IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1996 SESSION

FILED

May 24, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)
	) C.C.A. No. 01C01-9501-CC-00023
Appellee,	)
V.	) Giles County
	)
KENNETH PATTERSON (PAT) BONDURANT & HUGH PETER (PETE) BONDURANT,	)
	) Hon. Jim T. Hamilton, Judge
	)
	) (Murder in the Second Degree)
Appellants.	)

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

O P I N I O N

A jury found the appellants, Pat and Pete Bondurant,[1] guilty of second degree murder. They were sentenced to twenty-five years incarceration. On appeal, both appellants collectively aver: (1) that the trial court erred in refusing to grant a severance, (2) that evidence was either insufficient or insufficiently corroborated, and (3) that the trial court erred procedurally and substantively in its giving of a supplemental jury instruction. Individually, Pat Bondurant argues: (1) that prejudicial prosecutorial misconduct occurred, and (2) that the jury verdict was contrary to law. Additionally, Pete Bondurant individually assigns error in allowing: (1) testimony concerning the burning of the deceased, (2) testimony of alleged sexual activities, (3) evidence that the appellants were a source of drugs, and (4) evidence implying that the appellant Pete Bondurant had a prior criminal record. We affirm.

FACTS

This case involves the homicide of Gwen Swanner Dugger (victim). On May 30, 1986, Ken Swanner testified that he and his sister, the victim, went to the appellants' residence to repair a car. While Mr. Swanner was working on the vehicle, the victim went into the appellants' house. After the repairs were made, Mr. Swanner walked up to the house and asked the victim "if she was ready to go." The victim followed Mr. Swanner outside and informed him that "she was going to stay." Mr. Swanner never saw the victim again.

Approximately one week later, the victim's family became concerned after not hearing from the victim. Ken Swanner returned to the appellants' residence. He asked the appellant, Pat Bondurant, and his wife, Denise, if they knew the victim's whereabouts. They responded that they did not know. Several days later, Mr. Swanner saw the appellant Pete Bondurant. He questioned Pete

[1]Because the Bondurant name is used many times in this opinion, we will refer to the different people by their first names for easier reading.

concerning the victim's whereabouts. Pete responded: "I dropped her off at Shady Lawn last week."

In June of 1986, Jack Swanner and Ken Swanner embarked on another effort to locate the victim. While en route to the appellants' residence, they observed Pete Bondurant on the interstate. They followed Pete to a night club. At the night club, the Swanners confronted Pete. Pete stated, "I didn't kill her . . . . I ain't done nothing. Leave me alone. I'm crazy." The club's owner came outside and told them to "break it up." Pete then backed into the nightclub yelling that "he was crazy; that he had killed once; he'd kill again." The Swanners left.

In 1990, Investigator William Coleman approached Denise Bondurant. Denise was separated from the appellant, Pat Bondurant. She stated that she was afraid Pat would hurt someone else. Therefore, she gave Investigator Coleman a statement concerning the victim's death. She was later given immunity from prosecution.

Denise Bondurant testified that on May 30, 1986, she, Pat Bondurant, Pete Bondurant, Dwayne Howell, and Gary Hardin were all present at the Bondurant residence when the victim and her brother arrived. Denise stated that the victim walked up to the house and purchased Valium from the appellant Pat Bondurant. She testified that although Ken Swanner wanted the victim to leave with him, the victim decided to "stay and party." She stated that everyone there "was drinking and doing drugs, except for [her]." She attributed her abstinence to her pregnancy.

Later in the evening, Denise testified that Pat told her to "put on some steaks." She stated that the victim attempted to assist her. However, the victim

was so intoxicated she could "barely even stand up." In addition to the Valium and beer, Denise stated that "Pete had given her some Placidyls."

Denise stated that Gary Hardin was "trying to make a pass at [the victim]" while they were in the kitchen. Pat, however, came into the kitchen carrying a .38 caliber pistol. She testified that Pat said "if anyone's getting her, Pete's going to have her her [sic] first, because he had bought her drugs."[2] Pete then took the victim into the bathroom. Denise stated that she saw the victim performing fellatio on Pete in the bathroom.[3]

Denise testified that later "Dwayne came back in the kitchen, and I felt like he was trying to keep me in there; you know, that he was stalling, you know, for conversation." She stated that she became "suspicious of what's going [on in the] front of the house."[4] She stated that she went up front and noticed that the bedroom door was closed. Although Gary was holding the door shut from the inside, she forced her way in and found Pat having sex with the victim. She stated that she hit both Pat and the victim, gathered up some clothes, and left.[5]

Gary Hardin testified that after Denise left, he and Pete "got [the victim] up." They carried her, while nude, outside and put her in a car. They then drove her down to the barn. He testified that the victim was "messed up" and mumbling. Gary stated that after the victim was taken to the barn, he, Pete, and

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[2]Both Gary Hardin and Dwayne Howell testified that Pat, while waiving his gun in the air, stated that no one gets the victim until Pete has her first.

[3]Dwayne Howell testified that he looked into the bathroom and saw the victim performing fellatio on Pete.

[4]Dwayne Howell testified that he saw the victim go into a bedroom with Pat. Dwayne stated that he then went to the kitchen to talk to Denise. She asked me "Where's Pat? And I said I don't know." He stated that Denise then ran to the front of the house and pushed the bedroom door open.

