IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1998 SESSION

FILED

December 31, 1998

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	No. 01C01-9607-CC-00139
	)	
Appellee	)	
	)	Lawrence County
vs.	)	
	)	Honorable Jim T. Hamilton, Judge
ROGER DALE BENNETT,	)	
	)	(Second degree murder)
Appellant.	)	

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OPINION FILED: _____

AFFIRMED

JAMES CURWOOD WITT, JR.
JUDGE

OPINION

On August 27, 1996, a Lawrence County jury convicted the defendant, Roger Dale Bennett, of second degree murder, a Class A felony. The trial court sentenced him to serve twenty-five years as a Range I, standard offender in the Department of Correction. The defendant appeals contending that the evidence was insufficient to sustain a conviction for second degree murder, that the trial court erred by failing to charge the jury with the lesser-included offense of reckless homicide, and that his sentence is excessive. We disagree with the defendant's claims and affirm the defendant's conviction and sentence.

I. Facts

At 5:45 p.m. on April 7, 1995, Anita Littrell Bennett called 911 and reported that her husband, Roger Dale Bennett, had just shot a man.[1] When Jim Foriest, the investigator for the Lawrence County Sheriff's Department arrived at the Bennett residence, he found the body of Gary Don Ray lying face down on the living room floor between a coffee table and the sofa. The victim had a quarter-sized wound to the left side of the head immediately adjoining the ear lobe. An unloaded rifle lay partially concealed under the victim's right arm and side with the butt visible above Ray's shoulder. When the officer turned the body over, he found a .45 caliber, single-shot derringer under the victim's right chest. The derringer was pointing toward the victim's head. A spent .410 shell was in the pistol; a similar live cartridge was in the victim's pocket, and the victim's truck contained a second live round. The victim's head was surrounded by a copious amount of blood. At trial, the investigator testified that because the blood was not smeared or smudged in any way, he believed that the body had not been touched or moved after the shooting.

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[1] Anita Littrell Bennett is referred to in this opinion as Ms. Littrell or Littrell.

The defendant was present when the first officer arrived. As the police car drove up, he came out onto the porch carrying a bottle of beer and asked the officer, "What's going on?" During the ride to the jail, the defendant told the deputy, "Well, Shawn, I guess I f----d up this time. You just don't go around killing your best friend and getting away with it." At some point that evening, the defendant was taken to the hospital and treated for a drug overdose. His stomach was pumped. The police did not take a formal statement until the day after the shooting.

Ms. Littrell, the defendant's wife,[2] was present at the time Ray was killed. She testified for the state at trial. According to her testimony, the two men arrived at the Bennett home early in the evening of April 7, 1995 to find her sitting at the kitchen table with her back to the wall. She was writing on a pad of paper. Ms. Littrell testified that she had just returned home after spending a few days with a friend. When the two men entered the kitchen, the victim put a pistol to her head and told her that he was going to kill her if she did not get Johnny Wayne Ferguson down there right away.[3] When she just stared at him, he turned to the defendant and said, "You shoot her. I can't."

Ms. Littrell testified that at this point, the defendant said, "I can" and took the pistol from Ray. He then fired a shot over his wife's head into the kitchen wall. Next, the three went into the living room. The victim sat on the sofa and Ms. Littrell sat in a chair that was placed at a right angle to the sofa. According to Ms. Littrell's trial testimony, the defendant was standing in front of the coffee table with the pistol in his hand. The rifle may have been leaning against the coffee table or the door. The victim got up and came over to her with tears in his eyes. He apologized and told her that he could never shoot her because he loved her like a

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[2] Littrell and the defendant had first married in 1989 but were divorced in 1994. The couple remarried on March 21, 1995. When the trial was held on August 7, 1996, they were still married. However, they had divorced by February 10, 1997, when the trial court imposed sentence.

[3] The trial record contains no information about "Johnny Wayne Ferguson" nor does it explain why the victim desired an encounter with him.

sister. The defendant pointed the pistol at her and told her that he was "fixing" to kill her. According to Littrell, the victim then said, "Don't shoot her. If you've got to shoot somebody, shoot me."

Littrell put her arm over her face. When she heard the gun shot, she looked up to see the defendant standing with the smoking gun in his hand and the victim lying on his back partially under the coffee table. She recalled that one of the victim's legs was "up." When she began to scream, the defendant took her into the bathroom where he told her to calm herself because he might need help with the body. He gave her three Valium and then returned to the living room. She climbed out the bathroom window and ran to her aunt's house where she called 911.

