

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY 1996 SESSION

FILED

December 13, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,

*

C.C.A. # 01C01-9509-CR-00318

Appellee,

*

DAVIDSON COUNTY

VS.

*

Hon. Ann Lacy Johns, Judge

MARQUETIA BROWN,

*

(Second Degree Murder)

Appellant.

*

For Appellant:

Monte D. Watkins
176 Second Avenue, North
Suite 300
Nashville, TN 37201

For Appellee:

Charles W. Burson
Attorney General & Reporter

Charlotte H. Rappuhn
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Dan Hamm
Asst. District Attorney General
Washington Square
222 Second Avenue, North
Nashville, TN 37201-1649

OPINION FILED: _____

AFFIRMED AS MODIFIED

GARY R. WADE, JUDGE

OPINION

The defendant, Marquetia Brown,¹ was convicted of second degree murder for the shooting death of her husband, Frederick Brown. The trial court imposed a range one sentence of seventeen and one-half years. In this appeal of right, she challenges the sufficiency of the evidence and asserts that the sentence is excessive.

We affirm the conviction; the sentence is modified to 15 years.

Most of the facts are undisputed. In the fall of 1993, the victim resumed a relationship with a former girlfriend, Chantelle Henderson, who lived in Gary, Indiana. The victim saw her every couple of months when he was in Indiana on business. He spoke with her on the telephone about three times a week and received her correspondence at the residence he shared with the defendant.

In early March of 1994, the defendant discovered a letter establishing that the victim was having an affair with Ms. Henderson. Upset about her discovery, she expressed concern to a friend, Philip Barber, over the victim's affair, first claiming that she wanted to commit suicide but then suggesting that she wanted to hurt the victim. During the ensuing week, the defendant spoke with members of the victim's family about her marriage.

At trial, Ms. Henderson testified that she had spoken by telephone with the defendant and the victim on the day of his murder. The victim told Ms. Henderson he wanted to end their relationship. When Ms. Henderson asked the victim if he wanted his ring back, he answered no.

¹It is the policy of this court to refer to the defendant as her name is listed on the indictment, although the other pleadings refer to the defendant as Marquetta Brown.

Barber testified that he went to the defendant's residence on the day of the murder. The defendant acknowledged having shot the victim. Barber discovered the body lying between the bedroom and the hallway and called 911. He saw blood and a hole in the victim's chest.

Officer John Campbell testified that when he arrived at the scene of the shooting, the defendant informed him she had shot the victim. Officer Brad James, also on the scene, testified that he thought the defendant appeared to be going into a state of shock. Paramedics checked the defendant, but found no signs of injury.

Officer Mac Peebles, who spoke with the defendant at the crime scene, testified that the defendant claimed the victim had punched her several times and slammed her to the floor. When told by the defendant that she shot the victim as he was coming toward her, Officer Peebles prepared a report of domestic violence by the victim against the defendant.

Detective Clifford Mann testified that he treated the scene as a two-part incident; that is, the defendant had suffered domestic abuse and the victim, obviously, had been shot. Detective Mann observed that some of the furniture in the house was in disarray; he acknowledged that the defendant claimed that her husband had struck her and then knocked her to the ground. He related that the defendant claimed injuries from the attack but refused medical treatment.

Dr. Charles Harlan, a pathologist, found that the cause of death was a gunshot wound to the left side of the chest. It was his opinion that the gun was fired from more than 24 inches away and that the bullet traveled slightly upward through the body.

During the days after the shooting, the defendant called the victim's cousin, Cheryl Donaldson, and apologized. The defendant also called the victim's mother. During their phone conversation, the defendant, crying and screaming, expressed remorse and acknowledged she did not have to kill the victim.

The defendant's mother, Mardelle Gore, testified that the defendant, an honor student, had been named valedictorian of John Gupton Mortuary College. Sarah Cason, the defendant's supervisor, verified her good work habits. Ms. Cason, who suspected the defendant was in an abusive relationship, testified that she had noticed bruises on the defendant who refused to reveal the cause.

Shaneitha Sketers, the defendant's cousin, lived with the defendant and the victim for a time. She testified that the victim was physically abusive to the defendant, having struck her on the leg on one occasion and having wrestled her to the ground on others. Each time, the victim acted like it was a joke. She testified that she saw the victim slap the defendant once.

The defendant, who had no prior criminal record and weighed 110 pounds, testified that she was the manager of a funeral home in North Carolina before moving to Nashville to attend mortuary science school. After her move, she met and eventually married the victim. While in histology at a hospital, she attended Belmont University in the pre-med program. She claimed that she paid all of the bills. She described the victim, who was training to be a correctional officer, as occasionally abusive.

The defendant recalled discovering Ms. Henderson's letter, talking with the victim's friends and family members, and then talking with the victim. She stated

that the altercation took place at the conclusion of the phone call to Ms. Henderson when she asked the victim about the ring. She claimed that the victim pushed her away and that she slapped the victim in the face. She testified that the victim quickly wrestled her to the ground and punched her in the stomach, causing her to cry and ask for help.

