

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MARCH SESSION, 1995

FILED
December 11, 1995
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

VS.)

BLAINE M. WRIGHT,)

Appellant.)

C.C.A. NO. 03C01-9410-CR-00388

CUMBERLAND COUNTY

HON. LEON BURNS, JR.
JUDGE

(Second Degree Murder)

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE
CRIMINAL COURT OF CUMBERLAND COUNTY

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant, Blaine Wright, appeals as of right from a jury verdict convicting him of second degree murder. He was sentenced as a Range I standard offender to eighteen years in the Tennessee Department of Correction. We affirm the judgment of the trial court.

The Defendant argues five issues on appeal: (1) Whether the evidence was sufficient to support a conviction for second degree murder when the state failed to carry its burden on the issues of defense of another and the absence of adequate provocation; (2) whether the trial court erred in excluding testimony about prior violent acts of the victim when such testimony was admissible as "first aggressor" evidence; (3) whether the appellant was denied a fair trial by prosecutorial misconduct, specifically that the prosecutors asked numerous improper questions and made improper argument to the jury, and in that the trial court failed to give any curative instructions; (4) whether the trial court erred in failing to instruct the jury on circumstantial evidence; and (5) whether the trial court erred in permitting all of the bench conferences to be held off the record.

On November 14, 1992, an outdoor party and bonfire was held at the home of Harley and Abby Clark in Crossville, Tennessee. The party was to celebrate the birthdays of Harley Clark and Joel Hepburn, a friend of the Clarks. Several people were invited to attend the party, and other uninvited guests, including the victim, Lauren Heath Dykes, later arrived.

The Clarks had invited four people, the Defendant, Maggie Burrer, Joel Hepburn, and Tammy Mahan, to spend the night at their home after the party ended. The victim

left the party at one point in the evening and returned around 12:30 p.m. By this time, the party was winding down and Hepburn, Clark, and the Defendant began moving the stereo equipment from an outside platform back into the house. Maggie Burrer testified that when the victim returned, he appeared to be acting strangely, and he climbed onto the platform where the stereo had been located and sat there looking down.

A short time later, Burrer and Abby Clark walked into the house and saw the victim looking under the covers of Tammy Mahan, who was sleeping. Mrs. Clark testified that he appeared to be taking Mahan's covers off. The victim jumped up when the two women entered the room. Later, the Clarks, Burrer, Mahan, the victim and the Defendant were gathered in the living room of the house. Mrs. Clark testified that the victim was acting "odd" and "saying weird stuff, not making any sense."

The Defendant testified that the victim approached him and asked him if he had any cocaine. The Defendant told the victim that he did not have any involvement with cocaine. The Defendant testified that later the victim came up to him speaking "gibberish," and asked the Defendant if he had a problem with that. Burrer testified that she later went to the car to get her purse. The Defendant followed her to the car to get his gun. He testified that he had seen the victim get into altercations at parties before and that he was terrified of the victim, so he got the gun to defend his friends from the victim. Burrer testified that she asked the Defendant not to bring the gun into the house and that he left the gun in the car. Burrer testified that she then heard loud screaming coming from the house, and that the Defendant again returned to his car, grabbed his gun, and said, "I'm not going to let him kill me."

Meanwhile, the victim was involved in a series of assaults inside the house. The first encounter was with Harley Clark. Harley Clark testified that he was sleeping on the floor in the living room with his back propped against the couch. The victim went into

the living room and grabbed Clark by the ankles and dragged him into the kitchen. Clark testified that he believed the victim was just engaging in horseplay until the victim began to choke and squeeze him. Clark later testified that he couldn't breathe and was afraid that he or someone else was going to be hurt.

During the altercation, Clark broke free from the victim twice. When Hepburn intervened, the victim grabbed him and threw him against the entertainment center which hit the wall, making a hole in the drywall. The victim then turned on Clark a third time. Hepburn again intervened. Hepburn testified that the victim threw him across the room and that he landed on the couch.

