IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

NOVEMBER 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. #02C01-9506-CR-00174
APPELLEE,	*	SHELBY COUNTY
VS.	*	Hon. Arthur T. Bennett, Judge
CLARENCE YOUNG,	*	(Attempted First Degree Murder)
APPELLANT.	*	

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OPINION FILED:_____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Clarence Young, was convicted of attempted first degree murder, a class A felony, and he was sentenced as an especially mitigated offender to thirteen and one half years in the Department of Correction. On this appeal as of right, he challenges the sufficiency of the evidence and the trial court's failure to instruct the jury on the defense of voluntary intoxication.

The judgment of the trial court is affirmed.

On July 6, 1993, the victim, Caren Spencer, was working as a clerk at the Harris One Stop Grocery in Memphis. At approximately 8:00 p.m., the appellant came into the store to purchase a beer. Ms. Spencer took money from the appellant, gave him change, and proceeded to wait on another customer. The appellant, whom Ms. Spencer described as intoxicated, then insisted that he had been given an insufficient amount of change. The appellant became angry and profane, and he demanded more money. Ms. Spencer told the appellant that he could return after the nightly audit was done on the cash register; she explained that if he was owed more change, he could get it at that time.

The appellant was not satisfied with this explanation, and he continued to use profanity and demand more money. After ten to fifteen minutes, Ms. Spencer called the police. Officer Melanie Ann Lewis responded to the call. When she arrived at the scene the appellant appeared to be intoxicated: his eyes were bloodshot, his speech was slurred, and he was unsteady on his feet. Officer Lewis ordered the appellant to leave the store.

The appellant returned to the store approximately one hour later. Ms.

Spencer saw him take a beer from the cooler, throw it forcefully to the floor, and then obtain a second beer from the cooler.[1] Ms. Spencer noticed that the appellant had a blue and tan pouch under his arm; he did not have the pouch during the previous encounter. Ms. Spencer waited on the customers who were in front of the appellant in line; she also noticed that the appellant allowed those who were behind him to go before him in the line.

When all the other customers had left the store, the appellant, again using profanity, demanded money from Ms. Spencer. The appellant then unzipped the tan pouch, pulled out a .38 caliber pistol, and pointed it at Ms. Spencer's face. He said, "I want my money; give me my money." Ms. Spencer told the appellant to move the gun away from her face. When the appellant glanced toward the parking lot, Ms. Spencer was able to move further down the counter and obtain her handgun. The appellant turned toward her, called her a "stupid bitch," and fired two shots. Ms. Spencer fired a shot in return but did not know whether she hit the appellant. The appellant fired two more shots as he fled from the store.[2]

Keith Spencer, the victim's brother, was also working at the store. He saw the appellant in the store both at 8:00 p.m. and around 9:00 p.m. He heard the appellant say, "I told you I was going to come back and get my money." He also saw the appellant reach into the tan pouch. He did not see a gun, but he did hear the shots that followed.

The police were notified about the shooting and it was Officer Lewis who

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[1] She described the appellant as even more intoxicated than he had been during the first encounter.

[2] The Crime Scene Unit later found three bullet fragments behind the store counter and one empty shell casing. The shell casing was from the victim's gun.

again responded to the call. She confirmed with Ms. Spencer that the appellant had been involved, and then she found the appellant sitting in a locked car in the parking lot. Officer Lewis detained the appellant at gunpoint until other officers arrived. Officer Martin Boldt arrived at the scene, and he later talked with the appellant. The appellant told him that "all he wanted was his money back." The appellant also said: "She pulled a gun and I pulled my gun and shots were fired." Officer Boldt described the appellant as "highly inebriated."

The appellant testified that he was sixty-one years of age at the time of the shooting. He lived in south Memphis, three blocks from the Harris One Stop Grocery. On July 6, 1993, he walked to the store around 8:00 p.m. to buy a beer. He gave Ms. Spencer a twenty dollar bill but received change for a ten dollar bill. He told Ms. Spencer that the change was incorrect and an argument ensued. When the police arrived, Ms. Spencer said that he could return after the nightly audit of the cash register.

The appellant went home and watched television and listened to music for about an hour. He then decided to go back to the store to get another beer and to see about his money. By this time it was darker outside so he took his handgun for protection. The appellant lived in a "bad neighborhood" and had been robbed on a prior occasion. When he got to the store he again asked about his change, and another argument occurred. Ms. Spencer then said, "I'll blow your damn head off." She pulled a gun from under the counter and shot him once in the neck. The appellant fell to the floor, pulled his gun from the pouch, and shot Ms. Spencer's gun from her hand. He fired two more times to keep her from shooting at him as he fled from the store.

After leaving the scene, the appellant started to walk home. He was picked up by someone he did not know who took him back to the parking lot where he was later found by the police. The appellant maintained that he fired only in self defense and that he did not intend to shoot the victim. He said he had been drinking the previous two days but was not drunk on the day of the shooting. He strenuously denied being intoxicated, unruly, or profane.

I

The appellant claims that the evidence was insufficient to support a conviction for attempted first degree murder; specifically, he cites State v. Brown, 836 S.W.2d 530 (1992) and State v. West, 844 S.W.2d 144 (Tenn. 1992), and argues that the State did not prove his actions were either premeditated or deliberate. The State, of course, maintains that there was sufficient evidence to support the jury's verdict.

The standard for review by an appellate court is whether, after considering the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 318-19 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn. R. App. P. 13(e). On appeal, the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978). In determining the sufficiency of the evidence, we do not reweigh the evidence, id., nor do we substitute our inferences for those drawn by the trier of fact from the evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956).