[5]Gary Hardin testified that after the victim and Pete came out of the bathroom, Pat and the victim went into the bedroom. Gary stated that Pat "told me he wanted me to hold the door for him, while he had sex with [the victim]." While Pat and the victim were having sex, Denise pushed the door open. He stated that she then hit Pat, hit the victim, and "told me to get . . . out of her house." He stated that he walked outside to Dwayne's car and about five minutes later, Denise left.

Dwayne all had sex with her. Dwayne testified that when they finished with the victim, they left her lying in the barn and went to the house to eat.

Patricia Howell Love testified that she worked in a strip bar across the street from the Bondurants' residence. She stated that on the evening of May 30, 1986, Pete entered the club and said "he had a whore tied up to a bale of hay, if anybody needed a good f___."

Denise testified that after she had left the house, she drove to the interstate and headed toward Alabama. When she got to the Ardmore-Huntsville exit, she turned around and headed back home. Denise returned to the house and found that Gary and Dwayne had not left. She again instructed them to leave. They then left.

Denise walked into the house and found that the victim had been brought back up to the house from the barn. Denise stated that she walked into the room where the victim lay nude on a mattress. She tried to wake her by "nudging her with [her] foot." She stated that the victim was unresponsive so she "started smacking her in the face, trying to get her to awake." She stated that the victim starting "coming to" but described the victim as "groggy."

As the victim regained consciousness, Denise began accusing the victim of having sex with her husband, Pat. The victim denied her allegations. Denise stated that "right then [she saw] that [the victim] was not aware of what had happened." Denise stated that she hit the victim. She, however, described the victim as being helpless and unable to defend herself "so [Denise] stepped out of the way."

Denise then described the victim's murder. She stated that Pat walked in from the back of the house. He was carrying a big stick or ax handle. She

stated that Pat told her to use the stick on the victim. Denise responded, "Pat, look at her. I don't need that." Pat then said, "Well, I'll do it for you."

Denise testified that Pat began the assault by striking the victim on top of the head with the ax handle. She stated that she saw blood on both the victim and the weapon. She stated that Pat then hit her a second time. The victim fell to her knees. Denise testified that she told Pat to "please stop before you hurt her really bad." However, as the victim was attempting to rise, Pat struck her again. She believed that the third blow was to the victim's side. She stated that the blow to the side "flung [the victim] across the room." She estimated that Pat administered nine to twelve blows to the victim.[6]

After Pat ceased striking the victim with the ax handle, he began having sexual intercourse with her. Denise stated that he raped the victim vaginally and anally. While raping the victim vaginally, "Pat made the statement to Pete that [the victim] was peeing . . . like it was something really funny to him." Denise further testified that while Pat was anally raping the victim, the victim began losing her bowel on him about which Pat also commented. After climaxing, Pat offered the victim to Pete. Denise stated that Pete "turned it down." She then testified that she told Pat he "ought to get cleaned up before someone were to come up, and you know, catch [him] like this. . . . [H]e had blood and her bowel movement all over him."

Pat went to the bathroom to take a bath and Denise followed. Denise testified that, while Pat was bathing, Pete entered the bathroom carrying a .22 caliber revolver. Pete "said [he was] going to put [the victim] out of her misery." She stated that Pete walked into the room where the victim lay unconscious. Denise then heard two shots. She stated that Pete returned to the bathroom and

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[6]Denise testified that she was standing at the doorway to the room when the beating occurred. She stated that she "tried to stop him from hitting her, and I couldn't, and there was nothing I could do. I stepped back out of the way."

removed two spent cartridges from the gun. Denise then walked into the room where the victim lay. She looked down at the victim and saw two gunshot wounds in the victim's head, one to the "[r]ight temple and one between her eyes." Denise also testified that she saw movement in the victim's body following the gunshot wounds.

Denise stated that Pete left the house and came back with some large trash bags. She stated that Pete began bagging the victim's body with lime in the large trash bags. Then they began cleaning blood splatterings from the walls, floor, and ceiling. They gathered the mattress, cushion, carpeting, couch, chair, victim's clothes, and other items covered with the victim's blood. These items were burned in a backyard pit. Later the ax handle was also burned.

The victim's body was loaded onto a trailer in tow by a three-wheeler. They took the victim's body to a secluded area. Denise testified that they stuffed the victim's body head first into a 55-gallon drum. She also stated that they placed rubber matting inside the barrel to increase the fire's temperature. She testified that the appellants used a hammer and nails to perforate the bottom of the barrel to increase air flow. They poured kerosene on the victim "and just set a fire." She stated that after the fire was set, they sat "there and . . . watched her flesh burn off the bones of her feet." Later, they went out to eat.

After eating, they returned to the location of the victim's burning body. Denise stated that the victim was then dumped from the barrel. Denise described the victim as follows:

> her legs were burnt up past her knees, and her whole body was ju - - it just looked like her f[l]esh was all wrinkled, and you could still see that her head had some hair.

Because the victim was not burning fast enough, they left the victim out of the barrel so "it could get more air to burn a little bigger fire." Denise testified that

they continually added wood and rubber to the fire. She stated that they burned the victim from Friday night until Sunday afternoon. She further stated that Pat used a shovel to chop "up little sections" and crush "bones that had already burned." She stated that by Sunday afternoon, the victim was "completely burned up." She stated that there were "just some round piece[s] of bone" and "chunks of bone" that Pat "would just smack down with a shovel."

Denise stated they shoveled the victim's ashes, more lime, and topsoil from the fire pit into the drum. The drum was loaded onto their truck and transported to the Elk River. Pat then disposed of the victim's cremated remains by pouring the mixture of ashes, lime, and topsoil from the barrel into the river.

