IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1994 SESSION

FILED

May 16, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 01C01-9401-CC-00025
	)	
	)	Perry County
v.	)	
	)	Honorable Donald P. Harris, Judge
	)	
KEITH LEEGAN,	)	(Second Degree Murder and
	)	Theft Under $500)
Appellant.	)	

For the Appellant:

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OPINION FILED:_____

AFFIRMED

PER CURIAM

O P I N I O N

The defendant, Keith Leegan, was convicted in a jury trial in the Perry County Circuit Court of second degree murder, a Class A felony, and theft of property valued under $500.00, a Class A misdemeanor. As a Range I, standard offender, he received a twenty-year sentence for the second degree murder conviction and a concurrent eleven months and twenty-nine days sentence for the theft conviction. In this appeal as of right, the defendant asserts the following:

> 1. The evidence was insufficient to convict him of second degree murder and theft under $500.
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> 2. The trial court erred in failing to sequester the jury and in failing to grant a new trial on the basis of contact between jury members, state witnesses, and a brother of a state witness.
>
> 3. The trial court erred in permitting into evidence details of a prior conviction of the defendant.
>
> 4. The trial court erred in imposing an excessive sentence upon the defendant.

The state's first witness, Ms. Elizabeth Marshall, the live-in girlfriend of the victim, testified that she had last spoken with the victim on September 7, 1991, at 8:00 a.m. as she left for work. According to Ms. Marshall, upon returning home that afternoon she found a note left by the victim which stated that he had gone to Waverly with Keith (the defendant) and would be home about 5:00 p.m. When the victim failed to return home, Ms. Marshall left her home in search of him and met two of his friends at a local gas station. The friends told Ms. Marshall that the victim had been by the station earlier that afternoon.

The victim did not return home, and Ms. Marshall went to the defendant's home at approximately 11:00 a.m. the following morning. The defendant admitted to Ms. Marshall that he had been with the victim the day before but stated that he did not

know where the victim was at that time. He stated that he had left the victim at Jabbo's, a local tavern, at approximately 6:00 p.m. the prior evening. Ms. Marshall noted that the defendant would not look at her directly.

Jimmy King, a friend of both the victim and the defendant, testified that he had seen the victim and the defendant together in the defendant's blue Ford truck on September 7, 1991, at Bill's Dollar Store and had joined them. He stated that he had taken his purchases home and had met the couple at the bridge over Short Creek where he, his brother-in-law, the victim, and the defendant had smoked a "joint." He testified that he had left with the victim and the defendant at approximately 11:30 a.m. and traveled to a nearby store to purchase gas and beer. He stated that he had seen a Harrison and Richardson twenty-gauge, single-shot shotgun with the stock on the floor of the truck with the barrel pointing toward the window. According to King, the group went to a local bar at approximately 1:00 p.m. and left approximately three (3) hours later. He stated that the victim had been driving the defendant's truck, and the defendant had been shooting at signs from the truck. The three men then argued about shooting and got out of the truck to take turns shooting. They again stopped at a store to buy beer, and the defendant moved into the driver's seat. Mr. King said that he had gone home at approximately 5:00 p.m. but that the other two men had said that they were going to Jabbo's.

On cross-examination Mr. King testified that he had purchased and helped consume a six pack of beer, bottle of tequila, and two half-pints of whiskey on the day in question and that the group had smoked two joints. He also stated that when he had heard about the murder the following day he had returned to one of the locations where the gun had been shot and had retrieved a shell and had given it to Sheriff Ward. On redirect examination, Mr. King testified that the victim had shown him a wad of money on the day of the incident.

Robert Howell, another friend of the victim and the defendant testified that he has seen the two men at a gas station at approximately 3:30 p.m. on September 7 and that he had talked to the defendant briefly. He stated that the defendant was in the passenger seat of a blue pickup truck and that he had noticed a shotgun in the truck.

Ricky Harris testified that he had been cooking at Jabbo's on the day in question, arriving at approximately 10:30 a.m. and leaving at about 10:00 p.m. that evening. He said that T.B.I. officers had questioned him the day after the murder and had shown him a photograph of the victim. He told the officers that the victim had arrived in a blue Ford flatbed truck and had been "cutting up with everybody." He stated that he had seen the truck leave and return, but the last time he had seen the defendant and the victim was approximately 5:00 p.m., with the two men only staying about fifteen (15) to thirty (30) minutes.

Larry Conder testified that he had also been at Jabbo's cooking fish on September 7. He stated that he had seen the victim and the defendant about 5:00 p.m. that afternoon. He said the men had circled the building and had then stopped and come in. When the men left, Mr. Conder stated that the defendant had gotten in the truck and told the victim to "come on."

