

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON  
MAY 1995 SESSION

**FILED**  
September 20, 1995  
Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE, )  
 )  
 Appellee, )  
 )  
 VS. )  
 )  
 ALFONZO E. ANDERSON and )  
 BARRY WOODLEY, )  
 )  
 Appellants. )

C.C.A. NO. 02C01-9410-CR-00243

SHELBY COUNTY

HON. ARTHUR T. BENNETT ,  
JUDGE

(Felony Murder, Aggravated Robbery)

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OPINION FILED: \_\_\_\_\_

**AFFIRMED**

**JOHN H. PEAY,**  
Judge

## OPINION

On May 11, 1993, the defendants Anderson and Woodley were indicted on three counts of aggravated robbery against victims named Crump, Dabney, and White. In addition, both defendants were charged with the felony murder of the victim, Sam Ward. Because all these charges arose out of the same criminal episode, the defendants' indictments were consolidated for a single trial. On November 15, 1993, the defendants were convicted by a jury on all counts. Each defendant received a life sentence for the felony murder conviction and twelve year sentences for each of the three aggravated robbery convictions. Two of the aggravated robbery sentences were ordered to run concurrently with the felony murder conviction, while the third aggravated robbery conviction was ordered to run consecutively.

In this appeal as of right, the defendants bring the following combined issues claiming that:

1. the evidence in the record is insufficient to support the jury's finding of guilt as to any of the offenses charged in the indictments;
2. the trial court erred in denying the defendants' request for an instruction that reckless homicide is a lesser included offense of felony murder;
3. the trial court erred by allowing into evidence color photographs of wounds on the victim's body; and
4. the trial court abused its discretion in ordering that each defendant serve a twelve year aggravated robbery sentence consecutively to his life sentence for felony murder.

In addition, the defendant Anderson brings nine individual issues<sup>1</sup> contending that the trial court:

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<sup>1</sup>Defendant Anderson raised five additional issues in his brief that he simultaneously waived.

1. erred in excusing a potential juror for cause during voir dire after the juror said that he could not find guilt where the potential penalty was a life sentence;
2. erred in stating to the jury during voir dire that it would impose the sentence of life imprisonment if guilt was found;
3. erred in directing defense counsel to hurry in that it expressed the trial court's displeasure with defense counsel in front of the jury;
4. erred in admitting into evidence a photograph depicting the victim when he was alive;
5. erred in allowing testimony of a witness at a joint trial that referred to statements of a defendant made during the incident where the witness could not state to which defendant the statement was attributable;
6. erred when it allowed a witness to testify as to what someone had said during the "craps" game;
7. erred in allowing the testimony of a witness that codefendant Woodley said, "this is a robbery;"
8. erred in allowing the prosecution to use the Bible in closing argument; and
9. erred in allowing the prosecution to make an inflammatory statement that the deceased "wanted to be there."

Following our review, we affirm the convictions and sentences.

The proof offered by the State showed that on the afternoon of May 19, 1992, the defendants and two other individuals joined a group of people, including Sam Ward, Curtis Crump, Eddie Dabney, and Michael White, in a "craps" game at a home in Memphis. The defendant Anderson participated in the game and his companions watched him quickly lose one hundred dollars. After Anderson asked for and received additional money from the defendant Woodley, Woodley drew a gun from a bag and announced, "this is a robbery." Anderson also drew a gun and pointed it in the direction of those who had gathered at the game.

From all accounts, events then began to unfold quickly. Several witnesses

testified that after Anderson had drawn his gun, he pulled a necklace from around White's neck. At approximately the same time, Woodley took jewelry and a watch from Crump at gunpoint. Those who had gathered to watch or play in the games fled in all directions amid a flurry of gunfire from Woodley and Anderson.

Unlike the other individuals who had gathered for the neighborhood "craps" game, Ward had difficulty fleeing from the scene because of a bad leg. One nearby resident testified that someone fitting Anderson's description had shot the limping Ward in the back of the head as Ward attempted to flee. This resident further testified that this man had shot Ward again in the buttocks as he lay prone on the ground. Another neighbor testified that just moments before Ward's death, she had seen Anderson chasing Ward and brandishing his gun while he demanded that Ward drop his money.