Dwayne Howell testified. He stated that a few days after the May 30, 1986 party, Pat and Denise Bondurant stopped by his house. He testified that Pat had "wanted to know if anybody had come around asking any questions." Howell responded that he "didn't know what [Pat] was talking about." He testified that Pat then responded "well, if [you] know what's good for [you], if anybody comes over asking, questions, [you] don't know anything."[7]

Gary Hardin testified that he saw Pete shortly after the May 30, 1986 party. He stated that Pete said "you ain't seen nothing up there that night." Hardin further testified that approximately one year later, Pete approached him and said "like I said, you ain't seen nothing, and they ain't got a case without a body."

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[7]In Mr. Howell's April 24, 1990 statement, he made a written statement under oath that:

> The next day around 4 to 6 p.m. Pat and Denise Bondurant both come to where Snow and I lived with my mother. In Elkon, Vinter Mill Rd. Denise . . . went into the house with Snow and Pat and I stayed in the yard. Pat started right in. He said if the police come around asking questions about Gwen Dugger not to tell them anything or he would kill me. He also mentioned that my mother lived there too.

Investigator Coleman testified. He stated that in 1990, they excavated a pit in the appellants' backyard. There he discovered a partially burned high top tennis shoe. He stated that a pink diaper pin was attached to the shoe. Investigators also found springs, remnants of carpet, and other household materials in the pit.

Patricia Howell Love testified. She stated that she was familiar with a peculiarity of the victim's mode of dress. She stated that the victim always wore either a pink or blue baby's diaper pin attached to her high top tennis shoes. She also testified that Pete Bondurant said the victim "wouldn't be back" and "[y]ou can't make a case without a body." She further stated that "Pete made the statement that he could get out of it, because he was crazy."

Ms. Love's testimony also revealed that she was commonly addressed by the childhood nickname, "Snow." Pete, however, referred to her as "his little 'Snowby.' " She testified that, following the victim's death, Pete carried around two .22 caliber shells that he referred to as "Gwenbys."[8] She stated that "[h]e would roll [the 'Gwenbys'] in his hand like dice, or he would put them on the table and play with them like a shell game."[9]

Inmate Billy Dwayne Golden testified. He stated that while he and the appellant, Pete Bondurant, were in jail, Pete spoke with him regarding the victim's death. Mr. Golden stated that Pete told him "they would never convict him of murder when there wasn't [sic] no body, and he took care of the body. He burned it in a fifty or hundred gallon barrel feed drum. He had properly disposed of the remains. . . . He told me that he took care of that bitch [the victim]." Mr. Golden also testified that Pete told him that he and Pat would "pin" the murder

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[8]The terms "Gwenbys" and "Gwembies" are used interchangeably throughout the record. For purposes of consistency, we will refer to the shell casings as "Gwenbys."

[9]Denise Bondurant stated: "Pete even carried the two .22 cal [sic] shell castings he used to shoot Gwen. He called them 'Gwenbys' all the time they were burning the [body]."

on Denise Bondurant. Mr. Golden further testified that he overheard Pete, in a phone conversation, say "not to do anything to Denise, right now. He said, they couldn't handle another stiff on their hands. The T.B.I. agent would freak."

MOTION FOR A NEW TRIAL

The appellant, Pat Bondurant, was convicted by a jury on March 30, 1991. He was sentenced on May 18, 1991. He filed his Motion For A New Trial on June 18, 1991. The Tenn. R. Crim. P., Rule 33(b), however, mandated that his Motion for New Trial be filed on or before June 17, 1991. Accordingly, all of Pat Bondurant's issues have been waived other than his sufficiency of the evidence challenge.

Pursuant to Rule 52(b), however, we can review for "plain error." Tenn. R. Crim. P., Rule 52(b). The "plain error" rule provides:

> An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial . . .

Id. It is within our sound discretion whether a waived issue is properly reviewable under Rule 52(b). State v. Adkisson, 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994).

Prior to invoking a Rule 52(b) review, we must find error that rises to an "obvious" or "clear" deprivation of a "substantial right." Id. A "substantial right" is defined as a right of "fundamental proportions in the indictment process, a right to the proof of every element of the offense, and is constitutional in nature." Id. Accordingly, "plain error" is more than merely a "conspicuous" error. Id. The error must be "an especially . . . egregious error that strikes at 'the fairness, integrity or public reputation of judicial proceedings.'" Id.

In determining whether an error is properly reviewable under Rule 52(b), we must find that:

1. The record clearly established what occurred in the trial court;
2. A clear and unequivocal rule of law has been breached;
3. A substantial right of the accused has been adversely affected;
4. The accused did not waive the issue for tactical reasons; and
5. Consideration of the error is "necessary to do substantial justice."

Id. at 641-42. We are mindful that our invocation of Rule 52(b) should be "sparingly"[10] when waiver results from procedural defaults. Id. at 641; see United States v. Young, 470 U.S. 1, 16 (1985) (holding that "[r]eviewing courts are not to use the plain error doctrine to consider trial court errors not meriting appellate review absent timely objection.").

We have reviewed Pat Bondurant's remaining waived issues. We do not find that clear and unequivocal rules of law have been breached. Accordingly, Pat Bondurant's waived issues do not satisfy the criteria for invoking a Rule 52(b) review. We will address, however, Pat Bondurant's assignment that the evidence was insufficient to sustain his conviction.