Thomas Ward, the sheriff of Perry County, testified that on September 8, the following morning, Mr. Melvin Barker had reported that he had found a body on Tree Farm Road. He went to the scene and at approximately 11:45 a.m., he found the body of the victim. He testified that the body was "cold and stiff" and that it had appeared that somebody had pulled the defendant's pockets out in an effort to get whatever was in them. He also testified that it had appeared that someone had placed

the body on a piece of plywood and attempted to pull the body up a hill. He found a bullet wound in the victim's neck and on the top of his head.

Sheriff Ward testified that when he had questioned the defendant about a shotgun, the defendant had denied even owning a shotgun. Ultimately, however, the defendant and his mother produced a shotgun, but it was not a Harrison and Richardson model. Pursuing the investigation, Sheriff Ward had hired a diver to check under several local bridges for any evidence, and about a half of a mile from the defendant's house, the diver had found a twenty-gauge shotgun shell. The sheriff also stated that he had examined the defendant's truck the evening after the victim was found and that it had appeared that the truck had been cleaned.

Richard Alley, a special agent with the T.B.I., testified that he had found no shotgun shells or latent fingerprints from the bottles or debris taken from the scene. He testified that Mr. King had brought him and Sheriff Ward a shotgun shell King claimed to have come from Blue Hill Road and that a second shell had been recovered under Beardstown Bridge. Both shells were sent to the Tennessee Crime Laboratory and it was determined that both shells had been fired from the same gun. He stated that Dr. Charles Harlan, the medical examiner, had provided portions of a cartridge removed from the body of the victim and the pellets were determined to be eight-shot size from a Remington shell fired from a twenty-gauge shotgun.

Agent Alley stated that he had questioned the defendant on three occasions but that the defendant had never admitted having a shotgun. Some two or three months later, the Leegan family turned over a shotgun, but it was determined that the shells in evidence had not come from that gun. Agent Alley also stated that the defendant had told him that he, the victim, and Jimmy King had been drinking all day on the day of the murder and that he and the victim had visited Jabbo's but that he had

only stayed twenty (20) to thirty (30) minutes. The defendant told Agent Alley that he had left Jabbo's by himself and that he had gotten home between 6:00 p.m. and 7:30 p.m. that evening.

Charles Harlan, the Chief Medical Examiner for the State of Tennessee testified that the autopsy of the victim revealed that he had been shot with a shotgun once in the neck and once in the forehead. He stated that both shots had passed from front to back with no vertical elevation or depression. It appeared that the wound to the neck had come from a shot fired from a distance of six to nine feet and the forehead wound had come from a shot fired from a distance of three feet or less. In summary, Dr. Harlan testified that the victim had been alive at the time both wounds were inflicted and that he had died as a result of the wounds. On cross-examination he testified that the victim's blood/alcohol level six hours after death had been 0.24 percent, his urine/alcohol level had been 0.28 percent, and drug tests had proven to be negative.

Anthony Dotson, employer of the victim, then testified that the victim had been paid the day before he was killed. He stated that when he had heard of the victim's death, he had called Ms. Marshall to tell her that he had passed the defendant's truck on Tree Farm Road the evening of the murder and that what he had remembered about the time was that it had not been dark enough for headlights.

The bartender for Jabbo's testified that she had remembered that the victim and the defendant had come into the bar at approximately 5:30 p.m. on the evening of the incident and that the victim had displayed a handful of money. She stated that the men had stayed only fifteen (15) minutes and that it was her opinion that they had been intoxicated. The state then rested its case.

Chris Carpenter, a special agent with the T.B.I., testified that he had been called to Perry County on September 8 to assist Agent Alley in the investigation of the homicide of the victim. He stated that he, the sheriff, and Agent Alley had gone to the residence of the defendant at approximately 1:30 a.m. on the morning of September 9 after obtaining the defendant's consent to search and that they had found no bloody clothing nor the purported weapon. He testified that the defendant's father had arrived at the residence and had shown the officers his personal guns but that nothing had been seized as evidence. On cross-examination, Agent Carpenter testified that he had observed that the defendant's truck had been extremely clean.

Melissa Leegan, wife of the defendant, testified that on September 7 the victim had called her husband at approximately 9:00 a.m. and that her husband had left the house sometime around lunch. She stated that he had arrived home before dark and had acted normal. On cross-examination she testified that her husband had not maintained regular employment at the time of the incident.

