

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

November 19, 2013 Session

STATE OF TENNESSEE v. DANIEL PAGAN

**Appeal from the Criminal Court for Knox County
No. 97620 Steven W. Sword, Judge**

No. E2012-02210-CCA-R3-CD - Filed March 11, 2014

The Defendant, Daniel Pagan, pled guilty to possession of a Schedule II controlled substance with intent to deliver and, thereafter, was convicted by a jury of voluntary manslaughter. The trial court imposed consecutive terms of six years for the voluntary manslaughter conviction and four years for the drug possession conviction, for a total effective sentence of ten years. In this direct appeal, the Defendant contends (1) that the evidence at trial was insufficient to prove that he had the requisite intent to support a conviction for voluntary manslaughter and (2) that the trial court improperly determined that he was a dangerous offender for consecutive sentencing purposes. After our review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JR., JJ., joined.

Mark E. Stephens, District Public Defender; Kathryn M. Merwald, Assistant Public Defender (on appeal); and Bruce E. Poston (at trial), Knoxville, Tennessee, for the appellant, Daniel Pagan.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Senior Counsel; Randall E. Nichols, District Attorney General; and Kevin J. Allen, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION
FACTUAL BACKGROUND

This case arises out of the stabbing death of Dashaunta C. “Tai” Murphy (“the victim”), which occurred at the hands of the Defendant during a drug deal on January 27, 2011. As a result, the Defendant was charged with second degree murder, a Class A felony, and possession of a Schedule II controlled substance with intent to deliver, a Class C felony. See Tenn. Code Ann. §§ 39-13-210, -17-417.

After a jury was empaneled, the Defendant pled guilty to the drug possession charge but proceeded to trial on the second degree murder charge. The proof adduced at the Defendant’s trial revealed the following facts. On the afternoon of January 27, 2011, the victim, along with her friends Chelsea Garrett and Megan Turner, formulated a plan to rob the Defendant of his illegal prescription drugs, some Roxicodone pills. The victim and the Defendant knew each other personally, and the women believed that the Defendant would be an “easy target.” They hoped that the Defendant would trust the victim to “walk off with some” of the pills, and then the victim would then run to the car hidden close by, where the other two girls would be waiting to drive off. They selected a location for the drug deal—the neighborhood where the victim and her mother had recently lived, known to them as “the neighborhood” or “little hood[,]” in the Cedar Bluff area of Knoxville. After surveying the area, they determined that a dark cul-de-sac in the neighborhood was the best location. They also thought that the victim would be easily able to defend herself against the Defendant if something went wrong.

That afternoon, the Defendant and his girlfriend, Kayla Green, were shopping at a local Wal-Mart when the Defendant received a text message from Chelsea Garrett seeking to buy some Roxicodone pills. The Defendant was friends with Chelsea’s¹ brother, Chad Garrett, and had sold pills to Chelsea in the past. Both the victim and Chelsea were using the phone to text message back and forth with the Defendant. Ultimately, the Defendant and the victim agreed to the terms of the drug transaction, thirty pills for twenty-five dollars a piece.

Some time after returning home from Wal-Mart, the Defendant and Green dropped off their young daughter at a relative’s house and proceeded to the location chosen by the victim. After arriving in the neighborhood, the Defendant drove to the location where he believed the victim resided, but she was not there. The Defendant called the victim, and she asked him to meet her in a nearby cul-de-sac. The last recorded phone call between the two parties occurred at 10:21 p.m. The Defendant went to that location, and the victim approached the car. The victim was armed with a red-handled knife with a black blade, although the knife was not displayed to the Defendant at that time. According to Chelsea,

¹ Because Chelsea and Chad Garrett share the same last name, we will refer to them by their first names. We intend no disrespect.

the victim asked to borrow Chelsea's knife as she exited the car just prior to leaving to meet the Defendant.