SUFFICIENCY OF THE EVIDENCE

Collectively, the appellants aver that: (1) Denise Bondurant was an accomplice, and (2) her testimony as an accomplice was insufficiently corroborated. Individually, the appellant Pete Bondurant assigns error in the trial court's denial of his Motion for Acquittal premised on the state's alleged failure to sufficiently establish the corpus delicti.

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[10]See United State v. Gerald, 624 F.2d 1291 (5th Cir. 1980) (holding plain error rule "not a run-of-the-mill remedy. The intention of the rule is to serve the ends of justice; therefore it is invoked 'only in exceptional circumstances' [where necessary] to avoid a miscarriage of justice").

CORROBORATION OF ACCOMPLICE TESTIMONY

A criminal conviction cannot be based solely upon the uncorroborated testimony of an accomplice. Sherrill v. State, 321 S.W.2d 811, 814 (Tenn. 1959). An accomplice is one "who knowingly, voluntarily, and with common intent with the principal offender unites in the commission of a crime." Clapp v. State, 30 S.W. 214, 217 (1895); Conner v. State, 531 S.W.2d 119 (Tenn. Crim. App. 1975). If there exist disputed issues of fact as to whether a witness is an accomplice, resolution of the issue is within the exclusive purview of the jury. Id.; Abbott v. State, 508 S.W.2d 801 (Tenn. Crim. App. 1974).

Corroborative evidence may be direct or circumstantial. McKinney v. State, 552 S.W.2d 787 (Tenn. Crim. App. 1977). Corroborative evidence need neither be sufficient, standing alone, to support a conviction nor extend to every facet of the accomplice's testimony. State v. Copeland, 677 S.W.2d 471, 475 (Tenn. Crim. App. 1984); State v. Green, ___ S.W.2d ___, No. 03C01-9501-CR-00011 (Tenn. Crim. App. Aug. 23, 1995). "Slight circumstances may suffice." Copeland, 677 S.W.2d at 475. Therefore, an accomplice's testimony is sufficiently corroborated "[i]f the corroborating evidence fairly and legitimately tends to connect the accused with the commission of the crime charged," id., in such a way as to satisfy the jury that the accomplice is telling the truth. See People v. Fauber, 831 P.2d 249, 273 (Cal. 1992).

The jury determines both the quantum of evidence necessary for corroboration and whether sufficient corroboration has occurred. Stanley v. State, 222 S.W.2d 384 (Tenn. 1949); Clapp, 30 S.W. at 217. The jury may take into consideration all the evidence and draw whatever reasonable inferences that may exist therefrom. Copeland, 677 S.W.2d at 475. This "Court may not substitute its judgment or inferences for those of the jury." Id. (citing Hawkins v. State, 469 S.W.2d 515 (Tenn. Crim. App. 1971)).

In this case, a disputed issue of fact existed as to whether Denise Bondurant was an accomplice. The issue was properly submitted to the jury with appropriate accomplice instructions. At trial, however, the appellants failed to request a special verdict as to whether Ms. Bondurant was found to be an accomplice. We are therefore, unable to determine how the issue was resolved. Regardless, we find that if Ms. Bondurant was an accomplice, her testimony was adequately corroborated. Bethany v. State, 565 S.W.2d 900 (Tenn. Crim. App. 1978).

The jury heard testimony from non-accomplice witnesses. From this evidence, the jury could have drawn the inference that the appellants murdered the victim. See Garton v. State, 332 S.W.2d 169 (Tenn. 1960). Patricia Love testified that the appellant Pete Bondurant made statements inferring that the victim was dead and her body had been destroyed. She also testified that Pete carried two .22 caliber shells named "Gwenbys." This evidence corroborated Denise's testimony that Pete referred to two .22 caliber shells as "Gwenbys" while they were burning the victim's body. Billy Golden testified that he overheard Pete make incriminating statements concerning the victim's death and destruction of her body. Human blood splatterings were found on two walls in the room where testimony indicated that the victim was murdered. Behind the house, burned items were excavated from a backyard pit that corroborated Denise's testimony of the appellants' efforts to destroy evidence.

A jury conviction, approved by the trial judge, resolves all conflicts in favor of the state. State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978). On appeal, the state is entitled to both the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The weight and credibility of a witness' testimony are matters entrusted exclusively to the jury as the triers of

fact. State v. Sheffield, 676 S.W.2d 542 (Tenn. 1984); Byrge v. State, 575 S.W.2d 292 (Tenn. Crim. App. 1978).

Upon listening to the testimony at trial, viewing witness demeanor, and considering the testimony in light of all the facts in the case, the jury accredited the state's witnesses and, if necessary, found adequate corroboration. Assessing witness credibility and making corroboration determinations are exclusively the purview of the jury. State v. Banes, 874 S.W.2d 73, 78 (Tenn. Crim. App. 1993). We will not reweigh the evidence. We will not supplant the jury's inferences with those of our own. Accordingly, the appellants have neither demonstrated that the trial court should have directed a verdict of acquittal nor shown that the evidence was insufficient. This issue is devoid of merit.

CORPUS DELICTI

The appellant Pete Bondurant argues that "there is no proof of there being 'a deceased person' or any proof of the deceased's identity as required." He apparently challenges the use of circumstantial evidence in establishing corpus delicti contending "[n]o inferences can be made from circumstances until the corpus delicti is proven beyond a reasonable doubt." We find his argument misguided.