Abby Clark testified that she could see her husband's face getting red and that she thought the victim was going to hurt her husband. When Mrs. Clark and Joel Hepburn could not stop the victim's violent actions, she screamed for the victim to leave. He replied, "You get the hell out of the house," as he began fighting both Mr. Clark and Hepburn. Mrs. Clark testified that she was screaming for the victim to stop the assaults. When he would not, she then left the room to get her own gun and to enlist the assistance of the Defendant.

Meanwhile, as Burrer and the Defendant proceeded back toward the house, Burrer testified that Mrs. Clark came out onto the front porch screaming and acting hysterically. As the Defendant and Burrer entered the house, they saw the victim fighting with Hepburn and Harley Clark. The Defendant testified that he tried to break up the fight by prying the victim's hands off of Hepburn. The Defendant then stepped back and gave several words of warning to Dykes saying, "I have a gun. I'm going to shoot you. You're hurting him. Let him go." Burrer testified that these warnings had no effect on the victim.

The Defendant then shot the victim three times. The first shot angled across the victim's back and lodged near his spine. The Defendant testified that the victim turned and lowered his shoulder and charged at the Defendant. The Defendant shot again, hitting the victim in the shoulder. The Defendant testified that the victim continued to charge at him, so the Defendant fired a third shot which hit the victim in the chest and pierced his heart.

The Defendant then screamed for someone to call 911 as he helped the victim over to the couch. Burrer also testified that the Defendant then attempted to do CPR on the victim. Burrer testified that during this time, the Defendant was trying to comfort the victim and said something to the effect of, "I love you, Man. I didn't know what to do. You know, you were out of control." The Defendant died a few minutes later before police or medical help arrived.

The only visible injury on the Defendant was a cut on his right hand, which was bleeding. Apparently the Defendant, upset by the death of the victim, went into the bathroom and hit the shower with his fist, cutting his hand. Neither Joel Hepburn nor Harley Clark had any significant injuries. Hepburn testified that his nose was scratched, and his wrist and back were bruised, and that he went to the emergency room the next morning to be checked out by a physician.

I.

The Defendant first argues that the evidence was insufficient to support the jury's verdict of guilt of second degree murder beyond a reasonable doubt. He contends that the evidence will only support a conviction for voluntary manslaughter.

When an accused challenges the sufficiency of the convicting evidence, this court must review the record to determine if the evidence adduced during the trial was sufficient "to support the findings by the trier of fact of guilt beyond a reasonable doubt." T.R.A.P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. 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 circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (Tenn. 1956). This court is required to 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. State v. Herrod, 754 S.W.2d 627, 632 (Tenn. Crim. App. 1988).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). In State v. Grace, 493 S.W.2d 474 (Tenn. 1973), the Tennessee Supreme Court said, "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." Id. at 476.

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, id., the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record and the inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt. Matthews, 805 S.W.2d at 780.

The Defendant was charged with first degree murder, and the trial court judge instructed the jury on the lesser included offenses of second degree murder, voluntary manslaughter and criminally negligent homicide. Second degree murder is defined as "the knowing killing or another." Tenn. Code Ann. § 39-13-210(a)(1). A person acts knowingly when the person is aware that the conduct is "reasonably certain to cause the result." Tenn. Code Ann. § 39-11-106(a)(20).

In order to reduce a second degree murder charge to voluntary manslaughter, it must be shown that the victim acted upon a sudden heat of passion. Voluntary manslaughter is the "intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Tenn. Code Ann. § 39-13-211(a). Thus, if the jury believed adequate provocation existed, they could find the Defendant guilty of the lesser charge of voluntary manslaughter, a Class C felony.

Although the Defendant testified that he warned the victim that he was going to shoot if the fighting did not stop, the Defendant did not physically attempt to break up the fight. According to the testimony of the three men and three women present, they

could only stop the unarmed victim by shooting him. The Defendant shot the victim three times, with two of the shots fired from a distance of less than eight inches away. Additionally, one of the shots was to the victim's back at a very close range.

Moreover, the Defendant testified that before the victim began scuffling with the other men in the house, the Defendant and the victim had words with each other. This brief encounter resulted in the Defendant going to his car to get the gun. He put the gun in the waist of his pants, under his shirt, to take it into the house. The Defendant's holster was found in the bathtub, and the Defendant testified that he did not know how it got there.