Mary Leegan, mother of the defendant, testified, substantially corroborating the testimony of the defendant's wife. The defendant's brother and sister-in-law also corroborated Ms. Leegan's testimony, stating that they had been at the Leegan home when the defendant had come in on September 8 and that the time had been approximately 6:30 p.m. When questioned concerning the movies they stated they had watched when the defendant had come in, one witness said the movies were comedies, one said they were westerns, and another said they were adventure-type movies.

The defendant's father, Earl Leegan, testified that T.B.I. agents had come to his home early on the morning of September 9, and that he had just come in from a wrecker run. The officers had asked permission to search Mr. Leegan's trailer, and he

stated that he had consented. He testified that when they had questioned him about guns he had shown them his collection of approximately fifteen guns. He stated that he had shown them the only twenty gauge he owned and that they had told him that it was not the gun they were looking for because it had dust and spider webs on it.

The defendant then testified concerning the events of the weekend of September 8. He testified that the victim had called him at approximately 9:30 or 10:00 a.m. on the morning of September 8 and had wanted him to pick him up to go drinking. He stated that he had taken his 1971 blue Ford pickup truck and that he had not had any type of shotgun in the truck on that day. He stated that he and the victim had met Jimmy King and that Mr. King had joined them at Short Creek Bridge to go riding around. He stated that the group had purchased beer, gas, tequila, and whiskey and that when they had left the liquor store, the victim had been driving. They stopped at a bar where they drank and played pool for approximately thee and one half hours and they took Mr. King home. He testified that the victim had wanted to go to Jabbo's and that they had stayed at Jabbo's for about thirty (30) minutes. According to the defendant, the victim went outside and when he returned the defendant told him that he would like to leave. He stated that he and the victim had walked to the truck together but that the victim had refused to leave with him. He testified that he had not learned of the victim's death until about 3:30 p.m. the following day when he was questioned by the T.B.I. agents. He adamantly denied having a gun in the truck on the day of the murder and said that he had not killed the victim.

Robert Curtis, Jr., testified that he had been to Mousetail Landing Park on September 8 and that he had seen the defendant on Highway 100 and had watched him turn into his father's driveway at approximately 6:30 p.m. He stated that the defendant had not turned out Tree Ridge Road. He also stated that he had not volunteered this information until he had realized that time was significant to the

defendant's defense. He acknowledged that he worked for the defendant's uncle and considered the defendant a good friend. Ricky Travis and Herbert Curtis, two other friends of the defendant, testified that they had also seen the defendant on Highway 100 at approximatley 6:30 p.m. on September 8 and that they had also followed him until he turned into hs father's driveway.

In rebuttal, J.W. Garretson, a dispatcher and jailer for the Perry County Sheriff's Department, testified that he had come to work at approximately 8:00 a.m. on September 8 and that he had looked out his window at about 9:00 a.m. and had seen the defendant's pickup truck coming out of the parking lot of a gas station down the street. Agent Alley was recalled to read from the defendant's transcribed statement which revealed some time inconsistencies in the defendant's statement made September 8 and his testimony at trial. The defendant was convicted of second degree murder and theft upon the foregoing evidence.

I

The defendant asserts that the evidence is insufficient to convict him of second degree murder and theft. He contends that the evidence was entirely circumstantial in that no evidence was presented which would place the defendant with the victim at the time of the murder.

When the sufficiency of the evidence is questioned on appeal, the standard of review 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, 99 S. Ct. 2781, 2789 (1979). This means that the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from it. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Likewise, the determination of the weight and

credibility of the testimony of witnesses and reconciliation of conflicts in the testimony are entrusted exclusively to the trier of fact, in this case the jury. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). Further, the standard for review is the same whether the conviction is based upon direct or circumstantial evidence. State v. Johnson, 634 S.W.2d 670, 672 (Tenn. Crim. App. 1982).

In this case, the defendant was seen with the victim at approximately 5:00 p.m. on September 7 by three Jabbo's employees. The two men were also seen leaving the bar together, and this was the last time the victim was seen alive. Two witnesses testified that a shotgun had been in the defendant's truck on the day of the murder, and one of the witnesses testified that the truck had been extremely messy. When investigators searched the truck the following day, it had been cleaned, and although the defendant testified that he never left his home on the morning of September 8, the local jailer testified that he had seen the defendant's truck at approximately 9:00 a.m. that morning. Another witness testified that he had seen the defendant's truck on Tree Farm Road at approximately 6:00 p.m. the night of the murder. We conclude that sufficient proof existed to allow a rational trier of fact to find beyond a reasonable doubt that the defendant unlawfully and knowingly killed the victim. See T.C.A. §§ 39-13-201 and -210(a)(1).

