IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 21, 2009 Session

STATE OF TENNESSEE v. JUSTIN BRIAN CONRAD

Appeal from the Circuit Court for Montgomery County
No. 40501125 John H. Gasaway, III, Judge

No. M2008-01342-CCA-R3-CD - Filed September 29, 2009

After being indicted by the Montgomery County Grand Jury in December of 2005 for first degree premeditated murder, felony murder and theft of property over $1,000,[1] Appellant, Justin Brian Conrad, was found guilty by a jury on all counts of the indictment. As a result, the trial court merged the felony murder conviction with the first degree premediated murder conviction and sentenced Appellant to a life sentence. After the denial of a motion for new trial, Appellant seeks resolution of the following issues on appeal: (1) whether the evidence was sufficient to support the convictions for first degree murder and felony murder; (2) whether the trial court properly denied a motion for judgment of acquittal on the theft of property charge; and (3) whether the trial court properly refused to declare a mistrial after a witness alluded to Appellant's prior criminal history. After a review of the record, we determine that the trial court properly denied a mistrial where the jury was immediately admonished to ignore the improper testimony regarding Appellant's prior criminal history and that the evidence was sufficient to support the convictions. Accordingly, the judgments of the trial court are affirmed.

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

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

J. Runyon, Clarksville, Tennessee, for the appellant, Justin Brian Conrad.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel E. Willis, Assistant Attorney General; John Carney, District Attorney General, and Arthur Bieber, Assistant District Attorney General, for the appellee, State of Tennessee.

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[1] A co-defendant, Nicholas Cruz, was also charged in the same indictment. His charges were severed at the request of the State.

OPINION

Factual Background

On September 29, 2005, Patrick Summers was found dead in his home on Barton's Creek Road in Montgomery County, Tennessee, from a single gunshot wound to the back of the head. The bullet entered the right side of the back of the head, transecting the high cervical spinal cord and exiting through the left side of the face. The victim was discovered by his best friend, Donald Painter,[2] who went over to the house after being unable to reach Mr. Summers by telephone. Mr. Summers was discovered "sitting there in the chair, leaned over on the floor" in his house. The two men had known each other for about forty years, since attending high school together in Joliette, Illinois. Mr. Painter moved to Tennessee in 1997, and Mr. Summers moved down a few years later. Mr. Painter called 911 to report "a man down." When emergency medical personnel arrived, it was clear that the victim was deceased.

According to friends and neighbors, Mr. Summers was somewhat of a weapons collector who "kept plenty of knives and guns" in his home. Mr. Summers was known to have several sabres, a .22 pistol, a .38 pistol, and a 9mm Rueger. Mr. Summers' neighbor, Peggy Harrell, cleaned house for Mr. Summers. She regularly saw at least five guns scattered throughout the house and remembered seeing two sabre swords on a shelf. Mr. Summers also regularly carried a large roll of money in his front pocket.

Mr. Summers and Mr. Painter had another friend, Tony Conrad, who had moved to Tennessee from Illinois. Mr. Conrad had two sons, Jason and Appellant. Mr. Painter was aware that one of Mr. Conrad's sons had visited Mr. Summers several times in the year prior to the victim's death.

As the investigation progressed, evidence was collected at the victim's house. Investigator Billy Batson located a box for a laptop computer and several spent shell casings - six from a .38, four from a .22, and six from a 9mm. The spent shell casings were located on the victim's back deck. Investigators also located a bullet hole in the wall near the front door just above the recliner and discovered a bullet lodged in the headboard of a bed on the opposite side of the same wall. When the bullet was removed, Sergeant Brian Prentice of the Montgomery County Sheriff's Department could see directly into the kitchen area where the table was located. The victim was found partially sitting in a chair in the kitchen area.

On September 29, Appellant called a man named Bobby Brown to ask if he or his father were interested in buying guns. Appellant met the men at the old Wal-Mart parking lot in Lexington, near Appellant's home. Mr. Brown and his father were selling pit-bull puppies. Appellant was

[2] Mr. Painter died of lung cancer prior to trial, but his testimony was preserved pursuant to Rule 15 of the Tennessee Rules of Criminal Procedure.

accompanied by Paul Gilbert Sanders and Nicholas Cruz. Robert Brown, Bobby Brown's father, bought a .22 from Appellant for $50. The next day, he turned the gun over to the Lexington Police Department. The gun matched the description of one of the guns owned by the victim at the time of his death. Appellant, Mr. Sanders, and Mr. Cruz, were identified as suspects in the victim's death.