The corpus delicti consists of two elements: (1) the death of a human being, and (2) a criminal agency in producing that death. State v. Driver, 634 S.W.2d 601 (Tenn. Crim. App. 1981). The state must prove these elements beyond a reasonable doubt. State v. Shepherd, 902 S.W.2d 895, 901 (Tenn. 1995). In establishing the corpus delicti, the state may proffer testimony of an eyewitness to the act or rely purely on circumstantial evidence. Berry v. State, 523 S.W.2d 371, 373 (Tenn. Crim. App. 1974). Regardless of the state's method, the evidence must show that death or disappearance was not

occasioned by accident, suicide, or natural causes. Shepherd, 902 S.W.2d at 901 (citing Davis v. State, 445 S.W.2d 933, 936 (Tenn. Crim. App. 1969)).

The failure to recover a victim's body should not be fatal to the prosecution of a homicide. Requiring a body would afford absolute immunity to defendants who are cunning enough to destroy the body or otherwise conceal its identity. In People v. Manson, 139 Cal. Rptr. 275 (Cal. Ct. App. 1977), the court succinctly stated:

> The fact that a murderer may successfully dispose of the body of the victim does not entitle him to acquittal. That is one form of success for which society has no reward. Id. at 298.

In addition to California, a plethora of states have upheld homicide convictions, in the absence of a victim's body, provided that the evidence sufficiently established the corpus delicti.[11] The state may establish corpus delicti circumstantially when the destruction or disappearance of a body has occurred. Berry, 523 S.W.2d at 373.

In the present case, the victim was last seen with the appellants at their residence on May 30, 1986. At the time of the appellants' trial, the victim had neither been seen nor heard from for approximately five years. We find that the length of the victim's absence and her failure to communicate with either family

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[11] See Lewis v. State, 125 So. 802 (Ala. 1930) (holding eyewitness, bone fragments, blood splotches and stains, and proof that body of deceased burned was sufficient); Derring v. State, 619 S.W.2d 644 (Ark. 1981) (finding evidence of victim's routine, fact that victim last seen talking to person fitting defendant's description, and that defendant attempted to sell victim's car was sufficient); People v. Bolinski, 67 Cal. Rptr. 347 (Cal. Ct. App. 1968) (upholding finding of corpus delicti where victim had disappeared and defendant was arrested with victim's car and credit cards); People v. Scott, 1 Cal. Rptr. 600 (Cal. Ct. App. 1959) (affirming finding of corpus delicti where defendant made statements that he knew his wife was dead and proof had shown he recently cleaned his car); People v. Cullen, 234 P.2d 1(Cal. 1951) (finding sufficient proof where victim disappeared, proof that defendant forged victim's check, proof of bloodstains on rug and clothing, and proof of defendant's incriminating statements); People v. McMonigle, 177 P.2d 745 (Cal. 1947) (holding proof sufficient where testimony of FBI agent recounting defendant's reconstruction of events and other admissions, evidence of victim's shoes and other personal possessions); State v. Pyle, 532 P.2d 1309 (Kan. 1975) (upholding finding of corpus delicti where house burned to ground and no trace of victim); Warmke v. Commonwealth, 180 S.W.2d 872 (Ky. 1944) (holding evidence sufficient where baby dropped in creek and only cap was found); State v. Zarinsky, 362 A.2d 611 (N.J. Super. Ct. App. Div. 1976) (finding sufficient where victim last seen driving away with man fitting defendant's description and admission to cellmates); State v. Dudley, 249 N.E.2d 536 (Ohio Ct. App. 1969) (affirming where victim's cap found on floor and defendant's car stained with blood).

or friends gave rise to an inference that the victim was no longer alive.

In establishing that the victim died as the result of a criminal agency, the state showed: that a burned tennis shoe with an attached pink diaper pin was found in the appellant's backyard; that the victim wore tennis shoes with a pink or blue baby pin attached to them;[12] that human blood splatterings were found on the walls of a room in the appellants' house where the victim's beating had occurred; and that burned carpet and household items were found in an excavated backyard pit. Furthermore, the jury heard non-accomplice testimony indicating that the appellants killed the victim and destroyed her body. The jury heard evidence that the appellant, Pete Bondurant, had nicknamed two spent .22 caliber shell casings "Gwenbys." Accordingly, we find sufficient proof to establish that the victim died as the result of a criminal agency.

DENIAL OF SEVERANCE

The appellant, Pete Bondurant, next assigns error in the trial court's refusal to grant a severance. He argues that prejudicial evidence of Pat Bondurant's activities was improperly considered adversely to him as the result of consolidation. We disagree.

Joinder is permissible when each defendant "is charged with accountability for each offense included." Tenn. R. Crim. P., Rule 8(c)(I). A trial judge may, however, grant a severance prior to trial if "it is deemed appropriate to promote a fair determination of the guilt or innocence of one or more defendants." Tenn. R. Crim. P., Rule 14(c)(2)(i). Whether to grant severance is within the trial judge's sound discretion. The exercise of that discretion will not be reversed absent an affirmative showing of prejudice.

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[12] See Berry, 523 S.W.2d at 374 (holding that circumstantial evidence of peculiar characteristics of clothing or articles found in connection with remains may establish identity).

When evidence implicates one defendant in a multi-defendant litigation, the jury should be instructed accordingly to prevent prejudice. State v. Kyger, 787 S.W.2d 13, 28 (Tenn. Crim. App. 1989). In the case sub judice, the jury was instructed as follows:

> You should give separate consideration to each defendant. Each is entitled to have his case decided on the evidence and the law which is applicable to that particular defendant. Any evidence which was limited to a particular defendant should not be considered by you as to any other defendant. You can acquit both or convict both, or you can acquit one and convict the other. If you cannot agree upon a verdict as to one of them, you must render a verdict as to the one upon which you agree.

