IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1996 SESSION

FILED

March 27, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**NO. 01C01-9601-CC-00038**
Appellee,	)	
	)	**WILLIAMSON COUNTY**
VS.	)	
	)	**Hon. Henry Denmark Bell, Judge**
CHRISTOPHER CLAY KENNEDY,	)	
	)	(Reckless Endangerment With a
Appellant.	)	Deadly Weapon and Leaving the
	)	Scene of an Accident)

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OPINION FILED: _____

AFFIRMED

J. STEVEN STAFFORD,
Special Judge

OPINION

The appellant, Christopher Clay Kennedy, appeals his convictions from the Williamson County Circuit Court. He was convicted by a jury of two (2) counts of reckless endangerment with a deadly weapon (a Class E felony) and one (1) count of leaving the scene of an accident. He was ordered to serve concurrent sentences of three (3) years for each count of felony reckless endangerment and 30 days for leaving the scene of an accident. On appeal, Kennedy challenges the sufficiency of the convicting evidence for two counts of reckless endangerment. Secondly, he argues that the trial court erred in not "specifically and separately" charging the jury on both felony reckless endangerment and misdemeanor reckless endangerment. He further claims that the jury verdict form misled and confused the jury by creating an inference of guilt. Finally, he contends that his due process rights have been violated under the Constitutions of the United States and the State of Tennessee because the statutory definitions of "reckless endangerment" and "deadly weapon" are vague. We affirm the judgment of the trial court.

FACTUAL BACKGROUND

The proof at trial showed that Franklin Police Officer Rob Hollon noticed a red pickup truck spinning its tires in downtown Franklin. Officer Hollon activated his blue lights and pulled alongside the truck so that the drivers' doors were side by side. As Officer Hollon was attempting to speak with the driver, the driver stuck his head out of the window. Officer Hollon was able to observe the driver of the truck for about 10-15 seconds. The driver was later identified as Clay Kennedy.

When Officer Hollon tried to turn his vehicle around behind the truck, Kennedy sped down the road. Kennedy proceeded down the road and made a right turn onto Bridge Street. As he was turning, however, his right tires jumped the curb, causing him to temporarily lose control of the vehicle. At the same time Kennedy's vehicle was "fishtailing," Franklin Police Officer James Gibson was traveling in the

opposite direction on Bridge Street. Fortunately, Officer Gibson was able to narrowly evade the oncoming truck. The truck continued down Bridge Street and turned south on Fourth Avenue.

When Kennedy reached the intersection of Fourth Avenue and Main Street, he ran a red light and hit the left rear bumper of a truck driven by Jonathan Nesmith. The collision caused Nesmith to spin around so that the drivers' side doors of both trucks were almost side by side. Nesmith recognized the driver as the defendant. Kennedy did not stop the truck, but accelerated down Fourth Avenue. Because the license plate on the vehicle read "BIGDOG2," several witnesses identified the truck as belonging to Kennedy. There was testimony that Kennedy then extinguished his headlights and ran several stop signs on Fourth Avenue.

Following the incident, Kennedy proceeded to Mercury Drive. He and a passenger (later identified as Chad Hall) parked the truck on the side of the street. They both got into Hall's truck and drove away in a hurried fashion. The police found Kennedy's truck parked at that location.

SUFFICIENCY OF THE EVIDENCE

Kennedy claims that the evidence is insufficient to support a guilty verdict for two counts of felony reckless endangerment. Instead, he submits that the evidence only supports one conviction because both convictions arose out of a single act of driving. He argues that because of the proximity in time and location of the incidents, the two counts of reckless endangerment should have been consolidated by the trial court. Therefore, he contends that one conviction for felony reckless endangerment should be set aside.

Where sufficiency of the evidence is challenged, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or crimes beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); State v. Duncan, 698 S.W.2d 63 (Tenn. 1985); T.R.A.P. 13(e). The

state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832 (Tenn. 1978).

T.C.A. § 39-13-103(a) defines reckless endangerment as "recklessly [engaging] in conduct which places or may place another person in imminent danger of death or serious bodily injury." The crux of appellant's argument is that the events leading up to his arrest are part of a single course of conduct.

Kennedy relies on State v. Ramsey, 903 S.W.2d 709 (Tenn. Crim. App. 1995), to support his argument. In Ramsey, the defendant was speeding while he and his passenger were arguing. As his vehicle came over a hill, he temporarily lost control of his vehicle, swerved into the oncoming lane of traffic, and narrowly missed an oncoming vehicle. However, his car continued to veer into the oncoming lane and hit a second vehicle. The defendant was convicted of three (3) counts of reckless endangerment because of the number of victims in the two oncoming cars.

This Court reversed two (2) of the convictions, stating that even though several people were victimized by the defendant's actions, only one (1) conviction is appropriate when the defendant's actions constitute a single course of conduct. Id. at 713. The Court focused on the distance between the two vehicles, the time between the incidents,[1] and the fact that the reckless conduct was one continuous act. However, the Court noted that "[w]e need not fashion a blanket rule that provides that a defendant's continuous operation of a vehicle may *only* result in one act of reckless endangerment under the statute. Many scenarios could be created where such a rule would not be prudent." Id. at 713.

In the present case, we find that Kennedy committed two separate and distinct acts. The first act was committed when he made a right turn onto Bridge Street and veered into the oncoming lane of traffic, endangering and almost hitting Officer Gibson. He chose to continue to drive at an accelerated rate of speed. Two

[1] Our Supreme Court has recently recognized that when "time and location separate and distinguish the commission of the offenses, the offenses cannot be said to have arisen out of a single wrongful act." State v. Phillips, 924 S.W.2d 662, 665 (Tenn. 1996).

blocks later he ran a red light through a busy intersection in Franklin crashing into Nesmith's vehicle, thereby committing the second act. By doing so, he chose to consciously disregard the risk that lives would be placed in danger of death or serious bodily injury.