As demonstrated by its verdict, the jury obviously did not believe that adequate provocation existed for the Defendant to shoot the victim. It is within the province of the jury to determine the credibility of witnesses and to resolve any issues of fact. The testimony at trial revealed that the Defendant went to get his gun before the victim began the altercation in the house. After Mrs. Clark called for the Defendant to help break up the fight, the Defendant got his gun and concealed it in the waistband of his pants before taking it into the house. Although the Defendant had a gun, the victim was unarmed. The Defendant did not try to stop the altercation except by giving a few words of warning before shooting the victim three times at close range.

It was certainly a foreseeable consequence that death could result from any shot fired at close range. Thus, the evidence that the Defendant shot the victim at close range without first trying to stop him by using less deadly means could support a finding that the Defendant acted "knowingly" as defined in the second degree murder statute. We conclude that the evidence was sufficient to support the jury's finding that the Defendant acted knowingly.

Although the Defendant argued that he acted in self-defense or in the defense of others, the issues of self-defense and defense of others, as well as the degree of homicide, are for the jury to decide in light of all the circumstances of the killing. State v. Keels, 753 S.W.2d 140, 143, (Tenn. Crim. App. 1988). The self-defense statute states that

[a] person is justified in threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force. The person must have a reasonable belief that there is an imminent danger of death or serious bodily injury. The danger creating the belief of imminent death or serious bodily injury must be real, or honestly believed to be real at the time, and must be founded upon reasonable grounds.

Tenn. Code Ann. § 39-11-611(a).

Thus, the test to determine whether the Defendant's conduct was justified under a self-defense theory is three-fold: (1) The Defendant must reasonably believe he is threatened with imminent loss of life or serious bodily injury; (2) the danger creating the belief must be real or honestly believed to be real at the time of the action; and (3) the belief must be founded on reasonable grounds. See Tenn. Code Ann. § 39-11-611 (Sentencing Commission Comments). The jury must resolve these factual determinations.

Tennessee Code Annotated section 39-11-612 states when a person is justified in acting for the defense of a third person:

A person is justified in threatening or using force against another to protect a third person if:

(1) Under the circumstances as the person reasonably believes them to be, the person would be justified under § 39-11-611 in threatening or using force to protect against the use or attempted use of unlawful force reasonably believed to be threatening the third person sought to be protected; and

(2) The person reasonably believes that the intervention is immediately necessary to protect the third person.

Tenn. Code Ann. § 39-11-612.

The jury verdict has rejected the Defendant's testimony and claim of self-defense and the claim that he was acting in the defense of others. The jury obviously did not believe that the Defendant satisfied the three-prong test. Neither the Defendant nor the other two men involved in the altercation with the victim suffered any obvious injuries. Except for the small hole in the drywall, the interior of the Clark's home where the incident took place showed no other damage or signs of struggle. The jury obviously did not find that the Defendant had the requisite "reasonable belief" to justify self-defense or the defense of others.

The jury obviously rejected the Defendant's argument that he acted in such a state of passion produced by adequate provocation to reduce the degree of homicide to voluntary manslaughter. In viewing the testimony in the light most favorable to the State, we conclude that the record contains sufficient evidence to support the jury's finding that the appellant was guilty of murder in the second degree beyond a reasonable doubt.

II.

The Defendant next argues that the trial judge erred in excluding testimony about prior violent acts of the victim when such testimony was admissible as "first

aggressor" evidence. The Defendant contends that the trial court erred in prohibiting Maggie Burrer, the State's witness, from testifying during cross-examination about her knowledge of the victim's prior acts of violence.

In a homicide case in which self-defense is an issue, evidence concerning the victim's propensities for peacefulness or violence is generally admissible although usually limited to testimony concerning the victim's general reputation in the community. State v. Barnes, 675 S.W.2d 195, 197 (Tenn. Crim. App. 1984). However, the admissibility of the victim's prior acts of violence usually depends upon the purpose for which the evidence is offered. The trial court must distinguish whether the evidence is offered to show the defendant's state of mind at the time of the offense or whether the testimony is offered to show the conduct and motives of the deceased or which party began or provoked the fight. State v. Jerry Dale Bennet, No. 03C01-9304-CR-00115, Hamilton County, slip op. at 8-9 (Tenn. Crim. App., Knoxville, filed Feb. 24, 1994). The latter type of evidence is commonly known as "first aggressor" evidence. Id. at 9.

