IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 02C01-9403-CR-00055
APPELLEE,	*	SHELBY COUNTY
VS.	*	Hon. Arthur T. Bennett, Judge
ERIC J. FAIR,	*	(First Degree Murder)
APPELLANT.	*	

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OPINION FILED:_____

AFFIRMED

Gary R. Wade, Judge

OPINION

The defendant, Eric J. Fair, was convicted of first degree murder and received a life sentence. In this appeal of right, the defendant presents the following issues for our review:

> (1) whether the evidence was sufficient to support a first degree murder conviction;
>
> (2) whether the trial court erred by refusing to instruct the jury on voluntary manslaughter; and
>
> (3) whether the trial court erred by permitting the jury to examine an exhibit during the course of their deliberations.

We have found no reversible error and thus affirm the judgment of the trial court.

On April 16, 1992, at approximately 1:00 A.M., the victim, Gloria Rice, was shot and killed in Memphis. Terry Cox, Patrick Blankenship, LaTonya Jones, and the victim were standing in front of the Cox residence when a vehicle with a loud muffler approached along Farrington Street. The headlights were off. Someone in the car said, "Terry, I'm going to get you," or words to that effect. Afterwards, several shots were fired from the passenger's side of the car. The victim was shot in the back and lay face down on the ground. All of the others in the group ran as the car continued along the street. Ms. Jones had been shot in the leg. When the car was out of sight, the three returned and attempted to provide assistance to the victim. The car,

however, was driven by a second time and more shots were fired. Even more shots were fired when the car was driven down the street a third time. Neither the victim nor any of her three friends were armed.

Officer W. McNabb of the Memphis Police Department found several spent .380 casings at the crime scene. He recovered two .380 bullets from the interiors of two of the houses in the neighborhood. No weapon was found. Although witnesses had been unable to identify the passengers, they did provide the police with a description of the vehicle. It was later determined that the car belonged to the girlfriend of Larry Hunter. Police searched the vehicle and found a white plastic bag containing live .380 rounds in the right front floorboard. Three .25 caliber shell casings and four .22 caliber shell casings were found just outside the car. A traffic ticket bearing the defendant's name and a black jacket containing a traffic ticket bearing the name of Larry Hunter were also found in the vehicle.

About an hour after the incident, the defendant bragged to Landra Todd that he had shot some people standing alongside Farrington Street. When questioned by police, the defendant admitted that he had fired a pistol several times into a crowd while attempting to shoot Cox. He acknowledged that he had been in the car from which the shots had been fired and told the officer that he had planned to rob Cox of his marijuana. He described the murder weapon as a chrome .380 pistol. The defendant also related that he and Marquis

Dunlap had let Hunter out of the car before their first approach in order to provide cover in case Cox or any of his friends had a weapon. The defendant explained that Marquis said, "somebody in the crowd ... had a gun, and so I fired four or five shots at Terry, but I accidentally shot the girl in the leg." The defendant claimed that he had run out of ammunition after the first drive by and that Hunter had fired the shots from the vehicle as it was driven by on the second and third occasions.

Dr. Violet Hnilica performed an autopsy on the victim. She testified that the cause of death was "a gunshot wound to the chest that entered the back, and a bullet was recovered in the front of the body under the skin." She related that the bullet penetrated the lung and caused a massive hemorrhage to the chest cavity.

I

The defendant, who did not testify at trial, claims that the evidence is insufficient because there was more than one person firing weapons at the scene. He asserts that his confession linked him only to the shooting of Ms. Jones and that the failure of the state to identify a murder weapon with a caliber of the bullet causing death to the victim was fatal to the prosecution.

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 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the evidence, are matters entrusted exclusively to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292 (Tenn. Crim. App. 1978). A conviction may be set aside only when the reviewing court finds that the "evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This court may neither reweigh nor reevaluate the evidence and must not substitute its inferences for those drawn by the jury. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856 (1956), cert. denied, 352 U.S. 845 (1956).

Our statute defines "deliberate act" and "premeditated act" separately. Tenn. Code Ann. § 39-13-201(b)(1) and (2). The former is "one performed with a cool purpose," and the latter is "one done after the exercise of reflection and judgment." In State v. Brown, 836 S.W.2d 530 (Tenn. 1992), the supreme court held that deliberation requires some time interval between the decision to kill and the act itself:

> It is consistent with the murder statute and with case law in Tennessee to instruct the jury in a first-degree murder case that no specific period of time need elapse between the defendant's formulation of the design to kill and the execution of that plan, but we conclude that it is prudent to abandon an instruction that tells the jury that "premeditation may be formed in an instant."... [I]t is now abundantly clear that the deliberation necessary to establish first-degree murder cannot be formed in an instant.

836 S.W.2d at 543 (emphasis added); see Everett v. State, 528

S.W.2d 25, 28-29 (Tenn. 1975)(Brock, J. dissenting).

