

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE, v. DOLWIN DEON CORMIA,

**Direct Appeal from the Criminal Court for Hamilton County
No. 214134 - 214135 Douglas A. Meyer, Judge**

No. E1999-01504-CCA-R2-CD - Decided April 4, 2000

The defendant was convicted of the 1996 first degree murder of Welton Green, Jr., for which he received a life sentence with the possibility of parole, and of abuse of a corpse, for which he received a concurrent two year sentence. In this Rule 3 appeal, he challenges the sufficiency of the convicting evidence, the use of lay witness opinion evidence, the use of evidence which he says contravenes Tennessee Rule of Evidence 404(b), and the trial court's instructions to the jury on the elements of first degree murder. We affirm the trial court's judgment.

Tenn. R. App. P. 3; Judgment of the Criminal Court is Affirmed

WITT, J., delivered the opinion of the court, in which RILEY, J., and WOODALL, J., joined.

Steven D. Brown (on appeal), Mark A. Little, Chattanooga, Tennessee, for the appellant,
Dolwin Deon Cormia

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OPINION

The defendant, Dolwin Deon Cormia, appeals from his conviction of the first degree murder and abuse of the corpse of Welton Green, Jr. Cormia received his conviction at the conclusion of a jury trial in the Hamilton County Criminal Court. The trial court imposed a sentence

of life with possibility of parole for the murder conviction,¹ and upon the recommendation of the state, the court imposed a concurrent two-year sentence for abuse of a corpse. In this direct appeal, the defendant raises four issues for appellate review:

1. Whether the evidence sufficiently supports the first degree murder conviction.
2. Whether the trial court erred in allowing an eyewitness to testify that in her opinion, the defendant did not shoot the victim in self-defense.
3. Whether the trial court erred in ruling that evidence of the defendant's involvement in the drug trade was admissible.
4. Whether the trial court properly instructed the jury on the elements of first degree murder.

We have heard the oral arguments of the parties, reviewed their briefs and the record, and studied the applicable law. Upon consideration, we find no error requiring reversal. Accordingly, we affirm the judgment of the trial court.

In the light most favorable to the state, the evidence at trial demonstrated that the defendant, Dolwin Deon "Lucky" Cormia, an East Los Angeles native, came to Chattanooga in the Spring of 1996 with Chris "May-May" Cameron and Dereath "Malik" Polydore. Cameron was in the marijuana trade, and upon learning from the defendant that marijuana could be sold much more profitably in Chattanooga than in Los Angeles, he agreed to pay the defendant to accompany him to Chattanooga and to introduce him around town. The three arrived on a Greyhound bus in April 1996. Apparently, the business developed suitably, and the three stayed in Chattanooga for at least three weeks. During this time, the three lived in the apartment home of Jamie Sammons, the defendant's girlfriend. Cameron and the defendant sold marijuana during this time, and the proceeds were split equally among these two men and Polydore.

Meanwhile, on Saturday, April 27, 1996, the victim, Welton Green, Jr., called on his friend Kirby Marshall at the Lady Luck Beauty Salon, which was owned by Marshall and his wife. The victim, who was from California, was driving a large, late model, rented Mercury with California license plates. Marshall and the victim spent time driving around town that afternoon and made plans to go out later that evening.

Later, Marshall and the victim went to a nightclub, The Whole Note, but they were denied admission because of their attire. They purchased alcohol and sat outside in the parking lot

¹The state did not seek a sentence of death or life without parole.

consuming it until after the club closed. That same evening, the defendant, Polydore and Cameron were inside The Whole Note with Sammons and other female companions. The defendant and Sammons got into an argument at the club, and Sammons went home. After the club closed, the defendant and Cameron went to a Waffle House.

When they arrived at the Waffle House, they encountered the victim and Marshall. The victim and the defendant hugged each other, although the defendant told the victim he did not know whether he should hug him or kill him. Cameron had heard the defendant speak of the victim stealing money from him, so he was surprised to see the two hugging. Cameron's pager went off, and the victim offered to let Cameron use a cellular telephone in his car. While the victim was retrieving the telephone, Marshall told the defendant that the victim had a half kilo of cocaine and some money with him in Chattanooga. Marshall also revealed the location of the victim's hotel room.

A group of young women approached, and a plan was soon devised for the victim, the defendant, and two of the women to go to the victim's hotel room for the remainder of the night. Cameron, who had by now returned the call to his pager, decided to return to Sammons' apartment.

