

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
OCTOBER 1996 SESSION

STATE OF TENNESSEE,)
Appellee,) C.C.A. No. 02C01-9602-CR-00049
V.) Shelby County
) Honorable L. T. Lafferty, Judge
BRYANT DEWAYNE MILLEN,) (Murder in the First Degree)
Appellant.)

FOR THE APPELLANT:

Leslie I. Ballin
Mark A. Mesler
Ballin, Ballin & Fishman, P.C.
200 Jefferson Avenue, Suite 1250
Memphis, TN 38103

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter

Timothy F. Behan
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

John W. Pierotti
District Attorney General

Thomas D. Henderson
Asst. Dist. Attorney General
201 Poplar, Third Floor
Memphis, TN 38103

OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

O P I N I O N

The appellant, Bryant Dewayne Millen, was indicted on one count of first degree murder and one count of felony murder. He was convicted by a jury of first degree murder and sentenced to life imprisonment. He appeals raising the following issues for our review:

1. Whether the evidence was sufficient to convict;
2. Whether the state's failure to elect which count to proceed upon violated double jeopardy;
3. Whether the trial court erred in refusing to suppress the appellant's statement;
4. Whether the trial court erred in refusing to allow individual voir dire;
5. Whether the state committed prosecutorial misconduct during voir dire;
6. Whether the trial court erred in admitting a photograph of the victim;
7. Whether the trial court erred in determining that a testifying expert witness was qualified;
8. Whether the trial court erred in refusing the appellant's request for special jury instructions; and
9. Whether the state committed prosecutorial misconduct during closing arguments.

Finding no prejudicial error, we affirm.

FACTS

The appellant was a member of a gang known as the "Bloods." His intended victim, Tony Gray, was a member of a rival gang known as the "Crips." On June 1, 1994, the appellant told friends that he was tired of Gray's harassment and that if he saw Gray again he was "going to blast on him." Later that same day, the appellant went to a friend's house to get a gun. He instructed his friend that he "needed" the gun immediately. He was given a handgun with ammunition. The appellant proceeded to the corner of Graceland and David in Memphis. He placed a red bandana around his head and another around his

mouth.¹ Shortly thereafter, a car containing Tony Gray and several other passengers proceeded slowly down Graceland.² The appellant drew his weapon and began running towards the car firing repeated shots at its passengers.

The victim in this case was a 14 year old female. She was walking home from school down Graceland when the appellant began shooting at Tony Gray. The victim was hit and killed by an errant bullet fired by the appellant.

After the shooting, the appellant was observed running down Graceland towards his father's home. The police were dispatched to the house. Upon arrival, the appellant was found in the bathroom attempting to cut his hair. The handgun that the appellant had used was found buried in the backyard. After questioning, the appellant confessed to the shooting.

I

The appellant contends that the evidence was insufficient to support the jury's verdict. He argues that no reasonable jury could have concluded that the state proved beyond a reasonable doubt that he was guilty of first degree murder.

Where sufficiency of the evidence is challenged, the relevant question for this Court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or crimes beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); T.R.A.P. 13(e). The weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury as the triers of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); Byrge v. State, 575 S.W.2d 292, 295 (Tenn.

¹ The appellant is a member of the "Bloods" street gang. They wear red and black colors to signify membership in the gang. The intended victim is a member of the "Crips," a rival street gang. The "Crips" wear blue to signify membership in their gang.

² Tony Gray and the other passengers in the car were wearing blue.

Crim. App. 1978). A jury conviction, approved by the trial judge, resolves all conflicts in favor of the state. State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978). On appeal, the state is entitled to both the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

The appellant contends that the state failed to prove premeditation and deliberation. Specifically, the appellant avers that there was absolutely no evidence that he acted with a cool purpose.

At the time the appellant committed the offense, first degree murder was defined as "the intentional, premeditated and deliberate killing of another." Tenn. Code Ann. § 39-13-202 (1991 Repl.). A deliberate act was defined as an act performed with a cool purpose. Tenn. Code Ann. § 39-13-201 (b)(1) (1991 Repl.). A premeditated act was defined as an act done after the exercise of reflection and judgment. Tenn. Code Ann. § 39-13-201 (b)(2) (1991 Repl.).

This court takes judicial notice of an interesting and novel issue this case presents. Tenn R. App. P., Rule 13. We are confronted with whether the elements of deliberation and premeditation can be transferred from the intended victim to the unintended victim which is killed.

Transferred intent, in one form or another, has been consistently applied by most jurisdictions. Transferred intent addresses the "bad aim" situation. A shoots at B. A misses B and hits C. C is killed. Transferred intent holds that A is no less culpable for killing C as if had been successful in killing B. Jurisdictions have uniformly refused to reward A for merely being a bad shot. A intended death and death is what he accomplished. A's actions are, therefore, not less culpable simply due to the fact he killed an unintended and innocent bystander.