Ms. Littrell's trial testimony was contradicted by her three earlier statements to the authorities.[4] In those statements, she said that she covered her face because she thought the victim, rather than the defendant, was going to shoot her and that she never saw the gun after the shot was fired. During cross-examination Ms. Littrell could not remember that she told the police that after pointing the gun at her, the defendant said, "I'm not going to shoot her. She's my old lady." She admitted, however, that when she asked the victim why he wanted to see Johnny Wayne Ferguson, he told her that it would be the last thing she heard before she died and that she should give her heart to God. She also acknowledged that she had never told the police that she saw her husband with the "smoking gun," that he gave her three Valium or that he suggested that she might help him with the body. When confronted by these inconsistencies, Ms. Littrell stated that she was under a lot of stress when her statements were made. She loved her husband and was greatly influenced by what he told her. She insisted that the version she gave at trial was the truth. She admitted that she had numerous prior convictions for theft and forgery.

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[4] A letter that Ms. Littrell wrote to the defendant after the murder was admitted into evidence at trial. It also contains statements that contradict her trial testimony.

Dr. Charles Harlan, the medical examiner, testified that the victim died as result of a shotgun wound to the left side of the head.[5] The single entry wound shredded the left ear lobe and did extensive damage to the left ear. It shattered the left carotid artery and the jugular vein causing the victim to bleed to death. The wadding and the pellets were removed from the wound.[6] There were no satellite wounds. The doctor opined that the weapon was between three and seven feet from the victim's head when it was fired. The victim's blood alcohol level at time of death was .32, and his blood and urine tested postive for diazepam (Valium) as well as other chemical substances including nordiazepam, meprobamate, and dihydrocone.

The Tennessee Bureau of Investigation processed the gun shot kits prepared from the defendant's and the victim's hands. The defendant's hands tested positive for primer residue on both the palms and the backs of the hands. The victim's left palm and the back of his left hand tested positive as well. According to the forensic expert, the victim's left hand and the defendant's hands contained enough residue to have been in contact with the pistol when it fired. Because the derringer had a very short barrel and the primer is large, the expert said that the "stuff" would adhere to anything nearby when the pistol was fired. It would not be unusual to find the residue on the victim's hand if the hand were close to or in contact with the weapon at the moment of firing.

The defendant did not testify at trial nor did the defense call any witnesses. However, in his statement to the police, the defendant said that the victim told him that either he would kill Anita or the defendant could do it. The defendant put the gun to her head two times, and when he was unable to pull the trigger, he fired into the kitchen wall. Later the victim had the rifle in his right hand

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[5] Apparently Dr. Harlan did not know that the murder weapon was actually a short-barreled pistol that had fired the shotgun shell.

[6] The cartridge was loaded with approximately 115 number six pellets.

and the pistol in his left. He said to the defendant, "Shoot me, Bennett." The defendant bumped the victim with his elbow and the pistol fired. According to the defendant, the victim had been loading and unloading the pistol. He told the victim to put the gun away, but then he "messed up and did the wrong thing."

A firearms expert testified that the derringer's trigger required about ten pounds of pressure to fire and that it was unlikely that a casual bump would cause it to discharge accidentally.

On this evidence, the jury found the defendant guilty of second degree murder.

II. Sufficiency of the Evidence

In this appeal, the defendant contends that the state's circumstantial evidence against him is legally insufficient to support a verdict and that the numerous contradictions between Anita Littrell's trial testimony and her earlier statements render her testimony of no probative value. He also argues that Dr. Charles Harlan was unqualified to testify as to the distance from which the fatal shot was fired. We respectfully disagree.

When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is, whether after considering 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, 317, 99 S.Ct. 2781, 2789 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn. R. App. P. 13(e). Because a jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, a convicted defendant has the burden of demonstrating on appeal that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). 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. Harris, 839 S.W.2d 54, 75 (Tenn. 1992).

A criminal offense may be established exclusively by circumstantial evidence. Duchac v. State, 505 S.W.2d 237 (Tenn. 1973); State v. Jones, 901 S.W.2d 393, 396 (Tenn. Crim. App. 1995); State v. Lequire, 634 S.W.2d 608 (Tenn. Crim. App. 1987). However, before an accused may be convicted 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." State v. Crawford, 225 Tenn. 478, 470 S.W.2d 610 (1971); State v. Jones, 901 S.W.2d at 396. In other words, "[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." Crawford, 470 S.W.2d at 613; State v. McAfee, 737 S.W.2d 304, 305 (Tenn. Crim. App. 1987).