The jury is presumed to have followed these instructions. State v. Newsome, 744 S.W.2d 911, 915 (Tenn. Crim. App. 1987).

We find that the appellant has failed to demonstrate that the jury disregarded their instructions. Accordingly, the appellant has not shown prejudice. Absent a showing of prejudice, we will not disturb the trial judge's exercise of discretion in refusing to grant a severance. This issue is devoid of merit.

EVIDENCE OF NON-CONSENSUAL SEXUAL ACTS

The appellant, Pete Bondurant's, third assignment of error is the admission of testimony that Pat had unconsensual sexual intercourse with the victim after she was beaten unconscious. The appellant maintains that the evidence was irrelevant. In the alternative, he argues, if relevant, the prejudicial impact of this testimony far outweighed its probative value. In support of his contention, he cites Tenn. R. Evid., Rule 404(b).

As a general rule, evidence of uncharged crimes is inadmissible to show the accused's propensity to commit the crime charged. Tenn. R. Evid., Rule

404(b). This general rule is subject to exceptions. Evidence of other crimes may be admissible if tending to establish an accused's guilt of the crime charged. In establishing guilt, other crime evidence may be admissible to show: (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan for commission of two or more related crimes, and (5) identity. Clairborne v. State, 555 S.W.2d 414, 417 (Tenn. Crim. App. 1977); Ellison v. State, 549 S.W.2d 691, 695 (Tenn. Crim. App. 1976).

In this case, both of the appellants were aiding and abetting each other in their individual endeavors. Only by fortuitous circumstances were neither Pat Bondurant charged with rape nor Pete Bondurant charged as an aider and abettor to rape. See State v. Brobeck, 751 S.W.2d 828 (Tenn. 1988) (holding that death preceding penetration did not negate commission of aggravated rape). During argument on the motion in limine, the state argued that evidence of the uncharged rape provided motive for homicide.

We find introduction of the uncharged conduct was permissible under the single transaction rule as it constituted part of the res gestae. The single transaction rule permits admissibility of all activities occurring within a res gestae. Coffman v. State, 466 S.W.2d 241, 245 (Tenn. Crim. App. 1970). Res gestae is the complete criminal transaction from the starting point of the act until the end is reached. Randolph v. State, 570 S.W.2d 869 (Tenn. Crim. App. 1978). What constitutes the res gestae depends "wholly upon the character of the crime and the circumstances of the case." Id. Facts may be part of the res gestae when they are so interwoven with the principle facts at issue that they cannot be separated without depriving the jury of necessary proof in reaching a verdict. Ellison, 549 S.W.2d at 696. If there is doubt as to what constitutes res gestae, it is a question for the jury. Randolph, 570 S.W.2d at 872.

Facts occurring within the res gestae are relevant. Ellison, 549 S.W.2d at

695. Accordingly, evidence of an uncharged crime may be admissible, if the uncharged crime is

> so closely related to the crime under the investigation at trial, in point of time and place, and so intimately associated with it that they both form one continuous transaction [or res gestae].

Id. at 694. The rule is based on the premise "that all such acts are admissible as necessary parts of the proof of the entire deed." Id.; see also State v. McAfee, 784 S.W.2d 930, 931 (Tenn. Crim. App. 1989) (holding that events and circumstances occurring before, during and after killing may be relevant to issues such as premeditation).

Upon review, we find that the following acts constituted part of the res gestae: (1) Pat Bondurant's act of beating the victim to the point of unconsciousness, (2) Pat's acts of vaginally and anally raping the victim after she was beaten, (3) Pete Bondurant's act of shooting the victim twice in the head after watching Pat beat and rape her, (4) the appellants' combined subsequent acts of destroying the victim's remains and (5) Pat's act of pouring the victim's cremated remains into the river. The beating signified the beginning point of the appellants' criminal transaction and the disposal of the cremated remains denoted its end. Accordingly, testimony of activities occurring within these points was properly admissible as part of the res gestae. This issue is without merit.

EVIDENCE OF THE BODY'S DESTRUCTION

The appellant, Pete Bondurant's, next assignment of error is the trial court's admission of testimony relating to the destruction of the victim's body. He argues that the evidence was either irrelevant or, in the alternative, its probative value was outweighed by its prejudicial effect. We disagree.

The jury was entitled to consider evidence that the victim's body had been

destroyed. An inference of guilt may be drawn from the concealment or destruction of the body of the deceased. Cagle v. State, 507 S.W.2d 121, 129 (Tenn. Crim. App. 1973); State v. Redd, No. 03C01-9101-CR-0007 (Tenn. Crim App. July 25., 1991). As previously noted, the destruction of the victim's body occurred within the res gestae. Facts occurring within the res gestae are relevant. Ellison, 549 S.W.2d at 695. Furthermore, the evidence was necessary in establishing corpus delicti and explaining to the jury the absence of a body. The issue is meritless.

EVIDENCE OF DRUG ACTIVITIES

The appellant, Pete Bondurant, next argues that the prosecution intentionally elicited inadmissible testimony that the appellants were drug dealers. He argues that the evidence was irrelevant and prejudicial. He further argues that "introduction of said evidence is nothing more than an attempt to paint the defendant as one with evil propensity, a drug dealer." Intertwined within this assignment of error is an allegation of prosecutorial misconduct.

