IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
MAY SESSION, 1995

STATE OF TENNESSEE,	)	
	)	No. 02C01-9404-CC-00070
Appellee	)	
	)	McNAIRY COUNTY
vs.	)	
	)	Hon. **JOE H. WALKER III**, Judge
DEBORAH GLADISH,	)	
	)	(Murder, Second Degree)
Appellant	)	

For the Appellant:

Daniel A. Seward
Pillow-McIntyre House
707 Adams
Memphis, TN 38105

For the Appellee:

Charles W. Burson
Attorney General and Reporter

Eugene J. Honea
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

Elizabeth T. Rice
District Attorney General

Ed McDaniel
Asst. District Attorney General
302 Market Street
Somerville, TN 38068

OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Deborah J. Gladish, appeals from a conviction for second degree murder, a class A felony, entered by the Circuit Court for McNairy County. The appellant raises five issues for our review. First, the appellant challenges the sufficiency of the evidence to sustain her conviction. Second, the appellant alleges that the trial court erred in allowing the murder weapon to be marked for identification and entered into evidence. Third, the appellant contends that the trial court charged the jury with the incorrect range of punishment. Fourth, the appellant contends that the trial court erred in failing to instruct the jury on all lesser included offenses of second degree murder. Finally, the appellant avers that the jury selection process employed by the trial court conflicts with Tenn. Code Ann. § 22-3-101 (1994) and Rule 24 of the Tennessee Rules of Criminal Procedure.

Having reviewed the record, we affirm the judgment of the trial court.

I. Factual Background

In the early morning hours of December 25, 1992, Officer David Keller and Officer Qualls of the Selmer Police Department were dispatched to the residence of the appellant and her husband, Edwin Neal Gladish, to investigate a possible "gunshot." The officers entered the residence, a mobile home, through the front door, which opens into a small living room. They immediately observed Mr. Gladish lying on his back on the living room floor. The appellant was kneeling over Mr. Gladish, "holding him or cradling him." When the officers asked the appellant what had happened, she replied, "I shot him." According to Officer Keller, the appellant was upset, but not hysterical. He could smell alcohol on the appellant's breath, but she did not appear to be intoxicated. Keller found

a handgun on the living room floor and a spent casing on the kitchen floor. He further observed blood on a love seat in the living room and on the living room floor.

Medical emergency personnel arrived at the scene. Officer Keller then transported the appellant to the McNairy County Jail. After being advised of her Miranda rights, the appellant gave a statement to the police. The appellant related that, on the night of the shooting, she and her husband were at "Murray's Place," a bar in Selmer, from 7:30 p.m. until closing. The couple then returned home. When Officer Keller asked the appellant if she and her husband had been arguing, either at Murray's Place or at home, the appellant stated, "We weren't really arguing, but just joking around."

When the appellant and her husband arrived home, Mr. Gladish lay down on the love seat in the living room. After changing her clothes, the appellant sat down in a nearby chair and turned on the television.[1] The appellant's pistol, a .380 semi-automatic, was underneath her chair, having been cleaned by Mr. Gladish earlier in the day. As she watched the television, the appellant picked up her pistol and checked the weapon to see if it was loaded. The pistol "jammed," as it apparently had done several times in the past. The appellant told Officer Keller:

> I told Neal that the gun was jammed; and Neal took the pistol and unjammed the pistol. I picked the pistol back up and the shell Neal had got unjammed. I then pulled the slide back, got a shell in the chamber, and took the clip out; because he had always told me to keep the pistol loaded with a shell in the chamber. I put the extracted shell back into the clip and put the clip back into the gun; and then, I was sitting in the chair, pulled the trigger, thinking the gun safety was on. When I pulled the trigger, I knew the gun had

---

[1]The television was not on when the police arrived at the Gladish residence. At trial, when asked on cross-examination what evidence resulted in a charge of second degree murder, Officer Keller testified in part that "one the T.V. was not on and he was supposed to be watching television. If you're upset and hysterical, you're not going to turn the television off and call the law. You're going to call them right then, for one ... "

> fired. I got up; and then I said, "Neal, you have left the safety off." And Neal didn't say anything. I got up, went over to Neal, and started shaking him to get Neal's attention, because I thought Neal had passed out. . . .So I reached to set him up; and when I did, I saw the blood.

