IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY 1996 SESSION

FILED

November 08, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	C.C.A. NO. 03C01-9510-CR-00330
	)	
Appellee	)	HAMILTON COUNTY
	)	
	)	HON. STEPHEN M. BEVIL,
v.	)	JUDGE
	)	
WILLIE WILLIAMS, JR.,	)	
	)	First degree murder;
Appellant	)	Possession of prohibited weapon.

FOR THE APPELLANT

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OPINION FILED _____

REVERSED and REMANDED

JOHN K. BYERS
SENIOR JUDGE

O P I N I O N

The defendant was tried by jury on September 20-23, 1994 and found guilty of one count of first degree murder and one count of unlawful possession of a machine gun.

In this appeal, the defendant presents the following issues for our review:

(1) Whether the trial court erred in allowing testimony of the deceased given in an unrelated matter in juvenile court and on police 911 tapes;

(2) Whether the defense trial attorney provided constitutionally ineffective assistance;

(3) Whether the trial court erred in allowing evidence of a prior conviction without proper notice of the State's intention to use the evidence for impeachment; and

(4) Whether the trial court erred in refusing to instruct the jury on voluntary manslaughter and other lesser charges.

Because the trial court failed to charge the lesser offense of voluntary manslaughter, the judgment must be reversed. A new trial is ordered.

At approximately 4:40 a.m. on July 24, 1993, Delany Thomas was found dead of a gunshot wound to his head as he sat in the driver's seat of his automobile in the alley adjoining his mother's home. The car's engine was still running.

Prior to discovering Thomas' body, the Chattanooga Police Department had received several telephone calls that morning concerning Thomas and defendant.

At 3:37 a.m., Thomas phoned 911 and reported that he " . . . had a conflict for my [unintelligible] momma's brother-in-law, he just shot at my car. He shot it up. There's some bullet holes in it right now. If they don't come, I'm gonna get him."

At 4:37 a.m., defendant phoned 911 and reported " . . . I believe I shot somebody . . . I followed him and he laying in the car . . . Get the police out here right now. The man might be dying, he might be dead, I don't know. He around the corner from me. He in a Cadillac . . . I got the gun in the house now . . ."

A police officer arrived and found defendant at his home. She went with

defendant and defendant's brother to a nearby alley where she found Thomas dead in his car. Defendant's brother went into defendant's house, brought out a Norinco AK-47 semi-automatic rifle and gave it to the officer. Fourteen shells of bullets from the rifle were found in Thomas' car and on the street nearby.

Defendant gave a statement to police indicating that Thomas had fired gunshots at his home and that in response, he had chased Thomas and fired shots to draw Thomas away from his home. Defendant stated he only fired one shot toward Thomas, and then only because Thomas pointed a handgun at him from the auto.

The Hamilton County medical examiner testified that the victim was not facing the shooter when he was shot and that had the victim been holding a gun, the gun should have been in his hand or nearby in the auto. No such gun was found.

A neighbor testified that she heard shots and then saw a man drive up in a small car, get out, approach the alley, return to his car and leave. Soon afterward, she saw two men walk down the street, reach behind a wall, retrieve a gun while looking furtively around, and walk off.

Evidence was introduced at trial that Thomas was, at the time of his death, living with a woman whose daughter, Glorissa Buchanan, had been in a knife fight with defendant's sister, Valencia Williams. The week before Thomas was murdered, Glorissa Buchanan had been found delinquent at a juvenile hearing and sent to a juvenile detention facility.

Defendant first raises the issue of whether the trial court erred in allowing testimony about Thomas' statement at Glorissa Buchanan's juvenile hearing. The following testimony is challenged:

> Q: What did your boyfriend, Delaney Thomas, the victim in this case, what did he say about what Willie Williams did with respect to your daughter in court, what did he testify to?
>
> A: He said when my daughter stabbed Valencia, Willie hit her with a rifle here and here.

Defendant says this testimony was inadmissible hearsay.

Hearsay is "a statement, other than one made by the declarant while

testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801, Tenn. R. Evid.

When the declarant is unable to be present or to testify because of his death, his hearsay statement is admissible as evidence of the truth of the matter asserted in a limited number of situations. Rule 804(b)(1 - 4), Tenn. R. Evid.

Defendant argues that Thomas' statement at the juvenile court hearing was inadmissible hearsay because it was admitted for the truth of the matter asserted and does not meet the test of the exception in Rule 804(b)(1) dealing with former testimony. Rule 804(b)(1) allows hearsay of a deceased declarant when the declarations are in the form of:

> . . . testimony given as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination.

Defendant argues that since he was not present at the juvenile hearing and did not have an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination, the testimony is inadmissible under Rule 804(b)(1).

