

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
SEPTEMBER 1996 SESSION

STATE OF TENNESSEE,)
)
 APPELLEE,)
) No. 02-C-01-9509-CC-00260
)
) Lauderdale County
v.) Jon Kerry Blackwood, Judge
)
) (Escape)
KENNETH CULP,)
)
 APPELLANT.)

FOR THE APPELLANT:

Julie K. Pillow
Assistant Public Defender
P.O. Box 700
Somerville, TN 38068
(Trial and Appeal)

David S. Stockton
Assistant Public Defender
P.O. Box 700
Somerville, TN 38068
(Trial Only)

OF COUNSEL:

Gary F. Antrican
District Public Defender
P.O. Box 700
Somerville, TN 38068

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter
500 Charlotte Avenue
Nashville, TN 37243-0497

Ellen H. Pollack
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Elizabeth T. Rice
District Attorney General
302 Market Street
Somerville, TN 38068

James W. Freeland, Jr.
Assistant District Public Defender
302 Market Street
Somerville, TN 38068

OPINION FILED: _____

AFFIRMED

Joe B. Jones, Presiding Judge

OPINION

The appellant, Kenneth Culp, was convicted of escape, a Class E felony, by a jury of his peers. The trial court, finding the appellant to be a career offender, imposed a Range III sentence consisting of confinement for six (6) years in the Department of Correction. In this Court, the appellant contends the trial court committed error of prejudicial dimensions by (a) permitting a sheriff's deputy to testify regarding a telephone call he received on the evening the appellant escaped, (b) failing to instruct the jury on the defense of duress, and (c) giving an erroneous instruction on the defense of necessity. After a thorough review of the record, the briefs of the parties, and the authorities which govern these issues, this Court is of the opinion the judgment of the trial court should be affirmed.

On October, 21, 1992, the appellant was convicted of sale of a Schedule II controlled substance, a felony. When he was being taken back to the Lauderdale County Jail, he broke loose from a deputy sheriff and escaped. The appellant went to the home of his grandmother. She told the appellant she was going to return him to the jail. While she was in the bathroom, the appellant took his grandmother's keys and left in her motor vehicle.

The appellant drove to Brownsville. Apparently he ran out of gas. He called his girlfriend to come get him. The girlfriend in turn called the Lauderdale County Sheriff's Department and told the authorities where the appellant could be found. The Lauderdale authorities called the Haywood County Sheriff's Department, and advised the Haywood officers where the appellant was located. Officers were dispatched to the area. A deputy sheriff, a distant relative of the appellant, apprehended him. The appellant was returned to the Lauderdale County Jail on the evening of October 21st.

The appellant interposed the defenses of necessity and duress. He presented evidence he was threatened by jail authorities. According to the appellant, these people threatened to kill him on more than one occasion.

The record reflects the appellant escaped in August of 1992 from the Lauderdale County Jail. The Lauderdale County Sheriff's Department notified the Obion County Sheriff's Department the appellant could be found at the home of Cynthia Nichols, the

appellant's girlfriend. The Obion County authorities went to the home of Nichols on September 4, 1992. The authorities arrested the appellant and Nichols. The appellant expressed fear of being returned to the Lauderdale County Jail. He asked the officers to take photographs of him. The Obion authorities routinely take pictures of people arrested for identification purposes. Two photographs were taken of the appellant. The Lauderdale County deputy sheriffs came to Obion County, took custody of the appellant and Nichols, and returned them to the Lauderdale County Jail.

The appellant testified he was taken into a large room and interrogated. The sheriff, Jerry Crain, supposedly used racial slurs when addressing him or talking about him. He did the same with regard to the appellant's girlfriend. The appellant is an African American while his girlfriend is a Caucasian. The difference in their race seemed to enrage the sheriff.

According to the appellant, Crain told him: "You think you're real smart, and I will hurt you, or kill you. . . . We don't allow that type of stuff in Lauderdale County," referring to interracial dating or marriage. Crain referred to his girlfriend as a "yeller-headed nigger lover." He accused the girlfriend of helping the appellant escape from the jail. The appellant also testified Crain told him: "Whatever I have to do to get you off the streets, and keep you off the streets, I'll do it, if it takes me killing you . . . one way or the other." When the appellant left the room, Crain, according to the appellant, struck him twice in a hallway outside the men's restroom.