Ramsey is distinguishable because, in that case, the defendant swerved into the oncoming lane of traffic and immediately veered into the oncoming lane of traffic again. The incident happened within 1/10 of a mile and within seconds. On the other hand, Kennedy had time between the two acts to get control of his car and to think about what he was doing. As such, he had time to form the necessary criminal intent to commit the second act of reckless endangerment. Therefore, because we find that the two offenses did not arise out of a single wrongful act, we conclude that both convictions for reckless endangerment should stand. *See* State v. Phillips, 924 S.W.2d at 665; 9 David L. Raybin, *Tennessee Practice: Criminal Practice and Procedure* § 16.20 (1984 & Supp. 1995).

Kennedy also contends the trial judge failed to exercise his role as the thirteenth juror. T.R.Cr.P. 33(f). We find nothing in the record indicating the trial judge's dissatisfaction with the verdict. State v. Moats, 906 S.W.2d 431 (Tenn. 1995).

JURY INSTRUCTIONS

Kennedy maintains that the trial court's jury charge on felony reckless endangerment and misdemeanor reckless endangerment was unclear. Reckless endangerment with a deadly weapon is a Class E felony, otherwise reckless endangerment is a Class A misdemeanor. T.C.A. § 39-13-103(b). He argues that the trial judge did not clearly establish that misdemeanor reckless endangerment was a lesser included offense of the felony, which resulted in confusion to the jury.

The defendant did not object to the jury instructions at trial, nor did he raise this issue in the motion for new trial. Therefore, this issue is waived. T.R.A.P. 3(e); *see* State v. Sexton, 917 S.W.2d 263, 266 (Tenn. Crim. App. 1995); State v. Keel,

882 S.W.2d 410, 417-418 (Tenn. Crim. App. 1994); State v. McPherson, 882 S.W.2d 365, 375 (Tenn. Crim. App. 1994). Kennedy's argument rests on the fact that the instruction to the jury was unclear. Mere meagerness of a jury instruction is not reversible error, in the absence of a special request for an additional charge. State v. Brown, 795 S.W.2d 689, 697 (Tenn. Crim. App. 1990); State v. Haynes, 720 S.W.2d 76, 85 (Tenn. Crim. App. 1986); State v. Rollins, 605 S.W.2d 828, 832 (Tenn. Crim. App. 1980). Kennedy neither contemporaneously objected to the instructions given nor made a special request for an additional charge.

After an examination of the jury charge and the trial judge's remarks, we further conclude Kennedy suffered no prejudice. At most, this was harmless error. T.R.A.P. 36(b). This issue is without merit.

JURY VERDICT FORM

Kennedy contends that the jury verdict form was confusing and misled the jury. Apparently, the trial judge mistakenly filled in the amount for a potential fine assessment. This could have given the jurors the impression that the fine amount was pre-set if the defendant was found guilty. Kennedy moved for a mistrial, which was overruled by the trial court. Ultimately, no fine was assessed by the court.

Once again, this issue was not raised in the motion for new trial. As such, it is waived and cannot be raised on appeal unless it amounts to plain error. T.R.A.P. 3(e), 52(b).

Any error was harmless, at best. The decision to grant or deny a mistrial is within the discretion of the trial court. State v. McKinney, 929 S.W.2d 404 (Tenn. Crim. App. 1996). We will not disturb that finding absent an abuse of discretion. Id. Contrary to Kennedy's assertion, the mistake on the jury form did not give rise to an inference of guilt. The fine amount was relevant *only if* the jury found him guilty *and* decided to assess a fine. There was no abuse of discretion by the trial judge. This issue is without merit.

RECKLESS ENDANGERMENT WITH A DEADLY WEAPON

Finally, Kennedy argues that the definitions of "reckless endangerment" and "deadly weapon" are constitutionally vague. He suggests that any time a person recklessly places another individual in danger of serious bodily injury or death while in an automobile, that person is automatically guilty of felony reckless endangerment. Thus, he asserts that his rights to due process of law have been violated.

A person commits the offense of reckless endangerment when he/she recklessly engages in conduct which may place another person in danger of death or serious bodily injury. T.C.A. § 39-13-103(a). A deadly weapon can be "[a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury." T.C.A. § 39-11-106(a)(5)(B).

This Court has previously held that an automobile can be a deadly weapon if used in a manner capable of causing death or serious bodily injury. *See* State v. Tate, 912 S.W.2d 785 (Tenn. Crim. App. 1995) (aggravated assault); State v. Scott W. Long, C.C.A. No. 03C01-9301-CR-00032, Greene County (Tenn. Crim. App. filed August 19, 1993, at Knoxville) (reckless endangerment). "[T]his does not mean that an automobile is, under all circumstances, a deadly weapon. The method of use is the controlling factor and must be examined on a case-by-case basis." State v. Long, *supra*.

We find nothing vague in either of these statutes. The jury was adequately instructed on the meanings of "reckless endangerment" and "deadly weapon." Furthermore, we find overwhelming evidence to show that Kennedy used his automobile in a manner capable of causing death or serious bodily injury. He blatantly disregarded the risk that someone could have been injured or killed by his actions. This issue has no merit.

The judgment of the trial court is AFFIRMED.

J. STEVEN STAFFORD,
Special Judge

CONCUR:

JOE B. JONES, PRESIDING JUDGE

WILLIAM M. BARKER, JUDGE