Sergeant Prentice visited the apartment that Mr. Sanders shared with Jeffrey Wood in Lexington, Tennessee. When questioned, Mr. Wood turned over a .357 pistol and a Taurus .38 from the sofa seat cushions. When the apartment was searched, Sergeant Prentice located a 9 mm pistol, two swords and several knives. Subsequently, a search warrant was obtained for Appellant's residence. Officers found a shotgun, a laptop computer and charger, binoculars, and night vision goggles when the search warrant was executed. Officers later learned that the laptop was registered to "Patrick" but were unable to confirm the owner's last name or address.

Ralph Lane, a resident of Clarksburg, Tennessee, was a friend of Appellant's. The two men had worked together at a gas station in Jackson, Tennessee. In late September of 2005, Appellant contacted Mr. Lane and asked if he could borrow Mr. Lane's .380 cal. weapon. Mr. Lane agreed, and Appellant drove to his house to get the gun. Two other men accompanied Appellant. Appellant returned the gun the next evening.

According to testimony elicited at trial from Mr. Wood, on the day prior to the murder, Appellant was at the apartment shared by Mr. Wood and Mr. Sanders. He was accompanied by Mr. Cruz. Appellant, Mr. Cruz, and Mr. Sanders left the apartment to have dinner with Appellant's relatives in Clarksville. They returned just prior to midnight and brought several guns and swords into the apartment with them. The men had a .38 special, a .357 Magnum, a shotgun, a .22, a .380, some swords, and some other items. The items were taken into Mr. Wood's bedroom because it was larger. Appellant informed Mr. Wood that the items came from a man in Clarksville that owed Appellant money. Mr. Wood drove Appellant to Clarksburg the next day to deliver a .380 to Mr. Lane. On the way there, Appellant told Mr. Wood that he had killed the man because he had stolen some money from his family. When Appellant returned the gun, Mr. Lane asked if it worked "okay." Appellant responded that "it worked fine." Mr. Lane turned the gun over to a Montgomery County Sheriff's Deputy several days later.

According to Mr. Sanders, he was with Appellant and Mr. Cruz on September 28, 2005, at his apartment when Appellant suggested that they go to Clarksville to eat dinner with his aunt. The men left the apartment and stopped at Mr. Lane's house in Clarksburg where Appellant picked up a pistol. When they got back into the car, Mr. Sanders found out that they were not going to Clarksville to visit Appellant's aunt. Instead, Mr. Sanders overheard Appellant tell Mr. Cruz that they were going to see someone "to get some money back" and that Appellant was going to shoot the man in the back of the head.

The three men drove to a mobile home off of a two-lane road in a rural area near Clarksville. Appellant parked to the right of the residence near the air conditioning unit. Mr. Sanders stayed in

the back seat of the car while Appellant and Mr. Cruz went inside. Mr. Sanders "didn't want to be a part of" the activities. While Mr. Sanders sat in the car, he saw Appellant come out of the house three or four times talking on a cell phone. After about thirty or forty-five minutes, Mr. Cruz and Appellant came "running out with bags and some other stuff and [Appellant] was yelling at [Mr. Sanders] to put a bag in the trunk." Appellant was also carrying a laptop computer that he threw in the backseat with Mr. Sanders. When Appellant got into the car, Mr. Sanders heard Appellant say that the blood came out the victim's head looking like devil horns.

Mr. Sanders confirmed that Appellant drove the trio back to Mr. Sanders's apartment where they carried everything in and placed it in Mr. Wood's bedroom. Mr. Sanders saw "some knives, a bunch of bullets, and some swords and a pair of night vision goggles" along with two revolvers, an automatic gun, a computer and a .22 pistol. Mr. Sanders saw Appellant leave the residence with the computer, the .22, the goggles, a shotgun, and a bunch of knives.