The next morning, the defendant arrived at Sammons' apartment and made some telephone calls. Cameron was still in bed, but he overheard the defendant saying, "The guy is out here," or "The guy is here." After Cameron arose, the defendant inquired whether he would like "to go on a lick." In other words, the defendant was inviting Cameron to participate in a robbery. Because he was tired and had a hangover, Cameron declined. However, Varian LaShon "Skinny" Ford arrived to pick up the defendant.

According to Ford, however, he met the defendant at the Big Orange Car Wash. The defendant made a telephone call, which Ford understood was to the victim. Thereafter, the victim showed up in his rented Mercury, and Ford and the defendant got into the car with him. Because Ford was familiar with Chattanooga, he drove. The victim was in the front passenger seat and the defendant was in the back seat. The three were cruising and headed in the direction of Hamilton Place Mall.

Cameron testified that the pretext which was used to get the victim to go on this car ride was that Ford, the defendant and another person were going to purchase some cocaine from the victim. In actuality, the defendant's plan was to rob the victim.

While Ford, the defendant and the victim were stopped at a traffic signal at the intersection of Lee Highway and Shallowford Road, a woman in a car behind the Mercury observed the driver (Ford) and the back-seat passenger (the defendant) jump on the person seated in the front

passenger seat (the victim). At first, she thought they were horsing around, but then she saw that two or possibly all three of the men had drawn firearms. The eyewitness saw the man in the back seat “kind of angling the gun down over the fellow in the passenger seat.” She saw the rear-seat passenger’s hand jerk back, and she presumed the gun fired. Then, she saw a gun fly out the window. The back-seat passenger casually got out of the car, retrieved the gun, and returned to the car. The car quickly left the scene. The driver and the back-seat passenger pushed the front-seat passenger down onto the floorboard. The eyewitness testified that in her opinion, the back-seat passenger was not acting in self-defense when he shot the victim; rather, he and the driver were attacking the victim.

There was evidence that when the defendant first attempted to fire his weapon, it did not discharge, so he attempted to fire it a second time, which caused the victim’s fatal injury. Ford, the driver of the car, testified that after the defendant shot the victim, the defendant asked the victim why he made him do that. The defendant also told the victim that he owed him money and should have honored the debt. The defendant and Ford returned to the Big Orange Car Wash, where they parted company.

Ford purchased marijuana and then went to his girlfriend’s apartment in the Mansion Hills complex. Later that evening he met the defendant at Sammons’ apartment. The defendant was driving the victim’s rental car. The victim’s body was not in the vehicle. Ford saw a floor mat on the front passenger seat covering the victim’s blood. Ford wiped his fingerprints from the car. The defendant wanted to go to the victim’s motel room, so Ford, Cameron and the defendant left in Ford’s car.

The defendant had a key which allowed the three access to the victim’s motel room. Inside, they searched for money but were unable to locate any. They took two or three pieces of luggage from the room and returned to Mansion Hills. That evening, the defendant told Cameron in Ford’s presence where he had disposed of the victim’s body.

The next day, Marshall visited the defendant at Sammons’ apartment. Marshall saw the victim’s luggage in a bedroom.

Sometime in late April, the victim’s rental car was discovered abandoned. A Chattanooga police officer had it towed to a private storage lot, where blood was discovered on the front passenger seat.

The defendant left Chattanooga and was for a time in Memphis. Eventually, he returned to California.

For months, investigation progressed, but the police department was unable to locate the victim's body. In January 1997, the police received information from Ford which led them to discover the victim's skeletonized remains in a wooded area. They also received information from Ford and the defendant's other associates which led to the charges against the defendant.

The defendant did not present evidence at trial; however, through cross-examination of witnesses he presented his theory that he shot the victim in self-defense because the victim pulled a gun on him while they were tussling. The jury rejected this theory and convicted the defendant of first degree murder and abuse of a corpse.

I

The defendant first challenges the sufficiency of the convicting evidence for the crime of first degree murder. Specifically, the defendant contends that the state failed to establish the element of premeditation essential for a conviction of this crime.

When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, *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, 324, 99 S. Ct. 2781, 2791-92 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn. R. App. P. 13(e). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this court should not reweigh or re-evaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from the evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956); Farmer v. State, 574 S.W.2d 49, 51 (Tenn. Crim. App. 1978). On the contrary, this court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. Cabbage, 571 S.W.2d at 835.

