IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 01C01-9403-CR-00081
APPELLEE,	*	HANCOCK COUNTY
VS.	*	Hon. Seth Norman, Judge
CLAUDE FRANCIS GARRETT,	*	(Felony Murder)
APPELLANT.	*	

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OPINION FILED: _____

AFFIRMED

Gary R. Wade, Judge

OPINION

The defendant, Claude Francis Garrett, was convicted of felony murder and sentenced to life imprisonment. This is his appeal of right.

In addition to his challenge to the sufficiency of the evidence, the defendant presents the following issues for our review:

> (1) whether the trial court erred by refusing to grant a mistrial after the state failed to disclose exculpatory evidence;
>
> (2) whether the trial court erred by allowing photographs of the victim to be entered into evidence;
>
> (3) whether the trial court erred by failing to take stronger curative measures after it discovered that a relative of the victim was attempting to influence prospective witnesses; and
>
> (4) whether the trial court erred by failing to grant a new trial after discovering that a juror was untruthful during voir dire.

We find no error and affirm.

At approximately 5:00 a.m. on February 24, 1992, the victim, Lorie Lance, died from smoke inhalation when a fire engulfed the residence she shared with the defendant. When firefighters arrived, the defendant reported that he had escaped the blaze, but that the victim was still inside. Later, firefighters found the unconscious victim in a locked utility room. A large window in the room had been covered with boards. Efforts to revive the victim failed.

Investigators found traces of kerosene on the living room floor, a kerosene soaked bedspread in front of the refrigerator, and a five gallon plastic container filled with kerosene between the refrigerator and the utility room. A smoke detector from which the battery had been removed was found on the utility room dryer. All of these circumstances suggested that the defendant had locked the victim inside the room and then set the house on fire.

At trial, Sandra Lee Jones, the victim's mother, testified that her twenty-four-year-old daughter was a student at Volunteer State Community College and was an employee of Uno's Pizzeria at the time of her death. Ms. Jones, diagnosed as a manic depressive, had visited her daughter on several occasions and had expressed concern about her daughter's safety because her residence had no back door. The victim had installed a smoke detector in the kitchen to alleviate her mother's fears.

Michael Wayne Alcorn, who lived across the street from the victim and the defendant, testified that he was awakened by his wife on the night of the fire and saw flames extending from the windows, the roof, and the front door. Alcorn, who saw the defendant stooping near a tree, stated that he started to cross the road in an effort to help, at which point the defendant picked up a lawn chair, began breaking windows of the residence, and called the victim's name. When Alcorn's son Bobby arrived at the scene, the defendant handed him an axe, and began to spray water through

one of the windows. Alcorn noted that the defendant's left hand had been badly burned and that his facial hair had been singed. He described the defendant's emotional state as "sort of cold."

Fireman Patrick Hunt was one of the first to arrive at the scene. He testified that the defendant first informed Hunt that he had last seen the victim just outside the bedroom; when Hunt was unable to find her there, the defendant then said, "I know where she's at, if you'll go straight through the back of the house she's through a back door, the door in the back of the house by the kitchen."

A short time later, Captain Otis Jenkins found the unconscious victim in the utility room wedged between the washer and dryer and the wall. Captain Jenkins testified that the door to the utility room had been locked from the outside.

Immediately after the fire, Detective William Michael Roland had gone to the hospital to interview the defendant. The defendant appeared to be nervous and claimed that he and the victim had been asleep when the fire started. He also claimed that he saw the victim re-enter the residence and walk towards the kitchen. Although he had not yet been accused of setting the fire, the defendant asked if he was under arrest. When Detective Roland asked him to go to the police station for further questioning, a second statement given by the defendant did not match the first but was closely aligned to his trial testimony.

Detective David Miller, who led the investigation, questioned the defendant at the police station, had an officer photograph the defendant's injuries, and took possession of his clothing for testing purposes. Detective Miller testified that the defendant refused to provide a hand swab.

The defendant stayed at the Alcorn home for two days after the fire. During that time, the defendant appeared nervous but not despondent. He informed Bobby Alcorn that the police suspected he had "done it" and had taken his clothes to check for gasoline or kerosene.

When the police decided to place charges, they were unable to find the defendant at the address he had supplied. Using information received from an anonymous source, they eventually located the defendant in Hiawatha, Kansas.