In determining the sufficiency of the evidence, this court should not reweigh or reevaluate the evidence. State v. Matthews, 805 S.W.2d 250, 253 (Tenn. Crim. App. 1990). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. State v. Cabbage, 571 S.W.2d 833, 835 (Tenn. 1978). This court may not substitute its inferences for those drawn by the trier of fact from the evidence. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956); Farmer v. State, 574 S.W. 2d 49, 51 (Tenn. Crim. App. 1978). It is the appellate court's duty to affirm the conviction if the evidence, viewed under these standards, were sufficient for any rational trier of fact to have found the essential elements of the offenses beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789; State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); Tenn. R. App. P. 13(e).

To convict a defendant of murder in the second degree, a jury must find that a victim died, that the defendant's unlawful actions caused the death, and that the defendant knew that his actions would or could cause death. Tenn. Code Ann. §§ 39-13-201, -210 (1997); see also State v. Shepherd, 862 S.W.2d 557, 565 (Tenn. Crim. App. 1992). The defendant does not contest the fact that he was at the scene or that the victim died from a gun shot wound to the head. He tried to convince the jury that the shooting was accidental. The defendant's wife was present at the time of the murder. At trial, she testified that the defendant had the pistol in his hand immediately before the fatal shot was fired. The victim told the defendant to shoot him if he could not shoot his wife. Because she was afraid she would be shot, she covered her face with her arm. When she heard the shot, she raised her head and saw the victim lying on the floor. The defendant was standing next to the coffee table holding the gun in his hand. The physical evidence demonstrated that the victim had been shot one time in the area of his left ear. The murder weapon was a derringer loaded with a .410 shotgun cartridge, and the medical examiner opined that the shot had been fired from a distance of from three feet to seven feet. Moreover, the defendant admitted to the first officer who arrived that he had killed his best friend.

On its face, the evidence presented at trial is unquestionably sufficient for a rational jury to conclude that the defendant knowingly killed Gary Don Ray. The defendant, however, argues that much of Anita Littrell's trial testimony was contradicted by her earlier statements and, therefore, should not be considered as evidence. The defendant recites the rule that "contradictory statements of a witness in connection with the same fact have the result of 'cancelling each other out.'" Taylor v. Nashville Banner Pub. Co., 573 S.W.2d 476, 482 (Tenn. Ct. App. 1978) (quoting Johnson v. Cincinnati N.O. & T. P. Ry & Lt. Co., 146 Tenn. 135, 240 S.W. 429, 436 (1922) (citations to other cases omitted)). Therefore, the defendant reasons that Ms. Littrell's testimony that she saw him holding the murder weapon just after the shot was fired is "cancelled" by her statements to the police in which

she said that she did not see the gun after the shooting. The defendant correctly argues that if the rule about contradictory testimony is applied in this instance, much of Ms. Littrell's damaging testimony would be rendered a nullity.

We find, however, that the proposition concerning contradictory testimony does not apply to Ms. Littrell's testimony. To state "that contradictory statements by a witness with respect to the same issue of fact cancel or negate each other," Bowers v. Potts, 617 S.W.2d 149, 154 (Tenn. Crim. App. 1981), says both too much and too little. Our review of the law indicates that Tennessee courts have uniformly applied the rule in those instances in which a witness's sworn statements are contradictory. See e.g., Bowers, 617 S.W.2d at 154 (contradictory statements in plaintiff's two depositions are insufficient to establish agency); Taylor v. Nashville Banner Pub. Co., 573 S.W.2d 476 (Tenn. Ct. App. 1978) (unexplained inconsistencies in a witness's deposition testimony concerning an uncorroborated fact would invalidate the testimony); Wheeler v. Wheeler, 63 Tenn. App. 442, 474 S.W.2d 651 (Tenn. Ct. App. 1971) (complainant's contradictory trial testimony concerning his signature cannot stand); Tibbals Flooring Co. v. Stanfill, 410 S.W.2d 892, 895-96 (Tenn. 1967) (physician's contradictory trial testimony did not establish causation). In fact, in a more recent Court of Appeals opinion, the rule is restated as "[t]wo sworn inconsistent statements by a party are of no probative value in establishing a disputed issue of material fact." Price v. Becker, 812 S.W.2d 597, 598 (Tenn. Ct. App. 1991); see also Boatman's Bank of Tenn. v. Steven K. Dunlap, No. 02A01-9607-CH-00166 (Tenn. Ct. App., Jackson, Dec. 30, 1997); Benny Brown v. Georgia Life and Health Ins. Co., No. 1173 (Tenn. Ct. App., July 1, 1986).[7]

[7] An additional gloss on the rule requires that the contradiction be unexplained and that the fact be uncorroborated by other evidence. Taylor v. Nashville Banner Pub. Co., 573 S.W.2d 476, 483 (Tenn. Ct. App. 1978). If a witness is able to justify the seeming contradiction in some manner or the fact is corroborated by other evidence, the question raised by the contradictory statements goes to credibility and weight of testimony. Id.

