

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1999 SESSION

<p>FILED</p> <p>July 30, 1999</p> <p>Cecil W. Crowson Appellate Court Clerk</p>

STATE OF TENNESSEE,)
)
 Appellee,)
)
 v.)
)
 ROBERT MATTHEW LANE,)
)
 Appellant.)

No. 01C01-9801-CC-00045
 Cheatham County
 Hon. Allen Wallace, Judge
 (Felony murder)

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OPINION FILED: _____

AFFIRMED

Joseph M. Tipton
 Judge

OPINION

The defendant, Robert Matthew Lane, appeals as of right following his conviction upon a guilty plea in the Cheatham County Circuit Court for felony murder. He was sentenced by the trial court to life imprisonment without parole in the custody of the Department of Correction. The defendant contends that the trial court erred by finding two aggravating circumstances and by failing to consider his proposed mitigating circumstances. We affirm the judgment of conviction.

The record of the basic facts of this case comes from the guilty plea and sentencing hearings. At the guilty plea hearing, the defendant testified that he, John David Pickard and Donald Ray Clemmons broke into the home of Lucien Woodard on November 6, 1996. He testified that they stole sixty or seventy dollars from Mr. Woodard and a Remington shotgun.

The defendant testified that they were upset at not getting more money from Mr. Woodard, and later that evening they decided to rob John David's grandparents, David Pickard, Sr. and Barbara Pickard. He said they enlisted another friend, Warren Cole, to help. He testified that before going to the Pickard residence, they made a plan to cut the telephone lines, tie up Barbara Pickard, force David Pickard to open his gun safe, then tie up David Pickard. He said that he carried his Mossberg shotgun, and John David carried the Remington shotgun stolen from the Woodard residence.

The defendant testified that at the Pickard residence, they noticed a white Bronco in the driveway. He said John David said it probably belonged to his uncle Steven, who would be staying in the guest bedroom. He said they cut the telephone

lines, and he chose to enter the house first by shattering a glass door with his shotgun. He said he went down the hallway toward the guest bedroom.

The defendant testified that he opened the guest bedroom door and said, "Stay in the bed, nobody move." He said that Steven Pickard was already out of the bed and pushed a bookcase on him. He said he fell, and his gun was wedged against his chest with the bookcase on top of the gun. He said he yelled for help and somebody yelled, "Shoot!" He said a shot was fired, striking Steven Pickard. He testified that everyone ran out of the house. He said he climbed out from under the bookcase, jumped over the victim and ran out of the house. He said the victim did not appear to be breathing. He testified that they disposed of John David's gun, but he would not disclose to whom they gave it. He said the person to whom they gave it was instructed to get rid of it.

At the sentencing hearing, David Pickard, Sr., testified that he and his son, Steven, had been hunting the day before the murder. He testified that Steven went to bed at about 9:15 p.m. and that he went to bed shortly thereafter. He said that he awoke a little before 3:00 a.m. to a loud noise. He said he got up and headed toward the foot of the bed, but then he saw two men coming down the hall wearing masks and carrying guns. He said that as the men approached his bedroom, they instructed him and his wife to stay down. He said that both men pointed their guns at him and his wife. He said that he was standing at the foot of the bed, and his wife was sitting on the side of the bed. He said that neither of them moved. He said both men went to the victim's room and pushed open the door. He testified that he immediately heard a scuffle, although he could not see it. He said one of the men backed up into the hallway, and he then heard a gunshot blast. He said that he and his wife were in their same positions in the master bedroom, about twelve to fifteen feet from where the shot was fired.

Mr. Pickard testified that after the men left, he went to check on the victim. He said he told his wife to call 9-1-1, but she could not because the telephone lines were dead. He said he went next door to a neighbor's house to call 9-1-1. He said that when he returned, the victim was moaning and in pain. A diagram of the Pickard residence was admitted into evidence. It reflects that the guest bedroom, in which the victim was staying, is at the end of the hallway, with the hallway ending at the bedroom door. It reflects that the master bedroom is on the right side of the hallway before the guest bedroom.