Special Agent James Cooper, with the ATF Department of the U. S. Treasury Department, had led efforts to determine the cause of the blaze. He testified that the fire's point of origin was the living room and that a liquid accelerant had been poured on the floor. Agent Cooper determined from the burn pattern that the door to the utility room was closed during the fire.

Agent Sandra Paltorik Evans, a forensic scientist, tested each item collected by the police to determine whether an accelerant was present. She found that the bedspread, the five-gallon container, the smoke detector, and the living room

flooring contained a "kerosene-type" distillate. Agent Evans also tested the smoke detector by inserting a nine-volt battery and applying smoke; she found it to be in proper working order. She testified that the pants and shirt taken from the defendant tested negative for accelerant.

Dr. Mona Gretel Harlan, Assistant Medical Examiner for Davidson County, conducted the autopsy. Dr. Harlan testified that the victim had first and second degree burns over approximately twenty percent of her body and had an accumulation of soot at the opening of her mouth and nose. The "rather pink color" of the victim's blood led Dr. Harlan to conclude that the victim had died from an excessive intake of carbon monoxide. The blood alcohol level of the victim was .06 percent. No traces of narcotics were present. While examining the scene of the fire, Dr. Harlan found that when locked, the door to the room where the body was found could only be opened from the outside.

The defendant, a construction worker who conceded that he had previously been convicted of grand theft, two burglaries, and a jail escape, testified in his own behalf. He stated that he and the victim had been involved in a relationship for one and one-half years and planned to be married. He claimed that on the night of the fire, he and the victim spent several hours at a local bar, where they saw the victim's stepfather and stepbrother. He testified that they returned to their residence, watched television for a time, and fell asleep on the couch for a time before going to bed.

The defendant claimed that upon discovering the fire, he got out of bed, walked to the bedroom door, and yelled for the victim. The defendant testified that the victim grabbed his arm but pulled away and turned as if she was going back toward the rear of the house.

The defendant remembered that Wayne Alcorn directed Ms. Alcorn to "call the fire department." The defendant claimed that he had called to the victim as he broke out the windows and had instructed Bobby Alcorn to chop the bathroom window when he thought he heard water running. He contended that when firefighters arrived, he immediately informed them that he had last seen the victim in their bedroom. The defendant denied telling one of the firemen that he was a brother to the victim. He explained that when firemen were unable to find the victim on their first try, he had merely suggested the utility room as a possible alternative. He stated that when the victim was finally located, she was taken to a nearby hospital where efforts to revive her failed. The defendant, who had severe burns to his left arm and his face, testified that he sat with the victim's family as they awaited a report on her condition. He claimed that when medical personnel informed the group that the victim had died, he responded, "Why Lorie?"

The defendant testified that he fully complied with all requests made by investigating officers and specifically denied refusing to provide a "hand swab." He provided explanations for some of the statements he had made to

firefighters and law enforcement officials. The defendant denied locking the victim in the utility room and pointed out that Captain Jenkins was incorrect about there being a second lock and a door knob on that door. He believed that the door was not locked, but merely hard to open. The defendant testified that kerosene located beside the refrigerator and beside the kerosene heater in the living room were routinely kept there as a matter of convenience. He explained that he had spilled some kerosene while filling the heater on two or three different occasions. The defendant testified that he had purchased the smoke detector found on the dryer as a Christmas present for his mother and stepfather; his mother had returned the gift after noticing a strong kerosene smell at the defendant's residence. The defendant claimed the smoke detector was inoperable because the victim kept forgetting to buy batteries. He stated that the detector had been taken down a few days before while the kitchen was being painted.

The defendant believed that his neighbor, Stacy Floyd, might have started the fire by throwing a "molotov cocktail." He testified that the victim told him she had stolen eighty dollars and some marijuana from Ms. Floyd's mobile home on the day of the fire. The defendant acknowledged that he and the victim smoked some of the marijuana later that evening. He suggested that the girlfriend of the victim's uncle was a possible suspect in the crime. The defendant admitted that he had "beaten" the victim on three prior occasions.

When asked why he "ran off" to Kansas after being questioned about the fire, the defendant claimed that he had gone there to stay with his mother. He testified that several people knew how to reach him there, including his aunt, whose telephone number he had given to the police.

Fireman William McCormick testified for the defense. He stated that he and Captain Corbin had to restrain the defendant from re-entering the house. When he asked the defendant about his relationship to the person trapped inside, he claimed that the defendant said that he was her brother. McCormick noted that the defendant smelled of alcohol and appeared to be "slightly intoxicated."

