IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

AUGUST 1999 SESSION

FILED

November 23, 1999

Cecil CROWS ON, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	C.C.A. No. 03C01-9711-CC-00521
Appellee,	)	
	)	Greene County
v.	)	
	)	Honorable James E. Beckner, Judge
ALLEN DALE CUTSHAW,	)	
	)	(Second Degree Murder)
Appellant.	)	

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

ALAN E. GLENN, JUDGE

O P I N I O N

The defendant, Allen Dale Cutshaw, was indicted by the Greene County grand jury for first degree murder in the death of J. R. Metcalf. The defendant admitted to killing the victim, but argued the killing was in self-defense. A jury convicted the defendant on the

lesser included offense of second degree murder. The jury fixed a fine of $25,000. After a sentencing hearing, the trial court sentenced the defendant to the maximum sentence of twenty-five years. The defendant raises three issues on appeal:

> I. The trial court committed reversible error in denying defendant's motion for acquittal and/or a new trial because the evidence was insufficient to establish beyond a reasonable doubt that defendant did not act in self-defense.
>
> II. The trial court committed reversible error by not, at a minimum, admonishing the misconduct of the prosecution in instructing a defense witness to write "retreat" on a chalkboard behind the witness stand in the view of the jury, in violation of Tenn. Code Ann. § 39-11-611 (1997).
>
> III. The sentence was excessive because the trial court failed to properly weigh the enhancement and mitigating factors.

Based upon our review of this matter, we affirm the decision of trial court.

I. FACTS

The charges against the defendant resulted from a shooting incident which occurred during the early morning hours of December 14, 1996, on Arlie Waddell Road, near its intersection with Asheville Highway, in Greene County. Although the defendant did not testify during the trial, conflicting accounts from the eyewitnesses make the true facts difficult to divine. Because the prior, hard feelings between the defendant and the victim presaged the shooting, we will review both the background as well as the shooting itself.

A. Background

A hostile relationship existed between the defendant and the victim for several years before the shooting. The defendant introduced testimony to show the victim had made threats of violence against the defendant in the past. Janice Partin, the defendant's stepsister, described an incident that occurred approximately five years before the shooting. According to Partin, the victim tried to "run down" the defendant with his car while the defendant was standing next to Partin's car in a local parking lot. The defendant's uncle, Jake Albert Reed, Jr., described a 1990 incident in which the victim tried to pick a fight with the defendant while the defendant was unable to defend himself due to injuries suffered in a car accident. The defendant's mother, Shirley Cutshaw Thomas, related the details of a fight in 1992 between the victim and the defendant on the road outside the defendant's home. The defendant's father broke up the fight and the victim ran away. The defendant's mother recovered a handgun from the scene after the victim left. Becky Griggs, a former girlfriend of the victim, stated the victim told her there would be a

day that he would "kill the s-o-b [speaking of the defendant]." In addition to the testimony of the above witnesses, the defendant introduced court documents showing a history of alcohol abuse and domestic violence by the victim against the victim's former wife.

B. The Shooting

Many of the facts surrounding the shooting are undisputed. Several hours before the shooting, the victim and the defendant engaged in a brief fight at the Starlite Club. After bouncers broke up the fight, Tim Drinnon, owner of the club, escorted the defendant outside. Drinnon heard someone say the victim wanted to meet the defendant somewhere, presumably to finish the fight. The defendant said "that's fine." In an attempt to prevent any further violence, Drinnon told the victim and the defendant two different locations at which to meet. Drinnon refused to allow the victim to leave the club until the defendant left the parking lot. Eventually, both men left the Starlite Club. Drinnon said the defendant came back to the club looking for the victim, but left when he discovered the victim was gone. It is at this point the details of the night's events begin to differ.

The State presented testimony which showed that the defendant, along with William Thomas Cooter, II, searched for the victim after the defendant was thrown out of the Starlite Club. Cooter met the defendant at the defendant's home, where the defendant put a loaded rifle in his truck. Cooter and the defendant started to go to the 321 Club to find the victim, but according to Cooter, the defendant told him, "Oh, heck with it. J. R. and them might be down there. It ain't worth it. Let's just go back home."