The appellant stated that she and Neal had been drinking since early in the day.

On May 17, 1993, the appellant was indicted for second degree murder. The case proceeded to trial on September 30, 1993. At trial, Dr. O'Brien Smith, assistant medical examiner for Shelby County, testified that he performed an autopsy on the victim's body, which revealed that the cause of the victim's death was "a near gun shot wound ... on the back side of the right side of the [victim's] head." Dr. Smith further stated that there was a "stipple effect" around the wound, indicating that the gun had been fired within twenty-four inches of the victim's head.[2] On cross-examination, Doctor Smith testified that a blood-alcohol test had been performed on the victim, with a negative result. Doctor Smith opined that a blood alcohol level of .10 percent could easily have dissipated between the time the victim was shot and the time of his death.

Donald Carmen, a forensic scientist with the Tennessee Bureau of Investigation, testified that he had performed certain tests on the gun found at the Gladish residence and had determined that the bullet extracted from the victim's body was fired from that gun. He also testified that, while testing the gun, he encountered no mechanical problems. Finally, Carmen observed that the gun was equipped with two primary safeties, which were operational.

> There are two primary safeties on this particular pistol here. One, the left side of the frame here is --- well, it's commonly noted as a thumb safety, which you click on and you click off like that ... Also, on this particular model in the back is what's commonly noted as a grip safety, this device protruding out from the back strap here. You press that in ... it must be

---

[2]On cross-examination, Officer Keller testified that the chair in which the appellant had been sitting on the night of the shooting and the love seat on which the victim was lying were "approximately two, two and a half, maybe, three feet" apart.

> pressed in order for the trigger to be engaged with the firing pin in order for [the gun] to discharge. So, in order for this particular pistol to discharge, you must have the safety off and you must have sufficient pressure on the back pressing in and then sufficient pressure on the trigger, of course, in order for it to discharge.

The gun required an average trigger pull in order to discharge. On cross-examination, Carmen conceded that the gun could discharge accidentally.

II. Sufficiency of the Evidence

The appellant challenges the sufficiency of the evidence to sustain her conviction for second degree murder. A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant must establish that the evidence presented at trial was so deficient that no "reasonable trier of fact" could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994), cert. denied, __ U.S. __, 115 S.Ct. 743 (1995); Tenn. R. App. P. 13(e).

Moreover, an appellate court may neither reweigh nor reevaluate the evidence when determining its sufficiency. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). "A jury verdict approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory." State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073, 104 S.Ct. 1429 (1984). The State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. Id. See also State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992), cert. denied, __ U.S. __, 113 S.Ct. 1368 (1993).

Specifically, the appellant contends that the evidence does not support a finding that the appellant intended to kill her husband. However, second degree murder is the "knowing killing of another." Tenn. Code Ann. § 39-13-210(a)(1) (1991) (emphasis added). Tenn. Code Ann. § 39-11-302(b) (1991) provides that

> [k]nowing refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

Thus, a defendant may be found guilty of second degree murder if that defendant, while not having an actual intent to kill another, is either consciously aware of her conduct or reasonably certain that her conduct will cause death. Sentencing Commission Comments, Tenn. Code Ann. § 39-11-302 (1991); State v. Rutherford, 876 S.W.2d 118, 120-121 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994); State v. Rhodes, No. 02C01-9406-CC-00124 (Tenn. Crim. App. at Jackson, July 19, 1995). At trial, the state has the burden of proving the requisite culpable mental state beyond a reasonable doubt. Tenn. Code Ann. § 39-11-201(a)(2)(1991).

"The requisite mental state may be proved by circumstantial evidence. Knowledge or knowingly may be proved by the defendant's statements, by [her] conduct, and by all of the facts and circumstances surrounding that conduct." Rhodes, No. 02C01-9406-CC-00124. Circumstantial evidence must be inconsistent with the defendant's innocence and exclude every reasonable hypothesis or theory other than the defendant's guilt. State v. Gregory, 862 S.W.2d 574, 577 (Tenn. Crim. App. 1993). We note that in circumstantial evidence cases, single facts of themselves may each account for little weight, but when they are pieced together the facts and circumstances may unerringly point the finger of guilt to the defendant beyond a reasonable doubt. State v. Goodman, 643 S.W.2d 375, 385 (Tenn. Crim. App.), perm. to appeal denied,

(Tenn. 1982). Finally, in applying the above principles of law, it is incumbent upon this court to recognize that the weight to be given circumstantial evidence and "'[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.'" Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958)(citation omitted).