When this offense was committed, a first degree murder required evidence of an "intentional, premeditated and deliberate killing of another." Tenn. Code

Ann. §39-13-202(a)(1)(1991 Repl.). A deliberate act was "one performed with a cool purpose," and a premeditated act was "one done after the exercise of reflection and judgment." Tenn. Code Ann. §39-13-201(b)(1) & (2)(1991 Repl.). A criminal attempt occurs when a person acting with the culpability required for an offense:

> (1) Intentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;
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> (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
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> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

Tenn. Code Ann. §39-12-101(a)(1)-(3)(1991 Repl.).

We disagree with the appellant's claim that the evidence did not support a finding of premeditation or deliberation. The appellant was angry because he believed he had been shortchanged; he became profane and unruly, and he uttered a number of threats. Although ordered to leave the store by the police, he returned one hour later, this time carrying a loaded firearm. In this regard, the appellant's conduct differed from the defendant in State v. West, supra. In that case the supreme court noted:

> No one witnessed the defendant's retrieval of a gun, nor does any circumstantial evidence exist to support this theory. The defendant admitted to returning to his house, but insisted that he had carried his gun with him all morning. Thus, a jury would have to engage in speculation to conclude that the defendant had returned to his house in order to get a gun with which to shoot [the victim].

844 S.W.2d at 148. By contrast, it was uncontroverted that the appellant did not have his handgun the first time he was at the store, and that he went home and brought it back to the scene. Moreover, once at the store, the appellant deliberately waited until

all of the customers had left the premises and he was alone with the victim. He then demanded money; when the victim refused, he produced his firearm and started shooting.

Accordingly, we conclude that the jury could rationally have found all of the elements of the offense beyond a reasonable doubt. Tenn. R. App. P. 13(e).

II

The appellant argues that the trial court should have instructed the jury that evidence of his voluntary intoxication may have negated the culpable mental state required for attempted first degree murder. The appellant concedes that he did not request such an instruction until the motion for a new trial hearing and that he did not rely on such a defense at trial; still, he contends that it was incumbent upon the trial court to instruct the jury with regard to all of the issues raised by the evidence. The State maintains that an instruction on voluntary intoxication was not appropriate because it was a defense not relied upon by the appellant.

The trial court has a duty, without request, to instruct the jury on the law governing every issue raised by the evidence. Poe v. State, 212 Tenn. 413, 416, 370 S.W.2d 488, 489 (1963); State v. Locke, 771 S.W.2d 132, 138-39 (Tenn. Crim. App. 1988). An accused's right to a full exposition of the law applicable to the facts extends to the accused's theory of defense. Poe v. State, 212 Tenn. at 416-420, 370 S.W.2d at 491. If the evidence in the record does not fairly raise the defendant's theory of defense, however, the trial court is not compelled to instruct the jury on the issue. Manning v. State, 500 S.W.2d 913, 915-916 (Tenn. 1973); State v. McPherson, 882 S.W.2d 365, 374 (Tenn. Crim. App. 1993). In determining whether the evidence fairly raises an issue, the court must "assess the defendant's position without ascertaining

its truthfulness or the weight to which it might be entitled." State v. Ivy, 868 S.W.2d 724, 728 (Tenn. Crim. App. 1993).

Voluntary intoxication is a statutory defense in the sense that it may negate the required culpable mental state for an offense. Tenn. Code Ann. §39-11-503 (1991 Repl.). In State v. McPherson, supra, the defendant was convicted of aggravated rape. He complained on appeal that the trial court should have instructed the jury regarding his voluntary intoxication. This court disagreed:

> The fallacy with this argument is that the appellant did not rely upon this defense. Neither the opening statement of defense counsel, the defense proof, or the summation of defense counsel mentions that he was intoxicated. To the contrary, the appellant was able to vividly recall all of the events of the night in question....Moreover, the police officers that came into contact with the appellant never mentioned that he was intoxicated....In short, the evidence does not support his contention that he was intoxicated.

882 S.W.2d at 374; see also State v. Howard, 693 S.W.2d 365, 368 (Tenn. Crim. App. 1985)(defendant did not rely on the defense of voluntary intoxication); Harrell v. State, 593 S.W.2d 664, 672 (Tenn. Crim. App. 1979)(must be evidence that intoxication deprived the accused of the capacity to form the culpable mental state for the crime).[3]

Here, the only defense relied upon by the appellant was that he shot at the victim in self defense. As we have outlined, the State's evidence was clearly sufficient to support the jury's verdict that the appellant acted with intent, premeditation and deliberation. Although an instruction on voluntary intoxication may have been justified given the proof of the appellant's intoxication from the State's witnesses, the appellant strenuously refuted such evidence by testifying that he was not drunk at the

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[3] The case cited by the appellant, Brown v. State, 553 S.W.2d 94 (Tenn. Crim. App. 1977), is distinguishable. In that case the court specifically instructed the jury that voluntary intoxication was not an excuse for the crime, and it omitted the portion of the instruction that stated intoxication could negate a finding of premeditation. Moreover, the evidence fairly raised such a defense. Id. at 96.

time of the offense.[4] Having failed to raise the defense at trial, and having specifically denied the evidence which may have supported such a defense, the appellant cannot now complain that such an instruction should have been given. See Tenn. R. App. P. 36(a). Thus, the trial court's failure to give the instruction sua sponte was not reversible error.

The judgment is affirmed.

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William M. Barker, Judge

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Paul G. Summers, Judge

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David H. Welles, Judge

[4] Similarly, defense counsel repeatedly objected to the testimony about the appellant's state of intoxication.