IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER SESSION, 1996

FILED

May 16, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9603-CR-00084**
	)	
Appellee,	)	
	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**HON. THOMAS H. SHRIVER**
TONY G. SMITH,	)	**JUDGE**
	)	
Appellant.	)	**(Direct Appeal)**

FOR THE APPELLANT:

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OPINION FILED ________________________

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

On May 16, 1995 Davidson County Criminal Court jury found Appellant Tony Smith guilty of stalking in violation of Tennessee Code Annotated Section 39-17-315 (Supp. 1996) and attempted first-degree murder in violation of Tennessee Code Annotated Section 39-12-101 (1991). He was sentenced to eleven months and twenty-nine days for stalking and twenty-eight years for attempted murder. His sentences were ordered to run consecutively. On appeal, he raises two issues[1]: 1) whether the evidence is sufficient, as a matter of law, to sustain his convictions for attempted first-degree murder and stalking, and 2) whether the trial court committed reversible error by allowing the jury to separate without his permission.

After a review of the record, we affirm the judgment of the trial court.

Factual Background

In November 1992, Donnia Freeman, the victim, and Appellant began dating while Ms. Freeman was separated from her husband. The relationship was characterized by violence and physical abuse. As of May 1994, Ms. Freeman had decided to leave Appellant and had communicated that intention to Appellant. On May 10, 1994, Appellant went to the American Workshop, a

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[1] Appellant tried to raise additional issues in a document he drafted entitled Anders brief. In Anders v. State of California, 87 S.Ct. 1396, 1400 (1967) the United States Supreme Court prescribed certain procedures for a court to follow where appellate counsel finds lack of meritorious issues to raise on appeal. Anders has no applicability here. Appellant's counsel found several meritorious issues on appeal and filed a brief on behalf of Appellant. Moreover, in Tennessee, a criminal defendant must chose between self-representation and representation by counsel. State v. Burkhart, 541 S.W.2d 365, 371 (Tenn. 1976). Therefore, we decline to address the issues raised by Appellant in his Anders brief. However, if Appellant has any legitimate complaints concerning counsel's appellate representation he may seek appropriate post-conviction relief.

telemarketing company, to visit Ms. Freeman at work. Ms. Freeman asked Appellant to leave after he began fighting with her. Appellant refused to leave and Ms. Freeman asked her manager to ask Appellant to leave. When Ms. Freeman finished her shift and walked into the parking lot, Appellant approached her again, apparently having waited for Ms. Freeman to finish work. Appellant again started yelling at Ms. Freeman and aggressively coming toward her and her friend. Ms. Freeman threw a bottle of nail polish at Appellant. The next day, Appellant had Ms. Freeman arrested. Parked across the street, Appellant watched her being placed under arrest.

Sometime in late May, the manager of American Workshop received a call from Appellant. Appellant told the manager that the only way Ms. Freeman would leave Nashville was in a body bag.

On Memorial Day weekend, Mr. Freeman came to Nashville to visit Ms. Freeman and their children. Appellant arrived at Ms. Freeman's house unexpectedly. Ms. Freeman asked him to leave but he refused. Mr. Freeman asked him to leave and after much protest, he finally left.

While Ms. Freeman was out of town, Appellant called Cassandra Holt, Ms. Freeman's friend, and inquired about Ms. Freeman's whereabouts. He also threatened Ms. Freeman's life. When Ms. Freeman returned from her trip there were approximately twenty threatening messages on her answering machine from Appellant such as "Bitch, you're dead." After receiving these threatening messages, Ms. Freeman went to stay with another friend, Latonya Thompson. Having forwarded her messages to Ms. Thompson's house, she received even more threatening messages from Appellant such as "Bitch, I'm going to fuck you up when I see you and you can't hide."

On the morning of June 3, 1994, Appellant called Ms. Holt and said, "Tell Donnia this is it; I've got to talk to her today. I need to know something today." He also called Ms. Freeman and said, "I'm still going to get you."

