

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 16, 2006

STATE OF TENNESSEE v. JIMMY LEE BONDS

**Direct Appeal from the Criminal Court for Davidson County
No. 2003-D-2670 Steven R. Dozier, Judge**

No. M2005-02546-CCA-R3-CD - Filed September 28, 2006

The appellant, Jimmy Lee Bonds, was convicted by a jury in the Davidson County Criminal Court of first degree premeditated murder, felony murder, especially aggravated robbery, and two counts of aggravated burglary. The trial court merged the two murder convictions and imposed a total effective sentence of life plus twenty-eight years. On appeal, the appellant raises issues regarding the sufficiency of the evidence surrounding his murder convictions, the trial court's failure to timely rule on his motion for a judgment of acquittal, and the sentence imposed. Upon review of the record and the parties' briefs, we affirm the judgments of the trial court.

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

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

James P. McNamara (on appeal), and Katie Weiss, Ginny Flack, and Kyle Mothershead (at trial), Nashville, Tennessee, for the appellant, Jimmy Lee Bonds.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Amy H. Eisenbeck and Tammy H. Meade, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On April 22, 2003, the appellant broke into the apartment of the victim, Thomas West, and stole some marijuana. Four days later, on April 26, 2003, the appellant and a co-defendant again broke into the victim's apartment and, during the break-in, killed the victim. The appellant was subsequently indicted by the Davidson County Grand Jury on count one for the aggravated burglary of the residence of the victim on April 22, 2003; on count two for the premeditated first degree murder of the victim on April 26, 2003; on count three for the felony murder of the victim on April

26, 2003; on count four for the aggravated burglary of the victim's residence on April 26, 2003; and on count five for the especially aggravated robbery of the victim on April 26, 2003.

At trial, the victim's sister, Sharon Ann West, testified that at the time of the offenses, the victim, Thomas West, lived at apartment 120 of the Spinnaker Cove Apartments on Arbor Lake Drive in Nashville. The apartment was located on the third floor of the building. On April 22, 2003, the victim stayed home all day, watching a basketball game with West's youngest son. The next day, he went out on his boat. On April 25, 2003, the victim had a security system installed in his apartment. On April 26, 2003, the victim stayed in the apartment, again watching sports with West's youngest son.

Later in the evening of April 26, 2003, West received a call from the victim's security system provider, advising that the victim's alarm had been activated. West drove to the victim's apartment and saw a number of people in the parking lot. The victim's next-door neighbor saw West and told her not to go upstairs because the victim's apartment had been broken into, and the perpetrators might still be inside. West called her husband and waited for police to arrive. When an officer arrived on the scene, West followed him upstairs. The officer opened the door, and West saw the victim lying on the floor. The officer then pushed West out of the apartment.

West acknowledged that some of the victim's friends were "not savory law abiding people." West stated that she was aware that the victim occasionally smoked marijuana, dabbled in drugs, and kept drugs at his apartment. At the State's request, West looked at pictures of the appellant and his co-defendant, David Kestner. In both pictures, the men were wearing necklaces that belonged to the victim.

Mark McClure testified that on April 26, 2003, he lived in the Arbors of Heritage Apartments located across the street from Spinnaker Cove Apartments. He was employed with National HVAC Service, and he drove a white Ford cargo van. McClure kept a twenty-four foot extension ladder attached to the top of the van. At 10:15 p.m., McClure was lying in bed when he heard his ladder being removed from his van. He got out of bed, got dressed, and went to investigate. McClure stated that although he looked throughout his apartment complex, he was unable to locate the ladder that had been on top of his van.

Officer Bruce E. Landes with the Metropolitan Police Department (Metro) testified that on April 26, 2003, he was dispatched to the Spinnaker Cove Apartments on a home invasion call. Upon his arrival, he walked up the stairs to the victim's apartment. The front door of the apartment was open, but it did not display signs of forced entry. The apartment smelled strongly of marijuana, and a big screen television was on with the volume turned up high. Officer Landes saw the victim lying on the floor. He had no pulse, and blood was coming from his nose and mouth. Officer Landes radioed dispatch, requesting that MedComm speed their arrival to the scene. When MedComm arrived, they tested the victim for signs of life and found none.

Officer Landes' sergeant arrived on the scene and helped him to ensure that no suspects were hiding in the apartment. As he went through the apartment, Officer Landes observed that it had been ransacked. He noticed that there appeared to be signs of forced entry from the door leading to the balcony.