Shortly after Ward was shot, the defendants and their two companions fled the scene in a rented car. Within a matter of minutes, a high speed chase ensued by police who had come to the area in response to an emergency call. After their vehicle collided with a telephone pole, the four individuals abandoned it and attempted to elude police on foot. Moments later, police arrested the defendant Anderson who was in possession of a gun with ammunition matching a bullet casing found at the scene of the crime. Police then apprehended the defendant Woodley in the basement of a nearby house. Although Woodley was not in possession of a gun at the time of his arrest, police subsequently found a gun matching the one he had allegedly used during the robbery in a yard through which Woodley had fled. Jewelry later identified as that taken from White by Anderson was found in the abandoned car as well as a hat and a pair of sunglasses that matched clothing worn by Anderson at the "craps" game.

In their first joint issue, the defendants Woodley and Anderson contend that the evidence is insufficient to convict them of felony-murder or aggravated robbery. We

disagree. A defendant challenging the sufficiency of the proof has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "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, 319, (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Aggravated robbery is defined as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear (1) [a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon; or (2) [w]here the victim suffers serious bodily injury." T.C.A. §§ 39-13-401 and -402. Felony-murder is "[a] reckless killing of another committed in the perpetration of, or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping or aircraft piracy." T.C.A. § 39-13-202(b). When more than one person is shown to have the intent to commit the underlying felony and death results during the perpetration of the felony or attempted perpetration, both persons are responsible for the death "regardless of who actually committed the murder and whether the killing was specifically contemplated by

the other." State v. Brown, 756 S.W.2d 700, 704 (Tenn. Crim. App. 1988) (citations omitted).

In the instant case, the record illustrates that during the "craps" game, the defendants took cash or personal property from three people while brandishing dangerous weapons. Several witnesses testified that the defendant Woodley had stated "this is a robbery" as he drew his weapon. Dabney testified that he had left more than one hundred (\$100) dollars on the table when he fled. In addition, White testified that the defendant Anderson had taken a necklace from him which was later found in the car abandoned by the defendants as they fled from police. Crump similarly testified that Woodley had taken jewelry and a watch from him. Finally, a nearby resident testified that Anderson had told Sam Ward to "drop it" as Ward fled from the scene and that Anderson had told Woodley to wait for him as he picked up money which lay next to Ward's body. We find that as to the aggravated robbery convictions, the jury had sufficient evidence from which to conclude that both defendants were guilty beyond a reasonable doubt.

Similarly, as to the felony murder convictions and the testimony offered at trial, a reasonable juror could have found that Ward was killed while the defendants were in the process of committing aggravated robbery, a felony which falls within the purview of T.C.A. §39-13-202(b). While the evidence indicates that the defendant Anderson was the trigger man, under Brown, both defendants are guilty of felony-murder regardless of who actually shot Ward or whether the killing was specifically contemplated by the other person.

We also recognize that there were some minor inconsistencies in the testimony at trial.<sup>2</sup> However, questions concerning the credibility of witnesses, the weight

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<sup>2</sup>For example, one witness testified that defendant Woodley and not defendant Anderson had participated in the "craps" game.

and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. Moreover, a guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). We will not attempt to re-evaluate the witnesses' credibility on appeal. The evidence contained in the record and the reasonable inferences which may be drawn therefrom are sufficient to support the jury's finding that both defendants are guilty of the offenses charged. The defendants have failed to carry their burden that the evidence was insufficient; therefore, these issues have no merit.

In their second issue, the defendants contend that the trial court erred in denying their request for a jury instruction that reckless homicide is a lesser included offense of felony-murder. While it is true that reckless homicide is a lesser included offense of felony murder,<sup>3</sup> the defendants fail to recognize that reckless homicide did not exist until May 12, 1993. T.C.A. § 39-13-215 (Supp. 1993). Because the events surrounding Ward's death occurred almost a full year before the statute's effective date, the trial judge did not err in failing to charge reckless homicide as a lesser included offense of felony-murder. Accordingly, the defendants' second issue is without merit.

In their third issue the defendants maintain that the trial court erred in admitting into evidence color photographs of wounds on the victim's body. They argue that such photographs were irrelevant and served only to inflame the passions of the jury. To be admissible, a photograph must be relevant to some issue at trial, and its probative value must outweigh undue prejudicial effect. State v. Banks, 564 S.W.2d 947, 951 (Tenn. 1978). The discretion of a trial judge in allowing the admission of a photograph

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<sup>3</sup>In State v. Gregory Alan Gilliam, No. 03C01-9311-CR-00367, Hamilton County (Tenn. Crim. App. filed March 14, 1995, at Knoxville) this Court held that reckless homicide is one of only two lesser included offenses of felony-murder.

into evidence will not be overturned except upon a clear showing of an abuse of discretion. Cagle v. State, 507 S.W.2d 121, 132 (Tenn. Crim. App. 1973).

