IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 02C01-9502-CC-00044**
	)	
Appellee,	)	
	)	
	)	**CARROLL COUNTY**
VS.	)	
	)	**HON. C. CREED MCGINLEY**
ARCHIE VAUGHN MONTAGUE,	)	**JUDGE**
	)	
Appellant.	)	**(Direct Appeal)**

FOR THE APPELLANT:

STEPHEN M. MILAM
P. O. Box 1062
Lexington,TN 38351

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

ELLEN H. POLLACK
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243

ROBERT RADFORD
District Attorney General

ELENORA CAHILL
Assistant District Attorney
P. O. Box 686
Huntingdon, TN 38344

OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

A Carroll County Circuit Court jury found Appellant Archie Vaughn Montague guilty of one count of first degree murder. The conviction arose from the shooting death of Ronald Adams during the attempted perpetration of a robbery. Appellant received a sentence of life imprisonment. In this appeal, Appellant presents the following issues for review:

(I) whether the evidence presented at trial is legally sufficient to sustain a conviction for first degree murder;

(II) whether the trial court erred in admitting evidence relating to a suicide note written by Appellant while in prison;

(III) whether the trial court erred in refusing to allow individual voir dire of the jury;

(IV) whether the trial court erred in admitting evidence relating to Appellant's statement to law enforcement authorities concerning the shooting; and

(V) whether the method of jury selection constituted reversible error.

After a review of the record, we affirm the judgment of the trial court.

I. SUFFICIENCY OF THE EVIDENCE

Appellant first alleges that the evidence presented at trial is legally insufficient to sustain his conviction for first degree murder. When an appeal challenges the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318 (1979); State v. Evans, 838 S.W.2d 185, 190-91 (Tenn. 1992), cert. denied, 114 S. Ct. 740 (1994); Tenn. R. App. P. 13(e). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). This Court will not reweigh the evidence, reevaluate the evidence, or substitute its evidentiary inferences for those reached by the jury. State v. Carey, 914 S.W.2d 93, 95 (Tenn. Crim. App. 1995). In a criminal trial, great weight is given to the result reached by the jury. State v. Johnson, 910 S.W.2d 897, 899 (Tenn. Crim. App. 1995).

Once approved by the trial court, a jury verdict accredits the witnesses presented by the State and resolves all conflicts in favor of the State. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073 (1984). The credibility of witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury as trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). A jury's guilty verdict removes the presumption of innocence enjoyed by the defendant at trial and raises a presumption of guilt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant then bears the burden of overcoming this presumption of guilt on appeal. State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991). We will review the facts of this case in light of the foregoing well-settled principles of law.

On the afternoon of February 25, 1991, Ronald Adams died of a gunshot wound to the back of the neck. At the time of the shooting, Adams

was assisting Cathy Giles at Walker's Grocery and Sporting Goods Store in Carroll County, Ms. Giles place of employment. Adams' body was found lying on the floor behind a store display counter with a .380 auto projectile bullet in a flattened condition next to his knee. The physical condition of the bullet indicated that Adams may have been shot as he lay on the ground, with the bullet flattening after it passed through his neck and struck the concrete floor of the store. Medical evidence established that the bullet was fired less than twelve inches from the surface of the skin and that the bullet traveled through the muscles of the back of the neck, fractured two vertebrae, severed the spinal cord, and exited through the voice box in the hollow of the neck.

Earlier that same day, Chris Wilson visited Appellant's residence in Gibson County for the purpose of selling him a gun. Kaswasi Williams, a friend of Appellant, had spent the previous night at Appellant's residence and was still present when Wilson arrived. The three men left the residence together in Wilson's car. Making a brief stop at another friend's house so that Williams could eat, the men drove to the town of Huntingdon in Carroll County. During the trip, both Williams and Appellant inspected the loaded .380 caliber handgun that Appellant was considering purchasing. At some point during the trip, Appellant placed the loaded gun in the waistband of his pants.

At approximately 3:00 p.m., the men stopped at Walker's Grocery. While Williams pumped gas, Wilson and then Appellant entered the store. Both Giles and Adams were present in the store. Upon entering, Wilson told Giles that her father, the owner of the store, had ordered some pistol grips for him. Giles was unaware of any order but proceeded to the gun counter to

show Wilson the pistol grips in stock. Adams joined her, standing behind a knife counter that was next to the gun counter. In order to determine if the pistol grips fit properly, Wilson unloaded and dismantled his .357 Magnum handgun. Williams then entered the store, whereupon Adams indicated to Giles that Williams wanted to pay for the gas. In response, Giles moved between the gun and knife counters to the cash register. Nevertheless, before she was able to take payment for the gas, Williams left the store and returned to the car.