The victim told the Defendant that she was purchasing the pills for someone who lived inside the apartment building and kept trying to get the Defendant to give her the pills so she could count them. The Defendant refused to hand her the pills without first seeing any money. After the victim unsuccessfully tried to get Green to accompany her inside the apartment building with the pills, the Defendant agreed to go inside. He exited the car with the pills and followed the victim. According to Green, when the Defendant left the car, he was wearing a silver chain and a matching bracelet and was carrying a butterfly knife. The Defendant's butterfly knife was described as a martial arts weapon.

Green felt uneasy about the transaction, so she repositioned the car by backing the car closer to where the Defendant and the victim had walked away. After hearing shouting and expletives, Green saw the Defendant and the victim "wrestling around." Green shouted that she was going to call the police, and both the Defendant and the victim told her to call. However, before she could place any call, the Defendant ran down the hill, jumped into the car, and demanded that they leave the area immediately. While driving home, the Defendant phoned his mother at 10:32 p.m. Green saw that the Defendant still had his butterfly knife on him, but she did not see any blood on it. She asked the Defendant what had happened, and he said, "Just chill out right now, and don't worry about it. We'll talk about it later."

The couple stopped at a Pilot/Taco Bell station on the way home and ordered food. Video surveillance confirmed their presence at this station at 10:50 p.m. While there, the Defendant exited the car and walked towards a garbage can according to Green. After getting food, they continued home, and Green then left to go pick up their daughter. When she returned, the Defendant was taking a shower. He later told Green that he and the victim had "just gotten into a fight."

Later that evening, Chad, accompanied by his sister, found the unresponsive victim in the cul-de-sac and called 911 at 11:14 p.m. Emergency personnel were dispatched to the area, who observed on arrival that the victim was dead due to the infliction of multiple stab wounds. The victim's knife, a lid to a pill bottle, and two necklaces were found on the scene. Later testing revealed the victim's DNA on her knife. It was also determined that one of the necklaces belonged to the victim and that the other matched the pattern of a bracelet worn by the Defendant.

After learning of the Defendant's involvement, Knox County Sheriff's deputies arrived at his residence. Thereafter, the residence was searched; among the evidence seized

were forty-one Roxicodone pills, thirty Alprazolam pills, five OxyContin pills, one small baggy containing “white powder,” and one baggy containing a “green leafy” substance.

Both Green and the Defendant were questioned. Green told authorities that the Defendant had instructed her to lie about his whereabouts on the night of January 27, 2011, in order to provide him an alibi. She was suppose to say that they were home together that evening.

During the Defendant’s interview, he gave two conflicting stories about the events. At first, he told detectives that he did not have a knife, that the victim pulled her knife as she tried to take his pills, and that he managed to take her knife away from her before swinging it in her direction. Following further questioning, the Defendant relayed a second version of events, one more consistent with the evidence according to the detective who testified at trial. The Defendant admitted that the victim put him in a headlock and tried to steal his pills and that he pulled out his butterfly knife in response. According to the Defendant, he was going to abandon the encounter but decided to retrieve his pills, which he had dropped on the ground. Although the victim told the Defendant that she too had a knife in her possession, the Defendant acknowledged that he never saw the victim’s knife prior to stabbing her several times. Furthermore, he was aware that she had lost a lot blood when he fled the scene. When the Defendant was photographed, he had only a minor cut on his ear and showed no additional signs of recently being involved in a fight. The detective believed it was clear from the Defendant’s statement that the Defendant’s “knife was introduced into this confrontation first.”

After receiving information from the Defendant about where he had hidden evidence, officers returned to the Defendant’s mother’s residence, which was next door to the Defendant’s home. Once there, they discovered a plastic Wal-Mart sack underneath the back porch and a butterfly knife, wrapped in a baby wipe, buried in the flower bed. Inside the bag, officers found clothing that was stained with the victim’s blood. Also, later testing revealed that the baby wipe that shrouded the butterfly knife contained the victim’s DNA. Additionally, officers were able to locate an empty pill bottle in the garbage can of the Pilot/Taco Bell station. A fingerprint on the pill bottle matched the Defendant’s, and the lid found at the crime scene appeared to fit the pill bottle.