The defendant also asserts that the proof was insufficient to convict him of theft under $500. However, the state presented proof that the victim had been paid by his employer the day before the murder. Witnesses testified that he had been carrying a "wad" of money. When the victim's body was discovered, both of his pockets had been pulled out and no money was found in them. Again, we conclude that the evidence was sufficient to support this conviction. See T.C.A. § 39-14-103.

II

In his second issue, the defendant contends that the trial court erred in failing to sequester the jury and in failing to grant a new trial when jury members allegedly had contact with a state witness and the brother of a state witness. Specifically, he asserts that he did not consent to the jury being allowed to separate and that after the jury was released on the first day of trial, Jimmy King was seen talking with two of the jurors and his brother was seen taking one of the jurors into a room at the courthouse. Upon a review of the record, we conclude that these claims are without merit.

A.

Relative to sequestration of the jury, T.C.A. § 40-18-116 provided the following at the time of the trial in this case:[1]

> In all criminal prosecutions except those in which a death sentence may be rendered, the judge of the criminal court may, in his discretion, with the consent of the defendant, and with the consent of the district attorney general, permit the jurors to separate at times when they are not engaged upon the actual trial or deliberation of the case.

In Perry County, the Local Court Rules, in pertinent part, provide the following:

> Rule 5. REQUEST FOR SEQUESTRATION OF JURY. Except in capital cases, both the defendant and the state shall be deemed to have waived any right they may have to a sequestered jury unless a written request therefor has been filed with the Clerk of the Court at least 48 hours prior to the time the case is set.

According to the trial court, the rule was established because of a lack of accommodations in certain rural areas and the need for prior arrangements. In fact, it stated that Perry County had no motel accommodations for a sequestered jury.

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[1] Effective July 1, 1995, this statute was amended to provide that except for capital cases, jury sequestration was to occur only upon motion of the trial court or either party. See 1995 Tenn. Pub. Acts, ch. 43.

Although the local rule places a burden upon the defendant that can be viewed as not required or contemplated in the above statute, we do not believe that the defendant is entitled to relief in this case. Whether appropriate or not, the local rule placed defense counsel on notice that a request would have to be made. Even if defense counsel could be excused from knowing the local rule, the record on appeal reflects that the defendant made no mention -- by request, objection, or comment of any kind -- of sequestration during any part of the trial process. We also note that there is no transcript of the jury selection procedures, a time when sequestration with overnight stays for a three-day trial would be discussed with prospective and selected jurors.

The first mention of the issue is in the defendant's motion for new trial. Obviously, the defendant's failure to bring the issue to the trial court's attention when the jury was first let go until the next morning lends itself to an inference that he consented to it as required by the statute. See, e.g., State v. Mounce, 859 S.W.2d 319, 323 (Tenn. 1993) (when defendant chooses not to object to mistrial so as to give trial court opportunity to correct error, consent to the mistrial may be inferred for double jeopardy purposes). In any event, in the context of the sequestration requirement, the defendant is not entitled "to stand silently by while the trial court commits an error in procedure, and then later rely on that error when it is to his advantage to do so." Id. Thus, the defendant's failure to take action during the trial so as to give the trial court an opportunity to address his concerns bars him from obtaining relief.

B.

The defendant also complains that there was improper communication between third parties and the jury. At the motion for a new trial hearing, several relatives of the defendant testified that on the first day of trial, they had seen witness Jimmy King talking to one of the jurors in the hall and on the second day they had seen

Mr. King's brother, David King, taking another juror into a courtroom office. However, none of the relatives could testify as to what was said in the contacts. Moreover, no one immediately reported these allegations to the court or the authorities. We note, also, that although the state had juror affidavits ready to be tendered to the court, the trial court denied the defendant's motion and the affidavits were not submitted as evidence.

When there is an unexplained communication between a third party and a sequestered juror, there is a presumption of improper contact and prejudice. In such event, the state has an affirmative burden to show that no prejudice actually occurred. Otherwise, a new trial will be granted. Gonzales v. State, 593 S.W.2d 288, 293 (Tenn. 1980). However, for a nonsequestered juror, our supreme court has noted that "something more than a mere showing of a mingling with the general public is required" to shift the burden to the state in that it must also be shown that as a result of juror contact with a third person "some extraneous prejudicial information, fact or opinion, was imported to one or more jurors or some outside improper influence was brought to bear on one or more jurors." State v. Blackwell, 664 S.W.2d 686, 689 (Tenn. 1984).

The record before us does not reflect any indication of the nature of the remarks, if any, made by or to the jurors during the contacts mentioned by the defendant's witnesses. Therefore, the defendant has not provided sufficient evidence from which we may presume prejudice. The defendant is not entitled to a new trial upon this claim.