As Giles stood at the cash register wondering who would pay for the gas, a commotion of some kind drew her attention back to the area of the store where Adams, Wilson, and Appellant were standing. However, due to a partition separating the cash register from the gun and knife counters, Giles had an obstructed view of the area. Peering over the partition somewhat, Giles noticed that Appellant had moved around behind the counter where Adams and she had just been standing. She observed Appellant "going back and forth between the two counters," eventually knocking over the knife counter and another display rack. Soon thereafter, Giles heard a gunshot. While unable to observe Adams or to determine exactly what was happening, Giles retrieved a gun from under the cash register, later testifying that she believed the store was being robbed. Wilson moved to the cash register and told her to "get down, bitch." When Wilson moved back to the display counter area, Giles fled the store.

Immediately after leaving the store, Giles observed Williams in the car and fired one shot as he drove away. She then proceeded to the house next

door, telling her neighbor Mae Goodrum to “call 911. Someone has Ronnie held up in the store.” As Giles returned to the store to check on Adams, she saw Wilson and Appellant in the field behind the store. She fired two shots as they entered a wooded area, missing both men. Giles returned to the store to find Adams on the floor behind the counter, unconscious and bleeding from a gunshot wound. While calling for an ambulance, she noticed the car that she had just fired upon driving slowly in front of the store, honking.

Law enforcement authorities apprehended Williams not long after the shooting as he was driving away from the store. The police searched the vehicle and found stockings with the legs cut off, a thermal mask, and firearm ammunition. Williams refused to give his true name or the names of the other two men. The following day, Wilson and Appellant were apprehended after spending the night in the woods behind the store. Authorities eventually found Appellant’s .380 handgun hidden beneath two logs and some leaves in the wooded area where they had spent the night. Firearm tests confirmed that the bullet found next to Adam’s body was fired from this particular weapon. Moreover, the physical characteristics of the bullet were consistent with the type of wound tract identified during the autopsy of Adam’s body.

Later on the same day of his capture, Appellant made conflicting statements to authorities concerning the shooting. He first stated that he went into the store to get a pack of gum but could not remember anything about the shooting. He remembered only running from the store without the gum. He also stated that he did not know the name of the “white guy” involved, referring to Wilson. Approximately three hours later, investigators gave Appellant an

opportunity to add to his original statement in light of the fact that Wilson had now made a statement. At this point, Appellant remembered a more detailed account of the incident. Appellant reported that, as Williams attempted to pay for the gas, Adams, standing behind the display counter, grabbed him and pulled him over the counter. He stated that, as they struggled for his gun, it fired. However, the physical evidence of the shooting was inconsistent with Appellant's account of a struggle over the weapon. Adams suffered a gunshot wound to the back of the neck, making the contention that he was engaged in a hand-to-hand struggle at the time questionable. Also, Adams had no gunshot residue on his hands, indicating that he was not holding the weapon at the time it fired. During this opportunity to discuss the shooting, Appellant referred to Wilson by name, despite his earlier claim that he did not know Wilson's name.

On February 27, two days after the shooting, Appellant attempted to commit suicide in his jail cell. However, when alerted by the other inmates, jailors intervened. While in Appellant's cell, jailors discovered and took possession of a note that Appellant had written in association with his suicide attempt. The note read as follows:

> For the victim's family. I know this family wish I'll die, but I want everybody to know I didn't want to kill that man. I'm sorry, I weep their loss. We both was a victim. I'm sorry. I hope in your heart you can forgive me. I must do what I think is right. I broke one of God's rules, and I must die. Please don't hold no pain because I'm going to do my time. Please drop all charges on the other two guys, if you don't mind, please. God will be the judge for me. My heart weeps for your loss. I don't want anybody to think I'm crazy because I'm not. I feel this is right. If you take a life, you give a life.

At the conclusion of his trial, the jury found Appellant guilty of one count of first degree murder. In order to sustain a conviction for first degree murder in this case, the State was required to prove that Appellant recklessly killed Adams during an attempt to perpetrate a robbery. See Tenn. Code Ann. § 39-13-202(a)(2) (1991). Appellant argues that the State presented no direct evidence of Appellant's guilt and that the circumstantial evidence relied upon by the State failed to exclude every other reasonable hypothesis except that of Appellant's guilt. It is well settled that a crime may be established by the use of circumstantial evidence only. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987); State v. Bordis, 905 S.W.2d 214, 220 (Tenn. Crim. App. 1995). However, before an accused may be convicted of a criminal offense based upon circumstantial evidence alone, the facts and circumstances "must be so strong and cogent as to exclude [beyond a reasonable doubt] every other reasonable hypothesis save the guilt of the defendant." Bordis, 905 S.W.2d at 220 (quoting State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971)). Stated another way, "[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." Id.