Ms. Littrell's trial testimony was not contradictory in itself. It was, however, inconsistent in many respects with earlier statements she made to the police and in a letter to her husband. Those statements, however, were neither sworn nor were they made in the course of a judicial proceeding at the pleading, discovery or trial stage. See Benny Brown v. Georgia Life and Health Insurance Co., No. 1173 (Tenn. Ct. App., July 1, 1986). The defense merely attempted to impeach Ms. Littrell with her many prior inconsistent statements. Tennessee law has traditionally permitted a witness's prior inconsistent statement to be used to impeach the witness. Neil P. Cohen, et al., Tennessee Law of Evidence, § 613.1 at 312 (2nd ed. 1992). The evidence is not substantive evidence but is admissible only on the issue of the witness's credibility.[8] Id. In this case, the defense used Ms. Littrell's prior statements to discredit her trial testimony. A prior inconsistent statement, by definition, will always contradict trial testimony but it does not render that testimony a nullity. A witness's prior inconsistent statements raise questions of credibility. The jury determines the credibility of the witnesses and assesses the weight of their testimony. State v. Cabbage, 571 S.W.2d 833, 835 (Tenn. 1978). In this instance, the jury chose to accept Littrell's explanation for the discrepancies and accredited her trial testimony. The rule concerning a witness's contradictory statements does not apply in this case.

The defendant also complains that the medical examiner's testimony regarding the distance from which the fatal shot was fired should be disregarded because the doctor was not qualified as an expert in that area and was unaware that the murder weapon was not a shotgun but a little derringer. The defendant had the opportunity to object to the medical examiner's qualifications and to the prosecutor's questions and the doctor's responses. The record is devoid of any objection. Moreover, defense counsel could have asked Dr. Harlan about his knowledge of the murder weapon during cross-examination. Defense counsel

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[8] The trial transcript includes the trial court's instructions to the jury. The trial judge appropriately instructed the jury on the use of prior inconsistent statements.

chose not to address the subject. A party is not entitled to relief if the party is responsible for the error or if the party failed to take whatever action was reasonably available to prevent or nullify the harmful effect of the error. Tenn. R. App. P. 36(a). The defendant has waived this issue.

Despite Ms. Littrell's prior inconsistent statements and the difficulties presented by the physical evidence, the jury accredited the state's witnesses and resolved the conflicts in the evidence against the defendant. The jurors were not convinced by the defendant's claim that the shooting was accidental. We readily acknowledge that the evidence at trial leaves some questions unanswered. However, taken in the light most favorable to the state, the evidence is sufficient to prove beyond a reasonable doubt that the defendant knowingly killed Gary Don Ray.

III. Instruction on Reckless Homicide

The trial court instructed the jury on second degree murder, voluntary manslaughter, and criminally negligent homicide. The court did not give an instruction of reckless homicide. The defendant now contends that the failure to instruct on reckless homicide deprived him of his constitutional right to a trial by jury. The Tennessee Supreme Court recently considered this issue in State v. Willie Williams, Jr., ___ S.W.2d ___, No. 03S01-9706-CR-00060 (Tenn., Knoxville, Sept. 21, 1998), and that decision controls the resolution of the issue in this case.

In Williams, the defendant was convicted of first degree, premeditated murder. The trial court refused to instruct the jury on voluntary manslaughter even though the court gave instructions on second degree murder and reckless homicide. The trial judge also instructed the jury to consider the offenses in sequential order. Willie Williams, slip op. at 6-7. A panel of the Court of Criminal Appeals found that there was evidence in the record to support an instruction for voluntary manslaughter and reversed the defendant's conviction. Id. The Tennessee

Supreme Court granted the state's appeal. Our supreme court recognized that the trial judge should have given an instruction on voluntary manslaughter pursuant to Tennessee Code Annotated section 40-18-110. However, the court also held that failure to give the required instruction need not result in an automatic reversal. Id. at 9. Reversal is required only if the error affirmatively appears to have affected the result of the trial. Id. The supreme court found that by convicting the defendant of the greatest offense, that is, first degree murder, to the exclusion of the immediately lesser offense, second degree murder, the jury necessarily rejected all other lesser offenses including voluntary manslaughter. Id. at 11.