Captain Corbin confirmed that he had to help McCormick restrain the defendant. He testified that the defendant, who appeared to be intoxicated, began beating on the door of the fire truck and frantically telling firemen that the victim was in the bedroom.

Henry Lance, the victim's grandfather, testified that he had known the defendant for about a year and that the two had worked together. He had observed the defendant and victim together on numerous occasions and believed that they "got along all right."

Sylvia Hall, wife of the victim's cousin, testified that the defendant and the victim had lived with her and her husband for approximately two months before renting their own

home. She said that the victim and the defendant argued, like "normal couples" do, but never engaged in a physical confrontation. She did, however, admit that the victim once claimed to have received bruises during a fight with the defendant.

The defendant's aunt, Gladys Adkins, testified that the defendant stayed at her home for about a week after his house burned. She stated that she transported him back to the hospital to get the burns on his face, forehead, nose, hand, and arm redressed. At the end of his stay, she and her daughter drove the defendant to the bus station so that he could travel to Kansas to stay with his mother.

Betty Satterfield, the defendant's mother, corroborated the defendant's claim about the smoke detector. She recalled having observed that the defendant stored extra kerosene inside the house. Ms. Satterfield claimed that, after the fire, she called her sister-in-law and asked her to send the defendant out to Kansas so she could take care of him.

Connie Matthews, a waitress at the bar the defendant and victim visited on the evening of the fire, confirmed that the two were there until about 2:00 a.m. She testified that the victim and the defendant had not fought during the course of the evening but had noticed that the victim seemed to be fearful of the defendant. Sometime after the fire, the defendant stopped at the bar and told Ms. Matthews that he did

not kill the victim. She said he also showed her a pistol and told her that it was for "anybody who wanted to mess with him."

The state called Stacy Floyd to testify in rebuttal. She testified that she and her roommate had a party on the night of the fire. Because it was a warm night and she had no air conditioning, Ms. Floyd had left her door open and, therefore, remembered the defendant and victim returning to their residence at approximately 3:00 a.m. Ms. Floyd, who thought about inviting them to join her party, decided not to because it was raining. Ms. Floyd emphatically denied that she had started the fire, as the defendant theorized, and denied having a motive to do so.

Tina Harris, the victim's supervisor at Uno's Pizzaria for approximately a year and a half, also testified in rebuttal. Ms. Harris, who described the victim as friendly and very "happy-go-lucky," remembered her coming to work once with a black eye and marks on her leg and lower back.

On surrebuttal, the defendant reiterated that he had never struck the victim. He also contended that there was not a party at Ms. Floyd's trailer when he and the victim came home on the night of the fire. He denied that it was raining that evening.

On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences

which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073 (1984); Tenn. R. App. P. 13(e).

We are also guided in our review by other well-established principles. A crime may be established by the use of circumstantial evidence only. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987); Marable v. State, 203 Tenn. 440, 451-52, 313 S.W.2d 451, 457 (1958). However, before an accused may be convicted of a criminal offense based upon circumstantial evidence alone, the facts and circumstances "must be so strong and cogent as to exclude [beyond a reasonable doubt] every other reasonable hypothesis save the guilt of the defendant." State v. Crawford, 225 Tenn. 478, 482, 470 S.W.2d 610, 612 (1971). "A web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." Id. at 484, 470 S.W.2d at 613.

Here, the defendant was charged with felony murder. That offense is defined as follows:

> 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[.]

Tenn. Code Ann. § 39-13-202(a)(2)(emphasis added). Arson is, in turn, defined in Tenn. Code Ann. § 39-14-301(a), as follows:

> A person commits an offense who knowingly damages any structure by means of a fire or explosion:
>
> (1) Without the consent of all persons who have a possessory, proprietary or security interest therein; or
>
> (2) With intent to destroy or damage any structure to collect insurance for the damage or destruction or for any unlawful purpose.

Put simply, the state had the burden of proving that the defendant intentionally set fire to the residence that he shared with the victim and that the victim died as a result of that fire.