Detective Roy Dunaway testified that he was a member of Metro's "murder squad," a division of the police department devoted to investigating homicides where no suspect was readily apparent. Detective Dunaway stated that he was on call on April 26, 2003, and he reported to the scene when he was told that a homicide had been discovered. When Detective Dunaway arrived at the victim's apartment, paramedics with MedComm had already determined that the victim was dead. The detective noticed that the victim had suffered two gunshot wounds, one to the face and one to the chest.

Detective Dunaway observed that the victim's apartment had been ransacked. Additionally, he saw that the sliding door to the victim's balcony was open, and the screen appeared to have been pushed in from the outside. From the balcony, the detective noticed a large, red extension ladder extending from the ground to the victim's balcony. A few days later, Detective Dunaway went to the building housing Metro's identification section, which section is responsible for the collection and study of evidence obtained from crime scenes. The identification section had brought in the extension ladder found at the scene and an Oldsmobile Cutlass. On the roof of the vehicle, Detective Dunaway saw gouge marks. He measured the ladder and discovered that it was the same width as the gouge marks on the vehicle. Detective Dunaway said that David Kestner, the appellant's co-defendant, was driving the vehicle when he was arrested.

On April 29, 2003, Detective Dunaway spoke with Mike Miner, an individual who police believed had information regarding the people involved in the homicide. Miner agreed to wear a body wire while talking with the appellant. The tape-recorded conversation between Miner, the appellant, and the appellant's girlfriend was played for the jury.

On the tape, the appellant acknowledged that he had been in the victim's apartment on a prior occasion, ostensibly for criminal purposes. Miner asked the appellant why he had returned to the victim's apartment despite his previous assertion that he would never return to a crime scene. The appellant told Miner that he went back to get the money that Miner had said was in the victim's apartment. The appellant said that he went up a ladder into the victim's apartment, and he saw Kestner shoot the victim. Thereafter, the appellant and Kestner ransacked the victim's apartment. The appellant said that at the time of the homicide he was wearing gloves; therefore, if police had found his fingerprints in the apartment, the prints must have been there from his first foray into the apartment. Before he went to the victim's apartment the first time, the appellant told Miner he would prefer to go when the victim was not there so he could get all of the money in the apartment. Miner had cautioned the appellant that he might have to kill the victim, and the appellant stated that he was "fine" with that prospect. The appellant said that when he and Kestner went to the victim's apartment, they were prepared to do what they had to do to get the money from the victim or his apartment.

After Miner wore the wire and obtained incriminating information on the appellant, police spoke with the appellant. A videotape of that interview was shown to the jury. The video revealed that police advised the appellant of his Miranda rights and asked him to tell them about the night of the homicide. The appellant admitted that he had burglarized the victim's apartment several days before the homicide. At that time, he broke in through the front door and stole seven pounds of marijuana. The appellant stated that he knew the victim was not at home on that occasion because he had been told that the victim was out on his boat. He said that he knew the victim had drugs in the apartment because "Mike" had told him that the victim was a drug dealer.

The appellant told police that after the burglary, he told "Mike" what he had taken from the victim's apartment. "Mike" told the appellant that he should have found \$10,000 or \$15,000 in cash that the victim kept in a safe. The appellant said that although he was aware that the street value of the marijuana he stole was approximately \$6,000, he sold it for less than \$3,000 because it was "all profit."

The appellant said that he told Kestner that "lots of money" was supposed to be in the victim's apartment. Kestner wanted to break into the victim's apartment through the balcony. The appellant surmised that Kestner did not want to go through the front door because he was afraid of being seen. The appellant told police that on the night of the homicide Kestner had a .25 caliber gun, and he had carried a .9 millimeter gun. The appellant was wearing a tan "Dickies outfit" and work gloves. When the men arrived at the victim's apartment, they drove around for a while until they discovered a utility van with a ladder attached to the roof. Kestner cut the ladder free of the straps holding it, and the men drove back to the victim's apartment with the ladder on top of Kestner's car. The appellant said that he knew prior to going to the victim's apartment that the victim was rumored to always carry a .45 caliber gun.