In this case, the trial court instructed the jury on the elements of second degree murder, voluntary manslaughter, and criminally negligent homicide. The court also issued an instruction requiring the jury to consider the most serious offense first and then to proceed in sequential order to the lesser offense if they found the defendant not guilty of the more serious charge. As in Williams, the record contains evidence on which a jury could convict the defendant on the missing lesser charge. Also as in Williams, the jury in this case convicted the defendant of the most serious charge, that is, second degree murder. Accordingly, the trial court's error in not charging reckless homicide is harmless beyond a reasonable doubt because the jury's verdict of guilty on the greater offense of second degree murder and its disinclination to consider the lesser included offenses which were charged demonstrates that the jury would not have returned a verdict on reckless homicide. See Willie Williams, slip op. at 11. Therefore, we conclude that the trial court's error was completely harmless.

IV. Sentencing

Second degree murder is a Class A felony. Tenn. Code Ann. § 39-13-210 (1997). In this case, the trial court sentenced the defendant to serve the maximum Range I sentence of twenty-five years. The defendant contends that the trial court failed to make the appropriate findings with respect to enhancement

factors and failed to address the applicable mitigating factors. As a result, the defendant argues he received an excessive sentence.

When an accused challenges the length, range, or manner of service of a sentence, we must conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d)(1997). The burden of showing that the sentence is improper is upon the appealing party. Tenn. Code Ann. § 40-35-401(d), Sentencing Comm'n Comments (1997). This presumption, however, is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, determines the sentencing range, the specific sentence, and the propriety of imposing a sentence involving an alternative to total confinement. The trial court must consider (1) any evidence presented at trial and the sentencing hearing, (2) the presentence report, (3) the sentencing principles, (4) the arguments of counsel, (5) any statements the defendant has made to the court, (6) the nature and characteristics of the offense, (7) any mitigating and enhancement factors, and (8) the defendant's amenability to rehabilitation. Tenn. Code Ann. §§ 40-35-103(5); 40-35-210(a)(b) (1997); State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993). The trial court must begin with a presumptive minimum sentence. Tenn. Code Ann. § 40-35-210(c). The sentence may then be increased by any applicable enhancement factors and reduced in the light of any applicable mitigating factors. Tenn. Code Ann. § 40-35-210(d), (e).

The 1989 Sentencing Reform Act further provides that "[w]henever the court imposes a sentence, it shall place on the record, either orally or in writing, what enhancement or mitigating factors it found, if any, as well as findings of facts as required by § 40-35-209." Tenn. Code Ann. § 40-35-210(f) (1997) (emphasis added). Even the absence of the enhancing and mitigating factors must be

recorded. Tenn. Code Ann. § 40-35-210, Sentencing Comm'n Comments (1997). In the event the record fails to demonstrate the appropriate consideration by the trial court, appellate review of the sentence is purely de novo. Ashby, 823 S.W.2d at 169. If our review reflects that the trial court properly considered all relevant factors and the record adequately supports its findings of fact, 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 this case, the trial judge made a series of remarks at the conclusion of the sentencing hearing. He recalled some of the evidence presented at trial and reviewed some of the information contained in the presentence report. He noted that a pistol was the murder weapon, that the defendant's record indicated a life time of drunkenness and the use of illegal drugs, that the defendant had 29 prior convictions for everything from shoplifting to attempted robbery, and that the defendant was on parole at the time of the murder.[9] The trial court did not, however, relate those facts to the enhancement factors nor did the court make any findings relevant to mitigating factors or consider on the record the purposes and principles of the Sentencing Act. Therefore, we review the defendant's sentence without the presumption of correctness.

In conducting our de novo review, we must consider the evidence at sentencing, the presentence report, the sentencing principles, the arguments of counsel, the statements of the defendant, the nature and characteristics of the offense, any mitigating and enhancement factors, and the defendant's amenability to rehabilitation. Tenn. Code Ann. §§ 40-35-103(5), -210(b) (1990); State v. Ashby, 823 at 168.

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[9] The record indicates that the defendant was on probation for two 1995 convictions for the illegal possession of Schedule IV controlled substances. The defendant admitted that he was on probation when he committed the instant offense.