Dr. Darinka Mileusnic-Polchan performed an autopsy of the victim, examining the victim’s seven stab wounds and the two knives involved in the incident. The deadliest stab wound penetrated the victim’s heart; another stab wound penetrated the victim’s lung. After analyzing these two wounds, Dr. Mileusnic-Polchan was able to determine that the knife was thrust all the way “to the hilt or handle” and that these wounds were definitely inflicted by

the Defendant's butterfly knife. According to Dr. Mileusnic-Polchan, the victim also had stab wounds to the left side of her chest, her hip area, and her left elbow. In looking at the width of these wounds, she further opined that two of the wounds to the hip and chest area were consistent with the characteristics of the Defendant's butterfly knife. One of the wounds to the victim's hip area was "unusual" and unlike all of the other wounds. It was inflicted with a much wider blade according to Dr. Mileusnic-Polchan; she was able to determine that this wound was consistent with characteristics from the victim's knife. The other two wounds were too superficial for Dr. Mileusnic-Polchan to make a determination as to which knife might have inflicted the wound. Dr. Mileusnic-Polchan determined that the manner of death was homicide. Dr. Mileusnic-Polchan further concluded that the victim was not standing long after she was stabbed and that there was no evidence the victim hit anyone or anything.

After the Defendant's motion for judgment of acquittal was denied, he did not present any proof. The jury found him guilty of the lesser-included offense of voluntary manslaughter, a Class C felony. See Tenn. Code Ann. § 39-13-211. Following a sentencing hearing, the trial court imposed consecutive terms of six years for the voluntary manslaughter conviction and four years for the drug possession conviction, resulting in a total effective sentence of ten years. Regarding manner of service, the trial court determined that a sentence of split confinement was appropriate, ordering the Defendant to serve one year in the Knox County Jail before being released on "enhanced" probation for the remainder of his sentence.

The case is now before this court. The Defendant is challenging the sufficiency of the convicting evidence and the imposition of consecutive sentencing.

ANALYSIS

I. Motion for Judgment of Acquittal/Sufficiency of the Evidence

The Defendant argues that the trial court erred in denying his motion for judgment of acquittal because the evidence was insufficient to sustain a conviction for voluntary manslaughter. The State disagrees.

A motion for judgment of acquittal raises a question of law, i.e., the legal sufficiency of the evidence, for determination by the trial court. State v. Adams, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995) (citing State v. Hall, 656 S.W.2d 60, 61 (Tenn. Crim. App. 1983)). Thus, on appeal, this court applies the same standard of review both to the trial court's denial of a motion for a judgment of acquittal and to the sufficiency of the convicting evidence underlying the jury's verdict. State v. Carroll, 36 S.W.3d 854, 869 (Tenn. Crim. App. 1999) (citing State v. Ball, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998)). Therefore, we must consider "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, 319 (1979).

This court does not reweigh the evidence; rather, it presumes that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the State. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

A guilty verdict “removes the presumption of innocence and replaces it with a presumption of guilt, and [on appeal] the defendant has the burden of illustrating why the evidence is insufficient to support the jury’s verdict.” Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). “This [standard] applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of [both] direct and circumstantial evidence.” State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). The standard of proof is the same, whether the evidence is direct or circumstantial. State v. Dorantes, 331 S.W.3d 370, 379 (Tenn. 2011). Likewise, appellate review of the convicting evidence “is the same whether the conviction is based upon direct or circumstantial evidence.” Id. (quoting State v. Hanson, 279 S.W.3d 265, 275 (Tenn. 2009)). The duty of this court “on appeal of a conviction is not to contemplate all plausible inferences in the [d]efendant’s favor, but to draw all reasonable inferences from the evidence in favor of the State.” State v. Sisk, 343 S.W.3d 60, 67 (Tenn. 2011).