In the instant case, we conclude that the evidence is sufficient to establish that the appellant "knowingly" killed the victim. The appellant admitted to the police that she loaded the gun and pulled the trigger. The autopsy report revealed that, when fired, the gun was less than two feet away from the victim. Officer Keller's testimony suggested that the chair on which the appellant was allegedly sitting at the time of the shooting was somewhat farther than two feet away from the victim. The gun was equipped with two primary safeties, which were operational. The appellant's response, when asked by the police if she and her husband had been arguing, was ambiguous. Although, in her statement to the police, the appellant claimed that she never consciously pointed the gun at her husband, and that she thought "the gun safety was on," the jury rejected these statements when they returned a verdict of guilty. 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. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990). The jury was entitled to reject the appellant's claim that the shooting was accidental. State v. Bright, No. 92C01-9112-CR-00272 (Tenn. Crim. App. at Jackson, May 12, 1993).

III. Admission of the Murder Weapon

The appellant also contends that the trial court admitted the murder

weapon into evidence without authentication as required by Tenn. R. Evid. 901. Tangible evidence may only be introduced when identified by a witness or by the demonstration of an unbroken chain of custody. State v. Ferguson, 741 S.W.2d 125, 127 (Tenn. Crim. App. 1987); State v. Branson, No. 03C01-9305-CR-00148 (Tenn. Crim. App. at Knoxville, December 9, 1994); State v. Hudson, No. 3 (Tenn. Crim. App. at Jackson, November 8, 1989), perm. to appeal denied, (Tenn. 1990). Specifically, Rule 901(b)(1) provides that evidence may be identified or authenticated by a witness with knowledge that the item "is what it is claimed to be." Identification need not be absolutely certain. State v. Woods, 806 S.W.2d 205, 212 (Tenn. Crim. App. 1990), perm. to appeal denied, (Tenn. 1991), cert. denied, 502 U.S. 1079, 112 S.Ct. 986 (1992); Branson, No. 03C01-9305-CR-00148.[3] Finally, the trial court's decision to admit tangible evidence will not be disturbed in the absence of a clearly mistaken exercise of discretion. State v. Baldwin, 867 S.W.2d 358, 361 (Tenn. Crim. App. 1993); State v. Smith, No. 01C01-9205-CC-00152 (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1995).

At trial, in this case, Officer Keller positively identified the gun as the weapon that he found at the scene of the murder. This identification is sufficient under Rule 901, and obviated the need to establish a chain of custody. Hudson, No. 3. See also Daniels v. State, 550 S.W.2d 958, 959 (Tenn. Crim. App. 1976)(food stamps, identified by the victim as those taken in a robbery, admitted into evidence). Moreover, one purpose of authentication is to show that "there was no substantial alteration in the article offered which would effect its validity as evidence." State v. Johnson, 673 S.W.2d 877, 881 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1984). See also Baldwin, 867 S.W.2d at 361. The

---

[3]Authentication is merely a preliminary device to ensure that evidence submitted to the trier of fact for consideration is relevant under Tenn. R. Evid. 401 and 402. See Cohen, Paine, and Sheppeard, Tennessee Law of Evidence (1990) § 901.0, p. 473. In other words, "[authentication] is ... a facet of conditional relevance discussed in [Tenn. R. Evid.] 104(b)." Id.

appellant has never alleged, nor does the record reflect, that the gun has been altered in any way. In fact, the appellant has never alleged that the gun introduced into evidence is not the weapon used by the appellant to shoot the victim. Indeed, a forensic scientist with the Tennessee Bureau of Investigation testified at trial that the gun introduced into evidence was the gun submitted to him in connection with the appellant's case. He noted that the gun was marked with his initials. He further testified that the bullet obtained from the body of the victim was fired from that gun. Thus, even if the admission of the gun into evidence on the basis of Officer Keller's testimony was error, it was harmless error pursuant to Tenn. R. Evid. 103(a) and Tenn. R. App. P. 36(b). This issue is without merit.