On the way home, the two men stopped at the top of a hill on Arlie Waddell Road to talk to a man stopped on the road. The victim pulled in behind them. The victim got out of his vehicle and approached the defendant. As the victim approached, the defendant got the rifle from behind his truck seat. Cooter testified he told the defendant not to take the rifle, but the defendant said "he wasn't going to face him [the victim] without it as many times as J. R. had harassed him with guns." The defendant took the gun and walked away from the truck. According to Cooter, someone yelled to the victim, "He's got a gun." The victim then said, "Well, I've got something to take care of that." The victim continued to walk toward the defendant and, as Cooter described it, "made a dive at Allen [the defendant]." The defendant ran backwards and the victim grabbed the gun. The gun discharged as the victim grabbed it. After the shooting, the defendant walked back to the truck. Cooter said to him, "You killed him." The defendant replied with either "I didn't mean

to" or "I didn't have no choice." The defendant then put the gun back in his truck. Cooter further testified he was drunk at the time of the shooting and had been taking Valium.

Defense witness, Angela Dawn Smelcer, described the shooting a bit differently. Smelcer had gone out with the victim the night of the shooting. She was present at the Starlite Club when the fight occurred and after the fight she drove the victim around while he looked for the defendant. She and the victim returned to the Starlite Club to look for the defendant, but he was not there. According to Smelcer, Edward Thomas helped her and the victim look for the defendant. With Smelcer and the victim in the victim's truck and Thomas in his own truck, the three searched for the defendant. While driving near Arlie Waddell Road, Smelcer stated Thomas flashed the lights of his truck to indicate he was turning onto a road that circled around and intersected Arlie Waddell Road near the defendant's house. Just after Thomas turned, Smelcer saw the defendant headed toward his house.

The defendant turned and stopped. Smelcer stopped the truck and the victim got out and began walking toward the defendant. Both men yelled at each other. At this point, Thomas appeared in his truck, driving in from the opposite direction. He pulled off the road and stopped his truck. As the victim approached the defendant, Cooter stopped the victim and patted him down looking for a weapon. The victim continued walking toward the defendant with his hands raised and his shirt out, presumably to show he had no gun.

As the victim approached, the defendant had the gun down at his side. The victim approached the defendant at an angle and dove at the defendant's feet. In a statement given to sheriff's deputies approximately four hours after the shooting, Smelcer said "the gun went off" after the victim dove at the defendant's feet. At trial, Smelcer stated the defendant shot from the hip. However, upon further questioning by the defense, she stated she did not know where the gun was pointed when it was fired.

Edward Thomas, a lifelong friend of the victim, disputed the defense's contention he was following Smelcer and the victim, helping them to find the defendant. Thomas stated he left the Starlite Club on his own after the victim and Smelcer left. Only later in the evening did he come upon the victim and Smelcer in the parking lot of the Cold Creek Market. Thomas said he stopped to say hello and then left to visit his elderly grandfather who lived near Arlie Waddell Road. Thomas testified he did not see the victim and

Smelcer again until he came upon them on Arlie Waddell Road.

When Thomas arrived at the scene, he stopped his truck near the defendant and asked him what was going on. Thomas saw the victim standing by the highway with his shirt pulled open and his hands out to his side. The victim and the defendant were about forty yards apart and the victim started walking toward the defendant. According to Thomas, the defendant "just raised it up and shot." When the defendant walked away from the victim, Thomas asked him, "Why did you do it?" Thomas stated the defendant replied, "Do you think I'm playing?" He then shoved the gun at Thomas and drove off.

C. After the Shooting

After the defendant shot the victim, Smelcer called 911. Some time later, several sheriff's deputies and detectives arrived at the scene. A paramedic testified the victim was dead when his crew arrived. The defendant told Deputy Sheriff Frank Waddell he shot the victim. Waddell recovered the gun from the defendant's truck and arrested the defendant. The defendant was wearing muddy jeans that looked like he had fallen backwards.

Deputy Sheriff Joe Jaynes returned to the scene at 8:00 a.m. Jaynes found a spent shell casing about twelve feet from the body. He also found a shotgun belonging to Thomas in some high weeds at the scene. According to Thomas, the shotgun was taken from his truck on the night of the shooting. He did not know who took the gun, nor when it was taken.

The autopsy on the victim revealed he died very quickly due to a gunshot wound to the left chest. The shot was fired from a little more or less than two feet. The victim's blood alcohol level at the time of his death was .232; the vitreous alcohol level was .298; and, the urine alcohol level was .304.

