IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

NOVEMBER 1996 SESSION

FILED

March 18, 1997

Cecil Crowson, Jr.

Appellate Court Clerk

STATE OF TENNESSEE,	*	C.C.A. # 02C01-9605-CC-00158
Appellee,	*	TIPTON COUNTY
VS.	*	Hon. Joe H. Walker, Judge
TERRY LYNN ANTHONY,	*	(First Degree Murder)
Appellant.	*	

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OPINION FILED:_____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Terry Lynn Anthony, was indicted for first degree murder and attempted first degree murder. The defendant was convicted of the first degree murder of Jacqueline Anthony and the attempted voluntary manslaughter of Charlie Boyce, Jr. On direct appeal, this court ordered a new trial because the defendant had been required to wear shackles in the presence of the jury throughout the first proceeding. State v. Terry Lynn Anthony, No. 02C01-9408-CC-00173 (Tenn. Crim. App., at Jackson, May 10, 1995). On remand, the defendant entered a plea of guilt to attempted voluntary manslaughter for which he received a two-year sentence. Afterward, a jury found the defendant guilty of first degree murder. The trial court imposed a life sentence.

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

> (1) whether the evidence of premeditation and deliberation was sufficient to support the conviction of first degree murder;
>
> (2) whether the jury selection procedure violated Rule 24 of the Tennessee Rules of Criminal Procedure;
>
> (3) whether the trial court properly instructed the jury on the elements of premeditation and deliberation;
>
> (4) whether the trial court properly instructed the jury on the possible ranges of punishment; and
>
> (5) whether the trial court properly exercised its duties as a thirteenth juror.

We find no reversible error and affirm the judgment of the trial court.

The defendant and his wife, Jacqueline Anthony, had been separated for several years. They had two sons who were in the physical custody of the victim; they lived with the victim's mother, Mary Maclin. At about 7:00 A.M. on August 23, 1993, the defendant stopped at the Maclin residence and learned from his two sons, who were waiting outside for their school bus, that the victim had spent the night before with a male friend, Charlie L. Boyce, Jr. The defendant drove away from the Maclin residence, stopped his car to load a shotgun, and then drove until he saw the Boyce vehicle; Boyce and the victim were inside, traveling toward the Maclin residence. Boyce and the victim left their car and ran toward the residence of William Dowell. The defendant followed them and fired several shots at their car before the victim, shot in the knee, was disabled. Boyce was able to get inside the Dowell residence just as the defendant, from a distance of two to six yards, shot the victim in the chest and the head.

The victim's brother, Walter Maclin, Jr., was at the Maclin residence on the day of the shooting when, at about 7:15 A.M., the defendant stopped to talk to his sons. Maclin saw the defendant drive away and then return, following the Boyce vehicle. He observed the defendant fire four shotgun blasts at the Boyce vehicle. Later, Maclin overheard the defendant, who was armed, say, "I done killed your damn sister; so call the m-f-police."

Deputy Mike Forbes of the Tipton County Sheriff's Department

conducted the investigation. In response to the deputy's interrogation, the defendant made the following admission:

> I got in my car and went to Jackie's mother's house. I got there at about 7:20 A.M. Jackie wasn't home. I talked to my sons. I told them that I wouldn't be around for them anymore. I knew I was going looking for Jackie and I was going to kill her because I had told her several times that if I ever caught her with another man that I was going to kill her. After I left her mother's house, I stopped on the side of the road and loaded my shotgun. I had a pistol in my car, also, but it always stayed loaded. I started down the road going to look for Jackie when I met her in a car that was driven by Charlie Boyce. I ... chased them to her mother's house. They pulled in the driveway. I stopped my car in the road in front of the house and shot at their car. They took off driving behind the house.... I shot at them again when they were going down the road. I got in my car and started backing up in the road. Their car had quit on them, and they had gotten out of the car and started running across the yard. I got out of my car and was chasing them. I was carrying my shotgun. They ran to the back of Billy Dowell's house.... When I came around the corner of the house, Jackie was on the deck fixing to go in back of the house. I shot her in the leg first and she fell. I shot her again after she fell. I don't remember how many more times I shot. She never said anything to me.

The defendant testified at trial that he and the victim had experienced several problems associated with marital infidelity. He claimed that he had contracted gonorrhea from the victim and, after their separation, that he had tried to commit suicide. The defendant testified that he had just ended his relationship with Robin Blevins, one which had produced two children, when he and the victim, only a few days before the murder, discussed trying to get back together. The defendant described himself as very upset on the day of the murder. He claimed that his heart was broken

and that he was out of his mind.