IV. Jury Instructions Regarding Range of Punishment

The appellant asserts that the "trial court did not give the proper instruction to the jury as to the range of punishment." Upon request by a party, the trial court is obligated to "charge the possible penalties for the offense charged and all lesser included offenses." Tenn. Code Ann. § 40-35-201(b)(1) (Supp. 1994). However, this court has held that, when the state has not filed a notice of enhanced punishment, a trial court need not charge the complete range of punishments. State v. Watrous, No. 01C01-9009-CC-00234 (Tenn. Crim. App. at Nashville, February 26, 1991); State v. Jones, No. 7 (Tenn. Crim. App. at Jackson, October 13, 1983). In other words, absent a notice of enhanced punishment, the judge need only charge the penalties associated with Range I sentences since, without notice, an upper range sentence is not a possible penalty. Id.[4]

[4]Although, arguably, the trial court committed no error, we have also previously characterized a failure to instruct a jury, under these circumstances, on the complete range of punishment as harmless error, insufficient to constitute prejudice to the judicial system under State v. Cook, 816 S.W.2d 322, 326-327 (Tenn. Crim. App. 1991). State v. Adams, No. 03C01-9403-CR-00123 (Tenn.

The record reflects that, prior to trial, the appellant filed a motion pursuant to section 40-35-201(b). The state did not file a notice of enhanced punishment pursuant to Tenn. Code Ann. § 40-35-202 (1990). Accordingly, the trial court instructed the jury that second degree murder, a class A felony, is punishable by imprisonment for "not less than 15 years nor more than 25 years," and criminally negligent homicide, a class E felony, is punishable by imprisonment for "not less than 1 year nor more than 2 years." This instruction is a correct statement of the sentences available to a Range I offender.[5] See Tenn. Code Ann. § 40-35-112(a)(1) and (5) (1990). This issue is entirely without merit.

V. Jury Instructions Regarding Lesser Included Offenses

The appellant next contends that the trial court erred in failing to instruct the jury on all of the lesser included offenses of second degree murder. However, the record reveals that, before the trial judge read the instructions to the jury, he asked the appellant's counsel twice if they had any objections to the instructions or wished to propose any additions or deletions. Additionally, the judge ordered a brief recess, providing the attorneys an opportunity to examine the instructions. Moreover, after delivering his instructions to the jury, the trial judge, pursuant to Tenn. R. Crim. P. 30(b), gave the appellant's counsel yet another opportunity to object to the instructions. The appellant's counsel raised

---

Crim. App. at Knoxville, January 11, 1995). See also Tenn. R. Crim. P. 52(a) and Tenn. R. App. P. 36(b).

[5]The appellant does not contest now, nor did she contest at the sentencing hearing, her status as a standard offender pursuant to Tenn. Code Ann. § 40-35-105 (1994 Supp.) and the sentence imposed by the trial court. The appellant was sentenced to fifteen years incarceration with the Tennessee Department of Correction.

no objections. "[A]lleged omissions in the charge must be called to the trial judge's attention at trial or be regarded as waived." State v. Haynes, 720 S.W.2d 76, 84-85 (Tenn. Crim. App. 1986). In contrast to the case of erroneous instructions or the trial judge's failure to give a requested instruction, defense counsel cannot "sit on his objection [to an omission in the charge] and allege it as a ground in support of his motion for a new trial." Id. Thus, the appellant has waived this issue.[6]

Notwithstanding waiver, this issue is meritless. Tenn. Code Ann. § 40-18-110(a) (1990) requires trial judges to instruct the jury on lesser included offenses. Failure to instruct the jury on lesser included offenses denies a defendant his constitutional right to trial by jury. State v. Ruane, No. 01C01-9311-CR-00393 (Tenn. Crim. App. at Nashville, July 14, 1995). Yet, an indictment for second degree murder may implicate any number of lesser included offenses. The test used to identify lesser included offenses was set forth by our supreme court in Howard v. State, 578 S.W.2d 83, 85 (Tenn. 1979). The court held that "an offense is necessarily included in another if the elements of the greater offense ... include, but are not congruent with, all the elements of the lesser." Id. See also Ruane, No. 01C01-9311-CR-00393.

