IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER SESSION, 1994

FILED

August 25, 1998

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	NO. 01C01-9403-CC-00106
APPELLEE,	)	
	)	WILLIAMSON COUNTY
	)	
VS.	)	HON. DONALD P. HARRIS, JUDGE
	)	
	)	(FIRST DEGREE MURDER,
BILLY ANGLIN and	)	ATTEMPTED FIRST DEGREE
STEVE ANGLIN,	)	MURDER, AGGRAVATED ASSAULT,
	)	RECKLESS ENDANGERMENT)
APPELLANTS.	)	

FOR APPELLANT BILLY ANGLIN:

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OPINION FILED: _____

AFFIRMED

JERRY SCOTT, SPECIAL JUDGE

O P I N I O N

The Appellants were convicted of murder in the first degree, attempted murder in the first degree, aggravated assault and reckless endangerment. Both were sentenced to life imprisonment for the murder, twenty-five years in the state penitentiary for the attempted murder, four years imprisonment for the aggravated assault and two years imprisonment for the reckless endangerment. All of the sentences except the murder sentence are to be served concurrently, with both Appellants being designated Range I standard offenders. All of the concurrent sentences are to be served consecutively to the murder sentence, yielding an effective sentence of life imprisonment plus twenty-five years.

The offenses occurred in Hickman County. The venue was changed to Williamson County where the Appellants were convicted after a lengthy ten day jury trial.

On appeal the Appellants have presented nine identical issues. In the first issue they challenge the sufficiency of the convicting evidence.

On August 23, 1991, Steve Anglin, accompanied by Billy Anglin and armed with his shotgun, had gotten out of his truck at Dottie's Trailer Park and made statements threatening Buddy Simmons and Linda Lee Anglin, who was married to Johnny Ray Anglin, a brother of the Appellants. He grabbed Mrs. Anglin by the hair, slapped her three or four times, called her a "slut" and threatened to kill her, telling her he was "fixing to blow [her] brains out." He also said "that son of a bitch in the yellow truck's going to get some too." The only yellow truck there belonged to Buddy Simmons.

Mrs. Anglin went into her trailer and called the police. Steve Anglin came into her trailer and said if she was calling the law, he would kill her. She stayed on the telephone until officers arrived, during which time Steve Anglin again threatened to kill her if she had him arrested.

Nonetheless, Mrs. Anglin went to get a warrant for Steve Anglin's arrest, but the sheriff would not allow her to have one issued. She returned to the trailer park to get her five-year-old son whom she had left with Bess Besson.

Neither Steve Anglin nor Billy Anglin were at the trailer park when she arrived. However, while she was at Ms. Besson's trailer, she heard the Anglins arrive. She heard loud music.

Steve Anglin and Billy Anglin were sitting close to one another on the back of a car with the radio in the car playing loudly. Steve Anglin was banging on a garbage can and screaming for someone to make him turn the radio down. There was a shotgun leaning between the men. Linda Anglin got very scared and went back to get a warrant for Steve Anglin's arrest.

As the Appellants sat on the car, Buddy Simmons was seen walking toward the car where the Appellants were sitting. Steve Anglin shot into the ground in front of Buddy and Buddy backed away, after which Steve shot into the ground again. Buddy stood still while Steve reloaded the gun, then Buddy grabbed the gun and swung it at Steve.

John Anglin, father of Steve and Billy Anglin, lived in the trailer park.[1] Billy went to his father's trailer and said "Daddy, I need the gun." He got a shotgun. As he left the trailer, he put the gun to his shoulder and started swinging it and shooting. One shot hit Ms. Besson, who lived with Buddy Simmons. She had been outside trying to get Mr. Simmons to go back inside their trailer. At the time she was shot, she was returning to her trailer. She was not armed.

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[1]John Anglin was tried with the Appellants. He was found guilty of aggravated assault and reckless endangerment. He is not an appellant in this case.

Rose Haskins was hit on the "rear end" by one of the shots. She was taken to the hospital. She recovered and testified at the trial.

Mr. Simmons was also hit by one of the shots fired by Billy Anglin and he fell. As Mr. Simmons laid on the ground, Billy Anglin then shot him again. Billy Anglin then went to Mr. Simmons, put the gun to his head and pulled the trigger. It clicked, apparently out of ammunition. Steve Anglin then pulled the shotgun back, put it to Mr. Simmons' head and pulled the trigger. Again, the gun clicked.

Steve Anglin then got down on the ground where Mr. Simmons was lying and was described by a witness as making motions with his hands like he was "carving something up." He then stood up and began kicking and "stomping" Mr. Simmons.