III

Next, the defendant contends that the trial court erred in allowing into evidence the underlying facts of his prior conviction. The defendant had previously been convicted of misdemeanor theft of property, the offense occurring several months

before the killing in this case. The state proved that the theft was of flowerpots and that the defendant and Jimmy King had thrown them into the Buffalo River under a bridge, the same river from which the matching shotgun shell hull had been retrieved.

The defendant acknowledges that the theft conviction was admissible to impeach his credibility. However, he claims that the evidence of him throwing flowerpots off the bridge was "improper and prejudicial" in that it was used to show that he acted in the same manner by throwing the shell hull into the river. He claims that the probative value of this evidence does not substantially outweigh its prejudicial effect, citing Rule 608(b), Tenn. R. Evid.

The standard in Rule 608 for weighing probative value against the risk of prejudice does not apply to this issue. The trial court admitted the evidence under Rule 404(b), Tenn. R. Evid., upon the state's claim that it wanted to show that the defendant had previously disposed of evidence in the river and, therefore, would have done so in the present case.[2] The trial court saw little probative value to be gained in the direction taken by the state, but it saw no danger of unfair prejudice to the defendant because the theft conviction was already admissible.

Rule 404(b) allows evidence of other crimes and bad acts only if it is relevant to a litigated issue and its probative value is not outweighed by the danger of unfair prejudice. See State v. Hayes, 899 S.W.2d 175, 183 (Tenn. Crim. App.), app. denied (Tenn. May 8, 1995). "'Relevant evidence' means evidence having 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. If the state sought to prove the defendant's connection with the matching shell hull or even the unrecovered shotgun a witness saw in his vehicle, we

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[2] The state's brief contains no argument as to how the disposal of the flowerpots is relevant.

agree with the trial court that a slim degree of relevance exists. More importantly, we agree with its assessment that no danger of unfair prejudice existed. There is no merit to this issue.

IV

The defendant next contends that his murder sentence is excessive due to the fact that the trial court took into account a nonstatutory enhancement factor and placed undue weight on the defendant's prior criminal record. Specifically, the defendant contests the trial court's use of the defendant's employment history in sentencing the defendant to twenty (20) years when the statutory minimum sentence for second degree murder is fifteen (15) years.

When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-402(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d), Sentencing Commission Comments. This presumption, however, is conditioned upon an 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 Reform Act of 1989 provides certain guidelines to be followed in sentencing. Pursuant to T.C.A. § 40-35-210(b), the trial court must consider the following:

> (1) The evidence, if any, received at the trial and sentencing hearing;
>
> (2) The presentence report;
>
> (3) The principles of sentencing and arguments as to sentencing alternatives;
>
> (4) The nature and characteristics of the criminal conduct involved;

> (5) Evidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and
>
> (6) Any statement the defendant wishes to make in his own behalf about sentencing.

In addition, for the time of the offenses in this case, this section provided that the minimum sentence within the range is the presumptive sentence.[3] If there are enhancing and mitigating factors, the court must start at the minimum sentence in the range and enhance the sentence as appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors. If there are no mitigating factors, the court may set the sentence above the minimum in that range but still within the range. See T.C.A. § 40-35-210(c)-(e).

In this case, in determining the length of the sentence, the trial court stated the following:

> In any event, because of his prior employment record and the fact that he has been convicted of three previous theft offenses, I will sentence Mr. Leegan to twenty years in the Department of corrections as a standard Range I Offender on the second degree murder and to eleven months and twenty-nine days on the theft offense. Let the two run concurrently, one with another.

The state agrees with the defendant's claim that consideration of the defendant's employment history is not proper in determining the length of the defendant's sentence, see State v. Dykes, 803 S.W.2d 250, 258 (Tenn. Crim. App. 1990) (T.C.A. § 40-35-114 contains the exclusive factors that may be used to increase the length of a sentence within the range), but it contends that the sentence imposed remains justified by the defendant's past criminal history. See T.C.A. § 40-35-114(1). The defendant's presentence report reflects that he has a history of three theft convictions, one assault and battery conviction, and three traffic offenses.

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[3] For Class A felonies committed on or after July 1, 1995, the presumptive sentence is the midpoint of the range. See T.C.A. § 40-35-210(c) (Supp. 1996).

However, we are not limited to the defendant's past criminal history. The circumstances of the murder are relevant in that the defendant committed it with a firearm. See T.C.A. § 40-35-114(9). In light of the record before us, including the defendant's personal history and background, we believe that both factors, together, justify a twenty-year sentence.

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

PER CURIAM

(Tipton and Welles, JJ.;
Bevil, Sp. J., not participating)