Evidence offered to corroborate a claim that the victim was the first aggressor is admissible once the issue of self-defense has been properly raised. State v. Furlough, 797 S.W.2d 631, 648-49 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1990).¹ Uncommunicated threats or previous acts of violence unknown to the Defendant, although inadmissible to establish the victim's character trait for violence

¹Tennessee Rule of Evidence 404(a) prohibits the use of character evidence for the purpose of proving that one acted in conformity with that character trait. Thus, "before evidence of first aggressiveness is relevant, some evidence must be introduced which would raise an issue as to who was the first aggressor." State v. Laterral Jolly, No. 02C01-9207-CR-00169, Shelby County, slip op. at 7 (Tenn. Crim. App., Jackson, filed Dec. 15, 1993).

or the defendant's state of mind, are admissible to establish who was the first aggressor. See State v. Shelton, 854 S.W.2d 116, 120 (Tenn. Crim. App. 1992), perm. to appeal denied, id. (Tenn. 1993); Furlough, 797 S.W.2d at 648. The Defendant argues that the following testimony of Maggie Burrer should have been admitted as "first aggressor" evidence.

Q: Were you afraid that night while the fight was going on for your own safety?
A: Definitely. I was scared to death. You know, he had been acting so crazy, and, you know, I know how he gets in fights and everything. I've been at several parties where he's . . .

GEN. PATTERSON: I object, Your Honor.

THE COURT: Sustain. It's not relevant.

At the time that Ms. Burrer was asked this question, she had already testified as to the chronological events of the incident. In the Findings and Conclusions of Law accompanying its denial of the Defendant's Motion for New Trial, the trial court ruled that "the issue of 'first aggressor' was not properly raised at the time that Maggie Burrer was asked about prior bad acts of the victim." However, the trial court went on to say that

the defendant did not properly present the issue to the Court so that the Court could make a ruling on the issue; that the defendant did not make any offer of proof regarding the issue of "first aggressor" [sic] at the time of this witness' testimony; that issue of "first aggressor" [sic] could have been raised at other times throughout the trial; and that the defendant was not unfairly prejudiced nor denied a fair trial by the nonadmission of testimony regarding "first aggressor" [sic] which would have come through this witness.

We agree with the trial court and conclude that the Defendant, by failing to give the Court an explanation and argument for admissibility of the testimony under the "first aggressor" rationale, did not take action reasonably available to prevent the exclusion of the evidence and thus, has waived this issue. T.R.A.P. 36.

Notwithstanding the procedural waiver, even if the evidence was admissible as evidence of first aggression, its exclusion in this case was harmless error. Joel Hepburn, Abby Clark, and Harley Clark all testified that the victim was indeed the first aggressor and started the altercation by grabbing Mr. Clark's ankles and dragging him into the kitchen. The Defendant also testified that the altercation had escalated into physical violence when he entered the house. The jury, in its capacity as trier of fact, resolved the factual issues in favor of the State.

III.

The Defendant contends that he was denied a fair and impartial trial because of the misconduct of the State. He alludes to fifteen incidents that he considers to be prosecutorial misconduct, including improper questions to witnesses and improper comments during the closing argument of the State. The trial court found that the Defendant was not entitled to relief on this ground.

Ten of the questions alleged to be improper were not objected to by the Defendant at trial. Nor did the Defendant object to any of the alleged comments during the State's opening and closing argument at trial. The failure of defense counsel to make a contemporaneous objection waives consideration by this Court of the issue on appeal. T.R.A.P. 36(a); see Teague v. State, 772 S.W.2d 915, 926 (Tenn. Crim. App. 1988), cert. denied, 493 U.S. 874 (1989). The Defendant cites Sparks v. State, 563 S.W.2d 564 (Tenn. Crim. App. 1978), in arguing that despite his failure to enter a contemporaneous objection to the instances of misconduct, the resulting prejudice to the Defendant was so serious as to warrant the trial judge's intervention sua sponte.