Mr. Cruz accompanied the men to the victim's home.[3] According to Mr. Cruz, they stopped at Mr. Lane's house in Clarksburg. Mr. Cruz thought that they were going to Mr. Summer's home. Mr. Cruz had been to the victim's home a few weeks prior to the incident when Appellant borrowed $200 from Mr. Summers. While they were riding in the car that night, Appellant told Mr. Cruz that the victim "screwed [Appellant's] grandparents over eighty thousand dollars" and that he was going to kill Mr. Summers. When they got to Mr. Summers's house, Mr. Cruz went inside with Appellant. The men sat around the table and were talking about Appellant's family when, according to Mr. Cruz, Appellant "pulled the gun and shot Mr. Summers." Mr. Cruz heard the "pop" of the gun and saw Mr. Summers fall over backward in the chair. Mr. Cruz did not hear the victim consent to the removal of the guns, knives, or swords from the house. On the way out the door, Appellant instructed Mr. Cruz to pick up a bag and take it to the car. Appellant came out of the house with two bags. When they arrived back in Lexington at the apartment, Mr. Cruz carried a laptop computer and some night vision goggles inside that had been taken from the victim's house. Several guns were "dumped" from the bags onto the floor.

At trial, Special Agent Don Carmen of the Tennessee Bureau of Investigation testified that the bullet found in the headboard of Mr. Summers's bed was fired from the .380 owned by Mr. Lane. The cartridge cases that were found on the back deck of the home matched the weapons found at Mr. Wood's apartment.

Appellant took the stand in his own defense. At the time of trial he was almost twenty-seven years old and had lived in Lexington his entire life. He admitted that he had a prior conviction for commercial burglary and had served time in the penitentiary when he was eighteen. Appellant admitted that the men stopped at Mr. Lane's house on the way to the victim's house to get a .380. The three men were going to go target shooting the next morning. Appellant admitted that he went to see the victim on the day of the incident and was accompanied by Mr. Cruz and Mr. Sanders but

[3] Mr. Cruz testified at trial that he had reached an agreement to receive a fifteen-year sentence as a Range I offender for facilitation of first degree murder.

denied that he was the shooter. Appellant had a relationship with the victim and felt like the victim treated him like a grandson.

Appellant first testified that he heard a gun shot when he was outside the victim's residence by the car. He claimed that, at the time, he was talking to Mr. Sanders. Appellant then testified that he was on the phone in the driveway when he heard a loud pop, hung up the phone, and ran around the house to see what had happened. He saw Mr. Sanders coming out of the house and Mr. Cruz standing in the living room with a pistol in his hand. At that time, Appellant grabbed the duffel bag and the .22 pistol off the shelf. Appellant claimed that the victim had asked him to sell the guns and had discussed an estimate of how much he wanted for each item prior to his death. Appellant did not stop to check on the victim and admitted that he "messed up" by taking the things, including the guns and a computer from the victim's house.

Appellant admitted that he had borrowed money from the victim in the past and had told the victim that he was having money problems. Mr. Summers invited Appellant back to his house to talk about it. Appellant denied going to Mr. Summers's house to settle a dispute about $80,000.

On cross-examination, Appellant admitted that he was a convicted felon that was not supposed to be in possession of a firearm. Appellant also admitted that the victim did "not give [the .22] to me to sell" but that he thought the computer, worth $1,500, was given to him by the victim. Appellant also admitted that the victim did not give him the knives that were taken from the residence. Appellant acknowledged that he sold the stolen .22 pistol to Mr. Brown at Wal-Mart the next day.

Appellant called Rorey Mullins to testify. Mr. Mullins claimed that he did not remember telling investigators that Mr. Cruz confessed to the murder of the victim while the two were cellmates at the county jail. Mr. Mullins was an evasive witness and refused to answer many of the questions asked by counsel. The trial court allowed the recording of his interview to be played for the jury. Mr. Cruz testified in rebuttal that he had never spoken to Mr. Mullins. Additionally, Mr. Cruz's attorney testified that Mr. Mullins told him that Appellant had bribed him to give a statement implicating Mr. Cruz in the murder.

At the conclusion of the jury trial, the jury found Appellant guilty of first degree premeditated murder, felony murder, and theft of property over $1,000. As a result, the trial court merged the felony murder conviction into the first degree murder conviction. Appellant was sentenced to an effective sentence of life in prison. After the denial of a motion for new trial, Appellant appeals, arguing that the evidence is insufficient, that the trial court improperly failed to grant a mistrial, and that the trial court should have granted a motion for judgment of acquittal on the theft of property charge.

Analysis
Failure to Declare Mistrial

Appellant claims on appeal that the trial court erred when it failed to grant a mistrial during the testimony of Mr. Sanders. Specifically, Appellant argues that Mr. Sanders testified Appellant had been "in the penitentiary" and that his comment violated an order from the trial court that directed witnesses to refrain from commenting on Appellant's criminal history. The State, on the other hand, argues that the comment did not create a "manifest necessity" for a mistrial.