Shortly after 6 p.m. on June 3, Appellant went to his friend, Thomas Douglas' house. Uncertain about any specific times, Mr. Douglas testified that to the best of his memory, Appellant borrowed his car, a grey Pontiac Bonneville, around 7 p.m. to go to the store for Mr. Douglas. Appellant and a man of medium build returned twenty minutes later. According to Mr. Douglas, again uncertain as to exact times, the pair returned around 8 p.m. Appellant received a page and was informed that Ms. Freeman had been shot. Mr. Douglas stated Appellant left the Douglas residence around 10 p.m.

According to witnesses at Ms. Freeman's place of employment, around 8:30 p.m. on June 3, a man of medium build wearing a bandana over his face appeared at the door of the American Workshop, pointed a gun at Ms. Freeman and fired approximately five to six times. Ms. Freeman was shot in her buttocks. The gunman made no demands for money or anything else.

Shortly after the shooting a man of medium build was seen running up the hill toward a Kroger parking lot located off Charlotte Avenue near where the American Workshop building was located. The man ran up to a dark colored Pontiac Bonneville that was parked in the parking lot with its lights off. He jumped into the car and said, "Roll man, I think they saw me." The car then sped away from the scene.

After the shooting, Ms. Freeman's brother called Appellant to ask if he was involved with shooting his sister.Appellant denied any involvement. Days later, Ms. Freeman's brother received a call from someone who said, "Six

bullets wasn't enough." Ms. Freeman's brother, a friend of Appellant's, recognized the man's voice as Appellant's.

I. Sufficiency of the Evidence

Appellant maintains that the evidence presented at trial is not legally sufficient to sustain his conviction for stalking and attempted first-degree murder. When an appeal challenges the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318 (1979); State v. Evans, 838 S.W.2d 185, 190-91 (Tenn. 1992), cert. denied, 114 S. Ct. 740 (1994); Tenn. R. App. P. 13(e). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). This Court will not reweigh the evidence, re-evaluate the evidence, or substitute its evidentiary inferences for those reached by the jury. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). As the Supreme Court of Tennessee said in Bolin v. State:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

405 S.W.2d 768 (1966). Thus, a jury verdict is entitled to great weight.

Once approved by the trial court, a jury verdict accredits the witnesses presented by the State and resolves all conflicts in favor of the State. State v.

Hatchett, 560 S.W.2d 627 (Tenn. 1978); State v. Townsend, 525 S.W.2d 842 (Tenn. 1975). The credibility of witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury as trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). A jury's guilty verdict removes the presumption of innocence enjoyed by the defendant at trial and raises a presumption of guilt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant then bears the burden of overcoming this presumption of guilt on appeal. State v. Brown, 551 S.W.2d 329, 331 (Tenn. 1977).

Criminal attempt is defined in the following manner:

> A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense: (1) [i]ntentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be; (2) [a]cts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or (3) [a]cts 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.

Tenn. Code Ann. § 39-12-101(a)(1)-(3)(1991). First degree murder is the intentional, premeditated and deliberate killing of another. Tenn. Code Ann. § 39-13-202(a)(1). One is responsible for an offense committed by another if the proof shows that "acting with the intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense." Tenn. Code Ann. § 39-11-402(2).

It is well-established in this State that an offense may be proven by circumstantial evidence alone. Price v. State, 589 S.W.2d 929, 931 (Tenn.

Crim. App. 1979). To do so, the evidence must not only be consistent with the guilt of the accused but it must also be inconsistent with his innocence, excluding every other reasonable theory except that of guilt. Pruitt v. State, 460 S.W.2d 385, 390 (Tenn. Crim. App. 1970). Although certainly not overwhelming, the circumstantial evidence submitted at trial is sufficient for a rational trier of fact to conclude beyond a reasonable doubt that Appellant is criminally responsible for the actions of the shooter.