We disagree. Notwithstanding the procedural waiver, we conclude that the statements are not egregious examples of prosecutorial misconduct warranting a new trial.²

Three of the questions alleged to be examples of prosecutorial misconduct were properly objected to at trial. The question is whether the prosecutor's questions were so prejudicial as to invalidate the Defendant's conviction.

A prosecutor's argument must be supported by evidence introduced at trial and the reasonable inferences to be drawn from that evidence. State v. Beasley, 536 S.W.2d 328 (Tenn. 1976). A lawyer's personal opinion as to the credibility of witnesses should not be injected into the closing argument. Id. Although the prosecutor is an advocate, entitled to pursue his role with thoroughness and vigor, he also acts as the representative of a sovereignty who has an obligation to govern impartially. Judge v. State, 539 S.W.2d 340, 344 (Tenn. Ct. App. 1976) (citing Berger v. United States, 295 U.S. 78, 88 (1935)). "Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger, 295 U.S. at 88.

Tennessee courts have adopted a five-factor test in determining whether alleged improper conduct by the State affected the verdict to the prejudice of the defendant. Judge, 539 S.W.2d at 344. These factors include:

²The questions alleged by the Defendant to be inflammatory and irrelevant but that were not objected to at trial included questions by the State to three witnesses about the presence of alcohol at the party; whether three witnesses heard Burrer tell the Defendant after the incident that he was going to jail; a question to Burrer asking if she had been planning to marry the Defendant; a question to Harley Clark whether his wife went to get her gun to shoot the Defendant; a question to the Defendant about if he used cocaine, why the victim would ask him for cocaine; a question to the Defendant on whether he played in a heavy metal rock band; questions to the Defendant stating that no one had heard him tell the victim to "let him go" and that no one even knew he was in the house when the shot was fired; and a question to the forensic scientist stating that there were no drugs in the victim's system.

1. The conduct complained of viewed in context and in light of the facts and circumstances of the case.
2. The curative measures undertaken by the court and the prosecution.
3. The intent of the prosecutor in making the improper statement.
4. The cumulative effect of the improper conduct and any other errors in the record.
5. The relative strength or weakness of the case.

Id.

The first incident complained of by the Defendant was a question to Maggie Burrer by the prosecution:

Q: You didn't take it [her purse] in [the bathroom] to take your drugs out and put them in the toilet, did you?

MR. YORK: Objection, your Honor.

THE COURT: Sustained. You don't have to answer.

The Defendant promptly objected to the leading question of the State. Because the court took curative measures in sustaining the objection and directing the witness not to answer, we conclude that the Defendant was not prejudiced by this question.

The Defendant next objects to a question asked of Inspector Threet about a spent round lodged in the fireplace that was unrelated to this case.

Q:(by State to Inspector Threet): Tell me, do you remember how it was sitting? Do you remember how it was laying in the rocks, which way it was pointed or anything like that?

A: I can't remember exactly how it was.

MR. WARNER: Your Honor, we'd object if its something that doesn't have anything to do with the case.

THE COURT: If it has nothing to do with it, then it's not really necessary...

GEN. PATTERSON: Your Honor, the only thing that I wanted to make sure was, that it didn't have anything to do with the case. I didn't want it to be brought up at some time saying it had something to do with the case.

THE COURT: Do you want that introduced?

GEN. PATTERSON: No. I don't want it introduced as long as it doesn't have anything to do with the case and we're all in agreement on that.

THE COURT: All right.

The bullet in the fireplace had previously been mentioned by Inspector Threet when showing the jury the video tape of the crime scene. In viewing the testimony regarding the bullet in context and in light of the facts and circumstances of the case, we conclude that the testimony in no way prejudiced the Defendant. To the contrary, the testimony showed that the bullet was not related to the incident of which the Defendant was accused.

Next, the Defendant complains of a question by the State to witness Joel Hepburn about where he landed when the victim tossed him on the couch.

Q: So if [Tammy Mahan] testified she was on that couch, that would have to be wrong, because you didn't land on her, did you?

A: No, I didn't.

MR. YORK: Objection, Your Honor. She didn't testify to that when he was thrown.

GEN. FANN: Well, it's up to the jury to decide what she testified to.