I

On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832 (Tenn. 1978). This court may neither reweigh or re-evaluate the evidence. Id. at 836. Nor may this court substitute its inferences for those drawn by the jury. Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). The credibility of the witnesses, the weight given their testimony, and the reconciliation of conflicts in the evidence are matters entrusted exclusively to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). A conviction may be set aside only when this court finds that the "evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e).

Tennessee Code Annotated § 39-13-202(a)(1) (1991) defines first degree murder as "an intentional, premeditated and deliberate killing of another." A "'deliberate act'" is "one performed with a cool purpose" and a "'[p]remeditated act'" is one implemented "after the exercise of reflection and judgment...." Tenn. Code Ann. § 39-13-201(b) (1991).

The defense bases its claim that the evidence was insufficient to support first degree murder in great measure upon testimony by Boyce that the defendant, while firing the shots, had acted "like he had gone crazy or something." The defense argues that he could be guilty of nothing more than

second degree murder because there was no evidence to indicate that the defendant's passions had cooled between the time he had seen the victim with Boyce and when the fatal shots were fired.

Our statute defines "deliberate act" and "premeditated act" separately. Tenn. Code Ann. § 39-13-201(b)(1), (2) (1991). The former is "one performed with a cool purpose," and the latter is "one done after the exercise of reflection and judgment." Id. In State v. Brown, 836 S.W.2d 530 (Tenn. 1992), the supreme court held that deliberation requires some time interval between the decision to kill and the act itself:

> It is consistent with the murder statute and with case law in Tennessee to instruct the jury in a first-degree murder case that no specific period of time need elapse between the defendant's formulation of the design to kill and the execution of that plan, but we conclude that it is prudent to abandon an instruction that tells the jury that "premeditation may be formed in an instant."... [I]t is now abundantly clear that the deliberation necessary to establish first-degree murder cannot be formed in an instant.

836 S.W.2d at 543 (emphasis in original); see Everett v. State, 528 S.W.2d 25, 28-29 (Tenn. 1975) (Brock, J., dissenting). We interpret that holding to require proof that the offense was committed upon reflection, "without passion or provocation," and otherwise free from the influence of excitement.

Once a homicide has been established, it is presumed to be second degree murder. Witt v. State, 46 Tenn. 5, 8 (1868), overruled on other grounds, Campbell v. State, 491 S.W.2d 359, 362 (Tenn. 1973). The state must prove both premeditation and deliberation in order to elevate the offense from second to first degree murder. Bailey v. State, 479 S.W.2d 829, 833

(Tenn. Crim. App. 1972).

Using Brown as guidance, premeditation is, stated simply, the process of thinking about a murder before doing it. Deliberation is present when the circumstances suggest that the murderer reflected upon the manner and consequences of his act; the circumstances must suggest that the advanced thought process, the premeditation, took place in a cool mental state.

In State v. Bordis, 905 S.W.2d 214, 222 (Tenn. Crim. App. 1995), our court quoted portions of a treatise analyzing a distinction between first and second degree murder; that authority provided some insight into the nature of proof required before a jury might properly infer the elements of deliberation and premeditation:

> (1) facts about how and what defendant did prior to the actual killing which show he was engaged in activity directed toward the killing, that is planning activity; (2) facts about the defendant's prior relationship and conduct with the victim from which motive may be inferred; and (3) facts about the nature of the killing from which it may be inferred that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design.

(quoting 2 W. LaFave and A. Scott, Substantive Criminal Law, § 7.7 at 239 (1986) (emphasis in original)).

Here, the defendant acknowledged that he had warned the victim that he would kill her if she were unfaithful. There was testimony that when he was unable to reach her by telephone, he went to her residence to find her;

upon learning of her whereabouts, the defendant, according to his pretrial statement, told his sons that he intended to kill the victim. Immediately afterward, he loaded his shotgun and began to look for the victim. There was testimony that he stalked the Boyce vehicle, got out of his car, and then fired a shot into one of the tires. Afterward, the defendant drove toward the disabled Boyce vehicle, stopped, and fired at least three shots into the victim. There was a pause between the first and second shots. When the defendant saw the victim's brother, he admitted the killing and asked him to call the police.

While conceding that there was evidence of anger, perhaps even jealousy and passion, this court must conclude that there was plenty of circumstantial evidence from which a rational jury could have concluded that the defendant not only planned his course of action but intentionally and purposefully implemented that plan. The evidence is, therefore, sufficient.