Voluntary manslaughter is defined as “the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.” Tenn. Code Ann. § 39-13-211(a). The Defendant contends that a rational juror could not have found that he knowingly or intentionally killed the victim or, stated another way, that the Defendant was not “aware that swinging his knife at [the victim] was reasonably certain to cause her death.”² He contends that, at most, the evidence establishes a reckless killing. “A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result.” Tenn. Code Ann. § 39-11-302(b). “When acting knowingly suffices to establish an element, that element is also established if a person acts intentionally.” Tenn. Code Ann. § 39-11-301(a)(2). “[A] person . . . acts intentionally with respect to the nature of the conduct or to a result of conduct when it is the person’s conscious objective or desire to engage in the conduct or cause the result.” Tenn. Code Ann. § 39-11-302(a).

² The State devotes much of its sufficiency argument refuting the Defendant’s claim of self-defense; however, we find no claim of self-defense in the Defendant’s brief.

Taken in the light most favorable to the State, the evidence showed that the Defendant was provoked by the victim, who attempted to steal his drugs by placing the Defendant in a headlock. However, rather than abandoning the encounter, the Defendant stabbed the victim seven times in an effort to safeguard his drugs, which he had dropped on the ground. Twice the knife was thrust into the victim's torso all the way "to the hilt or handle." Not only did the Defendant stab the victim with his own knife, which was described as a marital arts weapon, but once the victim dropped her weapon, he used that knife to stab her again. The most fatal of the victim's wounds went directly into her heart. When the Defendant was photographed just following the encounter, he had only a minor cut on his ear, and there were no other signs that he had been involved in a fight. The victim's hands likewise showed no evidence of a fight. Following the encounter, the Defendant secreted evidence and attempted to establish an alibi. We, therefore, conclude that the evidence was sufficient for the jury to find the Defendant guilty of voluntary manslaughter beyond a reasonable doubt.

II. Consecutive Sentencing

The Defendant argues that the trial court improperly imposed consecutive sentencing based upon its erroneous finding that the Defendant was a dangerous offender. Our supreme court has recently held that "the abuse of discretion standard, accompanied by a presumption of reasonableness, applies to consecutive sentencing determinations" "if [the trial court] has provided reasons on the record establishing at least one of the seven grounds listed in Tennessee Code Annotated section 40-35-115(b)[.]" State v. James Allen Pollard, -- S.W.3d --, No. M2011-00332-SC-R11-CD, 2013 WL 6732667, at *7-9 (Tenn. Dec. 20, 2013). Thus, the imposition of consecutive sentencing is subject to the general sentencing principles that the overall sentence imposed "should be no greater than that deserved for the offense committed" and that it "should be the least severe measure necessary to achieve the purposes for which the sentence is imposed[.]" Tenn. Code Ann. § 40-35-103(2) & (4). Further, "[s]o long as a trial court properly articulates reasons for ordering consecutive sentences, thereby providing a basis for meaningful appellate review, the sentences will be presumed reasonable and, absent an abuse of discretion, upheld on appeal." Id. at *9 (citing Tenn. R. Crim. P. 32(c)(1) ("The order [for consecutive sentences] shall specify the reasons for this decision and is reviewable on appeal.)); see also State v. Bise, 380 S.W.3d 682, 705 (Tenn. 2012).

Tennessee Code Annotated section 40-35-115(b) provides that a trial court may order sentences to run consecutively if it finds any one of the following criteria by a preponderance of the evidence:

- (1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;

- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
- (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
- (6) The defendant is sentenced for an offense committed while on probation;
or
- (7) The defendant is sentenced for criminal contempt.

These criteria are stated in the alternative; therefore, only one need exist to support the appropriateness of consecutive sentencing.