On cross-examination, Mr. Pickard testified that he was only aware of one gunshot being fired. He said that he found the victim lying in the bedroom with his feet toward the door and his head toward the end of the bedroom. He said he did not see any place where a bullet had hit a wall. He said it looked like the shot hit only the victim. He said no pellets came into the master bedroom. Barbara Pickard testified substantially the same as her husband, except she added that she could see a flash of light when the shotgun was fired.

Anthony Clark, a Special Agent with the TBI, testified that he questioned the defendant on the day after the shooting. He said the defendant admitted his involvement in both the Woodard burglary and the Pickard murder. He testified that he collected shotgun shells and part of a shotgun barrel from the motel room where the defendant stayed after the murder. He said that investigators searched the defendant's car and recovered the shotgun the defendant had carried. On cross-examination, Agent Clark testified that the defendant gave him a statement and was cooperative.

Agent Mike Breedlove testified that the telephone lines at the Pickard residence had been cut. He stated that he found two shells at the residence. He said one shell was spent and was found in the center of the hallway. He said a second shell

was live and was found three and one-half feet away, beside the wall going into the hallway. He said the shells had the same ejector marks, and the marks matched those found on a shell in the motel room. He said the shells did not come from the Mossberg shotgun. He said he never recovered the gun from which they were ejected.

On cross-examination, Agent Breedlove testified that the victim was shot from behind and that the entry wound was in his lower back in the buttock area. He testified that there was no exit wound.

On redirect examination, Agent Breedlove testified that the defendant did not assist the TBI in recovering any property or finding any other person involved in the crime. He said he thought the defendant knew where the murder weapon was but did not want to volunteer that information because he wanted a deal. He said the defendant did volunteer information regarding unrelated gang activity in Nashville and did provide some names and addresses.

On recross-examination, Agent Breedlove testified that John David Pickard did not confess his involvement in the murder until after the defendant confessed. He said the defendant gave the TBI the names of the three others involved in the murder and told them that John David fired the shot. He stated that the defendant gave the TBI permission to search his car, and the Mossberg shotgun was found inside. He said the defendant told him that the shoes he wore that night were at his mother's house.

Agent Steve Scott, a firearms expert, testified that he was provided with materials that were found at the motel room for testing. He said that a recoil spring and a plug were found and that he determined that they could have come from a Remington shotgun like the one stolen from the Woodard residence. He said he used a Remington shotgun at the laboratory for tests. He said he took out the recoil spring, put the gun

back together, put in a live cartridge and fired the gun. He said that normally when the shotgun is fired, the bolt moves to the rear, ejects the shotgun shell, then loads a second one from the magazine. He said that if the spring were missing in the Remington, nothing would push the bolt forward and cause the gun to reload. He said the shell would have to be taken out manually to reload a fresh shot in the chamber for firing.

Dr. Pamela Auble, a clinical psychologist, testified that she performed a forensic evaluation on the defendant. She stated that she interviewed him, performed cognitive tests and personality tests, and reviewed his medical records. She testified that the defendant had no reasoning, intelligence, or memory problems. She testified that the personality test revealed that the defendant is very immature, rebellious and angry. She said he has difficulty trusting others and expects rejection. She said the defendant is impulsive but is not psychotic or crazy. She said the defendant has significant depression as well as guilt and remorse. She said she found some evidence of suicidal thoughts.

Dr. Auble testified that the defendant has been in and out of psychiatric hospitals and treatment programs since 1991. She said her profile of the defendant looked more like an adolescent than an adult. She testified that the defendant has the potential to mature with time. She said the structured environment of prison would be good for the defendant for a while. She said that as time passed, he would likely develop better judgment.

The defendant testified at the sentencing hearing. His testimony regarding the facts of the offense was substantially the same as he relayed at the guilty plea hearing. He said he felt comfortable with John David carrying the Remington because he did not feel that John David would shoot his relatives. He said he wanted

to be the first one in the house because he felt more comfortable with his judgment. He said his Mossberg contained no live rounds in its chamber. He said he did not load it because he wanted to use the intimidating sound of loading the shotgun to scare someone if necessary.