II

Before the selection of the jury, the trial judge inquired if the state or the defense had any objections to the following procedure:

> The way I normally do jury selection, with the agreement of both the State and the defendant, would be to call twenty-two names, pick them at random .... The ... first twelve would sit in the jury box, the next ten would sit on the front two rows. All twenty-two would be questioned at one time....
>
> The State would then have the opportunity to ask questions first, then the defendant. Then, challenges would be made to the twelve in the jury box. You could challenge one or more of the twelve, until you run out of challenges. The next person in line would be the person that would take the seat of the person excused, so that you've already had an opportunity to

> question everyone.... If you challenge one of the twelve, you do not accept that other eleven until you run out of challenges. You can challenge any of the twelve.

The defendant, represented by new counsel on appeal, complains that the procedure utilized by the trial court, violated Rule 24(c), Tenn. R. Crim. P.:

> **Peremptory Challenge and Procedure for Exercising.** After twelve prospective jurors have been passed for cause, counsel will submit simultaneously and in writing, to the trial judge, the name of any juror either counsel elects to challenge peremptorily. Upon each submission each counsel shall submit either a challenge or a blank sheet of paper. Neither party shall make known the fact that the party has not challenged. Replacement jurors will then be examined for cause and, after passed, counsel will again submit simultaneously, and in writing, to the trial judge the name of any juror counsel elects to challenge peremptorily. This procedure will be followed until a full jury has been selected and accepted by counsel. Peremptory challenges may be directed to any member of the jury and counsel shall not be limited to replacement jurors. Alternate jurors will be selected in the same manner. The trial judge will keep a list of those challenged and, if the same juror is challenged by both parties, each will be charged with the challenge. The trial judge shall not disclose to any juror the identity of the party challenging the juror.

In State v. Coleman, 865 S.W.2d 455, 458 (Tenn. 1993), our supreme court ruled that "close adherence to the procedure prescribed by Tenn. R. Crim. P. 24(c) is mandatory." It also ruled, however, that the burden was on the defendant "to prove prejudice or purposeful discrimination in the selection of a jury." Id. at 458. It determined that prejudice could not be presumed. Id.; see State v. Caughron, 855 S.W.2d 526, 539 (Tenn. 1993).

It is our view that the deviation from the prescribed procedure, a deviation that met with the approval of defense counsel at trial, did not prejudice the judicial process. While the rule in Coleman has been considered mandatory, the supreme court did rule that the deviation from the rule in Coleman qualified as harmless error. We are unable to distinguish this case from that result.[1]

III

The defendant next complains that the trial court provided "contradictory, confusing, and incomplete" supplementary instructions on the elements of premeditation and deliberation. The original instruction on the definition of first degree murder required the state to prove beyond a reasonable doubt the following essential elements:

> (1) that the defendant unlawfully killed the alleged victim;
>
> (2) that the defendant acted intentionally. A

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[1] An amendment to the rule, which, if approved by the General Assembly, will be effective July 1, 1997, provides as follows:

> (c) **Peremptory Challenge and Procedure for Exercising.** - After prospective jurors have been passed for cause, counsel will submit simultaneously and in writing, to the trial judge, the name of any juror in the group of the first twelve who have been seated that either counsel elects to challenge peremptorily. Upon each submission, each counsel shall submit either a challenge or a blank sheet of paper. Neither party shall make known the fact that the party has not challenged. Replacement jurors will be seated in the panel of twelve in the order of their selection. If necessary, additional replacement jurors will then be examined for cause and, after passed, counsel will again submit simultaneously, and in writing, to the trial judge the name of any juror in the group of twelve that counsel elects to challenge peremptorily. This procedure will be followed until a full jury has been selected and accepted by counsel. Peremptory challenges may be directed to any member of the jury, and counsel shall not be limited to replacement jurors. Alternate jurors will be selected in the same manner. The trial judge will keep a list of those challenged and, if the same juror is challenged by both parties, each will be charged with the challenge. They trial judge shall not disclose to any juror the identity of the party challenging the juror.

> person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscientious objective or desire to engage in the conduct or cause the result;
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> (3) that the killing was deliberate. A deliberate act is one performed with a cool purpose; and
>
> (4) that the killing was premeditated. A premeditated act is one done after the exercise of reflection and judgment. Premeditation means that the intent to kill must have been formed prior to the act itself.
>
> It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. It is sufficient that it preceded the act, however short the interval, as long as it was the result of reflection and judgment. The mental state of the accused at the time he allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation. If the design to kill was formed with deliberation and premeditation, it is immaterial that the accused may have been in a state of passion or excitement when the design was carried into effect.
>
> Furthermore, premeditation could be found if the decision to kill is first formed during the heat of passion, but the accused commits the act after the passion has subsided.