The men knew that the victim was home before they went into the apartment; they had seen his vehicle in the apartment parking lot. Additionally, the appellant saw that a female named "Lou" was in the apartment with the victim. He said that he did not want to put her in a bad situation, and he was going to call "it" off. However, he saw Lou leave, and they proceeded with their plan. They put the ladder against the building. Kestner went up the ladder first then motioned for the appellant to follow. The appellant became nervous and started to freeze up, but he continued up the ladder. He heard the victim's television on at a high volume. As the appellant was coming through the balcony door, he heard Kestner fire a shot. Kestner then fired a second shot into the victim's head, near his eye.

The appellant stated that after the shooting, the men ransacked the apartment. They took jewelry, a safe which contained a bank statement indicating that the victim had recently deposited \$10,000, digital scales, approximately one pound of marijuana, a DVD player, various paperwork, and a .357 caliber Smith and Wesson gun. The appellant said that they put the items into the victim's black leather bag for transport. They left through the front door, triggering the alarm system.

The appellant told police that he had stored his .9 millimeter gun underneath his mother's bed. He said that the victim's .357 caliber gun was underneath a mattress, and the black leather bag was in the living room of his mother's house.

Detective Dunaway testified that the appellant's mother gave police consent to search her home at 1617 Long Avenue. Therein, police found the appellant's .9 millimeter gun, the victim's .357 caliber gun, his digital scales, and a black leather bag. Additionally, both the appellant and the co-defendant, David Kestner, were photographed wearing the victim's jewelry.

Detective Dunaway said that during his investigation, he learned that Louann Labron was the victim's girlfriend. Labron was the mother of Miner's wife, Stella.

Charles Linville, an officer with Metro's identification section, testified that at 1:30 a.m. on April 27, 2003, he was called to the scene of the homicide. He noticed that the victim's apartment was in disarray. A ladder was extended to the victim's balcony. In the kitchen, Officer Linville found a box containing marijuana seeds, indicating the box had once stored marijuana.

George Bouton, an officer with Metro's identification section, testified that when he arrived at the victim's apartment shortly after the homicide, he found the victim lying on the floor in the living room. Officer Bouton noted that the back bedroom of the apartment had been ransacked. When he was examining the bedroom, Officer Bouton observed that one of the glass doors on the headboard bore fabric or pattern marks of the type made by gardening gloves. Officer Bouton saw a ladder propped against the victim's balcony, and the screen door to the balcony had been damaged. Officer Bouton deduced that the balcony had been the point of entry into the apartment. He took the ladder back to the identification building for fingerprinting. Kestner's fingerprints were found on the ladder.

Metro Officer Raymond T. Rader, Jr. testified that he was present when Kestner was arrested. At the time of the arrest, police found in Kestner's possession a .25 caliber Armi GT 27 automatic pistol.

Sergeant Danny Orr, who worked in Metro's identification section, testified that he was called by Detective Dunaway to go to 1617 Long Avenue to collect evidence. At that location, he found the victim's birth certificate, high school diploma, cancelled checks, and digital scales. Additionally, Sergeant Orr found a black leather bag, two sets of gloves, a lock box, and a large amount of ammunition, including shells for a .9 millimeter gun and shells for a .25 caliber gun.

Michael Pyburn, a Metro identification section officer, testified that he analyzed the two projectiles that were obtained from the victim's body during the autopsy. He stated that both bullets were consistent with a full metal jacket .25 caliber automatic cartridge bullet. However, Officer Pyburn did not match the bullets to any particular weapon.

Dr. Bruce Phillip Levy, the Chief Medical Examiner for the State of Tennessee and the Medical Examiner for Davidson County, testified that he performed the autopsy on the victim. He concluded that the victim died as a result of multiple gunshot wounds, and the manner of death was homicide. The victim suffered two gunshot wounds, one near “the inner aspect of his left eye, near the nose; and another gunshot wound to the left side of his chest.” Dr. Levy stated that both wounds were fatal; however, the wound to the chest would have taken at least minutes but not more than an hour to cause death. The chest wound was made from a distance of over two feet. The wound to the head was immediately fatal and was made from a distance of between six inches to twenty-four inches. Dr. Levy said that the toxicology screen on the victim revealed the presence of marijuana and benzodiazepines, a sedative such as Valium.