In the days leading up to the shooting, Appellant repeatedly threatened the life of Ms. Freeman. On the day of the shooting, Appellant called Ms. Freeman's friend, Ms. Holt and demanded to talk to Ms. Freeman that day. This call suggested that drastic action was imminent. The evening of the shooting, Appellant borrowed his friend's grey Pontiac Bonneville to go to the store. He returned with a black man of medium build. Immediately after the shooting, a black man of medium build was seen jumping into the getaway car - a grey Pontiac Bonneville apparently driven by someone else. The day after the shooting, Appellant called Ms. Freeman's brother and said, "Six bullets wasn't enough." Although Appellant didn't identify himself, Ms. Freeman's brother, a long-time friend of Appellant, recognized the voice of the caller as that of Appellant. Immediately after being notified of the shooting, Appellant reacted without concern for Ms. Freeman's condition or where she was being treated. This was in drastic contrast to his historically obsessive concern for her whereabouts.

At the time of the commission of the offense and before a 1995 revision of the statute, stalking was committed by a person:

> (A) [w]ho repeatedly follows or harasses another person with the intent to place that person in reasonable fear of a sexual offense, bodily injury or death; (B) [w]hose actions would cause a reasonable

person to suffer substantial emotional distress; and (C) [w]hose actions induce emotional distress to that person.

Tenn. Code Ann. § 39-17-315 (Supp. 1996). "Repeatedly" is defined to mean two or more separate occasions. Tenn. Code Ann. § 39-17-315.

Appellant repeatedly followed and harassed Ms. Freeman with the intent of placing her in fear of bodily injury or death. Appellant came to Ms. Freeman's place of work in early May, argued with her and would not leave when asked. Appellant refused to leave the premises, waiting for Ms. Freeman in the parking lot. When Ms. Freeman tried to leave Appellant verbally accosted her at which point she threw a bottle of nail polish at him. Appellant had her arrested for this and watched from across the street as she was taken away. Appellant told a number of witensses that he was going to kill Ms. Freeman or harm her in some way. When Ms. Freeman returned from vacation over Memorial Day weekend, she came home to at least twenty threatening messages on her answering machine such as "Bitch, you're dead." Appellant came to her house unannounced as Ms. Freeman was packing to leave for vacation and would not leave when asked to do so. All of these actions would cause a reasonable person to suffer substantial emotional distress. Appellant's actions did in fact have its intended result as Ms. Freeman finally involved her husband in her attempt to leave Appellant. Moreover, Ms. Freeman did not return to her job after the shooting and even moved to another state..

II. Failure to Sequester the Jury

Appellant further contends that the trial court committed reversible error by failing to obtain his consent before allowing the jury to separate at the end of each day of trial. Appellant argues that State v. Furlough, 797 S.W.2d 631, 645 (Tenn. Crim. App. 1990) stands for the proposition that a criminal defendant has the right to sequestration of twelve jurors. While this Court recognized such a right in Furlough, this Court also acknowledged that this right could be waived under Tenn. Code Ann. Sec. 40-18-116 (1990). Section 40-18-116 provides the following:

> In all criminal prosecutions except those in which a death sentence may be rendered, the judge of the criminal court may, in his discretion, with the consent of the defendant, and with the consent of the district attorney general, permit the jurors to separate at times when they are not engaged upon the actual trial or deliberation of the cases.

In Furlough, the defense objected to the separation of jurors several times. Furlough, 797 S.W.2d at 644-45. In contrast, Appellant made no objection even when during voir dire the prosecutors informed the prospective jurors that they would not be sequestered but would be allowed to go home at the end of trial each day. By failing to raise the issue at trial when any prejudicial effect of the error could have been prevented, Appellant has waived this issue as a ground for relief. T.R.A.P. 36(a); See Jones v. State, 915 S.W.2d 1,3 (Tenn. Crim. App. 1995).

We conclude that the evidence was sufficient to sustain Appellant's convictions for attempted first-degree murder and stalking. Furthermore, we conclude that Appellant has waived any complaints with respect to the lack of jury sequestration. We therefore affirm the judgment of the trial court.

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JERRY L. SMITH, JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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DAVID H. WELLES, JUDGE