On cross-examination, the defendant testified that the barrel of his shotgun had been sawed off, and the plug had been removed. He said that he was a member of the Crypts gang and that the other three were members of the Gangster Disciples. He said he wanted John David to carry the Remington because Cole and Clemmons were juveniles. He said he yelled "help" when he was trapped under the bookcase because he could not defend himself with his gun. He said he was going to use the gun to hit the victim. He said he was emotionally disturbed at the time of the incident because he was about to get evicted from his apartment. He said he needed money because he was behind in his rent. He admitted that he chose not to work to earn the money. He admitted that he was involved in planning the incident. Despite the trial court's direction that he name the person to whom he gave the Remington, the defendant refused to do so. He said only that he instructed the individual to throw the shotgun into a lake.

The defendant agreed to waive jury sentencing and allow the trial court to determine punishment. See Tenn. Code Ann. § 39-13-205(b). In sentencing the defendant, the trial court applied the following aggravating circumstances, as listed in Tenn. Code Ann. § 39-13-204(i):

(3) The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder; [and]

(7) The murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any first degree murder, arson, rape,

robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb[.]

Before sentencing, the state had announced its election of attempted robbery as the underlying felony to support the application of the felony murder aggravator because the underlying felony used to support the defendant's conviction for felony murder was burglary. The trial court stated that it gave the most weight to aggravating circumstance (3) and little weight to aggravating circumstance (7) because of the possibility that it could not be applied pursuant to State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992).

In mitigation, the trial court considered the defendant's youth at the time of the crime, the fact that the defendant assisted the authorities in detecting or apprehending others who had committed the offenses, and the fact that the defendant assisted the authorities in recovering property involved in the crime. See Tenn. Code Ann. §§ 39-13-204(j)(7), (9). The trial court determined that the aggravating circumstances outweighed the mitigating circumstances and sentenced the defendant to life without parole.

The defendant contends that the trial court erred by applying aggravating circumstances (3) and (7), by failing to apply his proposed mitigating circumstances, and by finding that the aggravating circumstances outweighed the mitigating circumstances. The state contends that the trial court properly considered and applied all applicable aggravating and mitigating circumstances and argues that the defendant's sentence is supported by the record.

In a first degree murder case in which the state does not seek the death penalty, "[i]f the jury unanimously determines that the state has proven beyond a reasonable doubt one (1) or more of the statutory aggravating circumstances . . . the jury shall, in its considered discretion, sentence the defendant either to imprisonment

for life without possibility of parole or imprisonment for life.”¹ Tenn. Code Ann. § 39-13-207(c). In reviewing the sentence on appeal, pursuant to Tenn. Code Ann. § 39-13-207(g), this court must use the following standard of review:

When a defendant has been sentenced to imprisonment for life without possibility of parole, such defendant may appeal such sentence to the Tennessee court of criminal appeals. The court of criminal appeals shall first consider any errors assigned and then the court shall review the appropriateness of the sentence. A sentence of imprisonment for life without possibility of parole shall be considered appropriate if the state proved beyond a reasonable doubt at least one (1) statutory aggravating circumstance contained in § 39-13-204(i), and the sentence was not otherwise imposed arbitrarily, so as to constitute a gross abuse of . . . discretion.

I. TENN. CODE ANN. § 39-13-204(i)(3)

First, the defendant contends that the trial court erred by applying aggravating circumstance (3), that the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during the act of murder. The defendant argues that the evidence does not show that Mr. and Mrs. Pickard were at risk and that even if it did, the aggravating circumstance does not apply to him because he did not fire the shot. The state contends that the trial court properly applied the aggravator. It argues that the act of murder encompassed the defendant and his friends entering the Pickard residence armed with guns and knives and pointing the guns at the Pickards, as well as the actual firing of the shotgun at the victim. It also argues that because the defendant is responsible for the shooting even though he did not fire the shotgun, his sentence is also subject to the application of the aggravating circumstance.

¹We note that in the present case, the defendant waived jury sentencing and agreed to be sentenced by the trial court. See Tenn. Code Ann. § 39-13-207(b).

