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,	)	
	)	
Appellee,	)	No. 01C01-9501-CC-00023
	)	
	)	Giles County
v.	)	
	)	Hon. Jim T. Hamilton , Judge
	)	
HUGH PETER BONDURANT, JR., and KENNETH PATTERSON BONDURANT,	)	(Murder in the Second Degree)
	)	
	)	
Appellants.	)	

CONCURRING OPINION

I concur in the results reached in the majority opinion. I disagree, though, with that opinion's use of "res gestae" as a legal concept that exists separately to justify the admission of evidence under the Tennessee Rules of Evidence, particularly Rule 404(b). The term res gestae has been criticized for its "vagueness and imprecision," leading to recommendations that it be omitted from use in any evidentiary analysis. 2 John W. Strong, et al., McCormick on Evidence, § 268 at 207-208 (4th ed. 1992) ("The ancient phrase can well be jettisoned, with due acknowledgment that it served its era in the evolution of evidence law.")[1] The majority opinion's inclusion of events two days after the victim's death as part of the res gestae for the murder indicates how the term's vagueness may lead to an unduly broad application.

[1]Others have been less kind in their suggestion to forego use of the term. "Lawyers and judges should never stoop to utter the term 'res gestae.' The term defies definition, causes confusion, and thwarts efforts at serious analysis. Wigmore described these meaningless Latin words as 'useless,' 'vicious,' and 'positively harmful." Neil P. Cohen, et al., Tennessee Law of Evidence § 803(2).1 at 532 (3d ed. 1995).

This court has previously stated that we should "avoid the murky concept of res gestae." State v. Carpenter, 773 S.W.2d 1, 9 (Tenn. Crim. App.), app. denied (Tenn. 1989). In fact, our supreme court has attempted to consign res gestae to history:

> We . . . must concede that over the years that the courts have frequently used the term res gestae when admitting evidence of other crimes or similar evidence before and after a crime. We think though that the author of Wigmore On Evidence, 3rd Edition, Vol. 1, at Sec. 218, correctly [analyzes] the theory and reason for this admission when he says:
>
> > The term "res gestae" should be once and for all abandoned as useless and confusing. Let it be said that such acts receivable as "necessary parts of the proof of an entire deed," or "inseparable elements of the deed," or "concomitant parts of the criminal act," or anything else that carries its own reasoning and definition with it; but let legal discussions sedulously avoid this much-abused and wholly unmanageable Latin phrase.
>
> Thus we think that this is sound reasoning in that the real reason for admission of these crimes before and after the crime for which the plaintiff in error is here being tried is that they were inseparable components of a completed crime.

Gibbs v. State, 201 Tenn. 491, 300 S.W.2d 890, 892 (1957). In similar fashion, the various acts which the majority opinion views as admissible as part of the res gestae are actually admissible as either inseparable components of the defendants' acts of murder or as relevant evidence tending to show motive, the element of malice, or the destruction of evidence. Thus, the acts are admissible under recognized exceptions to Rule 404(b) without any need to rely upon res gestae.

Also, I disagree with the majority opinion's conclusion, albeit in dictum, that Rule 30(c), Tenn. R. Crim. P., does not require supplemental jury instructions

during deliberations to be written, read and delivered to the jury. In State v. Crocker, 697 S.W.2d 362 (Tenn. Crim. App.), app. denied (Tenn. 1985), this court reviewed complaints about the trial court giving some supplemental instructions orally and delivering other written supplemental instructions to the jury without them being read to the jury. This court stated the following:

> It is elementary that every word of the judge's instructions to the jury should be in writing and read to the jury. Tenn. R. Crim P. 30(c).
>
> Clearly, the trial court's oral comments to the jury and its failure to personally read and deliver to the jury the supplemental charge were highly irregular and improper.

Id at 365. Jury instructions given at the end of a trial are meant to assist and guide the jury in its deliberations. In this respect, whether supplemental instructions are meant to clarify, explain, add to, correct or even rephrase the instructions already given, they are no less aids and guides to jury deliberation than the original instructions and should be treated the same.

I believe that there is little risk that the jury will place undue emphasis on supplemental instructions if they are in writing. Actually, if the only instructions possessed by the jury are those that confused it, there is a greater risk of a miscarriage of justice if the explanatory instructions are not in writing for the jury's continued review. Any concern that a supplemental instruction may be unduly emphasized can be addressed by instructing the jury to consider it in conjunction with the remainder of the instructions. In any event, I believe that the requirement of a written charge provided by Rule 30(c) covers all jury instructions at the end of the case given for the purpose of

aiding the jury in its deliberations, whether those instructions are viewed as original or supplemental.

I am authorized to state that Judge Wade concurs in this opinion.

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Joseph M. Tipton, Judge