The medical proof revealed that Mr. Simmons had very large and numerous lacerations to his abdomen, chest, back, face, back of his head, ears, over his eyes, to his tongue, arms and legs, as well as a cut throat. The lacerations to his arms were so deep that his bones were visible to his elbows. Parts of his left thigh was blown away by the shotgun blast midway to his buttocks with much of the muscle and tissue in that area blown away. Both bones in his lower left leg were fractured, and his right ulna was fractured. He had an evulsion injury to his right hand and his fifth finger (pinky) was destroyed. Miraculously, Mr. Simmons recovered after extensive medical treatment requiring eleven separate surgeries and forty-nine days of hospitalization at Vanderbilt University Medical Center in Nashville.[2]

During the shooting incident, Billy Anglin was heard to say to Mr. Simmons, "What are you going to do now, you son of a bitch?"

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[2]Dr. John Thomas Sexton, who examined Mr. Simmons at the Hickman County Hospital described his wounds as the worst he had ever seen in his three years of emergency room experience. He analogized the wounds to "something that would be seen in a military operation."

The autopsy revealed that Ms. Besson died of gunshot wounds to several vital organs including the left carotid artery, left subclavian artery and multiple left jugular veins. Three pieces of a deer slug were removed from her body. The slug entered her lower neck at the top of her sternum and exited in the area of the left shoulder blade. Ms. Besson was dead at the scene.

A TBI Crime Laboratory forensic expert tested the firearms found at the scene. A shotgun was identified as the weapon from which the fatal .410 gauge shell was fired. Other spent shotgun shells were identified as having been fired from the .12 gauge shotgun found at the scene. Both shotguns were surrendered to law enforcement officers by John Anglin, the father of Billy and Steve Anglin who had picked them up and taken them inside his mobile home. Four live .410 shotgun shells were found in Steve Anglin's left pants pocket.

Brenda Davis testified that immediately after the incident Billy Anglin appeared "calm and collected" and made small talk with her husband as he walked to his trailer, which was located behind Mr. and Mrs. Davis' trailer. Ms. Davis further testified that Steve Anglin "flipped us all a bird' as he was being driven away by the law enforcement officers.

The Appellants argue that the evidence is insufficient to establish all of the elements of the attempted murder in the first degree of Mr. Simmons. Thus, they reason there can be no conviction for that offense committed upon Mr. Simmons, nor can there be a conviction for the felony murder of Ms. Besson. Specifically, they contend there is no evidence of "premeditation," or "deliberation," essential elements of first degree murder which must exist in order for one to be convicted of an attempt to commit that offense.

In State v. Brown, 836 S.W.2d 530, 543 (Tenn. 1992), our Supreme Court held that "deliberation" requires "a process of carefully weighing such matters as the wisdom of going ahead with the proposed killing, the manner in which the killing will be accomplished, and the consequences which may be visited upon the killer if and when apprehended." "Deliberation" is present if the thinking, i.e., the "premeditation" is being done in such a cool mental state, under the circumstances, and for such a period of time as to permit a "careful weighing" of the proposed decision to kill.

By this holding our highest court abandoned the prior holdings that premeditation and deliberation can occur in an instant. That is not to say, however, that one must carefully plot and plan a killing for an extended period for the killing to be murder in the first degree. It is clear that the Appellants had the intent to do grievous injury to Mr. Simmons when they were at the trailer park that afternoon. They had threatened to kill Mr. Simmons, and deliberately attracted Mr. Simmons' attention when they arrived the second time by banging a garbage can and playing the radio at a loud volume. As soon as Mr. Simmons came out, Steve Anglin shot twice in his direction and reloaded the gun. Billy Anglin shot Mr. Simmons twice and they each put the gun to Mr. Simmons' head and pulled the trigger. Then Steve Anglin carved up Mr. Simmons' body so severely that the physicians who treated him at Vanderbilt were utterly amazed that Mr. Simmons survived.

In State v. West, 844 S.W.2d 144, 148 (Tenn. 1992), a post-Brown case, our Supreme Court noted that "(c)almness immediately after a killing may be evidence of a cool dispassionate, premeditated murder."

The rules of appellate review are so firmly entrenched in Tennessee jurisprudence that they hardly need be restated. A jury verdict, approved by the trial judge, accredits the testimony of the witnesses for the prosecution and resolves all conflicts in favor of the theory of the State. State v. Hatchett, 560 S.W.2d 627, 630

(Tenn. 1978). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978). A guilty verdict removes the presumption of innocence and raises a presumption of guilty on appeal, State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973), which the defendant has the burden of overcoming. State v. Brown, 551 S.W.2d 329, 331 (Tenn. 1977). When the sufficiency of the evidence is challenged, the question for appellate courts is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 2782, 61 L.Ed.2d 560 (1979). An examination of the circumstances of the crimes in this case reveals that there was ample, indeed overwhelming evidence from which any rational trier of fact would find the Appellants guilty of all of the offenses just as the jury did. The issues challenging the sufficiency of the convicting evidence have no merit.