The defense called a single witness, Michael Miner. Miner stated that he wore a body wire for the State and obtained an incriminating tape recording of the appellant. Miner said that the victim told him about stealing the victim’s marijuana during the first burglary. Miner acknowledged that he could have spoken with the appellant about the victim and his boat because he believed that the victim “had a cool boat.” He stated that he asked the appellant why he went back to the victim’s apartment after the first burglary, noting that the appellant had “done a few things in the past, and that was his number one rule, you never go back to the same place twice.” Miner conceded that his wife had previously purchased marijuana from the victim. Additionally, Miner admitted that the appellant might have given him some marijuana from the first burglary. Miner said that he might have told the appellant that he had overlooked money in the victim’s apartment.

Based upon the foregoing, the jury found the appellant guilty on all counts. The trial court merged the appellant’s convictions for first degree premeditated murder and felony murder and imposed a life sentence. The court also imposed a twenty-two-year sentence for the especially aggravated robbery conviction, a four-year sentence for one of the aggravated burglary convictions, and a six-year sentence for the remaining aggravated burglary conviction. The trial court ordered that the four-year aggravated burglary sentence be served concurrently with the other sentences. The sentences for the remaining offenses were to be served consecutively with each other for a total effective sentence of life plus twenty-eight years. On appeal, the appellant challenges the sufficiency of the evidence relating to his murder convictions,¹ the trial court’s failure to timely rule on his motion for a judgment of acquittal, and the imposition of consecutive sentencing.

II. Analysis

A. Sufficiency of the Evidence

On appeal, a jury conviction removes the presumption of the appellant’s innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will not support the jury’s findings. See State v. Tuggle, 639 S.W.2d 913, 914

¹ The appellant does not challenge the sufficiency of the evidence relating to his aggravated burglary convictions or his especially aggravated robbery conviction.

(Tenn. 1982). The appellant must establish that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. See State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. See State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

First, the appellant contends that the evidence is insufficient to support his conviction for first degree premeditated murder because the State failed to establish premeditation. Specifically, the appellant states that “there is no evidence that [he] formed a design to kill the victim before the codefendant shot and killed him. The [appellant] concedes that the record does support the fact that he formed the intent to commit the offense of aggravated burglary.”

In order to obtain the appellant’s conviction for first degree premeditated murder, the State was required to prove, beyond a reasonable doubt, that the appellant committed the “premeditated and intentional killing of [the victim].” Tenn. Code Ann. § 39-13-202(a)(1) (2003). Premeditation “is an act done after the exercise of reflection and judgment” and “means that the intent to kill must have been formed prior to the act itself. [However,] [i]t is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time.” Id. at (d). Although there is no concrete test for determining the existence of premeditation, Tennessee courts have relied upon certain circumstances to infer premeditation. See State v. Pike, 978 S.W.2d 904, 914 (Tenn. 1998). Specifically, the following factors have been used to support a jury’s inference of premeditation: (1) the appellant’s prior relationship to the victim which might suggest a motive for the killing; (2) the appellant’s declarations of intent to kill; (3) the appellant’s planning activities before the killing; (4) the manner of the killing, including the appellant’s using a deadly weapon upon an unarmed victim, killing the victim while the victim is retreating or attempting escape, or killing the victim in a particularly cruel manner; (5) the appellant’s demeanor before and after the killing, including a calm demeanor immediately after the killing. See Pike, 978 S.W.2d at 914-15; State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997). Additionally, this court has suggested that facts concerning the prior relationship between the appellant and the victim from which motive could be inferred is indicative of premeditation. See State v. Gentry, 881 S.W.2d 1, 5 (Tenn. Crim. App. 1993).

We also note that the trial court instructed the jury on the theory of criminal responsibility. “A person is criminally responsible as a party to an offense if the offense is committed by the person’s own conduct, by the conduct of another for which the person is criminally responsible, or by both.” Tenn. Code Ann. § 39-11-401(a) (2003). Tennessee Code Annotated section 39-11-402(2) (2003) provides that an appellant is criminally responsible for the actions of another when, “[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds

or results of the offense, [the appellant] solicits, directs, aids, or attempts to aid another person to commit the offense.”