On direct examination of Denise Bondurant, the following colloquy took place:

> Q. Who was the first person who came there that night that was not a member of the household, that didn't live there? Do you recall?
>
> A. I believe it was Dwayne Howell and Gary Hardin came together.
>
> Q. And were they regular visitors at your house?
>
> A. Yes, sir.
>
> Q. Do you know for what purpose they usually came to your house?
>
> A. Probably to purchase drugs and --

At that point, appellant's counsel objected and a jury-out hearing was held.

During the jury out hearing, the prosecutor maintained that he did not expect nor deliberately elicit the response to that question. He stated that he anticipated "it would come later, and that we would stop."

When prosecutorial misconduct is alleged, the appellant must show that the improper conduct detrimentally affected the jury's verdict. Harrington v. State, 385 S.W.2d 758, 759 (Tenn. 1965). In reviewing the allegation of improper conduct, we consider: (1) the intent of the prosecutor, (2) the curative measures which were undertaken by the court, (3) the improper conduct viewed in the context and in light of the facts and circumstances of the case, (4) the cumulative effect of the remarks with any other errors in the record, and (5) the relative strengths or weakness of the case. Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976). Trial judges retain broad discretion in controlling counsels' conduct occurring within their courtrooms. We will not interfere with their discretion, absent a showing that they abused their discretion. Smith v. State, 527 S.W.2d 737, 739 (Tenn. 1975).

We have viewed the questioned response in relation to the record as a whole and in the context in which it was made. The appellant has not shown nor can we say that the state specifically and intentionally elicited information that either of the appellants were involved in drug trafficking. Moreover, we are not convinced that the statement affected the jury's verdict to the appellant's detriment. Although implied, the witness did not specify that the appellants were in fact the source of drugs. Either Denise or Ricky Franklin, an adult resident at the appellant's house, could have been the source. Accordingly, we find that the statement was harmless error and that the state's actions did not rise to a level of prosecutorial misconduct. This issue is meritless.

TESTIMONY THAT DEFENDANT HAD KILLED BEFORE

The appellant, Pete Bondurant, challenges the admission of his statement that "he was crazy; that he had killed once; he'd kill again." He argues that the statement logically infers that he had a prior manslaughter conviction. He further argues that the statement was irrelevant and highly prejudicial. We disagree.

The record reflects that the appellant made this statement when Ken and Jack Swanner confronted the appellant about the victim's disappearance.

> Q. What happened when you got to the Thirty-One Club?
>
> A. We got off the bike. Jack said, where's Gwen? I'm her big brother. And Pete started backing off. Said, I ain't done nothing. Leave me alone. I'm crazy.
>
> Q. Did he make any statements -- excuse me. Continue.
>
> A. I remember the owner came out, and said, y'all break it up, out there. And then he begin backing into the club saying he was crazy; that he'd killed once; he'd kill again. Like he was scared of us.

The appellant's statement was made for purposes of intimidation. As a statement of intimidation, the uttered words did not go to the truth of the matter asserted, i.e., that the appellant had in fact killed another person or had a previous conviction for an unlawful killing. The jury may well have surmised that the appellant lied about having previously killed to dissuade a possible attack. Accordingly, the statement did not establish propensity to commit murder. The statement merely established the appellant's propensity to use intimidating phrases such as "I'm crazy" or "I'm a killer" to ward off possible violent confrontations.[13] Although, probably irrelevant, we find that the error, if any, in allowing the testimony was harmless.

JURY INSTRUCTIONS

In his last issue, Pete Bondurant argues that the trial court erred

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[13]This is analogous to someone stating "I'm a trained killer" or "these hands are lethal weapons" prior to a bar room confrontation. Although the utterer probably has never killed nor taken a taekwondo lesson, he makes such contentions hoping to deter a physical confrontation.

substantively and procedurally when instructing the jury. Substantively, he assigns that the trial court committed reversible error when instructing:

> Death following a wound from which death might ensue, inflicted with the intent to kill, is presumed to have been caused by such wound, and the burden of proceeding by offer of proof is upon the defendant to show that death resulted from some other cause not attributable to the defendant. However, while the burden of proceeding may shift, the burden of proof never shifts, and is always upon the State to prove, beyond a reasonable, that the death of the deceased was brought about by the unlawful act of the defendant.[14]

He maintains that use of the word presumption unconstitutionally shifted the state's burden of proof.

Following jury deliberation, the jury returned and requested clarifications which included a request for interpretation on the objected-to portion of the instruction. The trial judge's supplemental charge included the following:

> And the last paragraph means to me -- it certainly doesn't mean that the burden of proof has shifted from the State to the defendant. The burden of proof never shifts. It stays with the State throughout the trial of the case.
>
> This means that if death follows a wound that's inflicted with intent to kill, it's presumed that that death was caused by that wound, and the burden of proceeding; that is, if the defendant wants to show that the death resulted from some other cause that could not be attributable to that person. It is not the burden of proof. It's the burden of proceeding with that proof if they so desired.
>
> And of course, the last sentence just simply says that the burden of proof never shifts from the State. It always stays with the State of Tennessee. They must prove, beyond a reasonable doubt, the defendant's guilt.

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[14]We acknowledge our recent disapproval of a similar instruction in State v. Ruane, 912 S.W.2d 766 (Tenn. Crim. App. 1995). In Ruane, reversed on other grounds, we noted that a similar instruction and the use of the word "contribute" could tend to mislead or confuse the jury regarding the state's proof on the issue of causation. Although, in retrospect, the instructions in Ruane and in the case sub judice which are based upon T.P.I. Crim. 37.11 are not favored today, these instructions do not rise to the level of a constitutional deprivation.