We agree with defendant that the evidence is hearsay and does not fall within any of the statutory exceptions to the hearsay rule. The rule is clear that former testimony is only admissible when the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination. Tenn. R. Evid. Rule 804(b). Since defendant was not at the hearing, the testimony is inadmissible. At retrial, if the defendant presents a witness who was actually present at the altercation between the two girls and has knowledge of defendant's intervention, such testimony about the defendant's allegedly "hitting her with a rifle here and here" as the cause of "bad blood" between the victim and defendant would be an admissible prior bad act to show motive. However, as presented for this appeal, the evidence is inadmissible and therefore it was error for the trial judge to allow it.

Defendant next contends that the trial judge erred in permitting the introduction into evidence of a police 911 tape on the day of the murder in which

Thomas complained that defendant was shooting at his house. Defendant argues this tape was inadmissible because it was prejudicial and not relevant.

The State argues that the 911 tape is admissible as a public record (Tenn. R. Evid. Rule 803[8]), because it is an excited utterance (Tenn. R. Evid. Rule 803[2]), and because, although prejudicial, it was relevant and necessary to establish the sequence of events and who called the police at what times.

The argument that a police 911 call is admissible as a public record is unpersuasive because Rule 803(8) specifically excludes "matters observed by police officers and other law enforcement personnel." However, we find the State's other arguments to be persuasive. The transcript of Thomas' 911 call, as quoted *infra*, indeed demonstrates it was an excited utterance, admissible under 803(2). Furthermore, the jury was instructed not to consider the tape for the truth of the matter asserted, but to establish the time of the call and the identity of the caller. Therefore, we find defendant's argument that the tape is inadmissible to be without merit.

Defendant next argues that he was denied a fair trial by ineffective assistance of counsel. He asserts that his counsel was ineffective because he (1) failed to file a formal discovery request, (2) failed to fully investigate the crime, (3) failed to develop or explain to him a "concrete or stated defense theory," (4) failed to file various pre-trial motions to suppress evidence, and (5) failed to call defendant's brother as a witness.

Defense counsel testified at the hearing on Motion for New Trial that he had practiced criminal defense law for 37 years. He did not file a formal discovery request because he participated in a discovery conference with the District Attorney and believed the entire District Attorney's file had been made available to him. Therefore, he was not surprised or prejudiced at trial by the production of unexpected evidence by the State.

As to the second allegation, that defense counsel failed to fully investigate the crime, defense counsel employed the services of a private investigator to investigate the crime before trial and accompanied the investigator on several

occasions. He was unable to uncover evidence that Thomas had a gun when defendant shot him or to discover who might have retrieved a gun from the area after the murder.

As to the allegation that defense counsel failed to develop a theory of defense, the defense theory upon which counsel initially relied based upon statements made to him by the defendant was that Thomas was the aggressor and defendant reacted in fear. However, counsel then discovered that the evidence, especially the police 911 tapes, tended to contradict what he had been told by the defendant. As a result, he encouraged defendant, in light of the evidence, to plead guilty to second degree murder, which defendant declined to do on the advice of his family.

Defendant next asserts he was denied effective assistance of counsel because his attorney failed to file motions to suppress the 911 tape, the rifle used in the murder and statements made to police at the scene.

Defense counsel testified at the hearing on Motion for New Trial that his investigation and interviewing of witnesses led him to conclude that the rifle was voluntarily given to the police. It is abundantly clear from defendant's 911 call to police that he was voluntarily providing self-incriminating statements even before the police were aware that a murder had been committed. The on-scene police investigator testified that defendant was read his rights, waived them, and voluntarily gave a statement when first contacted at the scene.

Finally, defendant asserts he was denied effective assistance of counsel because his attorney failed to call his brother as a witness at trial. Defense counsel testified, however, that the brother had provided information in pre-trial interviews that both impeached the brother and tended to impeach the defendant. Therefore, the decision not to call defendant's brother does not indicate ineffective assistance.

To prevail on a claim of constitutionally ineffective assistance of counsel, defendant must prove that his representation was not reasonably effective, and that its ineffectiveness raised a reasonable probability that but for counsel's deficient

performance, the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668 (1984); *State v. Melson,* 772 S.W.2d 417 (Tenn. 1989).

Defendant was convicted based upon his own unsolicited 911 phone call in which he admitted that he shot at Thomas' car, his voluntary statements at the crime scene as to his remorse for having possibly killed Thomas, and his sending or permitting his brother to retrieve the murder weapon from his home and provide it to the police at the crime scene.