As applicable to the case at bar, first degree murder is "a premeditated and intentional killing of another" Tenn. Code Ann. § 39-13-202(a)(1) (1997). "[P]remeditation' is an act done after the exercise of reflection and judgment." Tenn. Code Ann. § 39-13-202(d) (1997); see State v. Brown, 836 S.W.2d 530, 541 (Tenn. 1992) (premeditation is the process "of thinking about

the proposed killing before engaging in the homicidal conduct”). “It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time.” Tenn. Code Ann. § 39-13-202(d) (1997).

In Tennessee, a homicide, once established, is presumed to be second degree murder. See, e.g., State v. West, 844 S.W.2d 144, 147 (Tenn. 1997); Brown, 836 S.W.2d at 543. The state bears the burden of establishing premeditation in order to elevate the crime to first degree murder. See, e.g., West, 844 S.W.2d at 147; Brown, 836 S.W.2d at 543. Premeditation may be inferred from the circumstances surrounding the crime. See, e.g., State v. Pike, 978 S.W.2d 904, 914 (Tenn. 1998), cert. denied, — U.S. —, 119 S. Ct. 2025 (1999). Among the facts which may indicate the existence of premeditation are

- (1) facts about how and what the 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 the killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design.

State v. Gentry, 881 S.W.2d 1, 4-5 (Tenn. Crim. App. 1993) (citation omitted).

In the present case, there was evidence that shortly after parting company with the victim, whom he had unexpectedly encountered, the defendant made a telephone call in which he was overheard saying, “The guy is out here,” or “The guy is here.” Immediately thereafter, the defendant asked Cameron whether he wanted “to go on a lick.” The defendant phoned the victim and lured him to the car wash. There was evidence that the defendant procured a weapon from a friend earlier in the day of the killing. All of these facts are circumstantial evidence of planning activity relevant to premeditation.

The state presented evidence that the victim owed money to the defendant. When the defendant first saw the victim, he said he did not know whether to hug him or kill him. The defendant knew, after being told by Marshall, that the victim had money and a large amount of cocaine with him in Chattanooga. After shooting the victim, the defendant made statements which referred to the victim’s failure to pay the defendant money that was owed him. These facts are indicative of the defendant’s motive of killing the victim to avenge the victim’s failure to repay a debt.

Finally, the nature of the killing is indicative of a preconceived design to kill. As noted above, the defendant planned an encounter with the victim and lured him to a meeting place. The defendant and Ford suddenly, simultaneously attacked the victim. When the defendant unsuccessfully attempted to fire his gun, he fired a second time and hit the victim. He then removed evidence by casually retrieving the gun that had flown outside the car onto the median.

When viewed in the light most favorable to the state, the facts sufficiently support a finding of premeditation and ultimately, the defendant's guilt of first degree murder.

In so holding, we have rejected the defendant's argument that in view of the evidence of provocation, that is, the victim's and the defendant's "mutual combat," this homicide is more properly characterized as voluntary manslaughter. To so find would require us to discard the jury's resolution of questions of witness credibility, weight and value of the evidence, and to substitute our own inferences from the evidence. The law requires otherwise. See Cabbage, 571 S.W.2d at 835; Liakas, 199 Tenn. at 305, 286 S.W.2d at 859; Farmer, 574 S.W.2d at 51.

II

The defendant's second issue is whether the trial court erred in allowing an independent eyewitness to testify to her opinion that the defendant did not shoot the victim in self-defense. The defendant concedes that lay opinions are not *per se* inadmissible; however, he argues that the jury could have drawn its own conclusion from the evidence without the lay witness's testimony.

The eyewitness, who was in traffic behind the victim's rental car during the incident that led to the victim's death, testified in great detail about her observations. She observed the driver and the back-seat passenger jump on the front-seat passenger "kind of all at once" and out of nowhere. At first, she thought they were "horsing around," but then she saw two or three guns and the defendant angling his gun down over the victim. She saw what she presumed was a gun being fired, a gun flying out the window, and the back-seat passenger "casually" getting out of the car and retrieving the gun. After this testimony, further questioning by the state was as follows:

Q. Did you witness enough of that incident to be able to say whether or not this was fairly self defense?

...

[Defense objection - ultimate issue]

Q. What I'm getting at is, from what I understand, the guy in the front seat was the

recipient of all this action, is that correct?