The need for transferred intent has uniformly arisen when state murder statutes define murder as "the unlawful killing of the victim." Both courts and legal scholars have suggested that the need for transferred intent can be avoided by defining homicide as intending "to cause the death of that person [the victim] or of another person." State v. Fekete, 901 P.2d 708, 714 (N.M. 1995) (citing Paul H. Robinson, Criminal Law defenses § 89(c) (1984) (paraphrasing Ala. Code § 30-2-1(A)).

Tennessee's murder statute defines first degree murder as the "intentional, premeditated and deliberate killing of another." Tenn. Code Ann. § 39-13-202 (1991 Repl.). The Code does not limit the killing to the intended victim or that person. Accordingly, we find that Tenn. Code Ann. § 39-13-202 (1991 Repl.) incorporates the doctrine of transferred intent. The appellant's conviction can be sustained provided he intended, with premeditation and deliberation, to kill his intended victim.

The state presented evidence that the appellant had stated he intended to "blast on" Tony Gray the next time he saw him. Evidence was presented that he made a special trip to a friend's house to get a weapon. The jury could have concluded that he "needed" the weapon to kill Tony Gray. Also, testimony was given stating that the appellant brandished his gang's colors prior to shooting at the passing car. The jury could have inferred that the appellant reflected upon his course of action and wanted to be certain that the occupants of the passing car knew they were being attacked by a rival gang member.

Based upon the evidence adduced at trial, the jury could have concluded that the appellant, after reflection and consideration, planned to kill Tony Gray. Moreover, the jury had ample evidence from which to conclude the killing was committed with a cool purpose. We will not supplant the jury's inferences with those of our own. Accordingly, the appellant has failed to demonstrate that the evidence was insufficient. This Court finds it to be overwhelming. This issue is without merit.

II

The appellant next contends that the state's failure to elect which count to proceed on amounted to a violation of the prohibition against double jeopardy. The appellant was indicted on one count of first degree murder by premeditation and deliberation and one count of felony murder. He argues that these two charges are essentially the same and that, therefore, he was put in double jeopardy. We disagree.

The double jeopardy clauses of the United States and Tennessee Constitution, virtually identical in content, provide protection against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969).

In this case double jeopardy was not offended. The state is not required to elect upon separate charges in the same indictment. State v. Beard, 818 S.W.2d 376, 378 (Tenn. Crim. App. 1991) If the appellant had been convicted and sentenced on both counts of the indictment, his contention would be well placed. However, the appellant was only convicted and sentenced for one count of first degree murder. This issue is without merit.

III

The appellant next contends that his statement to police shortly after the shooting was not freely and voluntarily given and should have been suppressed. He argues that the police made statements to convince him that he would be given leniency if he cooperated. He claims he was so "gripped by the hope of leniency" that he confessed to the shooting.

A trial court's determination of the voluntariness and admissibility of an accused's statement is binding on this Court unless the appellant can show that the evidence preponderates against the trial court's ruling. State v. O'Guinn, 709 S.W.2d 561, 566 (Tenn. 1986); State v. Rickman, 876 S.W.2d 824, 830 (Tenn. 1994). The overriding question addressed by this Court is whether the behavior of law enforcement officials served to overbear the accused's will to resist. State v. Kelly, 603 S.W.2d 726, 728 (Tenn. 1980).

Upon review of the suppression hearing transcript, we conclude that the appellant has failed to meet his burden. His claim rests almost solely on the fact that law enforcement officials told him what potential crimes he could be charged with and the range of punishment attached to each. The appellant's statement cannot be considered coerced simply because he was informed of the potential consequences of his actions. Furthermore, the record reveals that the appellant's father was present during the entire interview. Nothing in the record convinces this Court that the evidence preponderates against the trial court's ruling. This issue is without merit.

IV

The appellant next contends that the trial court erred in denying his motion for individual sequestered voir dire to question prospective jurors about their exposure to pretrial publicity. He claims that there was a significant possibility that potential jurors were exposed to excessively prejudicial material.

The ultimate goal of voir dire is to insure that jurors are competent, unbiased, and impartial. State v. Howell, 868 S.W.2d 238, 247 (Tenn. 1993); State v. Stephenson, 878 S.W.2d 530, 540 (Tenn. 1994). Generally, the control of voir dire rests within the sound discretion of the trial judge. Id.; State v. Jefferson, 529 S.W.2d 674, 682 (Tenn. 1975). However, individual sequestered voir dire is mandated when there is a "significant possibility" that a juror has been

exposed to potentially prejudicial material. State v. Harris, 839 S.W.2d 54, 65 (Tenn. 1992).

The record reveals that the trial judge took the appellant's motion for individual sequestered voir dire under advisement. The judge stated that it would be allowed if it became necessary. He obviously felt that it never did. We agree. The record does not show a "significant possibility" of such exposure in this case. The appellant has failed to show that group voir dire of the prospective jurors prejudiced him in any way. This issue is without merit.

V

The appellant next contends that the state prejudiced the potential jury by explaining that the shooting in this case appeared to be gang related. Also, the appellant contends that the state's explanation of how premeditation applied to the facts of this case was prejudicial. He argues that "these comments planted a seed in the minds of the jurors that must have affected their mental perspective before trial."