Procedurally, the appellant assigns that the trial court committed prejudicial error when providing this supplemental interpretation. In support of his contention, he argues: (1) that the trial court erred when providing the interpretation without the presence of all counsel; (2) that the trial court erred by failing to admonish the jury not to place undue emphasis on the interpretation; and (3) that the trial court erred by not reducing the oral interpretation to writing.

CONSTITUTIONALITY OF THE INSTRUCTION

In determining whether a jury instruction is constitutional, we must ascertain whether the challenged charge created a mandatory presumption or a permissive inference. Adkins v. State, 911 S.W.2d 334, 352 (Tenn. Crim. App. 1994). Mandatory presumptions violate due process by impermissibly shifting burdens to defendants. Id. Permissive inferences, however, are constitutional. Id. Permissive inferences merely permit, as opposed to mandate, juries to infer elemental facts from proof of the basic facts. State v. Bolin, 678 S.W.2d 40, 42 (Tenn. 1984). Although, "inference" rather than "presumption" should be used when instructing the jury, we must examine the charge in the overall context of the entire instruction. Id.

In the case sub judice, the trial judge made repeated references that the state carried the burden of proof. The trial judge further noted, in both the original charge and the supplemental charge, that the state's burden of proof never shifted. Therefore, when taken in the overall context, the trial court's use of the term "presumption" rather than "inference" was harmless error.

PROCEDURE ON SUPPLEMENTAL INSTRUCTION

The appellant avers that the trial court committed error procedurally by: (1) providing supplemental charges in the absence of co-defendant's counsel;

(2) failing to admonish the jury not to place undue emphasis on the supplemental charge; and (3) not reducing the oral supplemental charge to writing.

When answering questions propounded by a jury during deliberations, the trial court should call the jury, counsel, the defendant(s), and the court reporter back into open court. State v. Mays, 677 S.W.2d 476, 479 (Tenn. Crim. App. 1984). The matter should then be addressed on the record. Id. The supplemental instructions should be: (1) elicited by the jury, (2) comprehensively fair to all parties, and (3) not unduly emphatic upon certain portions of the law to the exclusion of others equally applicable. Berry v. Conover, 673 S.W.2d 541, 545 (Tenn. Crim. App. 1984). The trial court is to admonish the jury not to place undue emphasis on the supplemental charge.

I

In the case sub judice, the jury, the appellant's counsel, and the court reporter were all present during the supplemental charges. The charges were made in open court and on the record. Although, the appellant was represented by counsel during supplemental charges, we admonish the trial judge to have all counsel present when providing supplemental charges.[15] However, because Pete Bondurant's counsel was present, he has suffered no prejudice as the result of the trial judge's error.

II

The appellant has waived complaint of the trial court's failure to reduce the supplemental charge to writing by his failure to raise a timely and specific

[15]See Tenn. R. Supr. Ct., Rule 10, Cannon 3, A(4) (stating that "[a] judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding").

objection. He objected to the content of the supplemental charge and to co-counsels' absence during the supplemental charge. He did not, however, object to the trial court's failure to submit the supplemental charge to the jury in writing. Tenn. R. App. P., Rule 36(a).

Notwithstanding waiver, we find this issue lacks merit. The Tenn. R. Crim. P., Rule 30(c) provides that in felonies, jury instructions shall be in writing and read word for word to the jury. Then the jury is to take possession of the written instructions for reference during their deliberations. Id. However, unlike the original instructions, juries are not to place undue emphasis on supplemental charges. A rule requiring that supplemental charges be reduced to writing and given to the jury during their deliberations merely invites juries to place inappropriate or undue emphasis on supplemental charges. Supplemental charges should merely clarify ambiguities in the original instruction. Once the ambiguity has been elucidated, the jury should then return to deliberations based upon the original instructions. Accordingly, we find that supplemental charges or instructions merely purporting to elucidate a previous instruction, such as these, are not within Rule 30(c)'s written requirement. Tenn R. Crim. P., Rule 30(c); see State v. Gorman, 628 S.W.2d 739 (Tenn. 1982).

III

The appellant's last subissue, challenging the trial court's failure to admonish the jury, is devoid of merit. The better procedure is to admonish juries not to place undue emphasis upon supplemental instructions. Whether the trial court's failure to admonish constitutes reversible error must be determined upon examination of the entire record. State v. Chance, 778 S.W.2d 457, 461 (Tenn. Crim. App. 1989); State v. Forbes, No. 01C01-9410-CC-00338, slip op. at 20 (Tenn. Crim. App. Dec. 19, 1995).

Initially, we note that the main jury charge provided instructions sufficient to forestall the problem of which appellant complains. The main charge stated:

> The order in which the instructions are given is no indication of their relative importance, and you should not single out one or more of them to the exclusion of another or others, but you should consider each one in the light of and in harmony with the others.

The jury was presumed to have followed this instruction. See Chance, 778 S.W.2d at 461. Next, we find that in substance, the supplemental charge contained language favorable to the appellant. In the supplemental charge, the trial court incessantly reiterated that the state always carried the burden of proof and that that burden of proof never shifted. Accordingly, the entire record indicates that the failure to admonish did not affect the jury's verdict to the appellant's detriment.

CONCLUSION

Because we find that the appellant Pat Bondurant's issues are either devoid of merit or waived and the appellant Pete Bondurant's issues are without merit, the judgment of the trial court is, in all respects,

AFFIRMED.

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PAUL G. SUMMERS, Judge

CONCUR:

_____
GARY R. WADE, Judge

_____
JOSEPH M. TIPTON, Judge