The physical evidence surrounding the shooting, and the capture of the suspects, including Appellant, the testimony of Ms. Giles concerning the events leading up to and following the shooting, and the conflicting accounts of the shooting offered by Appellant permit any rational trier of fact to conclude that Appellant intentionally shot Adams in the back of the neck during an attempt to rob the store. The facts and circumstances of this case are

sufficiently strong and cogent to exclude beyond a reasonable doubt every other reasonable hypothesis save the guilt of Appellant. Thus, we find that, when viewed in a light most favorable to the State, the evidence is legally sufficient to support Appellant's conviction for first degree murder.

II. ADMISSION OF APPELLANT'S SUICIDE NOTE

Appellant alleges that the trial court erred in admitting evidence relating to a suicide note written by him while in prison. In the note, Appellant states that he "didn't want to kill that man" and that, in doing so, he "broke one of God's rules." Over objection, the trial court permitted the State to cross-examine Appellant regarding the note. Appellant argues that evidence pertaining to the note was inadmissible because authorities unconstitutionally seized it from his jail cell in violation of his right to a reasonable expectation of privacy.

The United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. The Constitution of the State of Tennessee makes a similar guarantee. See Tenn. Const. art I, § 7. The touchstone of unreasonable search and seizure analysis is "whether a person has a 'constitutionally protected reasonable expectation of privacy.'" State v. Bowling, 867 S.W.2d 338, 341 (Tenn. Crim. App. 1993) (quoting California v. Ciraolo, 476 U.S. 207, 211 (1986)). The United States Supreme Court has established a two-part inquiry for determining an individual's constitutionally protected reasonable expectation of privacy. First, has the individual manifested a subjective expectation of privacy in the object of the

challenged search? Second, is society willing to recognize that expectation as reasonable? Id.

Here, Appellant has failed to manifest a subjective expectation of privacy in his suicide note. The constitutional guarantees against unreasonable searches and seizures do not protect what an individual "knowingly extends to the public." Bowling, 867 S.W.2d at 211 (quoting Katz v. United States, 389 U.S. 347, 351 (1986)). Clearly, Appellant drafted the suicide note with the intention that others read it and gain an understanding of the reasons underlying his planned suicide. Furthermore, society is unwilling to recognize Appellant's expectation of privacy as reasonable. The Tennessee Supreme Court has determined that prisoners do not have a "reasonable or legitimate expectation of privacy in the confines of a prison cell." State v. Dulsworth, 781 S.W.2d 277, 284 (Tenn. 1989) (citing Hudson v. Palmer, 468 U.S. 517, 525-26 (1984)). Under this two-part inquiry, Appellant was not entitled to a constitutionally protected reasonable expectation of privacy with regard to a suicide note left in his jail cell. Furthermore, even assuming arguendo that the suicide note was unconstitutionally seized, evidence relating to the note was still admissible for the purposes of impeachment. See Kimmelman v. Morrison, 477 U.S. 365, 376 (1986); see also State v. Hopper, 695 S.W.2d 530, 539 (Tenn. Crim. App. 1985) (finding that it is proper to use unconstitutionally seized evidence for impeachment purposes). Here, the State questioned Appellant about the suicide note in order to impeach his earlier testimony that the shooting resulted from a struggle instituted by the victim. Thus, we find that the trial court properly admitted this evidence.

III. INDIVIDUAL VOIR DIRE

Appellant alleges that the trial court erred in refusing to allow individual voir dire of the jury. He argues that individual voir dire was proper because of the serious nature of the offense and the tremendous local interest in the proceedings. We note initially that the prevailing practice of selecting a jury is to examine the prospective jurors collectively. State v. Jefferson, 529 S.W.2d 674, 681-82 (Tenn. 1975), cert. denied, 506 U.S. 905 (1992); State v. Oody, 823 S.W.2d 554, 563 (Tenn. Crim. App. 1991). Individual voir dire is mandated only when there is a "significant possibility" that a prospective juror has been exposed to potentially prejudicial material. State v. Harris, 839 S.W.2d 54, 65 (Tenn. 1992), cert. denied, 507 U.S. 954 (1993) (quoting State v. Porterfield, 746 S.W.2d 441, 447 (Tenn.), cert. denied, 486 U.S. 1017 (1988)). The supervision of voir dire, including the decision of whether individual voir dire is appropriate, rests within the sound discretion of the trial court. State v. Cazes, 875 S.W.2d 253, 262 (Tenn. 1994), cert. denied, 115 S. Ct. 743 (1995). As a result, this Court must uphold the ruling of the trial court unless the defendant establishes the existence of a clear abuse of discretion. State v. Raspberry, 875 S.W.2d 678, 681 (Tenn. Crim. App. 1993). Appellant has failed to show, or even specifically allege, that there was a significant possibility that a prospective juror was exposed to potentially prejudicial material. Without such a showing, the trial judge cannot be said to have abused his discretion in denying the request for individual voir dire.