A. Yes, sir, in the passenger front.

Q. Okay. Did you form an opinion, based on what you saw, as to whether or not the guy in the back seat, who is the one you say fired the gun, was firing that gun in self defense?

A. No, I don't think they were firing it in self defense.

Q. That's not your –

A. They were attacking him, from what I saw.

Lay witnesses may give testimony in the form of an opinion where the testimony is “(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue.” Tenn. R. Evid. 701(a). The testimony is not objectionable merely because it embraces an ultimate issue before the jury. Tenn. R. Evid. 704. However, the admission of lay opinion testimony is limited to those situations where the jury could not readily draw its own conclusions on the ultimate issue, without the aid of the witness’s opinion testimony. Blackburn v. Murphy, 737 S.W.2d 529, 533 (Tenn. 1987). Put another way, the lay witness may express an opinion to describe her observations if that is the only way in which she can effectively communicate her observations to the jury. Brown, 836 S.W.2d at 550. When the admission or exclusion of evidence is challenged on appeal, it is reviewable only for abuse of discretion. See, e.g., State v. Gray, 960 S.W.2d 598, 606 (Tenn. Crim. App. 1997).

In order to evaluate the propriety of this evidence, we have considered the context in which this evidence came before the jury. In particular, immediately prior to this independent eyewitness’s testimony, “Skinny” Ford testified that the victim and the defendant were scuffling back and forth when the victim reached for a gun concealed in his pants. Ford heard a noise, and then he saw the gun going out the window. The next thing he knew, he heard a “pow,” and the victim slumped down in his seat. When the defense cross-examined Ford, the following exchange occurred:

Q. Mr. Ford, you believe the only reason that Lucky [the defendant] shot Welton [the victim] is because Welton went for his gun, is that correct?

A. Yes, sir. That's what, from what I saw, yes, sir.

...

Q. The substance of [what you told Detective Bowman] was, Lucky shot Welton because Welton was going for his gun?

A. Yes.

Thus, when the independent eyewitness took the stand, the jury already had before it Ford's opinion, based upon his eyewitness observations, that the defendant was defending himself when he shot the victim. Significantly, Ford's opinion was elicited by the defense. Thus, although the testimony of the independent eyewitness was detailed in its account of her observations of the altercation in the car in front of her, the nature of the attack was something best and only effectively communicated in the form of opinion testimony that the defendant was not acting in self-defense. This is particularly so in light of Ford's previous cross-examination testimony that the defendant was defending himself.

Further, the context in which the phrase "self-defense" was used in the questioning of the independent eyewitness is not necessarily coextensive with the legal definition of "self-defense." Tennessee law provides that the threat or use of force against another must be justified, immediately necessary and founded upon a reasonable belief of imminent death or serious bodily injury. See Tenn. Code Ann. § 39-11-611(a) (1997) (defining "self-defense"). The opinion testimony of the independent eyewitness concerned whether the defendant was an aggressor in the situation or whether he was reacting defensively, rather than whether his actions met all the elements of a complete defense to the prosecution. At the close of the proof, the jury was properly instructed on the legal concept of self-defense. As such, the opinion rendered by the witness may fairly be characterized as not embracing the so-called "ultimate issue." Cf. State v. Valentine, 911 S.W.2d 328, 333 (Tenn. 1995) (defendant's admission of "manufacturing" held not admission of offense of manufacturing controlled substance because defendant did not admit to legal definition of that term); State v. Timothy R. Bowles, No. 01C01-9711-CR-00547, slip op. at 11-12 (Tenn. Crim. App., Nashville, Apr. 20, 1999) (in sexual assault case, victim satisfactorily explained her prior statement that defendant did not "penetrate" her where she did not at the time of prior statement understand the legal definition of "sexual penetration"), perm. app. granted (Tenn. 2000); State v. Gerald Robert Stevens, No. 02C01-9607-CC-00220, slip op. at 8 (Tenn. Crim. App., Jackson, Mar. 19, 1997) (in drug case, trial court did not abuse its discretion in allowing state's witnesses to use term "precursor" in their testimony where their definition of the term was not the same as the legal definition of the term "immediate precursor" provided for in the drug statutes), aff'd on other grounds, 989 S.W.2d 290 (Tenn. 1999). In any event, we see no reasonable likelihood that the witness's testimony misled the trier of fact.

In sum, we find no abuse of discretion in the admission of this testimony.