In the present case, the State introduced photographs of the deceased victim which illustrated the locations of the bullet wounds. Upon review, we do not find that the photographs were inflammatory but were relevant to show the cause of the victim's death and the manner in which the victim was killed. We conclude that the trial judge did not abuse his discretion in admitting these photographs. This issue is without merit.

In their fourth common issue the defendants contend that the trial court abused its discretion in ordering one of their twelve year aggravated robbery sentences to run consecutively to both their concurrent twelve year aggravated robbery sentences and their life sentences for felony-murder. They argue that the life sentence for the felony-murder charge implicitly considers the seriousness of the aggravated robbery count.

When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, is conditioned upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

\_\_\_\_\_ A portion of the Sentencing Reform Act of 1989, codified at T.C.A. § 40-35-115, established that where there are multiple convictions the trial judge must consider a number of factors in deciding whether to order sentences to run consecutively



or concurrently. Under this section, the trial judge may order sentences to run consecutively if he or she finds, by a preponderance of the evidence, one or more of the following seven (7) conditions is met:

(1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood; (2) The defendant is an offender whose record of criminal activity is extensive; (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences; (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high; (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims; (6) The defendant is sentenced for an offense committed while on probation; or (7) The defendant is sentenced for criminal contempt.

T.C.A. § 40-35-115(b) (emphasis added).

In the instant case, the trial court ordered each defendant to serve one twelve year sentence for aggravated robbery consecutively with his life sentence for felony-murder. It is clear from the record that the court did so only after specifically finding that each defendant was a "dangerous offender" who had evinced "little or no regard for human life, and [had] no hesitation about committing a crime in which the risk to human life is high" in accordance with the sentencing statute. T.C.A.

§ 40-35-115(b)(4). Moreover, neither defendant has carried the burden of showing that the trial court erred in finding that he was a "dangerous offender." Nothing in the record refutes the State's proof that the defendants fired many shots, often indiscriminately, at different individuals in the "craps" game. Such conduct alone suggests that the defendants are both "dangerous offenders" who have little regard for human life. However, both men also have extensive juvenile records including arrests for several

violent offenses. Based on these facts, the trial court was justified in ordering each defendant to serve one of the aggravated robbery sentences consecutively to the felony-murder sentence. This issue is without merit.

In addition to the four common issues, the defendant Anderson raises nine issues independently. In his first issue, Anderson contends that in dismissing a juror for cause during voir dire, the trial court violated his right to a fair and impartial trial as guaranteed by Article I, Section 9 of the Tennessee Constitution and the Sixth Amendment to the United States Constitution.

A juror may be dismissed for cause if he or she holds any views which "would prevent or substantially impair the performance of . . . [his or her] duties as [a] juror . . . in accordance with . . . [his or her] instructions and . . . [his or her] oaths." State v. Harris, 839 S.W.2d 54, 64 (Tenn. 1992). The trial court's finding with respect to a juror's capacity to fulfill his obligations as a juror are "accorded a presumption of correctness inasmuch as such findings involve a determination of demeanor and credibility" and the burden is on the defendant to "establish by convincing evidence that the court's determination was erroneous." Harris, 839 S.W.2d at 64.

In the instant case, the trial court dismissed potential juror Bates for cause after Bates stated during voir dire that he could not return a verdict of guilty where the sentence under Tennessee law would be life imprisonment.<sup>4</sup> Clearly, a refusal to convict because the law would require a life sentence conflicts with the fundamental duty of a juror to decide guilt and innocence based upon the proof presented at trial. We find that because of his views concerning life imprisonment, Bates would have been unable to return a verdict of guilty even if supported by the record. Moreover, defendant Anderson

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<sup>4</sup>T.C.A. § 39-13-202(b) provides: "A person convicted of first degree murder shall be punished by death or by imprisonment for life." Because the prosecution did not ask for the death penalty in this case, the remaining punishment was life imprisonment.

has failed to show that the court's dismissal of juror Bates was erroneous or that he was prejudiced in any way. Accordingly, the defendant Anderson's first issue is without merit.

In his second issue, the defendant Anderson argues that the trial court committed prejudicial error in advising the jury during voir dire that it must impose a life sentence if it found Anderson guilty of felony-murder. In essence, he contends that the court incorrectly advised the jury that it, and not the court, would impose a life sentence if the jury returned a conviction and that such a misstatement was reversible error.

