IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH SESSION, 1993

FILED

January 5, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 01C01-9209-CC-00290
Appellee,	)	
	)	Lincoln County
v.	)	
	)	Hon. William Charles Lee, Judge
	)	
CARLA JO FITCH,	)	
	)	(First Degree Murder)
Appellant.	)	

DISSENTING OPINION

I respectfully disagree with the conclusions my colleagues reach regarding the question of the trial court's actions as the thirteenth juror. I believe that the trial court's comments reflect a proper understanding of its duties as the thirteenth juror and that although expressing "some reservations" about the sufficiency of the evidence regarding the degree of homicide, it ultimately concluded that the evidence was sufficient so as to allow it to approve the jury's verdict. This reasoning process should be expected to be the norm for a strongly contested, close case, and I do not think it reflects a substantive dissatisfaction with the verdict.

Also, I agree with Judge White that the state improperly failed to disclose to the defense in pretrial discovery certain oral statements purportedly made by the defendant to certain law enforcement agents who were investigating the shooting. However, I question whether substantive harm to the defendant has been shown to the degree

that would affirmatively appear to have affected the trial result.

First, the state should have disclosed the fact that Sergeant Fitch stated that upon his inquiry at the scene shortly after the shooting, the defendant told him that she was in the kitchen at the time of the shooting. Given the nature of her later statements about handing the shotgun to the deceased, the contradiction between the two was extremely important. On the other hand, the defendant did not specifically object to Sergeant's Fitch's testimony about her statement. As importantly, the record reflects that Detective Bradford testified that the defendant told him that she was in the kitchen when the shotgun discharged. This statement was in his offense report and there is no indication in the record that the defendant was unaware of the contents of that report.

Second, the state should have disclosed the fact of and the specifics of the defendant's demonstration to Chief Deputy Mullins showing how the shooting occurred. The defendant's demonstration was conducted at the request of law enforcement during her oral account of the events being investigated, an account being given by her in response to police interrogation. In State v. Underwood, 669 S.W.2d 700, 704 (Tenn. Crim. App. 1984), this court viewed a defendant's demonstrative reenactment of the events in issue as "evidence in the nature of a declaration against interest" and admissible against the defendant. In similar fashion, it defies common sense to say that the demonstration in the present case was not discoverable, as well, as part of "the substance of any oral statement which the state intends to offer in evidence at the

trial made by the defendant . . . in response to interrogations by any person then known to the defendant to be a law-enforcement officer" as provided by Rule 16(a)(1)(A), Tenn. R. Crim. P. I conclude that a demonstration given in aid of a statement, oral or otherwise, is part of that statement for discovery purposes.

To hold otherwise would be to bow to fine distinctions having no relevance to the purposes for our discovery rules. For example, a defendant's nod of the head up and down in answer to a question would not be discoverable under the state's position. Nor, apparently, would either the fact that a defendant tells an interrogator, "Let me show you how it happened," or the details of such a showing be discoverable. In the present case, the duty on the state to disclose did not rise or fall upon whether Chief Deputy Mullins said to the defendant, "show me," instead of "tell me," how the shooting occurred. Either way, the defendant's response is a discoverable statement.

However, the trial court recessed the proceedings until the next morning in order to allow the defendant to have the opportunity to examine the stick that was used in the demonstration and to prepare for the use of such evidence, including filing a motion to suppress if the defense so desired. The record reflects that no further objection or motion was made regarding this demonstration. In this respect, the defendant's present complaint about the nondisclosure of the demonstration is not accompanied by any showing of substantive prejudice flowing from the trial court's refusal to suppress the demonstration evidence. Thus, I do not believe that the state's

failure to disclose these matters before trial should result in a reversal of the conviction.

As to the remaining issues raised by the defendant, I do not believe any merit worthy of reversal of the conviction has been shown. In this respect, I concur in Judge Cornelius' opinion. Otherwise, I dissent from the conclusion that this case must be reversed and retried.

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Joseph M. Tipton, Judge