II. DISCUSSION OF LAW

A. Sufficiency of Evidence

When a challenge is made to the sufficiency of the evidence, the standard for appellate review is whether, after considering the evidence in a light most favorable to the State, 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, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). The defendant's burden of showing insufficiency is heavy, since all

conflicts in testimony are resolved in favor of the State, and the State is entitled to the strongest legitimate view of the evidence as well as all reasonable or legitimate inferences that may be drawn therefrom. State v. Burns, 979 S.W.2d 276, 287 (Tenn. 1998).

To obtain a conviction for second degree murder, the State must prove the defendant knowingly killed the victim. Tenn. Code Ann. § 39-13-210(a)(1) (1997). When, as here, the defendant admits to the killing, but raises the affirmative defense of self-defense, the State must prove beyond a reasonable doubt the defendant did not act in self-defense. State v. Belser, 945 S.W.2d 776, 782 (Tenn. Crim. App. 1996). "A person is justified in threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force." Tenn. Code Ann. § 39-11-611(a) (1997). The person's belief that there is imminent danger of death or serious bodily injury must be reasonable. Id. "The danger creating the belief of imminent death or serious bodily injury must be real, or honestly believed to be real at the time, and must be founded upon reasonable grounds." Id. A person does not have a duty to retreat before threatening or using force. Id.

The jury heard testimony concerning past instances of violence between the victim and the defendant and the circumstances surrounding the fight hours before the shooting. Such evidence is relevant to determine whether the defendant acted under a reasonable fear for his own life. Ellis v. State, 555 S.W.2d 731, 733 (Tenn. Crim. App.), cert. denied (Tenn. 1977); see also State v. Butler, 626 S.W.2d 6, 11 (Tenn. 1981) (holding evidence of victim's animosity toward defendant, including words and actions at time of killing and before are relevant to determine who was aggressor). Further, the defendant's decision to leave the confrontation, arm himself, and then return to the scene of first trouble does not as a matter of law characterize him as a first aggressor. Gray v. State, 203 Tenn. 332, 313 S.W.2d 246, 247 (1958). The jury is charged with weighing the evidence presented and reaching a verdict based upon the applicable standard of review and applicable law. Further, the jury is to determine whether the "defendant's belief in imminent danger was reasonable, whether the force used was reasonable, and whether the defendant was without fault." State v. Renner, 912 S.W.2d 701, 704 (Tenn. 1995).

Giving the State the benefit of the strongest legitimate view of the evidence as well as all reasonable or legitimate inferences that may be drawn therefrom, we cannot say the

evidence was insufficient to support the jury's verdict. The defendant admitted he killed the victim. Although the defendant presented testimony to support his claim of self-defense, the State presented evidence to show the defendant did not use deadly force as a result of a reasonable belief he was in imminent danger. We hold that the jury's rejection of the defendant's claim of self-defense and the verdict of guilty of second degree murder are supported by the evidence presented.

B. Prosecutorial Misconduct

During the cross-examination of defense witness Smelcer, the State asked Smelcer to write the word "retreat" on a chalkboard located behind the witness stand:

> Q. If you would please, you've got a pen there and I'm going to ask you to stand up to the board. You played basketball at South Greene High School, is that right?
>
> A. Yes.
>
> Q. I want you to stand up there to the board and I want you to write the word "Retreat."
>
> A. (Witness writes).

Defense counsel objected stating, "I'm going to object unless there's some series of questions to connect to that word." The State responded, "I'm getting ready to, Your Honor, and I promise you it will be very quick." The trial court made no ruling regarding the defendant's conditional objection and the State continued its questioning.

The State asked Smelcer several questions about the shooting. During direct examination, Smelcer stated the victim dove at the defendant's feet. In a question related to this statement, the State asked, "Did you ever, prior to the lunge that you've told the members of the jury you observed, . . . did this defendant ever take a step backward?" After this question, defense counsel objected, stating, "Your Honor, this is totally impermissible. There is no duty of retreat. He is trying to impart this jury a notion that he's under a duty to retreat."

The trial court overruled the defendant's objection stating, "The ruling is that although I will instruct the jury that a defendant has no duty to retreat to assert the defense of self-defense, certainly whether one retreats or not can be relevant to who is the first aggressor." Defense counsel then stated, "Your Honor, I respectfully submit to you, and I know better than to argue, but that word that's written on the board where this lady has already testified that J. R. was the first aggressor, we know that." The State then asked the bailiff to erase the word "retreat" from the board stating, "so that I don't get interrupted

again, would you erase the word?"