It is well established that in a first-degree murder case where the prosecution seeks the death penalty and the defendant is found guilty, the jury, and not the court, fixes the sentence in a separate sentencing hearing. T.C.A. § 39-13-204(a). Where, however, the state does not seek the death penalty, it is the court and not the jury that ultimately imposes the sentence. Without question, the trial court here misstated the law when it advised the jury that it was to impose a life sentence if it found defendant Anderson guilty of first degree felony-murder. However, we do not find that the error was fatal to the prosecution's case. Instead, we find that because the trial court's misstatement was made during voir dire and due to the overwhelming evidence of Anderson's guilt, any error was harmless beyond a reasonable doubt. T.R.A.P. 36(b); Tenn. R. Crim. P. 52(a). Accordingly, his second issue is without merit.

In his third issue Anderson argues that the trial judge erred in directing defense counsel during voir dire to "speed it up." Anderson maintains that the judge's comment was prejudicial in that it indicated to the jury that the judge was "displeased with him." Initially, we note that this issue is technically waived because the defendant Anderson failed to make appropriate references to the record and without such references, the State is denied an opportunity to respond to the defendant's contentions. Tenn. Ct. of Crim. App. R. 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim.

App. 1988); see also T.R.A.P. 27(a)(7) and (g). Nevertheless, we will briefly address the issue on its merits.

While it is the duty of every trial judge to conduct himself with impartiality and maintain the appearance of impartiality, he must also insure that the proceedings before him move along in an orderly and timely fashion. Hamilton v. State, 555 S.W.2d 724, 728 (Tenn. Crim. App. 1977). The trial judge has a great deal of discretion in balancing these often competing goals of expeditiousness and impartiality. State v. Evans, 838 S.W.2d 185, 195 (Tenn. 1992). Our review of the record indicates that the trial was conducted in a fair and impartial manner. The trial judge's single remark during voir dire to the effect that defense counsel should "speed it up" was not prejudicial to defendant Anderson and was reasonable in light of the judge's duty to insure that the proceedings before him move along in a systematic fashion. Accordingly, Anderson's third issue is without merit.

In his fourth issue Anderson contends that the trial court erred in admitting into evidence a photograph depicting the victim when he was alive. As stated above, to be admissible, a photograph must be relevant to some issue at trial, and its probative value must outweigh undue prejudicial effect. State v. Banks, 564 S.W.2d 947, 951 (Tenn. 1978). Further, the discretion of a trial judge in admitting a photograph will not be overturned except upon a clear showing of an abuse of discretion. Cagle v. State, 507 S.W.2d 121, 132 (Tenn. Crim. App. 1973).

In the instant case, we fail to see the relevance of such a photograph or any probative value attached thereto; therefore, the trial judge improperly admitted the photograph. However, in light of the entire record in this cause and the overwhelming evidence of defendant Anderson's guilt, we are satisfied that this error was harmless beyond a doubt. T.R.A.P. 36(b); Tenn. R. Crim. P. 52(a). Accordingly, Anderson's

fourth issue is without merit.

In his fifth, sixth and seventh issues the defendant Anderson contends that the trial court erred in allowing testimony as to certain remarks allegedly made by the defendants and others at the "craps" game. At the outset, we note that because Anderson has failed to make appropriate references to the record, these issues are also technically waived. Tenn. Ct. Crim. App. R. 10(b); Killebrew, 760 S.W.2d at 231; see also T.R.A.P. 27(a)(7) and (g). Nevertheless, we will briefly address each issue on its merits.

As to his fifth issue, Anderson argues that the trial court erred in allowing testimony that one of the defendants asked whether he could participate in the "craps" game where the witness did not identify which defendant had made the inquiry. Anderson maintains that the testimony was hearsay under Tenn. R. Evid. 802 and that its admission violated his right of confrontation under the Sixth Amendment to the United States Constitution. We reject both contentions.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Testimony offered merely to show that a statement was made and not that the statement was true is not hearsay.

The trial court allowed Eddie Dabney to testify that one of the defendants asked whether he could join the "craps" game. Defendant Anderson's claim that such testimony was inadmissible as hearsay is unfounded as the testimony was not offered to show the truth of the matter asserted but simply that the statement was made. However, assuming arguendo that the testimony was offered to show the truth of the matter asserted, we still find no reversible error because the testimony had little probative

value. Any error in light of the other evidence presented at trial would be harmless. Tenn. R. Crim. P. 52(a). This issue is without merit.