We can find nothing in the conduct of the investigation or trial that his counsel could have done to overcome the overwhelmingly inculpatory evidence defendant voluntarily provided before he obtained counsel. Therefore, we find defendant's issue as to ineffective assistance of counsel is without merit.

Defendant next raises the issue of whether or not prejudicial error was committed when the trial court allowed introduction of evidence of his prior conviction for petit larceny without first providing formal notice of intent to do so as required by Rule 609, Tenn. R. Evid. Although the State provided defense counsel with a copy of defendant's prior criminal record, this was insufficient to satisfy the Rule 609 notice requirement. *State v. Barnard,* 899 S.W.2d 617 (Tenn. Crim. App. 1994). The State concedes that the trial court's ruling was error, but avers that the error was harmless. Taking into consideration the overwhelming evidence of the defendant's violent acts in this case, we find it incredible to suppose that defendant's prior conviction for petit larceny had any influence upon the verdict, and therefore the error was harmless.

Finally, defendant raises the issue of whether or not the trial court erred in "not instructing the jury on voluntary manslaughter and other lesser charges."

It is the duty of all judges charging juries in cases of criminal prosecutions for any felony wherein two (2) or more grades or classes of offense may be included in the indictment to charge the jury as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so. TENN. CODE ANN. § 40-18-110(a).

Voluntary manslaughter is the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner. TENN. CODE ANN. § 39-23-211.

Voluntary manslaughter is a lesser grade of first-degree murder but is not a "lesser included" offense of first-degree murder because voluntary manslaughter, unlike first-degree murder, requires proof that the offense was committed in "a state of passion produced by adequate provocation to lead a reasonable person to act in an irrational manner." TENN. CODE ANN. § 39-13-211.

Where defendant claims adequate provocation and self-defense and the state alleges premeditation and deliberation, defendant is entitled to a jury instruction on first-degree murder and voluntary manslaughter, not because the latter is a lesser included offense of the former but because it is a lesser grade of the former. Defendants are entitled to jury instructions on all lesser included offenses and on all offenses which are lesser grade or class of the charged offense, if the evidence would support a conviction for the offense. *State v. Wayne Trusty,* 919 S.W.2d 305 (Tenn. 1996).

In this case, the trial judge declined to instruct on voluntary manslaughter because:

> I felt like based on the proof that was before the Court, it was either murder in the first degree or murder in the second degree or it was nothing at all, because the Court did not find based on the evidence that there was a killing in the heat of passion based upon a sudden and adequate provocation. I did not find that to be the case. I did not find that the *facts* [emphasis ours] made out a case of voluntary manslaughter, and that's why I did not charge it.

On the rare occasions in which none of the proof offered at trial might permit an inference of guilt of a lesser offense, the trial judge is excused from that obligation. *State v. King,* 718 S.W.2d 241 (Tenn. 1986). But this court has recently upheld the rule that if there is any proof in the record that might permit such inference, the trial court must instruct jury on the lesser charge.

> However plain it may be to the mind of the Court that one certain offense has been committed and none other, he must not confine himself in his charge to that offense. When he does so he invades the province of the jury, whose peculiar duty it is to ascertain the grade of the offense. However clear it may be, the Court should

> never decide the facts, but must leave them unembarrassed to the jury.

State v. Ruane, 912 S.W.2d 766, 783 (Tenn. Crim. App. 1995).

The State argues that there is no evidence, either from the defendant or any of the State's witnesses, that the defendant intended to kill Thomas in a heated passion.

Defendant maintained throughout the investigation and at trial that he never intended to kill Thomas. This evidence, however, was not convincing to the jury, as indicated by defendant's conviction for first degree murder, which requires an intentional killing. It remains, therefore, for us to determine whether there was any evidence of heat of passion based upon a sudden and adequate provocation. If so, a jury charge of voluntary manslaughter was required, and failure to give such charge was reversible error.

The defendant testified that as he was returning home from work and parking his car in his driveway, he heard and saw Thomas driving past his house shooting. He told his wife, "Willene, get the kids and get in the back." After his wife and children had run to the back of the house, he went outside and saw Thomas driving around the corner towards his house again. He left his house to entice Thomas away from shooting at it. Thomas continued to shoot at the house. On the next turn around the block, it developed that Thomas was driving straight towards defendant's car. "That's when I see his car coming up real quick. And I, and I panicked, and I just started shooting my gun, not trying to hit him, but trying to scare him . . . what was in my mind? I'm thinking he's coming back to shoot again at me, and I panicked."

Defendant's assertion that he "panicked" is verified by the police 911 tape in which he repeatedly insisted that the dispatcher send the police immediately because " . . . He came by here shooting, and uh, he came by here shooting a couple of times, and I believe I shot him. And I followed him and he laying in the car . . . Please send the police . . . and an ambulance, please."