We interpret that holding to require proof that the offense was committed upon reflection, "without passion or provocation," and otherwise free from the influence of excitement.

Once a homicide has been established, it is presumed to be second degree murder. Witt v. State, 46 Tenn. 5, 8 (1868). The state must prove both premeditation and deliberation in order to elevate the offense from second to first degree murder. Bailey v. State, 479 S.W.2d 829, 833 (Tenn. Crim. App. 1972).

Using Brown as guidance, premeditation is, stated simply, the process of thinking about a murder before doing it. Deliberation is present when the circumstances suggest that the murderer reflected upon the manner and consequences of his act; the circumstances must suggest that the advanced thought process, the premeditation, took place in a cool mental state.

In Brown, our supreme court quoted portions of a treatise analyzing a distinction between first and second degree murder and which provided some insight into the nature of proof required before a jury might properly infer the elements of deliberation and premeditation:

> Three categories of evidence are important for this purpose: (1) facts about how and what 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 W.LaFave and A.Scott, Substantive Criminal Law, § 7.7 at 239 (1986)(emphasis in original).

The evidence established a motive; that is, that the defendant intended to rob Cox of illegal drugs. Because the defendant acknowledged to police that he had stolen marijuana from Cox only a short time before, he doubted that he would be able to purchase the drug from him. The defendant admitted that he was armed with a semi-automatic pistol and fired several shots in the direction of Cox and his friends. The headlights of the vehicle were off as the defendant approached Cox, the victim, and the two others. That indicated a prior plan. The defendant conceded that he was the only shooter in the first drive-by and acknowledged that he had wounded Ms. Jones. After the victim was shot, the car returned to the scene a second and third time. Additional shots were fired on each occasion.

Premeditation requires a design or intent to kill prior to a killing. State v. West, 844 S.W.2d 144, 147 (Tenn. 1992). Deliberation requires that the defendant "be free from the passions of the moment." Id. Although circumstantial in nature, the proof here suggests a planned, drive-by attack upon Cox. Whatever the motive, the defendant and the others

purposefully approached Cox and fired shots in his direction. That the victim was shot instead is no defense. State v. Johnson, 661 S.W.2d 854, 860-61 (Tenn. 1983). The doctrine of transferred intent would apply. State v. George Henry, No. 02C01-9212-CR-00266 (Tenn. Crim. App., at Jackson, October 20, 1993), perm. to app. denied, (Tenn. 1994). That the car returned to the scene twice after the fatal shots were fired suggests a purposeful killing.

The statute defines first degree murder as "an intentional, premeditated, and deliberate killing of another." Tenn. Code Ann. § 39-13-202(a)(1). In our view, the proof offered by the state at trial established each of the elements of the crime.

II

Next, the defendant argues that the trial court erred by refusing to instruct the jury on the lesser included offense of voluntary manslaughter. The state claims that there was no evidence permitting an inference of guilt on the lesser offense.

Voluntary manslaughter is clearly a lesser included offense of first degree murder. See Wright v. State, 549 S.W.2d 682 (Tenn. 1977). Tenn. Code Ann. § 39-13-211 provides as follows:

> **Voluntary Manslaughter.**--(a) Voluntary manslaughter is the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.

(b) Voluntary manslaughter is a Class C felony.

The trial judge has a duty to give a complete charge of the law applicable to the facts of the case. State v. Harbison, 704 S.W.2d 314, 319 (Tenn.), cert. denied, 476 U.S. 1153 (1986). It is settled law that when "there are any facts that are susceptible of inferring guilt on any lesser included offense or offenses, then there is a mandatory duty upon the trial judge to charge on such offense or offenses. Failure to do so denies a defendant his constitutional right of trial by a jury." State v. Wright, 618 S.W.2d 310, 315 (Tenn. Crim. App. 1981) (citations omitted); Tenn. Code Ann. § 40-18-110. When there is a trial on a single charge of a felony, there is also a trial on all lesser included offenses, "as the facts may be." Strader v. State, 210 Tenn. 669, 675, 362 S.W.2d 224, 227 (1962). Trial courts, however, are not required to charge the jury on a lesser included offense when the record is devoid of evidence to support an inference of guilt of the lesser offense. State v. Stephenson, 878 S.W.2d 530 (Tenn. 1994); State v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990), cert. denied, 498 U.S. 1074 (1991); State v. Dulsworth, 781 S.W.2d 277, 287 (Tenn. Crim. App. 1989).

Here, the defendant was charged with first degree murder. The lesser included offenses included second degree murder, and voluntary manslaughter. See Howard v. State, 506 S.W.2d 951 (Tenn. Crim. App. 1973). The defendant argues that there was evidence that he acted with passion produced by adequate provocation to warrant instructions on voluntary

manslaughter. That duty, in our view, is present even when the evidence of the adequate provocation for the lesser offense is slight. It is only when the record contains no evidence which might support an inference of guilt of the lesser offense that no instruction is required.