In the next issue, the Appellants contend that the trial judge erred by failing to grant a severance of the defendants.

The Appellants submitted an agreed order to consolidate the offenses for trial. Thus, this issue was waived by each Appellant. Rule 36(a), Tenn. R. App. P.

In the third issue, the Appellants challenge the admission of a photograph of Ms. Besson's corpse. They contend that under the holding in State v. Banks, 564 S.W.2d 947, 951 (Tenn. 1978) the photograph should not have been admitted because it is particularly gruesome and was introduced simply to inflame the jury.

In Banks the Supreme Court held that the admissibility of photographic evidence, like other evidence, rests within the sound discretion of the trial judge and in that case the Supreme Court found the photograph admissible.

The Appellants contend that since they did not contest the fact that the fatal shot to Ms. Besson's body came from the gun fired by Billy Anglin, and since the medical examiner testified as to the cause of her death, the photograph was of no probative value and was merely cumulative.

The fact that the medical examiner had testified concerning the wounds to a deceased does not render the proffered photograph cumulative. State v. Van Tran, 864 S.W.2d 465, 477 (Tenn. 1993).

In this case, the photograph showed the nature and extent of the injuries inflicted upon Ms. Besson and causing her death. Although it can certainly be said that all photographs of corpses are gruesome, especially to those not accustomed to seeing the dead, it cannot be said that the photograph in this case is particularly so. Indeed, compared to the photographs admitted in other murder cases this photograph showing the corpse lying on the ground with blood around her neck and on her right arm is not gruesome at all. This issue has no merit.

In the next two issues, the Appellants contend that the prosecutors deliberately engaged in prosecutorial misconduct in the presentation of their final arguments and that the trial judge erred by failing to grant a mistrial sua sponte, by failing to effectively admonish the State's counsel, and by failing to provide curative instructions at the times of the "unethical and prejudicial conduct."

The first statement in the argument that is challenged by the Appellants was a quotation of Tracy Anglin, the wife of Steve Anglin who was heard by Mary Sullivan to have said: "No, Steve, no."

The Appellants assert that the speaker was the victim who said, "No, Buddy, no." Our examination of the record clearly reveals that Ms. Sullivan quoted Tracy

Anglin (not Ms. Besson) as saying, "No, Steve, don't." Thus the quotation in the argument was correct. In response to the objection, the trial judge properly overruled the objection and advised the jury that: "You are the final judge of what the facts are, and I will leave that to the jury."[3]

Next, the Appellants contend it was error for an Assistant District Attorney General to call attention to the fact that Jerry Anglin, a defense witness was a second cousin of the Appellants who was also married to the Appellants' sister. No objection was interposed to that statement. Thus, any objection to this argument was waived. Rule 36(a), Tenn. R. App. P.

The State contends that it was proper for the prosecutor to attempt to undermine the credibility of a defense witness due to his close degree of kinship to the Appellants both by affinity and consanguinity.

The State is correct. It was entirely proper for the prosecutor to call attention to Jerry Anglin's close familial relationships to the defendants in order to assert that he was not an impartial witness, but was instead a hostile defense witness testifying for his kin.

Next, the Appellants challenge a comment regarding John Anglin (who is not an appellant) and Steve Anglin where the prosecutor asked the jury to look at "[w]hat did they do to not promote or not assist" in the "tense situation." The Appellants term this as a "deliberate attempt to shift the jury's focus from the acts of the defendants and to ask the jury to convict (of reckless endangerment) on some moral obligation contrived by the prosecutor.

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[3]The objection was not interposed until the Assistant District Attorney General was quoting John Anglin a short time thereafter and that objection came from John Anglin's counsel. However, we treat the objection and the Court's admonition as applying to both quotations.

There was no objection to this statement. Therefore, the issue was waived, Rule 36(a), Tenn. R. App. P. Furthermore, viewed in context, it is clear that the comment was aimed at John Anglin who, in the words of the prosecutor, "had the loaded gun ready to go in a situation that he already knew was a tense situation." This argument has no merit.

The fourth statement challenged by the Appellants was "how can you say self-defense Ms. Story and Mr. Drolsum?"

