where there are three enhancing factors and two mitigating factors.

Therefore this issue is without merit.

The judgment of the trial court is affirmed.

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THOMAS T. WOODALL, JUDGE

CONCUR:

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DAVID H. WELLES, JUDGE

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DAVID G. HAYES, JUDGE