During the deliberations, the jury returned to open court and asked the trial judge to give further instructions on premeditation. It reread the quoted portion of the instruction relating to premeditation.

The defendant complains that the trial court should have reread the instructions on all degrees of homicide, instead of emphasizing the first degree murder instruction. He insists that the trial court should have supplemented the definition of deliberation and premeditation with an

instruction that required the jury to find "that the offense was committed upon reflection, without passion or provocation, and otherwise free from the influence of excitement." See State v. Brown, 836 S.W.2d 530, 542-43 (Tenn. 1992).

The defendant made no objections to the instructions at trial. The motion for new trial did not include this as a ground for relief. Defense counsel at trial reviewed the jury charge and was amenable to its content. See Rule 3(e), Tenn. R. App. P.; Rule 36, Tenn. R. App. P. Moreover, the charge comports with the law governing first degree murder. The defendant has been unable to substantiate his claim that the instructions, in that regard, were contradictory, confusing, or incomplete. When the jury sought supplemental instructions, the question pertained to premeditation only, an element present in no other grade of homicide than first degree murder. In our view, the trial court acted appropriately.

IV

The defendant also complains that the trial judge committed error by failing to charge the jury on the range of punishment for the lesser included offenses of first degree murder. He points out that both sides requested the charge. At the time of the charges, Tenn. Code Ann. § 40-35-201 provided in part as follows:

> In all contested criminal cases, ... upon the motion of either party, filed with the court prior to the selection of the jury, the court shall charge the possible penalties for the offense charged and all lesser included offenses.

Tenn. Code Ann. § 40-35-201(b) (1991).

Trial counsel for the defendant chose not to seek a charge on the range of punishment for second degree murder and voluntary manslaughter. The record demonstrates that the defense asked the court not to instruct the jury on the range of punishment for second degree murder and voluntary manslaughter. In State v. Cook, 816 S.W.2d 322, 326 (Tenn. 1991), our supreme court observed that the jury's knowledge of how lengthy a sentence might be on the greatest possible offense generally inures to the benefit of the defendant; that very rationale may have been the strategy employed by trial counsel when he elected that the jury not be informed of the punishment for the lesser included offenses. Under those circumstances, the application of the plain error doctrine would be inappropriate. We find no error.

V

Next, the defendant contends that the trial judge failed to independently exercise its duties as thirteenth juror. That assertion is made upon the following observation by the trial judge:

> The court notes that two separate juries have heard this case, and both juries, twenty-four people, have determined the defendant to be guilty of first degree murder of the victim. The court concurs in that finding.

Rule 33(f), Tenn. R. Crim. P., provides as follows:

> **New Trial Where Verdict is Against the Weight of the Evidence.** The trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence. If the trial court grants a new trial because the verdict is contrary to the weight of the evidence, upon request of either

> party the new trial shall be conducted by a different judge.

In all criminal cases involving a trial by jury, the trial judge has the duty to act as the thirteenth juror by either approving or disapproving the verdict. See Helton v. State, 547 S.W.2d 564, 566 (Tenn. 1977). Although that rule was abandoned by this state between 1978 and the 1991 amendment to the Rules of Criminal Procedure, our supreme court has again approved the propriety of this function of the trial judge. State v. Enochs, 823 S.W.2d 539, 540 (Tenn. 1991).

In State v. Carter, 896 S.W.2d 119, 122 (Tenn. 1995), our supreme court held that "Rule 33(f) imposes upon a trial judge the mandatory duty to serve as the thirteenth juror in every criminal case, and that approval by the trial judge of the verdict as a thirteenth juror is a necessary prerequisite to the imposition of a valid judgment." In State v. Moats, 906 S.W.2d 431, 434 (Tenn. 1995), our supreme court observed that "the purpose of the thirteenth juror rule is to be a 'safeguard ... against a miscarriage of justice by the jury'" (quoting State v. Johnson, 692 S.W.2d 412, 415 (Tenn. 1985) (Drowota, J., dissenting)).

In this state, the trial judge had the duty to ascertain whether the weight of the evidence was sufficient to support the verdict. "[A]n explicit statement of approval on the record is not necessary, and when the trial judge simply overrules a motion for new trial, an appellate court may presume that the trial judge has approved the jury's verdict as the thirteenth juror." Moats,

906 S.W.2d at 434. The record demonstrates that he did so. Thus, the issue has no merit.

Accordingly, the judgment is affirmed.

_____
Gary R. Wade, Judge

CONCUR:

_____
David G. Hayes, Judge

_____
William M. Barker, Judge