She claimed that she went toward the bedroom, where the gun was kept, when the victim threatened to kill her. Contending that she was fearful for her life, she grabbed the gun and, while backed into a corner, fired at the victim when he moved towards her.

The defendant first challenges the sufficiency of the evidence. Our scope of review is limited. On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073 (1984); Tenn. R. App. P. 13(e).

Second degree murder is defined as the knowing killing of another. Tenn. Code Ann. § 39-13-210(a)(1). Clearly, a rational jury could have found the essential elements of the crime. There was testimony that the defendant, understandably upset about her husband's extramarital affair, wanted to hurt him.

After a brief altercation, which apparently resulted in no injury, the defendant located the gun and fired at her husband from a distance of more than two feet. The defendant has devoted the large part of her brief to arguing the jury should have found self-defense. The jury, however, as was their prerogative, rejected the defense theory, accrediting the testimony of the state's witnesses.

Next, the defendant claims the seventeen and one-half year sentence is excessive. When a challenge is made to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a "de novo review ... with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in her own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210.

At the time of this offense, the presumptive sentence was the minimum in the range if there were no enhancement and mitigating factors. Tenn. Code Ann. § 40-35-210 (amended in 1995 changing the presumptive sentence for a Class A felony to the midpoint in the range). Should the trial court find mitigating and enhancement factors, it must start at the minimum sentence in the range and

enhance the sentence based upon any applicable enhancement factors, then reduce the sentence based upon any appropriate mitigating factors. Tenn. Code Ann. § 40-35-210(e). The weight given to each factor is within the trial court's discretion provided that the record supports its findings and it complies with the Sentencing Act. See State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The trial court, however, should make specific findings on the record which indicate his application of the sentencing principles. Tenn. Code Ann. §§ 40-35-209 and -210.

At the sentencing hearing, the trial court found the following enhancement factors applicable:

(1) The defendant had no hesitation about committing a crime when the risk to human life was high, Tenn. Code Ann. § 40-35-114(10); and

(2) The crime was committed under circumstances where the potential for bodily injury to a victim was great, Tenn. Code Ann. § 40-35-114(16).

Both of these factors were improperly applied because they are both inherent in the offense. See Tenn. Code Ann. § 40-35-114. The fact that the defendant had no hesitation about committing a crime when the risk to human life was high, Tenn. Code Ann. § 40-35-114(10), cannot be used to enhance the sentence because that factor is inherent in the offense of second degree murder. See State v. Jones, 883 S.W.2d 597, 603 (Tenn. 1994). To justify using this factor, the state must prove the defendant "demonstrated a culpability distinct from and appreciably greater than that incident to the offense for which he was convicted." Id. at 603; see also State v. Lambert, 741 S.W.2d 127, 134 (Tenn. Crim. App. 1987)(appropriate use of this factor in a homicide case where the defendant's conduct posed a threat to a large number of people before the particular victims were killed).

That the potential for injury to the victim was particularly great, Tenn. Code Ann. § 40-35-114(16), is also inherent in the offense. In Daugherty, this court held that the factor was an element of any homicide case and, therefore, could not be considered to enhance a sentence. State v. David Keith Daugherty, No. 03C01-9203-CR-00082 (Tenn. Crim. App., at Knoxville, August 27, 1993).

While factors (10) and (16) were improperly applied, however, we do observe the presence of at least one enhancement factor, that the defendant used a firearm in the commission of the crime. Tenn. Code Ann. § 40-35-114(8). Use of a firearm is not an essential element of second degree murder. See State v. Butler, 900 S.W.2d 305 (Tenn. Crim. App. 1994).

The court found in mitigation that the defendant acted under strong provocation, Tenn. Code Ann. § 40-35-113(2). The defendant argues the trial court should have also found additional mitigating factors:

(1) although guilty, the defendant committed the crime under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated her conduct, Tenn. Code Ann. § 40-35-113(11);

(2) the defendant acted under duress or under the domination of another person, Tenn. Code Ann. § 40-35-113(12); and

(3) the defendant's exemplary background, Tenn. Code Ann. § 40-35-113(13) (the catch-all provision).

Based upon testimony that the defendant stated a few days before the shooting that she wanted to hurt the victim, the trial judge could have reasonably discounted factor (11) (no sustained intent to violate the law). Given the jury's complete rejection of the self-defense theory, the trial judge also could have reasonably declined to apply factor (12) (the defendant was under duress). We do find, however, that the defendant's exemplary background should have been considered

in mitigation. An excellent student, she was employed full-time while a pre-med student at Belmont University.

The trial judge erroneously applied two enhancement factors but could have applied one that was apparently overlooked. The defendant's exemplary background warrants some mitigation. Upon de novo review, we impose a fifteen-year sentence. The conviction is affirmed as so modified.

Gary R. Wade, Judge

CONCUR:

Joseph M. Tipton, Judge

William M. Barker, Judge