At trial, the following exchange occurred between the prosecutor and witness Mr. Sanders:

PROSECUTOR:	All right, during this time that you waited in the car, did you think about leaving?
WITNESS:	Yes, sir, I did.
PROSECUTOR:	Did you leave?
WITNESS:	No sir.
PROSECUTOR:	Why didn't you?
WITNESS:	I was scared.
PROSECUTOR:	What were you scared of?
WITNESS:	[Appellant].
PROSECUTOR:	Why were you scared of [Appellant]?
WITNESS:	Previously he stated to me and Nick Cruz, that before he went back to the penitentiary - -

At that point, counsel for Appellant objected. The trial court sustained the objection and informed the jury to "disregard this response by this witness" and "consider it for no purpose whatsoever." The next day, counsel for Appellant moved for a mistrial based on Mr. Sanders's statement that was in violation of a motion in limine granted by the trial court. The trial court denied the motion.

The purpose of a mistrial is to correct the damage done to the judicial process when some event has occurred which would preclude an impartial verdict. *See Arnold v. State*, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). The decision whether to grant a mistrial is within the trial court's discretion and will not be disturbed absent an abuse of that discretion. *State v. Millbrooks*, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991) (citing *State v. Hall*, 667 S.W.2d 507, 510 (Tenn. Crim. App. 1983)). For this reason, an appellate court's review should provide considerable deference to the trial court's ruling in determining whether an occurrence or event at trial has so prejudiced the defendant or the State as to preclude a fair and impartial verdict. *See State v. Williams*, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996).

In determining whether there is a "manifest necessity" for a mistrial, "'no abstract formula should be mechanically applied and all circumstances should be taken into account.'" *State v. Mounce*, 859 S.W.2d 319, 322 (Tenn. 1993) (quoting *Jones v. State*, 403 S.W.2d 750, 753 (Tenn.

1966)). Only when there is "no feasible alternative to halting the proceedings" can a manifest necessity be shown. *State v. Knight*, 616 S.W.2d 593, 596 (Tenn. 1981).

Although Tennessee courts do not apply any exacting standard for determining when a mistrial is necessary after a witness has injected improper testimony, this Court has considered: (1) whether the improper testimony resulted from questioning by the State, rather than having been a gratuitous declaration; (2) the relative strength or weakness of the State's proof; and (3) whether the trial court promptly gave a curative instruction.[4] *See State v. Demetrius Holmes*, No. E2000-02263-CCA-R3-CD, 2001 WL 1538517, at *1-4 (Tenn. Crim. App., at Knoxville, Nov. 30, 2001); *State v. William Dotson*, No. 03C01-9803-CC-00105, 1999 WL 357327, at *4 (Tenn. Crim. App., at Knoxville, June 4, 1999). This analytical framework is helpful in the case at bar.

Looking to the above list of non-exclusive factors and applying them to the case herein, we initially note that there is nothing in the record that indicates that the prosecutor intentionally elicited Mr. Sanders's statement regarding Appellant's prior criminal history. In fact, it appears from the record that the prosecutor did not intend for the witness to refer to Appellant's time in the penitentiary. Indeed, the prosecutor merely asked the witness why he was afraid of Appellant. Moreover, the statement made by Mr. Sanders was an isolated indirect mention of the Appellant's criminal history and was immediately halted. The trial court followed the statement with an admonition to the jury to disregard the statement. Further, there was ample evidence presented at the point of the statement to sustain a conviction. In other words, the factors weigh in favor of the trial court's denial of a mistrial. Appellant is not entitled to relief on this issue.

Sufficiency of the Evidence/Denial of the Motion for Judgment of Acquittal

On appeal Appellant challenges the sufficiency of the evidence for his convictions for first degree premeditated murder and felony murder. Specifically, Appellant argues that the State did not prove premeditation and did not prove that the death occurred during the perpetration of a felony. Appellant contends that even though there was "a lot of evidence at trial" to support a theory of premeditation, it should be discredited because it was given by his co-defendants, who testified in order to obtain leniency. Appellant contends, instead, that the State proved second degree murder. Appellant also argues that the State failed to prove that he "went to the victim's home with the intent to commit the offense of theft." With respect to his conviction for theft of property, Appellant argues that the trial court improperly denied a motion for judgment of acquittal because the State failed to show that the property was taken without the effective consent of the owner. The State disagrees, stating that the evidence was sufficient.

