

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER SESSION, 1993

FILED
November 30, 1995
NO. 03C01-9304-CR-00136
Cecil Crowson, Jr.
Appellate Court Clerk
Claiborne County

STATE OF TENNESSEE,)
)
 Appellee)
)
 v.)
)
 JOHN HENRY WALLEN,)
)
 Appellant)

NO. 03C01-9304-CR-00136
Claiborne County
Hon. Lee Asbury, Judge
(First-Degree Murder)

For the Appellant:

Douglas A. Trant
Attorney at Law
900 S. Gay St., Ste 1502
Knoxville, TN 37902-1810

Judith O. Woods
Attorney at Law
900 S. Gay St., Ste. 1502
Knoxville, TN 37902-1810

For the Appellee:

Charles W. Burson
Attorney General & Reporter

Jeannie Kaess
Assistant Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0493

William Paul Phillips
District Attorney General

E. Shayne Sexton
Assistant District Attorney General
P.O. Box 415
Tazewell, TN 37879

OPINION FILED: _____

REVERSED AND REMANDED

John K. Byers,
Senior Judge

OPINION

The defendant was convicted of first degree murder and sentenced to serve a life sentence.

We find the trial court made reversible error, and we remand the case thereto for further proceedings.

Judge White wrote the original proposed opinion in this case. That opinion develops the facts of the case as presented to the trial court, and it also sets out an in-depth review of the cases and the law applicable to the issues raised. We concur in all of the conclusions reached in the opinion with the exception of the finding that the evidence is insufficient to show deliberation necessary for a finding of murder in the first degree and the finding that the trial judge was in error for admitting evidence that the defendant had previously fired into a City of Tazewell police vehicle approximately one month prior to the shooting of Trooper Tripp.

For the purposes of this opinion, we adopt the facts as set out in Judge White's opinion.

In this case, the evidence shows that, prior to the killing of Trooper Tripp, the defendant had spoken of killing Tripp.

In the statement to the police officers made after the killing of Trooper Tripp, the defendant said that Tripp came up behind him, turned on his blue lights and pulled him into the lot where the killing occurred. He stated he had made up his mind to kill Tripp if Tripp pulled his gun on him. Further, he said Tripp pulled his revolver and yelled at him not to run. He said that Tripp put his gun away and got back into his car. The defendant said that he then backed his truck up so he was driver's side to driver's side with Tripp, and he emptied his rifle into Tripp.

In *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992), the Supreme Court quoted WHARTON'S CRIMINAL LAW:

'Pre-meditation' is the process simply of thinking about a proposed killing before engaging in the homicidal conduct, and 'deliberation' is the process of carefully weighing such matters as the wisdom of going ahead with the proposed killing, the manner in which the killing will be accomplished, and the

consequences which may be visited upon the killer if and when apprehended. 'Deliberation' is present if the thinking, i.e., the 'premeditation' is being done in such a mental state under such circumstances and for such a period of time as to permit a 'careful weighing' of the proposed decision.

Brown, 836 S.W.2d at 541 (quoting Charles E. Torcia, WHARTON'S CRIMINAL LAW § 140 (14th ed. 1979)).

When the evidence in this case is weighed in conjunction with the definitions of premeditation and deliberation adopted in *Brown*, the evidence is sufficient to show both of the elements.

Wallen's statement prior to the shooting of the necessity of killing Tripp shows a premeditated intent to commit the murder, which supplies the element of premeditation. Wallen's statement indicates that he decided on the night of the killing that if Tripp pulled his gun, he would shoot him. Further, the defendant said Tripp got out of the patrol car, pulled his gun, put the gun away and got back into the patrol car. He said that he then picked up his rifle and "shot the rifle empty." This evidence is sufficient to show the defendant deliberated on whether he would kill Tripp on this occasion and the manner of the carrying out of the intent to kill. This evidence is further strengthened by the defendant's statement that he backed his vehicle up to position it beside Tripp before he fired. Obviously, this was done to make certain of the death of Tripp by the assault. This evidence satisfies the elements of deliberation as raised in *Brown*.

The elements of premeditation and deliberation are questions for the jury to determine and may be inferred from the manner and circumstances of the killing. *State v. Gentry*, 881 S.W.2d 1, 3 (Tenn. Crim. App. 1993). We conclude, therefore, that the evidence is sufficient upon which the jury could find the defendant guilty of murder in the first degree. If the jury could not draw these conclusions from the evidence, it is unlikely the State could ever prove a case of first degree murder in the absence of an eye-witness to the crime. Further, conclusions based upon reasonable circumstantial evidence have historically and logically been recognized

as sufficient to show the commission of a crime.

The issue of the admissibility of the evidence that the defendant fired into a police vehicle owned by the City of Tazewell is somewhat more problematic. However, under the circumstances in this case, we believe the probative value of the evidence outweighs any prejudicial effect of the evidence.

Is the evidence relevant? We think it is. The evidence shows Wallen had a grudge against police officers in general. Further, this evidence is probative on the issue of premeditation. See *State v. Gentry*, 881 S.W.2d 1, 4-5 (Tenn. Crim. App. 1993). We do not view the evidence as being merely evidence of propensity to commit a crime as condemned in *State v. Parton*, 694 S.W.2d 299, 203 (Tenn. 1985). This evidence is relevant on the issue of premeditation as we said above, and the relevancy is enhanced by the evidence of Wallen's pre-killing stated dislike of police officers. This evidence is certainly prejudicial to Wallen. However, any evidence which is relevant to show guilt is prejudicial. When cases have dealt with the prejudicial effect *vis-a-vis* the probative value of prior bad acts evidence, we find little articulable definition of the scale to use, and we conclude that definition of the relationship is, for the most part, inarticulable. As was said in *Claiborne v. State*, 555 S.W.2d 414, 417 (Tenn. Crim. App. 1977), "There is no set test to determine the relevancy of evidence of another crime. The question must be resolved in each case by logic and general experience."

If one can logically say the evidence of the prior crime has a tendency to prove an essential element of the charge at issue in the case on trial, then the evidence is relevant. If it is relevant on an issue in the case on trial, it is offered not to show propensity to commit a crime but as relevant evidence to show the commission of the crime charged in the case on trial. We think the evidence of the shooting of the police car by the defendant is admissible in this case.

We concur with Judge White's opinion on all other issues, and we agree with Judge White that there was reversible error in the trial of this case.

We, therefore, reverse the judgment of the trial court and remand the case for a new trial on the charge for first degree murder and all lesser crimes charged in the indictment, or not charged but included therein as a matter of law, if raised by the evidence.

Costs are assessed to the appellee, the State of Tennessee.

John K. Byers, Senior Judge

CONCUR:

Paul G. Summers, Judge

Penny J. White, Judge