Michael Alcorn, who arrived shortly after the blaze began, testified that the defendant appeared to be hunkered down in the yard at that point. Both Alcorn and his son, Bobby, characterized the defendant's efforts to locate the victim while the fire was burning as contrived. Initially, the defendant told Fireman Hunt that the victim was in the front bedroom, but after firefighters had unsuccessfully searched for her for several minutes, the defendant redirected their efforts to the utility room. When finally located, the victim had no pulse. Rescue personnel were unable to revive

her. Several witnesses testified that the defendant was emotionless following the fire, never showing any signs of grief. Experts found a "pour pattern" of liquid accelerant in the living room; a kerosene-soaked blanket in front of the refrigerator near the utility room; a large container of kerosene in the kitchen; a smoke detector with no batteries on the dryer; and a locked utility room door. Agent Cook, an expert in arson investigation, concluded that the fire was undoubtedly the result of arson.

Convictions may be upheld even if based entirely upon circumstantial evidence. Taken together, these circumstances were sufficient for the jury to have concluded, beyond a reasonable doubt, that the defendant committed the arson. That, coupled with the death of the victim, established the felony murder.

I

The defendant next claims that the trial court improperly refused to grant a mistrial despite the state's failure to disclose, in advance of the trial, the fact that Captain Jenkins had found that the utility room door was locked. He claims that this failure to disclose denied him Brady material. The state's response is that the defendant was not entitled to the evidence under Brady because it was inculpatory rather than exculpatory and was not impeachment evidence.

A defendant is entitled to any evidence which tends

to prove his innocence including that which, while not specifically exculpatory, may be used to impeach. See Brady v. Maryland, 373 U.S. 83 (1963); see also United States v. Bagley, 473 U.S. 667 (1985). That the victim was found in a room which had been locked from the outside was damaging to the defendant's case. Had the door not been locked, one of the defendant's hypotheses, that the victim went to the utility room and shut the door in an attempt to escape the fire, might have been viable. With the door being locked from the outside, however, the logical inference was that the defendant had locked the victim in the utility room, set the house on fire, and left the victim to die. In our view, this evidence was not exculpatory. See State v. Edgin, 902 S.W.2d 387 (Tenn. 1995)(information must have been favorable to the accused to qualify as Brady material).

The defendant also argues that he was entitled to this information because he could have used it to impeach Captain Jenkins. He has failed, however, to explain his basis for this assertion. Captain Jenkins had not previously made any written or oral statement. We are, therefore, unable to see how his statement that the utility room door was locked could have been used for impeachment.

II

Next, the defendant contends that the trial court erred by admitting photographs of the victim. The defendant claims the prejudicial value outweighed their probative effect.

The admissibility of photographs from the scene of the crime is governed by Tennessee Rule of Evidence 403 and State v. Banks, 564 S.W.2d 947 (Tenn. 1978). The evidence must be relevant and its probative value must outweigh any prejudicial effect. Tenn. R. Evid. 403; State v. Banks, 564 S.W.2d at 950-51. Whether to admit the photographs is within the discretionary authority of the trial court and will not be reversed absent a clear showing of an abuse. State v. Allen, 692 S.W.2d 651, 654 (Tenn. Crim. App. 1985).

While the photographs of the deceased were unpleasant, they were highly probative as to the cause of her death. One of the photographs depicted the soot which had accumulated around the victim's nose and mouth. Another showed the burns the victim sustained to her arm. Both of these were relevant to show that the victim died as a result of the fire set by the defendant. A final photograph showed that the victim was wearing socks and had sustained no burns to her legs. This photograph was introduced in redirect after defense counsel specifically questioned Dr. Harlan about whether the lack of burns on the victim's legs was unusual. That photograph was not shown to the jury. We hold that the trial court did not abuse its discretionary authority.

III

Next, the defendant claims that the trial court undertook inadequate curative measures when it discovered that a relative of the victim was communicating the testimony of prior witnesses to prospective witnesses in violation of the rule of sequestration. The state argues that there is insufficient information in the record to substantiate the claim. We agree with the state.

It is the duty of the defendant to place in the record any evidence necessary to convey a fair, accurate, and complete picture of the nature of the issue raised. State v. Arnold, 719 S.W.2d 543, 545 (Tenn. Crim. App. 1986). The only proof in the record concerning this incident is as follows:

> THE COURT: No. I'm going to put him back here until this case is over with, because I'm tired of him interfering with this case, and I'm [not] going to have anybody interfering with this case. I'm going to lock anybody up.
>
> Mr. Fox, come up here, sir. The State is prosecuting this matter, sir, and I will not have you interfering with any witnesses, whatsoever. You're in custody until this matter is over. Take him in the back.
>
> Now let me get some things straight right here and now. If I catch anybody interfering with any witnesses in this case I'll fine them fifty dollars and give them thirty days and make them serve every day. I'm going to take ten minutes. Y'all get outside and get the situation squared up with these witnesses. If I have to take care of it, I'll take care of it. If I have to lock some people up, I'll lock some people up. But it is a felony to interfere with a witness in a case. It's subornation of testimony. And I will not have it. I'll submit it to the grand jury, and I'll have somebody prosecuted for it. Take ten minutes,

General.