The appellant supposedly talked to an F.B.I. agent by the name of William Castleberry on September 9, 1992. The agent was investigating violations of civil rights that occurred in the Lauderdale County Jail. It appears Crain beat Nichols severely after he talked to the appellant. This was the focal point of the investigation. David Crain, the sheriff's son, supposedly told the appellant he would be killed if it was determined the appellant had furnished the agent with information concerning his father or him. The appellant also claims he was slapped across the face by a deputy jailer.

The record reflects the Crains were removed from office after being indicted by a federal grand jury. This occurred on September 12th or 13th. The Crains never returned to the jail. The appellant does not contend that he was threatened or abused after being

slapped by the deputy jailer.

The state presented evidence to establish the appellant did not bring what had taken place in the jail to the attention of the court during his October 21st trial. The appellant testified he told his lawyer, and his lawyer told him it was not the time to bring such information to the attention of the judge. Evidence was also introduced to establish "racial slurs" were not made as claimed by the appellant. Furthermore, the state's evidence established the appellant was not threatened and Crain did not enter the cell area in the jail later that day, September 4th, as the appellant claimed. Finally, the Acting Sheriff testified the Lauderdale County Sheriff's Department had never had an employee by the name of "Lumley," the name of the deputy jailer who allegedly slapped the appellant.

I.

The appellant contends the trial court committed error of prejudicial dimensions by permitting the State of Tennessee to introduce evidence that Lauderdale County Acting Sheriff Ted Sutton received a telephone call from Cynthia Nichols. The trial objection to this evidence was predicated upon the failure to authenticate or demonstrate how Sutton knew Cynthia Nichols was the person calling. See Tenn. R. Evid. 901(a) and (b)(6).

Any error in admitting this evidence was harmless. Tenn. R. App. P. 36(b). The appellant testified he called Nichols, told her he was in Brownsville and the precise location where he would be, and asked her to come get him. Nichols was the only person who knew where the appellant was situated. She apparently called the Lauderdale County Sheriff's Department and advised a deputy sheriff where the appellant could be located.

This issue is without merit.

II.

The appellant contends the trial court committed error of prejudicial dimensions by refusing to instruct the jury on the defense of duress. He argues the evidence fairly raises this defense. This Court is of the opinion the defense of duress was not fairly raised by the

evidence.

Before the defense of duress is fairly raised by the evidence, the evidence must establish the following:

- a.) The accused was threatened with harm;
- b.) The nature of the threatened harm was predicated upon a well-grounded fear of death or serious bodily harm;
- c.) The threatened harm was present, imminent and impending, and it continued throughout the time the act was committed;
- d.) The accused is not able to withdraw in safety; and
- e.) The desirability and urgency of avoiding the threatened harm clearly outweighs the harm sought to be prevented by the law proscribing the conduct when based upon ordinary standards of reasonableness.

Tenn. Code Ann. § 39-11-504(a). In this case, the evidence does not fairly raise (c).

The only people who allegedly threatened the appellant were Jerry Crain, the sheriff, and his son, David Crain, an employee of the Lauderdale County Sheriff's Department. When the Crains were indicted by a federal grand jury for violating the civil rights of a prisoner, Cynthia Nichols, the Crains' employment with the Lauderdale County Sheriff's Department was terminated. This occurred a few days after the appellant talked to Agent Castleberry on September 9, 1992. Neither Jerry Crain nor David Crain returned to the sheriff's department. The chief deputy was appointed acting sheriff. The record does not establish any threats or misconduct after the Crains were terminated. Furthermore, the trial occurred on October 21, 1992, more than a month after the Crains were terminated. In short, the threatened harm dissipated and it was neither present, imminent or impending nor did the threatened harm continue from September 4, 1992, until the appellant escaped.

This issue is without merit.

III.

The appellant contends the trial court gave an erroneous instruction to the jury regarding the defense of necessity. He argues the trial court "incorporated additional

elements" which are not contained in the appropriate statute, Tenn. Code Ann. § 39-11-609.

This is the second appeal in this case. See State v. Culp, 900 S.W.2d 707 (Tenn. Crim. App. 1994). During the first trial, the trial court refused to permit the appellant to present the defense of necessity to the jury. This Court found the trial court committed reversible error in this regard and remanded this case for a new trial. In doing so, this Court set forth the conditions which must be met to establish the defense of necessity. Culp, 900 S.W.2d at 711. Neither the appellant nor the State of Tennessee sought relief in the Supreme Court.

This issue is governed by the law of the case. Therefore, this Court will not address the issue on the merits.

JOE B. JONES, PRESIDING JUDGE

CONCUR:

DAVID H. WELLES, JUDGE

JERRY L. SMITH, JUDGE