The defendant argues the trial court committed reversible error when it failed to admonish the jury to disregard the word "retreat" written on the chalkboard or to instruct the State to remove the word.

No duty to retreat exists under Tennessee law. Tenn. Code Ann. § 39-11-611(a) (1997). However, related questions are permissible, in appropriate cases, so that the jury can properly assess the defendant's conduct. In Renner, after the defendant had claimed that he fired the fatal shot after the victim had reached into his rear pocket and threatened to kill the defendant, the State was allowed to question the defendant about available exits from the apartment:

> We, however, find that this question and those like it were useful in eliciting testimony relevant to many of the issues the jury would later determine: (1) the circumstances under which the confrontation occurred, (2) whether Renner was lawfully on the premises, (3) whether Renner's conduct under the circumstances was reasonable, and (4) whether Renner perceived himself to have been in imminent danger. As stated, these are factual issues for the jury to resolve, and by asking them, the prosecutor simply sought, in our opinion, to adduce illuminative testimony. Therefore, we conclude that nothing in the questions asked by the prosecutor on cross-examination establishes reversible error.

912 S.W.2d at 704-05.

The defendant, citing State v. Adkins, 653 S.W.2d 708, 714 (Tenn. 1983) (finding error in trial court's overruling of defendant's objection to prosecutor's misstatement of law during voir dire), argues the use of the word "retreat" was reversible error. However, the court in Adkins found the prosecutor's comments to be harmless error considering the trial court's proper instruction of the jury. Adkins, 653 S.W.2d at 714. Additionally, in Renner, the supreme court found proper jury instructions cured any ill effects of the State's improper reference to a duty to retreat during examination of a defense witness and during closing arguments. Renner, 912 S.W.2d at 704-05. Thus, even if it was error for the State to utilize the word "retreat" as it did, such error was cured, as in Renner and Adkins, by the instructions of the trial court.[1] Thus, this assignment is without merit.

[1]We are left to assume the trial court correctly instructed the jury a person has no duty to retreat. The trial court's charge to the jury has not been made a part of the record. Because the defendant has not raised the lack of such an instruction as an issue on appeal and because the defendant is responsible for ensuring the record is complete on appeal, we infer such an instruction was given.

C. Sentencing

The defendant next challenges the trial court's imposition of sentence. When an accused challenges the length, range, or manner of service of a sentence, this court has a duty to conduct a *de novo* review of the sentence with the presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997). In conducting a *de novo* review of a sentence, the 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). In felony cases, the presumption of correctness 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).

The sentencing range for a Class A felony in Range I is fifteen to twenty-five years. Tenn. Code Ann. § 40-35-112(a)(1) (1997). The presumptive sentence is the midpoint of the range, or twenty years, subject to increase and/or reduction by any applicable enhancement and mitigating factors. Tenn. Code Ann. § 40-35-210 (c), (d) & (e) (Supp. 1998). In the case *sub judice*, the trial court found the existence of three enhancement factors listed in Tenn. Code Ann. § 40-35-114 (1997):

> (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
>
> (8) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community; and,
>
> (9) The defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense.

The trial court found no applicable mitigating factors.

Because the record reflects the trial court's consideration of the proper sentencing principles and all relevant facts and circumstances, the presumption of correctness applies. The defendant does not challenge the applicability of the above enhancement factors, only the weight given to each factor. Enhancement and mitigating factors have no assigned weight, however. The weight given to each factor is left to the sound discretion of the trial

court. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992), perm. app. denied (Tenn. 1993). We find no error in the application of the three enhancement factors.

The defendant also argues the trial court should have found the following mitigating factors to be applicable:

> (2) The defendant acted under strong provocation;
>
> (3) Substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
>
> (10) The defendant assisted the authorities in locating or recovering any property or person involved in the crime;
>
> (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; and,
>
> (13) Any other factor consistent with the purposes of this chapter.

Tenn. Code Ann. § 40-35-113 (1997).

After reviewing the record, we find the trial court considered the above mitigating factors and properly found them not to apply. This assignment is without merit.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

_____
ALAN E. GLENN, JUDGE

CONCUR:

_____
JOSEPH M. TIPTON, JUDGE

_____
JOHN EVERETT WILLIAMS, JUDGE