In applying circumstance (3), the trial court stated as follows:

So the act of murder, is it the exact second of pulling the trigger? I don't think so. I think the act of murder was formed when they took all those shotguns, two shotguns and knives and so forth and went in that house.

And then you say, well, the one that pulled the trigger is less [sic] guilty than the rest of them? No. Put them in a sack and shake them up and you couldn't tell which one would fall out first. Every one of them is just as guilty as the other. The State's [proved] that number three applies beyond a reasonable doubt.

Our supreme court has held that aggravating circumstance (3)

“contemplates either multiple murders or threats to several persons at or shortly prior to or shortly after an act of murder upon which the prosecution is based.” State v. Cone, 665 S.W.2d 87, 95 (Tenn. 1984). “It most often has been applied where a defendant fires multiple gunshots in the course of a robbery or other incident at which persons other than the victim are present.” State v. Burns, 979 S.W.2d 276, 892 (Tenn. 1998). However, it has also been applied when a defendant fired one shot toward the ceiling in a tavern and one shot into the tavern owner and when a defendant fired one shot into the victim with others in the “nearby vicinity” of the victim. See Tommy L. King v. State, No. 01S01-9707-CC-00146, Maury County (Tenn. June 7, 1999) (for publication); State v. Richard Burt McKee, No. 01C01-9606-CC-00278, Cheatham County, slip op. at 18 (Tenn. Crim. App. Mar. 31, 1998), app. denied, (Tenn. Nov. 11, 1998).

A review of the record in this case shows that the evidence supports the application of aggravating circumstance (3). The record reflects that the victim's bedroom was located at the end of the hallway, with the hallway ending at the bedroom door. Mr. and Mrs. Pickard's master bedroom was located on the right side of the hallway before the victim's bedroom. The evidence shows that the defendant and John David Pickard entered Mr. and Mrs. Pickard's bedroom, pointed their guns at them and ordered them to stay down. The defendant proceeded to the victim's bedroom, and

John David followed him. The evidence reflects that John David took a few steps backward into the hallway once the defendant and the victim became involved in a scuffle. Mr. Pickard was standing at the foot of the bed, and Mrs. Pickard was sitting on the side of the bed. Mrs. Pickard testified that she saw the flash from the gun when the shot was fired. Under these facts, we believe the application of circumstance (3) is supported by the record.

As for the defendant's contention that aggravating circumstance (3) does not apply to him because he did not fire the shot, we believe that the evidence still justifies its application to him. The evidence shows that before the shooting, the defendant was aware that his armed accomplices were in the house. While he was trapped under a bookcase, the defendant realized that he could not defend himself against the victim and yelled for the assistance of his armed accomplices. The victim was immediately shot by John David Pickard. Under these circumstances, the defendant through his own actions knowingly created a great risk of death to the Pickards. Otherwise, we need not reach the issue of whether the defendant can be held vicariously liable for the acts of the trigger man.

II. TENN. CODE ANN. § 39-13-204(i)(7)

The defendant contends that the trial court erred by applying aggravating circumstance (7), the felony murder aggravator. He argues that the application of this aggravator is erroneous under Middlebrooks, and he further argues that it does not apply under the facts of this case because he did not have a substantial role in the offense. The state contends that the circumstance was properly applied. We agree.

First, we note that the state elected to proceed with the felony murder aggravator by using attempted robbery as the underlying felony. It stated that burglary was the underlying felony forming the basis for the felony murder conviction. Despite

the defendant's argument that this constitutes "double dipping," our supreme court has held that when "a felony not underlying the felony murder conviction is used to support the felony murder aggravating circumstance, there is no duplication." State v. Hines, 919 S.W.2d 573, 583 (Tenn. 1995). Thus, the application of circumstance (7) in the present case is appropriate and does not require a Middlebrooks analysis.

In any event, Middlebrooks does not bar the application of the aggravator in this case. In Middlebrooks, our supreme court held that the felony murder aggravator could not be applied in imposing a death sentence for felony murder because it did not sufficiently narrow the class of death-eligible offenders. 840 S.W.2d at 346. However, the court has since held that Middlebrooks does not apply to cases involving life imprisonment without parole. In State v. Butler, the court concluded that the constitutional mandates set forth in Middlebrooks were not implicated when the state did not seek the death penalty. 980 S.W.2d 359, 363 (Tenn. 1998). The defendant's argument is without merit.