[4] These factors are non-exclusive and may not be pertinent in every case. *William Dotson*, 1999 WL 357327, at *4; *see State v. Mounce*, 859 S.W.2d 319, 322 (Tenn. 1993) (holding that determination of propriety of mistrial is not subject to mechanistic determination and should be made on the facts of each individual case).

Motion for Judgment of Acquittal

According to Tennessee Rule of Criminal Procedure 29(b):

> On defendant's motion or on its own initiative, the court shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, presentment, or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

This Court has noted that "[i]n dealing with a motion for judgment of acquittal, unlike a motion for a new trial, the trial judge is concerned only with the legal sufficiency of the evidence and not with the weight of the evidence." *State v. Hall*, 656 S .W.2d 60, 61 (Tenn. Crim. App. 1983). The standard for reviewing the denial or grant of a motion for judgment of acquittal is analogous to the standard employed when reviewing the sufficiency of the convicting evidence after a conviction has been imposed. *State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998); *see also State v. Adams*, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995). A motion for judgment of acquittal made at the conclusion of the State's proof is waived for appellate purposes when a defendant thereafter presents evidence on his or her own behalf. *Mathis v. State*, 590 S.W.2d 449, 453 (Tenn. 1979); *see* Tenn. R. Crim. P. 29(a). After the trial court denied the motion regarding Appellant's charge for theft of property, Appellant failed to stand on his motion; instead, he elected to call witnesses to testify on his behalf. Therefore, we conclude this issue is waived and is not the proper subject of review.

Sufficiency of the Evidence

On appeal Appellant challenges the sufficiency of the evidence for murder convictions and we will address this issue. When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the "State's witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S.W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779.

Further, questions of witness credibility, the weight and value of evidence, and resolution of conflicts in the evidence are entrusted to the trier of fact. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996).

A. Premeditated First Degree Murder

First degree murder is the "premeditated and intentional killing of another." T.C.A. § 39-13-202(a)(1). Tennessee Code Annotated section 39-13-202(d) provides:

> As used in subdivision (a)(1) "premeditation" is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

T.C.A. § 39-13-202(d). Therefore, in order to convict Appellant of his indicted offense, the State was required to prove beyond a reasonable doubt that the defendant killed the victim with "premeditation."

Because premeditation entails proof of a state of mind about which there may be no direct evidence, "cases have long recognized that the necessary elements of first-degree murder may be shown by circumstantial evidence." *State v. Brown*, 836 S.W.2d 530, 541 (Tenn. 1992). Premeditation is a question of fact to be determined by the jury. *See State v. Suttles*, 30 S.W.3d 252, 261 (Tenn. 2000). And, the jury may infer premeditation from the manner and circumstances of the killing. *See, e.g., State v. Pike*, 978 S.W.2d 904, 914 (Tenn. 1998); *State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997); *State v. Bordis*, 905 S.W.2d 214, 222 (Tenn. Crim. App. 1995). Our courts have enumerated several factors that may support the existence of premeditation, including: a prior relationship that might suggest motive; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; the use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; infliction of multiple wounds; preparation before the killing for concealment of the crime; destruction or secretion of evidence of the murder; and the appellant's demeanor before and after the killing, including calmness immediately after the killing. *See State v. Nichols*, 24 S.W.3d 297, 302 (Tenn. 2000); *Pike*, 978 S.W.2d at 914-15; *Bland*, 958 S.W.2d at 660. *See also State v. Gentry*, 881 S.W.2d 1, 4-5 (Tenn. Crim. App. 1993); *State v. Anderson*, 835 S.W.2d 600, 605 (Tenn. Crim. App. 1992). This list, however, is not exhaustive and serves only to demonstrate that premeditation may be established by any evidence from which the jury may infer that the killing was done "after the exercise of reflection and judgment." T.C.A. § 39-13-202(d); *see Pike*, 978 S.W.2d at 914-15; *Bland*, 958 S.W.2d at 660.

One learned treatise states that premeditation may be inferred from events that occur before and at the time of the killing:

> Three categories of evidence are important for [the] purpose [of inferring premeditation]: (1) facts about how and what the defendant did prior to the actual killing which show he was engaged in activity directed toward the killing, that is, *planning activity*; (2) facts about the defendant's prior relationship and conduct with the victim from which *motive* may be inferred; and (3) facts about the *nature of the killing* from which it may be inferred that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design.