The state argues that the record supports five enhancement factors: (1) the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;[10] (9) the defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense;[11] (13)(c) the felony was committed while on probation if such release is from a prior felony conviction;[12] (10) the defendant had no hesitation about committing a crime when the risk to human life was high;[13] and (16) the crime was committed under circumstances under which the potential for bodily injury to a victim was great.[14]

We agree that the record supports the use of factors (1), (9), and (13)(c) to enhance the defendant's sentence. The defendant's criminal record is extensive. The presentence report lists more than twenty-five convictions extending back to 1972. Although most of the convictions are for misdemeanors such as public intoxication and disorderly conduct, his prior convictions include two for possession of a Schedule IV controlled substance with the intent to sell, and one each for grand larceny and attempted robbery. The defendant did not challenge the information in the report. The record fully supports the use of factor (1). It is also evident that factors (9) and (13(c) apply. The defendant used a firearm to shoot the victim, and in his testimony at the sentencing hearing, he admitted that at the time of the murder he was on probation for his 1995 felony convictions for possession with the intent to sell.

The applicability of factors (10) and (16) presents a closer question. Although these factors are generally inapplicable in a homicide case, this court has

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[10] Tenn. Code Ann. § 40-35-114(1) (1997).

[11] Tenn. Code Ann. § 40-35-114(9) (1997).

[12] Tenn. Code Ann. § 40-35-114(13(c) (1997).

[13] Tenn. Code Ann. § 40-35-114(10) (1997).

[14] Tenn. Code Ann. § 40-35-114(16) (1997).

held that they can be applied if the defendant's actions create a risk of harm to a person other than the victim. State v. Ruane, 912 S.W.2d 766, 784 (Tenn. Crim. App. 1995); State v. Makoka, 885 S.W.2d 366, 373 (Tenn. Crim. App. 1994). The state contends that because the defendant's wife was in the room when the defendant fired the fatal shot there was a risk to her life and the potential for bodily injury was high. We are not convinced that the mere presence of another person in a room when a shot is fired necessarily indicates that the risk to human life was high or that the potential for bodily injury was great. In this instance, the victim, who was seated on a sofa, was shot at close range from the left side. Ms. Littrell was seated in the chair to the left of the victim. The defendant was standing either in front of her or beside her or was seated on the sofa next to the victim. In any case, the shot was unlikely to endanger Ms. Littrell. Moreover, although a shotgun shell was loaded in the pistol, the weapon was fired at such close range that the wadding and all of the pellets struck the victim and created an entry wound of about the size of a quarter. On these facts, the potential for bodily injury to Ms. Littrell was not great.

The defendant argues that the following mitigating factors are applicable: (2) the defendant acted under strong provocation;[15] (3) substantial grounds exist tending to excuse or justify the defendant's conduct, though failing to establish a defense;[16] and (11) the 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 the criminal conduct.[17] The record does not contain any evidence of strong provocation that would justify mitigation of the defendant's sentence, nor do the facts tend to excuse or justify the defendant's conduct. Consequently we decline to apply mitigating factors (2) and (3). Moreover, although the facts surrounding the death of Gary Don Ray are certainly

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[15] Tenn. Code Ann. § 40-35-113(2) (1997).

[16] Tenn. Code Ann. § 40-35-113(3) (1997).

[17] Tenn. Code Ann. § 40-35-113(11) (1997).

unusual, the defendant's past criminal record indicates a sustained intent to violate the law. We find no basis for applying mitigating factor (11).

The defendant was convicted of second degree murder, a class A felony. Tenn. Code Ann. § 39-13-210 (1997). For a Range I offender, the applicable sentencing range is 15 to 25 years. Tenn. Code Ann. § 40-35-112 (A)(1). The defendant's lengthy criminal history is entitled to great weight as is the fact that the defendant committed this offense while he was on probation for two prior felony convictions. In addition, the defendant used a firearm in the commission of the offense. We find that the three strong enhancement factors and the lack of any mitigating factor justify the imposition of the maximum sentence of twenty-five years. Such a sentence is consistent with the principles and purposes of the Sentencing Act and is commensurate with the seriousness of the offense. See Tenn. Code Ann. § 40-35-102.

We affirm the judgment of the trial court.

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JAMES CURWOOD WITT JR., Judge

CONCUR:

(SEE CONCURING OPINION)
GARY R. WADE, Presiding Judge

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THOMAS T. WOODALL, Judge