In the instant case, the audio tape of the appellant’s conversation with Miner reflects that the appellant anticipated having to kill the victim before his first burglary of the victim’s apartment, and he was “fine” with that prospect. He further stated that he and Kestner were prepared to do whatever they had to do in order to carry out the second burglary of the victim’s apartment. The appellant and Kestner went into the victim’s apartment armed. They were aware that the victim was home and was probably armed before they attempted entry. The appellant stated that he and Kestner waited until after a lady he knew, Lou, left the apartment before beginning the burglary because he did not want to put her in a bad situation. The appellant and Kestner put a stolen ladder against the building, and they climbed up a ladder into the victim’s home. Kestner shot the victim twice. They then ransacked the home, searching for items to steal. Clearly, the appellant acted with the intent to promote or assist in the murder or to benefit from the murder when he aided or attempted to aid Kestner in the murder. See Tenn. Code Ann. § 39-11-402(2). Therefore, we conclude that the appellant intentionally joined Kestner in the venture and is thus criminally responsible for the first degree murder of the victim. See State v. Caldwell, 80 S.W.3d 31, 38-39 (Tenn. Crim. App. 2002).

As his second issue, the appellant complains that the evidence is insufficient to support his conviction for first degree felony murder “because it fails to establish that the [appellant] intended to kill the victim in furtherance of the underlying felony of [] robbery.” Felony murder is defined as “[a] killing of another committed in the perpetration of or attempt to perpetrate any . . . robbery.” Tenn. Code Ann. § 39-13-202(a)(2) (2003). Robbery is defined as “the intentional or knowing theft of property from the person of another by violence or putting the person in fear.” Tenn. Code Ann. § 39-13-401(a) (2003). During prosecution for felony murder, the State is not required to prove that a defendant intended to kill the victim. State v. Walker, 893 S.W.2d 429, 431 (Tenn. 1995).

The appellant concedes in his brief that “the Tennessee felony murder statute has been upheld on numerous occasions.” Regardless, the appellant contends that “as a matter of state constitutional law the felony murder statute cannot be interpreted to allow a defendant to be convicted of first degree murder where he did not develop an intent to kill the victim prior to the acts resulting in the victim’s death.” Further, the appellant contends that “Tennessee state constitutional provisions may impose higher standards and stronger protections than those set by the federal constitution.” The appellant’s argument is not a novel one, and it has been previously rejected by this court and our supreme court. See State v. Godsey, 60 S.W.3d 759, 773 (Tenn. 2001); State v. Kimbrough, 924 S.W.2d 888, 890 (Tenn. 1996); Walker, 893 S.W.2d at 431; State v. Middlebrooks, 840 S.W.2d 317, 336 (Tenn. 1992).

In Kimbrough, our supreme court explained that “[o]ne of the original purposes of the felony-murder rule was to deter the commission of certain felonies in a dangerous or violent way. Felony-murder differs from other forms of murder because it holds the actor strictly accountable even where the killing is unintended.” 924 S.W.2d at 890. The court further explained,

In the typical case of felony-murder, there is no malice in “fact” with respect to the homicide; the malice is supplied by the “law”. There is an intended felony and an unintended homicide. The malice which plays a part in the commission of the felony is transferred by the law to the homicide. As a result of the fictional transfer, the homicide is deemed committed with malice.

Id.

Recently, in Godsey, our supreme court reexamined the felony murder statute, noting:

In State v. Barber, 753 S.W.2d 659, 671 (Tenn. 1988), this Court considered and upheld the constitutionality of the pre 1989 statute, which did not contain a culpable mental state. In State v. Middlebrooks, 840 S.W.2d 317, 336 (Tenn. 1992), we reaffirmed our decision in Barber and upheld the constitutionality of the felony murder statute even though it did not contain a culpable mental state. . . . [T]he 1995 amendment to the first degree murder statute did not fundamentally change the felony murder doctrine so as to render the statute unconstitutional. With respect to the culpable mental state, the 1995 amendment merely returned the felony murder statute to its pre 1989 form. . . . Consistent with the traditional felony murder doctrine, the statute as amended in 1995 requires the State to prove that the predicate felony was committed with the applicable culpable mental state.

60 S.W.3d at 773. We conclude that the appellant’s contention that Tennessee’s felony murder statute is unconstitutional because it fails to require that the State prove that the accused had the intent to kill is without merit.

Further, we conclude that the proof at trial amply established the appellant’s guilt of felony murder. The appellant confessed that he went with Kestner to the victim’s house to obtain the money he believed he left behind during his previous burglary. Each man was armed with a gun. Upon entry into the apartment, Kestner shot the victim, and the men stole various items from the apartment. This issue is without merit.