The defendant also contends that the aggravator should not apply because he did not have a substantial role in the offense. On the contrary, we believe the evidence shows that the defendant had a substantial role. The defendant testified that he took part in planning the robbery and that he drove his car to the Pickard residence. He participated in cutting the telephone lines outside the house, and he used his shotgun to break through the glass door to gain entry. He testified that he chose to arm himself and to be the first person in the house because he trusted his judgment. Once inside the house, the defendant was the leader, storming down the hallway first with John David and the others behind him. The evidence overwhelmingly supports a finding that the defendant had a substantial role in the offense.

III. MITIGATING CIRCUMSTANCES

The defendant contends that the trial court erred by not applying all of his proposed mitigating circumstances and by finding that the aggravating circumstances outweighed the mitigating circumstances. The state contends that the trial court did not err. We agree.

The defendant contests the trial court's failure to consider the following mitigating circumstances:

- (1) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;
- (2) The defendant is remorseful;
- (3) The defendant was motivated by a desire to provide necessities for himself;
- (4) The defendant did not have the mental ability to exercise adequate judgment;
- (5) The defendant has a potential for rehabilitation; and
- (6) The defendant did not intend to harm anyone.

See Tenn. Code Ann. § 39-13-204(j)(5), (9).

In denying the mitigating circumstances, the trial court stated as follows:

The defendant was an accomplice in the murder committed on another person and the defendant's participation was relatively minor. No, the defendant's participation in this case was major.

....

[T]he defendant was motivated by a desire to provide necessities for his family and himself. I can't find that. The defendant in this case like a lot of people, appears in front of me, the reason they're in trouble, they have no work ethics at all. They wouldn't work in a pie factory if they were starving to death, so I can't find that applies.

....

[T]he defendant because of his then existing emotional state lacked substantial judgment in committing the offense. I don't find that's applicable. The inferences I can draw from the testimony in here, he is as experienced in the field of committing crimes like this as much as if he was out here working and experienced in climbing a light pole, so I don't find that applies.

The defendant's likely potential to rehabilitate. I doubt it in this case. It would be an act of futility anyway because of the time involved in this case already.

The defendant did not intend to harm anyone during the commission of the offense. That is not applicable. You don't arm yourself, cut telephone lines, bust open windows, take shotguns loaded with buckshot and slugs and then not intend to hurt anybody . . . Sure, he intended to use that gun when he went in there, so that's not applicable.

The defendant was remorseful over the commission of the offense. Well, I don't know whether he is or not. I'm hesitant on that one. While he said he was apologetic, what did he say, "I hated that it happened." I'm sure he did, but for what reason, because of the Pickard family or because of his own hide? And I can't figure it out because when he wouldn't tell -- when he protected some other Crypt out there . . . then that lessens his remorsefulness in my opinion.

Our review of the record shows that the trial court's findings are supported, and the defendant has not demonstrated otherwise. Thus, we conclude that the trial court did not err by not applying the defendant's proposed mitigating circumstances.

Finally, the defendant contends that the trial court erred by finding that the aggravating circumstances outweighed the mitigating circumstances. Upon proof beyond a reasonable doubt of at least one aggravating circumstance, the trial court shall, in its considered discretion, sentence the defendant either to life imprisonment or life without parole. Tenn. Code Ann. §§ 39-13-207(c), -204(2). In exercising this discretion, the trial court is required to weigh and consider the statutory aggravating circumstance or circumstances and any mitigating circumstances. Tenn. Code Ann. §§ 39-13-207(d), -204(3)(1). Only a gross abuse of discretion would result in our finding error. Having thoroughly reviewed the record, we conclude that the sentence of life

imprisonment without parole is not arbitrary and that the trial court did not grossly abuse its discretion.

In consideration of the foregoing and the record as a whole, we affirm the judgment of conviction.

Joseph M. Tipton, Judge

CONCUR:

Joe G. Riley, Judge

Alan E. Glenn, Judge