Q: But you didn't land on her, and you didn't land on a purse?

A: Not to my knowledge.

The Defendant argues that no basis existed for this question by the State. Although the State's initial question was improperly phrased, when subsequently rephrased the question was proper and relevant to the location of the witnesses during the fight.

In reviewing the alleged instances of misconduct under the Judge factors, we conclude that the actions of the State in questioning witnesses and arguing the case do not rise to the level of prosecutorial misconduct. This issue is without merit.

IV.

The Defendant next contends that the trial court erred in failing to instruct the jury on circumstantial evidence. The Tennessee Supreme Court has consistently held that when all of the incriminating evidence against a defendant in a criminal trial is circumstantial, the failure of the trial judge to instruct the jury concerning the law of circumstantial evidence is fundamental reversible error, even if neither side requests such an instruction. State v. Thompson, 519 S.W.2d 791, 792 (Tenn. 1975). However, when the proof adduced at trial is both direct and circumstantial, then the trial court does not commit reversible error by failing to so instruct the jury if not specially requested to do so. State v. Teague, 680 S.W.2d 785 (Tenn. 1984), cert. denied, 493 U.S. 874 (1989); Thompson, 519 S.W.2d at 792.

The testimony of the eyewitnesses who saw the events of the shooting was direct evidence. The Defendant's statements are also direct evidence. Because the proof in this case includes both direct and circumstantial evidence, the accused must have requested the judge to instruct the jury on circumstantial evidence in order to establish reversible error. Although the Defendant raised the issue of the judge's failure to charge the jury on the law of circumstantial evidence in his motion for new trial, there is no proof in the record that the Defendant requested a jury instruction on the law of circumstantial evidence or that he objected to the instructions as given.

Therefore, we conclude that the trial judge did not err by failing to instruct the jury on this issue.

V.

Finally, the Defendant contends that the trial court erred in permitting all of the bench conferences to be held without being recorded by the court reporter. The Defendant contends that even though the bench conferences were tape-recorded, the spirit of the law requiring the recording of bench conferences has been violated, thereby denying the Defendant adequate appellate review.

Tennessee Code Annotated section 40-14-307(a) mandates that a court reporter attend every stage of each criminal case and record verbatim "all proceedings had in open court and such other proceedings as the judge may direct." Tennessee case law has further expounded on the need for trial courts to ensure that bench conferences are held on the record. In State v. Hammons, 737 S.W.2d 549, 551 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1987), this court explained that when bench conferences are not recorded, the result is a void in the record which forecloses the parties from having a full and complete review of the issues on appeal.

Citing an unreported opinion, the Hammons court noted that "[s]idebar conferences may be utilized to prevent having to frequently inconvenience the jury, but they must be recorded to preserve the record. Id. at 551 (citing State v. William Taylor, No. 85-279, Davidson County (Tenn. Crim. App., Nashville, filed Aug. 22, 1986)). The court went on to say that counsel should refuse to engage in off-the-record bench conferences unless ordered to do so by the trial court. Id. Otherwise, counsel may run the risk of finding an issue waived if he voluntarily participated in an off-the-record bench conference during which the issue was discussed. Id.

In the case sub judice, certain bench conferences were conducted without the presence of a court reporter as clearly required. However, these conferences

were apparently recorded on tape and have been included in this record on appeal. These recordings have been transcribed, except for thirteen unintelligible portions which are usually statements made by the trial judge.

The law clearly requires that any bench conference be recorded and made part of the record either by court reporter or by other audio visual equipment, such as in those counties that now utilize video records rather than the conventional transcripts. The trial court should take the proper measures to ensure that the bench conferences are being clearly recorded by whatever recording method used in that jurisdiction.

Although the Defendant argues that he has been denied meaningful review of his case because the bench conferences were not recorded, he does not indicate how he was prejudiced by the unintelligible portions of the conferences. Moreover, the record does not indicate that the Defendant objected when the court reporter did not record the sidebar conferences. We conclude that because a tape recording was made of the conferences, and because the discussions during the conferences are apparently not at issue, the Defendant was not foreclosed from adequate review of his case. This issue is without merit.

The judgment of the trial court is therefore affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

WILLIAM M. BARKER, JUDGE