However, a prerequisite to a jury instruction on a lesser included offense is that the offense must be encompassed by the wording of the indictment, in order to ensure adequate notice to the defendant of the offenses for which he is called upon to answer. State v. Smith, 627 S.W.2d 356, 357-358 (Tenn. 1982); State v. Morris, 788 S.W.2d 820, 824 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1990); State v. Haynes, 720 S.W.2d 76, 82-83 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1986). Moreover, this court has held that

---

[6]We note, moreover, that the appellant's presentation of this issue in her brief minimally complies with Tenn. R. App. P. 27(a)(7) and barely avoids waiver under Tenn. Ct. Crim. App. R. 10(b).

where the record is "devoid of any evidence permitting an inference of guilt of the lesser offense," the trial judge need not charge the lesser offense to the jury. State v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990), cert. denied, 498 U.S. 1074, 111 S.Ct. 800 (1991). In fact, "the giving of instructions on offenses for which there is no evidence in the record is to be avoided." State v. Davis, 751 S.W.2d 167, 170 (Tenn. Crim. App. 1988). The appellant herself concedes that Tenn. Code Ann. § 40-18-110 (1990) only requires a jury instruction on all *reasonable* lesser included offenses.

The indictment in this case charged the appellant with "feloniously and knowingly kill[ing] Edwin Neal Gladish." The trial court instructed the jury on second degree murder and the lesser included offense of criminally negligent homicide. The only other remotely conceivable lesser included offense of second degree murder, at the time of the killing, was voluntary manslaughter.[7] State v. Mellons, 557 S.W.2d 497, 499 (Tenn. 1977); Davis, 751 S.W.2d at 170. However, in this case, it would have been pure speculation for the jury to have found that the appellant committed voluntary manslaughter. 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." Tenn. Code Ann. § 39-13-211(a) (1991). There is simply no evidence to support an inference that the appellant was in a state of passion produced by provocation when she killed her husband. We conclude

---

[7]In 1993, the legislature enacted the offense of reckless homicide, which is a lesser included offense of second degree murder and would be supported by the record in this case. See Tenn. Code Ann. § 39-13-215 (1994 Supp.). However, the offense in this case occurred in 1992.

Assault and aggravated assault, Tenn. Code Ann. § 39-13-101 to -102 (1991 & Supp. 1994), may be a lesser included offenses of second degree murder. State v. Sliger, No. 24 (Tenn. June 17, 1991); Ruane, No. 01C01-9311-CR-00393; State v. Prince, No. 87-116-III (Tenn. Crim. App. at Nashville, November 18, 1987). However, the evidence in this case clearly shows that the victim's death was the natural and probable result of the appellant's act. The only issue at trial was whether the killing was accidental. Thus, no instructions on these lesser offenses were required. Ruane, No. 01C01-9311-CR-00393; Prince, No. 87-116-III.

that the trial court properly instructed the jury.

VI. Jury Selection Procedures of the Trial Court

Finally, the appellant contends that the jury selection procedure employed by the trial court violated Tenn. Code Ann. § 22-3-101 (1994) and Rule 24 of the Tennessee Rules of Criminal Procedure. A description of the jury selection procedure employed at the appellant's trial was included in the record and reads as follows:

> Twenty-two names will be called at random. The first 12 will be seated in the jury box; the remaining 10 will be seated along side. Additional members of the panel will sit elsewhere in the Courtroom.
>
> The Court and/or lawyers will question the 22 jurors. Lawyers will then exercise their first round of challenges. Only the 12 in the jury box may be challenged.
>
> If anyone in the jury box is challenged, additional names will be drawn at random from among the 10 who are seated along side the jury box. Those persons called will be seated in the jury box. Challenges again may be made, but only to those 12 in the jury box and without asking any more questions. This procedure will continue until the jury is selected or until there remains an unfilled seat in the jury box.
>
> If all of these 10 additional jurors are exhausted, more names will be drawn. Those members of the panel may then be questioned. After they are questioned, the procedure as set forth above again will be followed until a jury is selected.