Here, the trial court imposed consecutive sentences finding that the Defendant was a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high. See Tenn. Code Ann. § 40-35-115(b)(4). In State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995), our supreme court imposed two additional requirements for consecutive sentencing when the "dangerous offender" category is used: the court must find that consecutive sentences are reasonably related to the severity of the offenses committed and are necessary to protect the public from further criminal conduct. Id. at 937-39; see State v. Imfeld, 70 S.W.3d 698,707-08 (Tenn. 2002). The adoption of the abuse of discretion standard with the presumption of reasonableness has not eliminated this requirement. Pollard, 2013 WL 6732667, at *10.

Initially, we note that the Defendant submits that the trial court failed to make the additional findings required by Wilkerson. At the sentencing hearing, the trial court found the dangerous offender criterion to be applicable, reasoning as follows:

As I stated before, the [D]efendant's act of taking a knife to a drug deal increases the risk to human life exponentially, and plus, this was a butterfly knife designed for hand-to-hand combat in this type of situation, and as I stated

before, you don't have a right to defend your illegal drugs. You do have a right to defend yourself, but I think that that action of taking the knife to this drug deal indicated that [the Defendant] was more concerned about his drugs and the safety of those drugs than he was about taking someone's life.

At the motion for new trial hearing, the Defendant argued that his conduct did not meet the Wilkerson requirements and that the trial court erred in imposing consecutive sentencing on this ground. The trial court found its sentencing decision to be appropriate, making the following additional determinations:

And then what the defense has focused on this morning is running those two sentences consecutive, and when you look at the Wilkerson limitations on when you can impose consecutive sentence for a dangerous offender, you have to look at would consecutive terms be reasonably related to the severity of the offense; and two, whether are consecutive sentences necessary to protect the public from serious criminal conduct by the [D]efendant.

And I think in my discussion at the sentencing hearing about the seriousness of the situation the [D]efendant put himself in, the repeated stabbings of the victim, that it wasn't a situation where he just cut her one time or stabbed her one time and then--and then ran, but multiple stabbings that resulted in her death and then hiding out, and I think when you look at that, and it's clear this was an extremely serious offense, and that it is necessary to protect the public, in my opinion, . . . from further serious crimes by this defendant.

A shorter sentence, I believe, could not accomplish that I believe that consecutive sentences were necessary to, one, avoid depreciating the seriousness of the offense, to give a significant length of time for this young man to be rehabilitated, and also to protect our public from further serious criminal conduct by this defendant. It's a big difference to . . . having 10 years hanging over your head instead of six.

Thus, it is clear from the record that the trial court corrected its error at the motion for new trial hearing and made the Wilkerson findings as required.

The Defendant further submits that the proof does not support application of the dangerous offender category to him.³ Here, the trial court properly articulated its reason for

³ The Defendant also argues that the trial court's dangerous offender classification was inconsistent because the trial court determined that enhancement factor 10—the defendant had not hesitation about committing
(continued...)

ordering consecutive sentences on the record, and thus, its decision is presumed reasonable absent an abuse of that discretion. In this case, the victim died from multiple stab wounds inflicted by the Defendant to protect his drugs. The trial court in this case thoroughly considered the purposes and principles of the Sentencing Act in rendering its decision. In accordance with the recent standard of review announced in Pollard, we cannot conclude that the trial court abused its discretion in classifying the Defendant as a dangerous offender to impose consecutive sentences and, therefore, affirm.

CONCLUSION

In accordance with the foregoing reasoning and authorities, we conclude that no error exists in the judgments of the trial court and affirm.

D. KELLY THOMAS, JR., JUDGE

³(...continued)

a crime when the risk to human life was high—did not apply to the Defendant. However, nothing in our Sentencing Act prohibits, nor requires, consideration of certain factors for both enhancement and consecutive sentencing purposes were applicable, only that the ultimate sentence complies with the purposes and principles of the Act. See State v. Davis, 825 S.W.2d 109, 113 (Tenn. Crim. App.1991).