In his sixth issue the defendant Anderson argues that the trial court erred in allowing Dabney to testify that at the "craps" game Eugene Bowen said that if Anderson "wanted to lose his money [and] his money was good, he could lose it." Again, we find that such testimony was not hearsay because it was not offered to show the truth of the matter asserted. The defendant Anderson's sixth issue is without merit.

In his seventh issue, defendant Anderson similarly contends that Dabney's testimony that defendant Woodley said, "Ho, this is a robbery" was inadmissible as hearsay. In arguing that testimony as to the defendant Woodley's remarks should not have been allowed, defendant Anderson relies heavily on United States v. Bruton, 391 U.S. 123 (1968). This reliance is misguided.

In Bruton, the United States Supreme Court held that in a joint trial where one defendant invokes his right against self-incrimination and does not testify, the admission of his pretrial statement implicating the codefendant violates the codefendant's Sixth Amendment right to confrontation. Bruton 391 U.S. at 126. In the instant case, we find that the defendant Woodley's statement "ho, this is a robbery" was not inculpatory as to the defendant Anderson and was therefore properly admitted. In conclusion, we find that in addition to being waived for failure to cite to the record, issues five, six and seven are without merit.

In his eighth issue defendant Anderson contends that the prosecution's use of the Bible during closing argument constitutes reversible error. During his closing remarks the prosecutor, while telling the jury that the judge would instruct them as to "flight," stated that "this book [Bible] has got the basis for that instruction in it." The

prosecutor then quoted a brief portion of Proverbs and stated, "[t]his is the real law book." When defense counsel objected to the State's use of the Bible, the trial court instructed the jury that this was just closing argument and that they were to consider only what they heard in the case. Following the trial judge's admonition, the prosecutor made another brief reference to the same biblical passage. The defendant maintains that such a tactic violated his rights under Article I, Section 3 of the Tennessee Constitution and the First and Fourteenth Amendments to the United States Constitution, both of which mandate separation of church and state. We disagree.

In State v. David Keen, No. 02S01-9112-CR-00064, Shelby County (Tenn. filed May 23, 1994, at Jackson) rehearing granted May 16, 1995, on other grounds our Supreme Court found that the prosecutor's biblical reference during closing argument did not affect the verdict and therefore was not reversible error. Slip op. at 19-20. Citing Kirkendoll v. State, 198 Tenn. 497, 281 S.W.2d 243 (Tenn. 1955), the Court concluded that such a reference was not reversible error unless it clearly had some effect on the verdict. Slip op. at 19-20.

In the present case, the prosecutor's comments were limited in scope and the trial court subsequently reminded the jury that nothing the prosecution said in argument should be taken as established fact. Further, the defendant fails to specify how he was prejudiced by the biblical reference or to demonstrate how it affected the verdict. We find that the prosecution's use of the Bible during closing argument does not constitute reversible error. Anderson's eighth issue is without merit.

In his ninth and final issue the defendant Anderson argues that the State's comment during closing argument that the deceased Sam Ward "wanted to come here and tell you what happened" amounted to prosecutorial misconduct. We disagree. To establish prosecutorial misconduct, the defendant is required to show that the argument

was so inflammatory or the conduct so improper that it affected the verdict to his detriment. Harrington v. State, 385 S.W.2d 758, 759 (Tenn. 1965). In reviewing an allegation of improper conduct, this Court should consider several factors including the intent of the prosecutor, the curative measures which were undertaken by the court, the improper conduct viewed in context and in light of the facts and circumstances of the case, the cumulative effect of the remarks with any other errors in the record, and the relative strength or weakness of the case. Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976).

After our review of the record, we find that the trial court did not abuse its discretion in finding that the prosecution's comment during closing argument rose to the level of prosecutorial misconduct. The comment was an isolated remark which was not representative of a pattern of improper conduct by the State. Further, the trial judge reminded the jury that comments made during argument are opinion and not evidence.

The trial judge has wide discretion in controlling the argument of counsel. That discretion will not be interfered with on appeal in the absence of an abuse thereof. Smith v. State, 527 S.W.2d 737, 739 (Tenn. 1975). We find no abuse of discretion in the present case. Anderson's ninth and final issue is without merit.

For the reasons set forth herein, the judgments of the trial court are in all respects affirmed as to both defendants.

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JOHN H. PEAY, Judge

CONCUR:



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DAVID G. HAYES, Judge

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WILLIAM H. BARKER, Judge