Section 22-3-101 grants the parties in civil and criminal cases "an absolute right to examine prospective jurors ... notwithstanding any rule of procedure or practice of [a] court to the contrary." Moreover, this court has observed that the purpose of *voir dire* "is to allow for the impaneling of a fair and impartial jury through questions which permit the intelligent exercise of challenges by counsel." State v. Akins, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1993). Thus, although the control of *voir dire* generally rests within the sound

discretion of the trial judge, State v. Oody, 823 S.W.2d 554, 563 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1991), this discretion is by no means unfettered. For example, while trial judges will generally require the collective examination of jurors for the purpose of expediency, they must allow individual *voir dire* "when there is a significant possibility that a prospective juror has been exposed to potentially prejudicial material." Id.

The appellant contends that the jury selection procedure imposed in this case prevented her from adequately examining potential jurors. However, the appellant has failed to include in the record a transcript of the jury's selection. It is the appellant's duty to ensure that the record on appeal contains all of the evidence relevant to those issues that are the bases of appeal. Tenn. R. App. P. 24(b). An appellate court cannot consider an issue which is not preserved in the record for appeal. State v. Banes, 874 S.W.2d 73, 82 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994).

Initially, in the absence of a transcript of the proceedings in this case, we are unable to determine even whether the appellant entered a contemporaneous objection to the selection procedure. State v. Smith, 857 S.W.2d 1, 20 (Tenn. 1993). Moreover, the extent of juror examination permitted by the trial judge is unclear from the mere description of the jury selection procedure. Specifically, it is unclear whether, following the initial *voir dire* of twenty-two potential jurors, the trial judge prohibited any further examination of those jurors or whether the trial judge simply prohibited further questioning during the exercise of challenges. In other words, the description does not reveal whether the trial judge permitted the parties a final opportunity to question tentatively selected jurors. Nor does the description reveal whether the appellant attempted to engage in further questioning of one or more jurors and was prevented by the trial court from doing so.

The appellant also contends that the procedure imposed by the trial court deviates from Tenn. R. Crim. P. 24. In relevant part, Rule 24 provides:

> After twelve prospective jurors have been passed for cause, counsel will submit simultaneously and in writing, to the trial judge, the name of any juror either counsel elects to challenge peremptorily ... Replacement jurors will then be examined for cause and, after passed, counsel will again submit ... the name of any juror counsel elects to challenge peremptorily. This procedure will be followed until a full jury has been selected and accepted by counsel.

The procedure employed by the trial court in this case does not technically comply with Tenn. R. Crim. P. 24. For example, pursuant to the trial court's procedure, twenty-two jurors, instead of only twelve, are questioned or examined for cause at one time.

This court has previously observed that departures from the prescribed procedure for the selection, summoning, and the impaneling of juries will not affect the validity of a verdict in a criminal case, absent a showing of prejudice to the accused. State v. Lynn, No. 01C01-9309-CC-00310 (Tenn. Crim. App. at Nashville, November 10, 1994), perm. to appeal granted, (Tenn. 1995). It is the burden of the accused to prove prejudice. State v. Coleman, 865 S.W.2d 455, 458 (Tenn. 1993). "Prejudice will not be presumed." Id.

There has been no showing by the appellant that the presiding jury was unfair or impartial. Id. Moreover, because the record is incomplete, we are unable to determine whether the appellant was prevented from adequately examining jurors or was denied the use of her statutorily mandated number of peremptory challenges or at any time denied the exercise of her right to challenge for cause. Id. Accordingly, the appellant has failed to carry her burden.

In Coleman, the court considered a somewhat irregular jury selection procedure similar to the procedure employed in the instant case. Id. The court found that because the appellant failed to demonstrate prejudice, the selection procedure did not rise to the level of reversible error. Id. However, the supreme court cautioned that "any future deviation from [Rule 24] could constitute prejudice to the entire judicial system and require reversal." Id. (emphasis added). The court concluded that "close adherence" to Rule 24 is mandatory. Id. (emphasis added). Again, the mechanics of the trial court's jury selection procedure do not appear to be entirely encompassed by the description of the procedure included in the record. Therefore, we are unable to determine the extent to which the procedure in this case deviated from Rule 24. Thus, we cannot conclude that the deviation was significant enough to prejudice the entire judicial system, thereby rising to the level of reversible error.

Accordingly, the judgment of the trial court is affirmed.

_____
David G. Hayes, Judge

CONCUR:

_____
John H. Peay, Judge

_____
William M. Barker, Judge