III

Next, the defendant challenges the trial court's ruling that evidence of the defendant's involvement in the drug trade was admissible. At trial, the state's theory was that the victim owed the defendant a debt from the drug trade, and this was the motive for the murder. The defendant filed a motion in limine pursuant to Tennessee Rule of Evidence 404(b) seeking exclusion of his prior bad acts. The court held a jury-out hearing at which state's witness Chris Cameron testified that the defendant was involved in the marijuana trade, but he had no knowledge of the victim being in the marijuana trade. The trial court ruled that this evidence was admissible.

As a general proposition, evidence of a defendant's prior crimes, wrongs or acts is not admissible to prove that he committed the crime in question. Tenn. R. Evid. 404. The rationale underlying the general rule is that admission of such evidence carries with it the inherent risk of the jury convicting the defendant of a crime based upon his bad character or propensity to commit a crime, rather than the conviction resting upon the strength of the evidence. State v. Rickman, 876 S.W.2d 824, 828 (Tenn. 1994). The risk is greater when the defendant's prior bad acts are similar to the crime for which the defendant is on trial. Id.; see also State v. McCary, 922 S.W.2d 511, 514 (Tenn. 1996). Nevertheless, evidence of a defendant's prior crimes, wrongs or acts may be admissible where it is probative of material issues *other than* conduct conforming with a character trait. Tenn. R. Evid. 404(b). In Tennessee, evidence of a criminal defendant's character may become admissible when it logically tends to prove material issues which fall into one of three categories: (1) the use of "motive and common scheme or plan" to establish identity, (2) to establish the defendant's intent in committing the offense on trial, and (3) to "rebut a claim of mistake or accident if asserted as a defense." McCary, 922 S.W.2d at 514. In order for such evidence to be admitted, the rule specifies three prerequisites:

- (1) The court upon request must hold a hearing outside the jury's presence;
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and,
- (3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b). A fourth prerequisite to admission is that the court find by clear and convincing evidence that the defendant committed the other crime. Tenn. R. Evid. 404, Advisory Comm'n Comment; State v. DuBose, 953 S.W.2d 649, 654 (Tenn. 1997); State v. Parton, 694 S.W.2d 299, 303 (Tenn. 1985).

In reviewing a trial court's decision to admit or exclude evidence, an appellate court

may disturb the lower court's ruling only if there has been an abuse of discretion. DuBose, 953 S.W.2d at 652; State v. Baker, 785 S.W.2d 132, 134 (Tenn. Crim. App. 1980). Where the trial court has been called to pass upon the admissibility of evidence of other crimes, wrongs or acts under Rule 404(b), its determination is entitled to deference when it has substantially complied with the procedural requisites of Rule 404(b). See DuBose, 953 S.W.2d at 652. In the present case, the trial court's findings are not memorialized on the record; however, there was no defense request that the court state its reasons for admitting the evidence. It appears that the trial court substantially complied with the rule by conducting a hearing, stating the material issue at stake, and acknowledging the balancing test between probative value and the danger of unfair prejudice. Thus, we must lay any deficiency in the record at the feet of the defendant in failing to request that the court memorialize its findings, see Tenn. R. Evid. 404(b)(2), and we must defer to the lower court unless it has abused its discretion. See DuBose, 953 S.W.2d at 652.

Prior to Cameron's testimony, there was evidence that the victim had previously stolen money from the defendant. The defendant knew prior to the homicide that the victim had cocaine and cash with him in Chattanooga, and the defendant made statements about the debt to the slain victim immediately after shooting him. After the killing, the defendant and his confederates went to the victim's hotel room, where they searched for money and stole the victim's luggage.

With this evidence already before the jury, the state proffered Cameron's testimony about the defendant being in the marijuana trade as circumstantial proof of its theory that the defendant killed the victim over a drug business debt. Notwithstanding the evidence that the victim had a large quantity of cocaine with him in Chattanooga, the defense objected that Cameron's testimony was too prejudicial for admission and was lacking probative value because Cameron was not aware of the victim being involved in the *marijuana* trade. The court allowed the evidence, and Cameron testified about his own and the defendant's coming to Chattanooga to sell marijuana through the defendant's local contacts. Cameron testified about his knowledge of the debt the victim owed the defendant, although he never explicitly tied it to a drug transaction. He also testified that the defendant and Ford arranged a pretextual drug transaction in order to set up the crime against the victim. Overall, Cameron established that both the defendant and the victim were drug traffickers and that the defendant bore animosity toward the victim over a debt.