B. Motion for Judgment of Acquittal

As his next issue, the appellant argues that “the trial court committed plain error when it refused to rule on the [appellant’s] motion for judgment of acquittal at the close of the State’s proof.” At the close of the State’s case-in-chief, the appellant moved for a judgment of acquittal as to the first aggravated burglary of the victim’s apartment, alleging that the appellant’s confession was uncorroborated. The trial court asked the appellant if he would be calling any witnesses. The

appellant replied that he would be calling Miner to testify. The court said, “What I’ll do at this time is take that under advisement, submit it – or listen, if any, to the [appellant’s] proof – but, unless something alters that, submit it to the Jury and can deal with it, if need be, after that.” The appellant did not object to the trial court’s failure to immediately rule on the motion for judgment of acquittal.

The appellant then presented the testimony of the sole defense witness, Miner. After the conclusion of Miner’s testimony, the following colloquy occurred:

[The State]: I’d like to be reheard on my response to the Judgment of Acquittal on Count One, and just add that Mike Miner has provided more corroboration.

[The appellant]: That’s why I didn’t raise it again.

The Court: ‘Scuse me?

[The appellant]: I wouldn’t be raising that motion again, now that Mike Miner has testified.

The Court: All right. Well, based on that discussion, then I’ll deny . . . Judgment of Acquittal as to Count One.

As we noted, the appellant contends that the trial court committed plain error by failing to timely rule on his motion for a judgment of acquittal. Specifically, the appellant argues that “[h]ad the motion been properly ruled on at the close of the State’s proof, the correct ruling would have been dismissal, because the only proof offered during the State’s case was the [appellant’s] completely uncorroborated confession to the crime.” The State concedes that the trial court erred by taking the motion for judgment of acquittal under advisement but contends that the appellant waived the issue by failing to object and by presenting proof, specifically Miner’s testimony, which served to corroborate his guilt of the first burglary of the victim’s apartment. Without Miner’s testimony, there was no evidence presented to corroborate the appellant’s confession to the April 22, 2003, burglary of the victim’s apartment.

Rule 29 of the Tennessee Rules of Criminal Procedure provides:

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant’s motion for judgment of acquittal at the close of the evidence offered by the State is not

granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

It is well-established that “[t]here is no authority in our practice or procedure in a criminal case for the trial judge to take under advisement a motion for a judgment of acquittal made at the [c]onclusion of all the State’s proof.” State v. Mathis, 590 S.W.2d 449, 453 (Tenn. 1979); see also State v. Johnson, 762 S.W.2d 110, 121 (Tenn. 1988); State v. Walker, 713 S.W.2d 332, 333 (Tenn. Crim. App. 1986). However, if a defendant makes a motion for a judgment of acquittal at the conclusion of the State’s proof, such motion is waived when the defendant chooses to present evidence on his own behalf. State v. Ball, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998). The appellant argues that the waiver provision, as explained in Mathis, was overruled by the adoption of the current language of Rule 29 which was adopted after the ruling in Mathis.² However, we note that our supreme court and this court have consistently held that presentation of proof after a motion for judgment of acquittal waives the motion. See Johnson, 762 S.W.2d at 121; Ball, 973 S.W.2d at 292; State v. Albert James Saavedra, No. M2004-02889-CCA-R3-CD, 2006 WL 618299, at *30 n.4 (Tenn. Crim. App. at Nashville, Mar. 13, 2006), perm. to appeal denied, (Tenn. 2006).

In the instant case, the appellant did not object to the trial court’s decision to take the motion under advisement. Additionally, after the trial court’s inaction on the motion, the appellant chose to present evidence which resulted in providing corroboration of the first burglary charge against him. Moreover, the appellant did not include this ground for relief in his motion for new trial. See Tenn. R. App. P. 3(e). Accordingly, the appellant waived his right to pursue this issue. Regardless, on appeal the appellant argues that this court should find that the trial court’s failure to timely rule upon the motion was plain error. See Tenn. R. Crim. P. 52(b). This court has previously noted that “[t]he strict guidelines as set forth by our supreme court for preserving as error a trial court’s denial of or inaction upon a motion for judgment of acquittal leave no room for a plain error analysis.” State v. Frank E. Huey, No. M2000-02793-CCA-R3-CD, 2002 WL 517132, at *15 (Tenn. Crim. App. at Nashville, Apr. 5, 2002). Notably, “[t]his court may not return to the midpoint of the trial and then order the trial court to direct a judgment of acquittal upon the basis of the record as it then existed.” Ball, 973 S.W.2d at 292. In any event, we conclude that the appellant has failed to meet the test for plain error review. See State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994).