Here, the intended victim of the shooting was Terry Cox. There was evidence that Cox sold marijuana and that the motive for the shooting may have been robbery. One witness heard someone from the defendant's car yell, "Terry, I'm to get you," or something to that effect. In a signed confession, the defendant acknowledged that the three men intended to "take the weed from Terry." He claimed that "Marquis said that somebody in the crowd ... had a gun, and so I fired four or five shots at Terry, but accidentally shot the girl in the leg." That summarizes the evidence of "adequate provocation" in the light most favorable to the defense.

On the rare occasions in which none of the proof offered at trial might permit an inference of guilt of a lesser offense, the trial judge is excused from that obligation. See State v. King, 718 S.W.2d 241, 245 (Tenn. 1986). This is one of those rare occasions.

In State v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990), cert. denied, 498 U.S. 1074 (1991), our supreme court, under circumstances similar to those involved here, upheld a conviction when the trial judge, after charging first and second degree murder, declined to instruct the jury on

voluntary manslaughter, ruling that there was "clearly no evidence the killing was committed upon a sudden heat produced by adequate provocation." That, we think, is the case here.

III

After the jury began deliberations, it sent a note to the trial judge asking "to see the statement given to the police by Mr. Fair." The trial court allowed the jury to view the statement in court and permitted copies to be taken to the jury room. At that point, the defendant objected to the statement being taken to the jury room unless all exhibits were provided to the jury. The trial judge granted the jury's request but declined to require that all exhibits be provided. The defendant maintains that this placed too much emphasis upon the confession.

The general rule has been that a jury in a criminal case may not take exhibits to the jury room during its deliberation, absent consent from the parties. See Watkins v. State, 216 Tenn. 545, 552, 393 S.W.2d 141, 144 (1965). When the jury has requested permission to look at an exhibit, the trial courts have been required to allow review only in open court. See, e.g., State v. Flatt, 727 S.W.2d 252, 255 (Tenn. Crim. App. 1986). Such error, however, is subject to a harmless error analysis. See Watkins, 393 S.W.2d at 149; State v. Wright, 618 S.W.2d 310, 319 (Tenn. Crim. App. 1981); see also Sterner v. State, 552 S.W.2d 793 (Tenn. Crim. App. 1977).

In State v. Jenkins, 845 S.W.2d 787, 793 (Tenn. Crim. App. 1992), this court considered the propriety of a request by the jury to either rehear portions of the testimony or consider a particular exhibit:

> We believe that the decision to allow a jury to review any evidence submitted at trial, whether it be an exhibit or testimony, should be left within the discretion of the trial court as limited by ABA Standard 15-4.2 in its entirety. The full standard is as follows:
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> > (a) If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, they shall be conducted to the courtroom. Whenever the jury's request is reasonable, the court, after notice to the prosecutor and counsel for the defense, shall have the requested parts of the testimony read to the jury and shall permit the jury to re-examine the requested materials admitted into evidence.
> >
> > (b) The court need not submit evidence to the jury for review beyond that specifically requested by the jury, but in its discretion the court may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.
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> Under this standard, the trial court would have the discretion to take such action as necessary, including denying the jury's request, to insure that the jury's determination of a actual issue would not be distorted by undue emphasis on particular evidence.

Effective July 1, 1995, the Tennessee Rules of Criminal Procedure were amended as follows:

Upon retiring to consider its verdict, the

> jury shall take to the jury room all exhibits and writings, which have been received in evidence, except depositions, for their examination during deliberations, unless the court for good cause, determines that an exhibit should not be taken to the jury room.

The Comments provide that this rule brings Tennessee in line with most other jurisdictions. This trial, of course, took place before the effective date of the rule.

Here, the jury had obviously focused upon the signed statement the defendant made to the police. That is understandable under the circumstances. That the trial court allowed the exhibit to be taken to the jury room absent consent of both sides qualified as error under the prior law. In our view, however, any error was clearly harmless. The record establishes that the trial court did not place any emphasis on the statement but, instead, merely complied with the reasonable request of the jury.

So long as the trial court has taken precautions to avoid any undue emphasis, any error under our prior rule should be harmless. Absent a showing of prejudice by individualized review of exhibits taken into the jury room, the verdict should stand.

While there was error here, it was clearly harmless under these circumstances. The statement had previously been read to the jury. When the defendant does not testify, a confession is almost always the focus of a criminal trial. Moreover, the evidence of guilt was simply overwhelming.

Accordingly, the judgment is affirmed.

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Gary R. Wade, Judge

CONCUR:

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Joe B. Jones, Judge

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John K. Byers, Senior Judge