IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1996 SESSION

FILED

February 11, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	C.C.A. NO. 03C01-9601-CC-00023
	)	
	)	CUMBERLAND COUNTY
Appellee	)	
	)	HON. LEON BURNS,
	)	JUDGE
v.	)	
	)	attempted first degree murder,
BILLIE AUSTIN a/k/a	)	attempted arson, possession of a
BILLY AUSTIN,	)	prohibited weapon, possession of a
	)	weapon with intent to employ it in
	)	commission of an offense
Appellant	)	

For the Appellant:

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OPINION FILED _____

AFFIRMED

JOHN K. BYERS
SENIOR JUDGE

OPINION

The defendant was convicted of the following offenses and sentenced to serve a term in the penitentiary as set out:

Attempted first degree murder - 25 years

Attempted arson - 4 years

Possession of a prohibited weapon - 2 years

Possession of a weapon with intent to employ it in the commission of a felony - 2 years

The defendant was sentenced as a standard range I offender and each of the sentences was ordered to be served concurrently with each for an effective sentence of 25 years.

The defendant says, in two assignments, that the evidence is insufficient to support the verdict and that the State was allowed to ask questions on cross-examination which were prejudicial and had no basis in fact.

The evidence accredited by the jury and approved by the trial judge is correctly and completely set out in the Statement of Facts in the State's brief. We adopt that Statement as our resume of the facts and set the statement out herein:

> Around 1:00 a.m. on December 12, 1994, Bertha Borja returned to her trailer after work. Stacy Austin, the defendant's nephew was on the couch and the defendant, Billy Austin was in the bedroom. Billy Austin was Borja's boyfriend.
>
> As Borja began undressing, Austin began a verbal assault. When Borja showed an attempt to re-dress and leave, Austin indicated that she was going nowhere.
>
> Austin then cut the phone cord telling Borja she would not be making any calls. After Austin and his nephew put on their shoes in the living room, the nephew retrieved a sawed-off shotgun from a second bedroom.
>
> The nephew retrieved a chain saw from Borja's bedroom. Austin said she would not be needing the saw any longer, and the nephew placed the saw outside.
>
> When Austin's nephew returned, Austin told him to stand guard with the shotgun. Austin then retrieved a jug of kerosene from an adjoining room.
>
> Austin saturated the living room floor with kerosene, and also dumped kerosene on Borja's dress. This alone caused

> burns. Austin told Borja that he had helped set the trailer up, so he was going to burn it down.
>
> Austin asked his nephew for the lighter, and ordered his nephew outside. Austin attempted to ignite the lighter but it only made a spark. When he raised the lighter a second time, Borja ran to him and embraced him. She pleaded with him and told him she loved him.
>
> Borja pleaded that the problems could be worked out. Austin disagreed raising the lighter a third time. Borja continued pleading with Austin and he finally sat down.
>
> Austin soon thereafter indicated he wanted to have sex. Borja did whatever he suggested, so as to keep him calm. Borja remained in Austins company until the next day acting as though nothing was wrong. When Austin drove her to work later that day, she called the police.

The defendant and his nephew testified that the events shown by the State's evidence did not occur.

The defendant's attack upon the attempt convictions in the case is based upon the assertion that no substantial step was taken to complete the crimes alleged to have been attempted.[1]

In *State v. Reeves,* 916 S.W.2d 909 (Tenn. 1996), the Supreme Court dealt with the issue of the application of the "substantial step" rule as set out in TENN. CODE ANN. § 30-12-101.[2] In *Reeves* the issue was whether a student had taken a substantial step toward poisoning her teacher when she placed a purse containing rat poison on the teacher's desk. The Court held:

> When an actor possesses materials to be used in the commission of a crime, at or near the scene of the crime, and where the possession of those materials can serve no lawful purpose of the actor under the circumstances, the jury is entitled, but not required, to find that the actor has taken a

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[1]The defendant raised in an amended motion for a new trial that he had renounced the attempt to commit the crimes. However, the defendant did not raise the defense at trial or give notice he intended to rely on the defense as required by TENN. CODE ANN. § 39-11-204(d). He cannot do so now.

[2]TENN. CODE ANN. § 39-12-101. Criminal Attempt. (a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense: (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

> "substantial step" toward the commission of the crime if such action is strongly corroborative of the actor's overall criminal purpose.

The defendant poured kerosene on the victim and on the floor of the trailer around the victim and attempted to light a cigarette lighter to ignite the fuel.

The evidence was sufficient for a rational trier of fact to find guilt beyond a reasonable doubt.

The defendant's second issue is presented by two sentences of argument at this level. There is no support in the record for the complaint and the issue is without merit.

We affirm the judgment of the trial court with costs assessed to the State of Tennessee.

John K. Byers, Senior Judge

CONCUR:

_____
Paul G. Summers, Judge

_____
Joseph M. Tipton, Judge