Generally, errors committed during the selection, summoning and the empanelling of juries do not affect the validity of a verdict in a criminal case unless prejudice has enured to the accused. Helton v. State, 255 S.W.2d 694, 700 (Tenn. 1953). The appellant has failed to substantiate this claim beyond mere speculation. He has not demonstrated that he was prejudiced by any error that was committed during voir dire. Without more, this Court must presume the jurors followed the trial judge's instructions and correctly applied the law to the evidence adduced at trial. State v. Barton, 626 S.W.2d 296, 298 (Tenn. Crim. App. 1981). This issue is without merit.

VI

The appellant next contends that the trial court erred in admitting a photograph of the victim while she was alive. He alleges that the photograph's probative value is substantially outweighed by its prejudicial effect.

The admissibility of photographs rests within the sound discretion of the trial court. The trial court's decision will not be overturned unless it affirmatively appears that the admission has affected the results of the trial. State v. Melson, 638 S.W.2d 342, 365 (1982); see also United States v. Brady, 595 F.2d 359, 361 (6th Cir. 1979). "The trend of modern authority is to vest more discretion in the trial court in this respect." State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978). Moreover, we cannot substitute our judgment for that of the trial court. State v. Weaver, No. 4 (Tenn. Crim. App. Jan. 3, 1985). To overturn in the absence of an affirmative finding of abuse of discretion and prejudice, we merely supplant the trial judge's judgment with that of our own.

The appellant has not affirmatively demonstrated that admission of the photographic evidence prejudiced the jury verdict. Moreover, the photograph was relevant in establishing the identity of the victim. This issue is without merit.

VII

The appellant next contends that the trial judge erred in accepting a resident pathologist as a qualified expert witness to testify as to the victim's cause of death. He alleges that the doctor should not have been certified as an expert because he received his medical degree in Pakistan, was not board certified, and could only work under supervision of a board certified doctor.

The determination of the qualifications of an expert witness and the relevancy and competency of expert testimony are matters which rest within the sound discretion of the trial court. State v. Fears, 659 S.W.2d 370, 377 (Tenn. Crim. App. 1976); State v. Scott, 735 S.W.2d 825, 828 (Tenn. Crim. App. 1987).

This Court will not interfere with the exercise of this discretion absent clear abuse. Fears, 659 S.W.2d at 377.

Tennessee Rule of Evidence 702 states that an expert may testify if scientific, technical or other specialized knowledge will substantially assist the trier of fact. Furthermore, a witness can acquire this specialized knowledge necessary to qualify as an expert by skill, experience, training, or education.

In this case the trial court did not abuse its discretion in allowing the pathologist to testify as to his findings concerning the victim's cause of death. Notwithstanding the doctor's lack of board certification, he possessed specialized knowledge that could have substantially assisted the trier of fact. If the appellant doubted the doctor's expertise, cross-examination was the appropriate tool for attacking the witness' testimony. This issue is without merit.

VIII

The appellant next contends that the trial court erred in failing to submit two special instructions to the jury on premeditation and diminished capacity. Specially, the appellant avers that the instructions submitted by the trial court failed to adequately explain the law under State v. Brown.³

An accused has a right to request jury instructions. State v. Tyson, 603 S.W.2d 748 (Tenn. Crim. App. 1980). However, jury instructions are sufficient where they adequately state the law. Upon review of the record, we find that the trial judge's instructions were an adequate rendition of the law. The decision to grant or deny the introduction of special instructions lies within the sound

³ The appellant contends that the jury should have been instructed that to commit first degree murder one must kill with a "cool purpose." State v. Brown, 836 S.W.2d 530 (Tenn. 1992).

discretion of the trial judge. We find no abuse of this discretion. This issue is without merit.

IX

In the last issue raised by the appellant, he contends that a mistrial should have been granted due to improper conduct of the prosecutor during closing argument. The conduct complained of includes quoting Biblical scripture and personally “testifying” before the jury during closing arguments. The appellant contends that these comments were highly inflammatory and prejudicial and should have resulted in a mistrial.

Trial judges have wide discretion in controlling the argument and conduct of counsel. State v. Smith, 527 S.W.2d 737, 739 (Tenn. 1975). However, in reviewing a claim alleging prosecutorial misconduct, this Court must determine whether the improper conduct could have affected the verdict to the prejudice of the defendant. Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976). This Court has set out five factors which must be considered in making this determination. Id. at 344. These factors are as follows:

1. the conduct complained of in light of the facts and circumstances of the case;
2. the curative measures undertaken;
3. the intent of the prosecutor in making the improper remarks;
4. the cumulative effect of the improper conduct and any other errors in the record; and
5. the relative strength or weakness of the case. Id.

This Court does not find any error related to this issue that mandates reversal. The prosecutor’s intent was not malicious. The evidence against the appellant was overwhelming. Moreover, the appellant confessed to the crime. We find that any error that was committed was harmless. This issue is without merit.

Upon review of the record, we find no reversible error. The judgment of the trial court is affirmed.

PAUL G. SUMMERS, Judge

CONCUR:

JOHN H. PEAY, Judge

DAVID G. HAYES, Judge