IV. ADMISSION OF APPELLANT'S STATEMENT

Appellant alleges that the trial court erred in admitting evidence relating to his statement to law enforcement authorities concerning the shooting.

Appellant argues that evidence pertaining to the statement was inadmissible because, at the time the statement was made, he was in a weakened physical condition due to the fact that he had spent the preceding night hiding in the woods and because the authorities made false promises of leniency in an effort to induce his statement. When a defendant complains of an improper admission of an incriminating statement, this Court must determine if the statement was the product of the defendant's voluntary and rational choice or if the conduct of the interrogators overbore the defendant's will to resist making a confession. State v. Kelly, 603 S.W.2d 726, 728-29 (Tenn. 1980). The judgment of a trial court at a suppression hearing is presumptively correct on appeal. State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994). This presumption of correctness may only be overcome on appeal if the evidence in the record preponderates against the determination of the trial court. Id.

Here, the trial court determined that Appellant's statement to law enforcement authorities concerning the shooting was admissible, finding that there was no indication that the statement was anything but voluntary. During the pre-trial suppression hearing, Appellant testified that his rights were explained to him. Furthermore, Appellant admits that he signed a waiver form and made the statement of his own free will. The investigators who took Appellant's statement testified that Appellant gave no indication that he did not understand his rights or the implications of his signature on the waiver form. The investigators also testified that Appellant was neither threatened nor promised leniency in return for his statement. The evidence in the record does not preponderate against the determination of the trial court and the statement was properly admitted into evidence.

V. IMPANELING THE JURY

Finally, Appellant alleges that the trial court erred in impaneling the jury. Appellant maintains that the trial court impaneled eighteen prospective jurors, seating twelve in the jury box and six in the front of the courtroom. Trial counsel allegedly conducted voir dire on the entire eighteen-member panel and then exercised peremptory challenges on the twelve members seated in the jury box. Those excused from the jury box were replaced by individuals from the six-member group seated in front and as needed, the group in front was supplemented with members of the remaining panel, and additional voir dire was conducted. Appellant argues that this method of impaneling the jury violates the spirit and intent of Tenn. R. Crim. P. 24. Rule 24 provides that "[a]fter 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." Tenn. R. Crim. P. 24(c) (Supp. 1995).

A departure from the prescribed method of jury selection will not invalidate the verdict in a criminal trial absent a showing of prejudice to the accused or a finding that constitutionally impermissible discrimination occurred in the selection process. State v. Coleman, 865 S.W.2d 455, 458 (Tenn. 1993); State v. Gladish, No. 02C01-9404-CC-00070, 1995 WL 695125, at *8 (Tenn. Crim. App. Nov. 1, 1995), perm. to appeal denied, (Tenn. 1996). It is the burden of the defendant to prove prejudice or discrimination. Coleman at 458. There is no evidence in this record establishing either prejudice or

discrimination in the method of jury selection. Thus, there is no reversible error with respect to this issue.[1]

Accordingly, the judgment of the trial court is affirmed.

_____
JERRY L. SMITH, JUDGE

CONCUR:

_____
JOSEPH B. JONES, PRESIDING JUDGE

_____
GARY R. WADE, JUDGE

[1]It is clear from the trial judge's statements at the hearing on the motion for a new trial that in fact twelve prospective jurors were seated in the jury box, while six additional prospective jurors were seated in the front of the courtroom. Challenges were allowed only for the twelve in the jury box and replacements were selected from the six seated in the front of the courtroom. The record is not clear as to whether the group of six was subject to voir dire. Because of this we are unable to say whether this procedure was a sufficient variation from Tenn. R. Crim. P. 24 to require a finding of prejudice to the entire judicial system thereby requiring reversal. See Coleman, 865 S.W.2d at 458; Gladdish, 1995 WL 695125, at *8. However, trial judges should be reminded that any deviation from the procedures of Tenn. R. Crim. P. 24 creates a risk of reversible error, and such departures from the rule's dictates should be avoided unless and until Rule 24 is amended to create a more expedient procedure. Id.