2 Wayne R. LaFave, *Substantive Criminal Law* § 14.7(a) (2d ed. 2003) (emphasis in original).

In the instant case the proof showed Appellant borrowed the weapon used to kill the victim and drove himself and his compatriots to the victim's home. Appellant told Mr. Wood that he had killed Mr. Summers over a dispute or feud between Appellant's family and Mr. Summers. Appellant expressed his intent to kill Mr. Summers "to get some money back." Part of the property taken from Mr. Summers' home was found in Appellant's residence. This evidence is more than sufficient to sustain a conviction for premeditated first degree murder.

B. Felony Murder

Appellant contends the evidence is insufficient to support the felony murder conviction but also states that it "should not be considered" due to merger. We note, as we begin our analysis, that the felony murder conviction was merged by the trial court into the conviction for first degree murder. Addressing the practical aspects of merger, this Court has observed: "[i]n the circumstance, in which two guilty verdicts are returned as to alternative charges, the guilty verdict on the greater charge stands and the guilty verdict on the lesser charge merges into the greater charge." *State v. Banes*, 874 S.W.2d 73, 81 (Tenn. Crim. App. 1993) (*rejected on other grounds by State v. Williams*, 977 S.W.2d 101, 105 (Tenn. 1998) (citing *State v. Davis*, 613 S.W.2d 218 (Tenn. 1981)). Under the merger concept, in this case, felony murder, is not extinguished; it simply merges with the greater offense of first degree murder resulting in one judgment of conviction. Despite our determination that the evidence is sufficient to support the convictions for premeditated first degree murder, we will address the sufficiency of the evidence for Appellant's "merged" conviction for felony murder in the event that further appeal leads to a reversal of the premeditated first degree murder conviction.

Felony murder is "[a] killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect or aircraft piracy." T.C.A. § 39-13-202(a)(2). Tennessee Code Annotated section 39-13-202 also provides that "[n]o culpable mental state is required for conviction under subdivision (a)(2) . . . except the intent to commit the enumerated offenses or acts." T.C.A. § 39-13-202(b). Additionally, the death must occur "in the perpetration of" the enumerated felony. *State v. Hinton*, 42 S.W.3d 113, 119 (Tenn. Crim. App. 2000) (citations

omitted). The killing may precede, coincide with, or follow the felony and still be in the perpetration of the felony, so long as there is a connection in time, place, and continuity of action. *State v. Buggs*, 995 S.W.2d 102, 106 (Tenn. 1999). If the underlying felony and killing were part of a continuous transaction with no break in the chain of events and the felon had not reached a place of temporary safety between the events, felony murder is sufficiently established. *State v. Pierce*, 23 S.W.3d 289, 294-97 (Tenn. 2000). Proof of the intention to commit the underlying felony and at what point it existed is a question of fact to be decided by the jury after consideration of all the facts and circumstances. *Buggs*, 995 S.W.2d at 107.

The evidence, as introduced at trial, indicated that Appellant went to visit the victim to "get some money back" and that the victim had "screwed" his grandparents out of a large sum of money. Appellant took Mr. Sanders and Mr. Cruz to Mr. Lane's house to procure a weapon prior to going to the victim's house. Appellant even told Mr. Cruz that he was going to "shoot [the victim] in the back of the head." Mr. Cruz claimed at trial that he saw Appellant shoot the victim, who was unarmed, in the head. The bullet that killed the victim came from Mr. Lane's gun. Immediately after the shooting, Appellant gathered a multitude of valuable items from the victim's home, placed it in bags, and loaded it into the car. The trio drove back to Lexington where they divided the property. Appellant returned the pistol to Mr. Lane the next day and informed him that it "worked fine." Appellant admitted that he took items from the home without the victim's permission, including a .22, that he later sold for $50, and a computer.

We determine that the evidence is clearly sufficient to convict Appellant of felony murder. Appellant admitted that he drove the three perpetrators to the victim's home. Appellant did not render aid to the victim after shooting him and the men left with guns, knives, night vision goggles and a computer. Part of these items were recovered from Appellant's home. Even though Appellant vehemently denied shooting the victim, he admitted that he was in the vicinity when the victim was shot. Mr. Cruz, however, testified that Appellant was the shooter. The jury clearly accredited his testimony. This issue is without merit.

Conclusion

For the foregoing reasons, the judgments of the trial court are affirmed.

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JERRY L. SMITH, JUDGE