From this limited statement, we are unable to discern the nature of what took place. We must presume, therefore, that the trial court acted appropriately. See Vermilye v. State, 584 S.W.2d 226 (Tenn. Crim. App. 1979). Moreover, the defendant did not request that the trial court take curative measures, nor did he voice any objection to the manner in which the court handled the matter. That constitutes a waiver of the issue. See Tenn. R. App. P. 36(a); State v. Killebrew, 760 S.W.2d 228 (Tenn. Crim. App. 1988).

IV

As his final issue, the defendant claims that he should have been granted a new trial because Ms. Huffman, a juror, was dishonest in voir dire when she denied that any members of her family were in law enforcement. He argues that, but for her untruthful answer, she would not have been seated as a juror because of her potential bias toward the state. He further insists that statements the juror made during deliberations show that she had an actual bias against the defendant, thus depriving him of a fair trial.

The common law rules governing challenges to juror qualifications fall into two categories: (1) propter defectum or (2) propter affectum. Partin v. Henderson, 686 S.W.2d 587, 589 (Tenn. Ct. App. 1984). Objections based upon general disqualifications, such as alienage, family relationship, or statutory mandate, are within the propter defectum class and, as such, must be made before the return of a jury verdict. Literally translated, propter defectum means "on account of

defect." State v. Akins, 867 S.W.2d 350, 355 (Tenn. Crim. App. 1993).

In contrast, a propter affectum challenge, translated as "on account of prejudice," is based upon the existence of bias, prejudice, or partiality towards one party in the litigation "actually shown to exist or presumed to exist from circumstances." Durham v. State, 182 Tenn. 577, 588, 188 S.W.2d 555, 559 (1945); see also Toombs v. State, 197 Tenn. 229, 270 S.W.2d 649 (1954). Propter affectum challenges may be made after the return of the jury verdict. State v. Furlough, 797 S.W.2d 631, 652 (Tenn. Crim. App. 1990). A juror who conceals or misrepresents information tending to indicate any lack of impartiality may be challenged upon motion for new trial. The burden is on the defendant to show that the juror had an actual bias or prejudice. State v. Caughron, 855 S.W.2d 526, 539 (Tenn.), cert. denied, _____ U.S. _____, 114 S. Ct. 475 (1993).

At the hearing on the defendant's motion for a new trial, juror Nicholson testified that he believed Ms. Huffman had been untruthful in voir dire by failing to answer affirmatively that she had relatives in law enforcement. According to Nicholson, Ms. Huffman related to fellow jurors during deliberations that she had relatives who worked in both the fire and police departments in California and that she believed people holding those types of positions were heroes who would not "compromise a crime scene" or make a mistake during a "search and rescue." Nicholson stated that he then asked her why she failed to mention this connection in voir dire; he claimed she did not respond.

Ms. Huffman also testified at the hearing and denied having any law enforcement officers in her immediate family. She conceded that a third cousin worked as a firefighter in California. Ms. Huffman further stated that she had mentioned her cousin during jury deliberations, but denied saying that members of her family worked for the Police or the Sheriff's Department.

The trial court found that Ms. Huffman had not been dishonest in answering the questions propounded to her during voir dire. It ruled that Ms. Huffman was asked only whether she had family members who were law enforcement personnel, a category which does not encompass firefighters, and that her answers were truthful. The trial court concluded that the circumstances had not prejudiced the defendant's right to a fair trial. Findings of fact made by the trial court are given the weight of a jury verdict. See State v. Burgin, 668 S.W.2d 668 (Tenn. Crim. App. 1984). The trial court chose to credit the testimony of Ms. Huffman; it acted within its prerogative in doing so. We cannot reverse the holding unless the evidence preponderates against the conclusion reached by the trial court. It does not in this instance.

Accordingly, the judgment is affirmed.

_____
Gary R. Wade, Judge

CONCUR:

_____

John H. Peay, Judge

_____
Rex H. Ogle, Special Judge