This evidence, even if uncorroborated, raises a factual issue which can only be resolved by the jury. If there is evidence in the record from which the jury could

have concluded that the lesser offense was committed, there must be an instruction for the lesser offense. *See Johnson v. State,* 531 S.W.2d 558 (Tenn. 1975).

We find the failure of the trial judge to instruct on voluntary manslaughter when there was evidence in the record from which the jury could have convicted defendant of this offense was fatal error, and thus we reverse the conviction and remand the case to the trial court for a new trial.

_____

John K. Byers, Senior Judge

CONCUR:

_____

John H. Peay, Judge

_____

Jerry L. Smith, Judge

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

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STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9510-CR-00330**
Appellee,	)	
	)	**HAMILTON COUNTY**
VS.	)	
	)	**HON. STEPHEN M. BEVIL,**
WILLIE WILLIAMS, JR.,	)	**JUDGE**
	)	
Appellant.	)	(First-degree murder)

CONCURRING OPINION

I concur in all of Judge Byers' holdings in the lead opinion. I write separately to distinguish the case of State v. Atkins, 681 S.W.2d 571 (Tenn. Crim. App. 1984), from the case presently under review. The dissent, relying on Atkins, would hold that any error in the instant case arising from the trial court's failure to charge the jury on the offense of manslaughter is at most harmless, requiring no reversal. I disagree.

In Atkins, this Court found that "there was no evidence introduced by the defendant contradicting the State's evidence." 681 S.W.2d at 577. We held "It would have been pure speculation for the jury to have found that the defendant committed the offense upon a sudden heat produced by adequate provocation or that the defendant did not intend death nor bodily harm when he shot the victim, and that death was accidentally caused by some unlawful act or an act not unlawful in itself but done in an unlawful manner and without due caution. Since there was no evidence to

support a finding of either degree of manslaughter, the trial judge did not err in failing to charge these offenses." Adams, 681 S.W.2d at 577.

In the case under review, the defendant testified that the victim was driving past his house shooting, causing him to tell his wife to take the children to the back of the house. He further testified that after his wife and children had run to the back of the house, he went outside and saw the victim drive towards him again and that he panicked and started shooting his gun, not trying to hit him, but thinking that the victim was coming back to shoot at him again, and that he had panicked. This testimony was somewhat supported by the police 911 tape made when the defendant notified the authorities about the shooting and by the fact that the victim had previously called 911, and that tape revealed that the victim had stated that if they [the police] did not come, he was going to get the defendant.

Based on the above proof offered on behalf of the defendant, it is obvious that there was evidence that could support a finding of manslaughter and therefore failure to so charge cannot be harmless error.

I therefore concur with the opinion by Judge Byers and am authorized to state that he joins in this separate concurring opinion.

_____
JOHN H. PEAY, Judge

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STATE OF TENNESSEE,	)	**C.C.A. NO. 03C01-9510-CR-00330**
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Appellee,	)	
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	)	**HAMILTON COUNTY**
VS.	)	
	)	**HON. STEPHEN M. BEVIL,**
WILLIE WILLIAMS, JR.,	)	**JUDGE**
	)	
Appellant.	)	**(First Degree murder;**
	)	**Possession of prohibited weapon.)**

CONCURRING IN PART DISSENTING IN PART

_____I respectfully dissent from the holding of the Court that the failure of the trial court to instruct the jury on voluntary manslaughter requires a reversal of Appellant's first degree murder conviction. As the majority states, there is sufficient evidence in this record to trigger the need for an instruction on voluntary manslaughter. It was error for the trial judge not to give such an instruction. However, it must be remembered that the jury was instructed with respect to second degree murder and yet rejected this lesser offense in favor of a finding that Appellant killed Delaney Thomas with premeditation and deliberation. Under these circumstances it seems illogical to me to believe the jury having rejected second degree murder in favor of murder in the first degree would, had a manslaughter instruction been given, have acquitted on first and second degree murder in favor of the less serious offense of voluntary manslaughter.

In a similar situation this Court has previously held that the failure to give an instruction on manslaughter offenses in a murder prosecution was at most harmless error where the jury was instructed on second degree murder and yet convicted the defendant of murder in the first degree. State v. Atkins, 681, S.W.2d 571, 577 (Tenn.

Crim. App. 1984). I believe the logic of Atkins is sound and that the error in the instant case is at most harmless error requiring no reversal.

I concur in all other respects with the opinion of the Court and I would affirm Appellant's conviction of murder in the first degree.

_____
JERRY L. SMITH, JUDGE