Having considered the evidence, we see no abuse of discretion in its admission. This evidence was highly probative of the state's theory regarding the defendant's motive and intent for committing first degree murder. "The motive and intent of the defendant in the commission of a murder are almost always critical issues." State v. Gentry, 881 S.W.2d 1, 7 (Tenn. Crim. App. 1993).

Further, upon a balancing review, we see no realistic danger of unfair prejudice in the

admission of this evidence. If the jury accepted that the defendant was involved in illegal drug transactions, it does not necessarily follow that he is more likely to commit murder. Thus, the danger of the evidence being misused as propensity evidence is low.

Finally, the evidence surpasses the clear and convincing standard of proof. Much of Cameron's testimony in question was corroborated by the testimony of other witnesses, particularly Ford. While these witnesses were certainly subject to strong scrutiny as regards overall credibility, there is no indication that this particular portion of Cameron's testimony is untrue. Further, it is significant that Cameron inculpated himself along with the defendant in his testimony about their involvement in the drug trade. This is an additional indicator of the reliability of this evidence.

In sum, we hold that the trial court did not abuse its discretion in admitting the evidence of the defendant's involvement in the drug trade.

IV

The final issue is whether the trial court properly instructed the jury on the elements of first degree murder. The indictment in this case charged the defendant with the premeditated, deliberate and intentional murder of the victim. However, at the time of the crime, the element of deliberation had been deleted from the first degree murder statute. See Tenn. Code Ann. § 39-13-202(a)(1) (1997).

The defendant's position on this issue is somewhat ambiguous. At trial, he argued that the court's instruction on first degree murder should conform to the indictment; that is, it should include the element of deliberation. In the written motion for new trial, one of the issues is, "The Court failed to give Defendant's Requested Instruction on First Degree Murder." At the hearing on the motion for new trial, however, the defense argued for the first time that the court should have given a curative instruction to the jury that it should ignore the element of deliberation in the indictment. Curiously, at the hearing on the motion for new trial the defendant abandoned his argument that the jury should have been instructed that it must find the element of deliberation in order to convict the defendant of first degree murder. On appeal, it is not apparent which position the defendant is taking. In pertinent part, the defendant's brief alleges that the indictment was read to the jury in its entirety, yet the instructions given omitted the element of deliberation without any explanation. Thus, in effect, the instruction was a constructive amendment to the indictment which violated the defendant's constitutional rights. Because it is not apparent which position the defendant is taking on appeal, we address both the argument made at trial and the argument made at the hearing on the motion for new trial.

With respect to the defendant's original claim that the jury should have been

instructed that it must find deliberation in order to convict the defendant of first degree murder, we are guided by the decision of our supreme court in State v. Irick, 762 S.W.2d 121, 128 (Tenn. 1988). In Irick, the defendant was charged with felony murder, and the indictment alleged additional, unnecessary elements beyond those required to constitute the crime. Id. The defendant argued that because the extra elements were alleged in the indictment, the trial court erred in failing to include them in its definition of the offense in the jury instructions, and the instruction given amounted to an impermissible amendment of the indictment. Id. The supreme court disagreed, holding that the legislature has the privilege to define criminal offenses, and neither the grand jury's approval of an indictment nor the draftsmanship of the attorney general in drawing the indictment serves to redefine the elements of an offense. Id. As a result, the defendant's argument that he was entitled to an instruction on the extra element of deliberation must fail.

Thus, we move on to the defendant's claim that the jury should have been given a curative instruction which directed it to overlook the element of deliberation alleged in the indictment. We find it compelling that this court has said that a trial court commits no error by refusing a special charge if the instructions given impart a correct, full and fair statement of the applicable law. State v. Zirkle, 910 S.W.2d 874, 892 (Tenn. Crim. App. 1995). The instruction given on first degree murder was a correct, full and fair statement of the applicable law. We fail to see how the failure to give the defendant's proposed curative instruction was error. Even if the jury incorrectly believed that it must find the element of deliberation in order to convict the defendant of first degree murder, such misapprehension would work to the defendant's benefit in that it would require the finding of an additional element beyond those required by statute before a conviction could be returned. Thus, even if we assume for the sake of argument that the trial court should have given the instruction, we fail to see how its omission prejudiced the defendant. Thus, there is no merit to this allegation.

Because we have discovered no error of law requiring reversal, we affirm the judgment of the trial court.