² For this proposition, the appellant cites Ronnie Finch v. State, No. M2004-02887-CCA-R3-PC, 2006 WL 264330 (Tenn. Crim. App. at Nashville, Jan. 31, 2006). However, we note that on August 21, 2006, our supreme court granted permission to appeal this court’s decision.

C. Sentencing

As his final issue, the appellant challenges the trial court's imposition of consecutive sentencing. Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2003). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence(s). See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

The trial court ordered that a twenty-two-year sentence for the especially aggravated robbery conviction and the six-year sentence for an aggravated burglary conviction be served consecutively to each other and to the life sentence. The four-year aggravated burglary sentence was to be served concurrently with the foregoing sentences. Thus, the appellant received a total effective sentence of life plus twenty-eight years. The appellant does not challenge the length of the sentences imposed; his sole sentencing challenge is to the propriety of consecutive sentencing.

Initially, we note that “[w]hether sentences are to be served concurrently or consecutively is a matter addressed to the sound discretion of the trial court.” State v. Adams, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997). Tennessee Code Annotated section 40-35-115(b) (2003) contains the discretionary criteria for imposing consecutive sentencing. See also State v. Wilkerson, 905 S.W.2d 933, 936 (Tenn. 1995). The trial court may impose consecutive sentencing upon finding the existence of any one of the following criteria:

- (1) The [appellant] is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
- (2) The [appellant] is an offender whose record of criminal activity is extensive;
- (3) The [appellant] 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 [appellant's] criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

(4) The [appellant] 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 [appellant] 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 [appellant'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 [appellant] is sentenced for an offense committed while on probation; or

(7) The [appellant] is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b)(1)-(7) (2003).

In making its sentencing determination, the trial court stated:

I don't think, and have not applied, that he's a leader in the commission of this offense, because I don't think any one of these two people was the leader.

I think each one of them – [the appellant] may have been the one who initially did the first burglary and then finds someone to help him do the second burglary.

But it was sorta (sic) his idea, and Mr. Kestner happens to be the first one up the ladder; so, he is, according to everyone, the shooter. But they're just as involved as – each one of them are just as involved as the other, and that's why the law treats them as such.

....

And they decide, through greed, that they want more money that they didn't get the first time, or that [the appellant] didn't get the first time; so they trample up a ladder that they steal – [the appellant] – with a Tech-Nine, and someone gets killed, knowing, I think, from the proof that the victim, Mr. West, was at home at the time of this event.

Thereafter, the trial court imposed consecutive sentencing based upon its finding that the appellant was a dangerous offender whose behavior indicates little or no regard for human life and had no hesitation about committing a crime in which the risk to human life was high.

In order to support consecutive sentencing based upon a defendant being a dangerous offender, a court must also find that “(1) the sentences are necessary in order to protect the public from further misconduct by the defendant and (2) ‘the terms are reasonably related to the severity of the offenses.’” Wilkerson, 905 S.W.2d at 938; see also State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999). In imposing the instant sentences, the trial court explicitly stated that consecutive sentencing was necessary to protect the public. Additionally, the trial court intimated that the sentences were reasonably related to the severity of the offenses by noting, “I’ve already discussed that, in terms of the facts of this case. . . . So, I think it is necessary . . . in order to let [the appellant] know how serious this offenses is and any others in his path, that’s coming along the way.” Based upon the record before us, which indicates the appellant’s foreknowledge of the dangerous situation he was creating combined with his complicity in carrying out the plan, we conclude that consecutive sentencing was appropriate. See State v. Jason D. Pillow, No. M2002-01864-CCA-R3-CD, 2004 WL 367747, at *25 (Tenn. Crim. App. at Nashville, Feb. 27, 2004); State v. Timothy Allen Moore, No. M2000-02933-CCA-R3-CD, 2002 WL 29474, at *3 (Tenn. Crim. App. at Nashville, Jan. 11, 2002).

III. Conclusion

Finding no reversible error, we affirm the judgments of the trial court.

NORMA McGEE OGLE, JUDGE