

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1999

**FILED**

January 26, 2000

Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE, )  
 )  
 Appellee, )  
 )  
 VS. )  
 )  
 LESTER ALLEN CLAYTON, )  
 alias LESTER A. CLAYTON, )  
 )  
 Appellant. )  
 )  
 )

C.C.A. NO. 03C01-9901-CR-00049

HAMILTON COUNTY

HON. REBECCA J. STERN,  
JUDGE

(DUI-Third Offense)

FOR THE APPELLANT:

LLOYD A. LEVITT  
312 Vine Street  
Chattanooga, TN 37403

FOR THE APPELLEE:

PAUL G. SUMMERS  
Attorney General and Reporter

ERIK W. DAAB  
Assistant Attorney General  
425 Fifth Avenue North  
Nashville, TN 37243

BILL COX  
District Attorney General

PARKE MASTERSON  
Assistant District Attorney General  
Courts Building  
500 Market Street  
Chattanooga, TN 37402

OPINION FILED \_\_\_\_\_

AFFIRMED

DAVID H. WELLES, JUDGE

## OPINION

The Defendant appeals from a conviction entered on a jury verdict finding him guilty of driving under the influence of an intoxicant, third offense. He argues that this conviction should be reversed because the trial court erred in the manner it allowed the State to exercise a peremptory challenge of a juror. We affirm the judgment of the trial court.

During the selection of the trial jury, at a bench conference, the assistant district attorney advised the trial judge that one of the potential jurors had engaged in a “rather heated and/or rather loud exchange” during jury selection in a prior trial. That potential juror had been excused for cause by the judge in the prior trial because his statements almost contaminated the entire panel. In the case at bar, the trial judge advised counsel that the potential juror could not be excused unless good cause was shown during voir dire, but the judge stated that she would allow the questioning of that juror to be conducted at the bench, rather than excusing the entire jury panel from the courtroom to allow individual voir dire of that potential juror. After further discussion, the assistant district attorney advised the judge that he would just go ahead and exercise one of his peremptory challenges on that juror rather than “possibly having to lose this whole panel.” After further discussion, and over the objection of defense counsel, the trial judge allowed the assistant district attorney to peremptorily challenge the juror in this manner.

The Defendant argues that his conviction should be reversed and that he should be granted a new trial because the trial judge failed to follow Rule 24(c)

of the Tennessee Rules of Criminal Procedure, which provides, in pertinent part, as follows:

Peremptory Challenge and Procedure for Exercising. — After prospective jurors have been passed for cause, counsel will submit simultaneously and in writing, to the trial judge, the name of any juror in the group of the first twelve who have been seated that either counsel elects to challenge peremptorily. . . . This procedure will be followed until a full jury has been selected and accepted by counsel.

Tenn. R. Crim. P. 24(c).

As the Defendant points out, the procedure employed by the trial judge in allowing the State to exercise one of its peremptory challenges was not in strict compliance with the rule. The Defendant acknowledges that the law “seems to be that absent a showing of prejudice, that failure to comply with Rule 24(c) is not reversible error,” but he argues that a violation of Rule 24(c) should constitute prejudice to the entire judicial process and require automatic reversal. We note that this Court has previously rejected such an argument, holding as follows:

The appellant contends that the trial court's noncompliance with Rule 24(c) compromises the integrity of the jury selection process. She urges that we find that “any departure [from] Rule 24 constitutes plain error and [is] prejudicial *per se*.” The appellant cites no legal authority in support of her argument, as such, we decline the invitation to so rule and rely instead upon the standard of review announced in previous decisions.

Although the particular procedure employed by the trial court deviated from Tenn. R. Crim. P. 24(c), the burden is on the appellant to prove prejudice or purposeful discrimination in the selection of a jury. Prejudice will not be presumed. Moreover, while the “adherence to the procedure prescribed by Tenn. R. Crim. P. 24(c) is mandatory,” deviation from the Rule may qualify as harmless error.

State v. Phyliss Ann McBride, No. 01C01-9606-CC-00269, 1997 WL 661480, at

\*3 (Tenn. Crim. App., Nashville, Oct. 24, 1997) (citations omitted).

In this case, the Defendant fails to show, or even suggest, how he was prejudiced by the procedure employed by the trial court. Under the circumstances of this case, we believe the trial court's deviation from the strict mandates of Tennessee Rule of Criminal Procedure 24(c) in no way constitutes prejudice to the entire judicial process and clearly does not require reversal. See State v. Coleman, 865 S.W.2d 455, 458 (Tenn. 1993).

The judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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GARY R. WADE, PRESIDING JUDGE

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DAVID G. HAYES, JUDGE