In context the statement was:

> The weapon was fired five times, five times in self defense, ask yourself. Ask yourself, well I will ask -- how can you say it's self defense Ms. Storey, Mr. Drolsum, how can you say it is self defense --

Counsel for Billy Anglin objected, Steve Anglin's counsel did not. The trial judge sustained the objection and instructed the jury. (The transcript as to the judge's admonition to the jury was "inaudible", but it is clear from the judge's statement, "Please do not," that the judge admonished the jury and allowed counsel to proceed with his argument.) It is presumed that the jury followed the judge's directions to disregard that portion of the argument. State v. Blackmon, 701 S.W.2d 225, 233 (Tenn. Crim. App. 1985). Furthermore, the argument was a perfectly legitimate one in light of the testimony and the physical evidence of the injuries to Mr. Simmons.

The Appellants also found fault with the prosecutor terming their defense of self-defense as "ludicrous" and as a "smokescreen." The context in which those terms were used was as follows:

> Self defense, I'll show you how it's done, he grabs it and puts it to his head, same thing, dry fires. Upset by that, takes out his knife and begins, as Mary Sullivan says, to carve him, to carving, his head, his mouth, his throat chest, his arms, his belly. Self defense, it is ludicrous. It is ludicrous defense of a third person. Shooting a man four times after he is already down on the ground after the

> first shot. Self defense of a third person, it is a smoke screen and an effort to try to get you to avoid the crucial issues here in this case.

Given the context of the remarks, to which there was no objection, and the evidence against the Appellants those appellations describing their defense, although strong, were not error. Prosecutors, like defense counsel, are entitled to shoot holes in their adversary's theories, although neither is entitled to unfairly characterize the theories of the other side. While hard blows are permissible, unfair ones are not. In this case, given the overwhelming evidence of the "carving" of Mr. Simmons, it cannot be said that the prosecutor's characterizations of the defense theory of self-defense was unfair or impermissible and the argument clearly had no effect upon the jury's verdict. Again, without objection, the Appellants cannot be heard to complain about the argument of opposing counsel. Rule 36(a), Tenn. R. App. P. This issue has no merit.

Finally, the Appellants object to the following remark of the prosecutor in the rebuttal argument responding to what the Appellants term the defense argument about the abnormal amount of testimony the State produced to describe the victims' injuries:

> It is -- that is the only picture that you saw. If the State was interested in gore, we would have brought Buddy Simmons in and asked Judge Harris to let him drop his pants for you and let you see what it looks like to have a buttock blown away and then muscle taken from the other to cover up the bone. We could have shown you some gore if that was our intent because there is plenty of gore in this case.

The objection interposed by Billy Anglin's counsel was sustained by the trial judge and the trial judge instructed the jury as follows:

> General, that is highly improper. I would ask the jury to disregard the last comment made by the prosecutor, there is no evidence of that in this case.

* * *

> THE COURT: There is evidence that he had that done. There is no evidence of what it looks like.

The Appellants term the trial judge's admonition as "perfunctory" and complain that the judge did not declare a mistrial sua sponte and that the trial judge did not give a more detailed curative instruction and also "admonish the advocate."

The trial judge correctly instructed the jury that there was evidence of the injury, but not as to what Mr. Simmons' body looked like after the injury and told them to disregard the argument. Nothing more was required. There is no requirement that the judge admonish counsel for improper argument in the presence of the jury. The purpose of admonitions and curative instructions is to have the jury properly consider the evidence before it, unimpeded by inappropriate comments from counsel. It is not the function of curative instructions to admonish or belittle counsel in the jury's presence. There certainly was no basis for declaring a mistrial.

The challenges to portions of the prosecutor's arguments and the trial judge's responses thereto have no merit.

In the next issue, the Appellants contend the State committed prosecutorial misconduct by seeking the death penalty in a case in which the facts clearly did not support the alleged aggravating circumstances, thus giving the State a guilt prone jury. In the following issue, the Appellants contend the trial court erred by not conducting or allowing the Appellants to conduct a pre-trial hearing to determine whether sufficient evidence existed to support the alleged aggravating circumstances.

There is no authority for the proposition that the jury was guilt prone because the members were death penalty qualified, except the ruminations of Justice Marshall of the United States Supreme Court in his dissent in Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 1773-75, 90 L.Ed.2d 137 (1986) where he analyzed social

science studies of death penalty qualified juries and found them to be predisposed to believing the defendant is guilty.

In this case, the District Attorney General sought the death penalty as he was entitled to do. However, the trial judge announced to counsel at a sidebar conference that he would, as thirteenth juror, set aside a sentence of death as he was not convinced that the aggravating circumstances had been proven beyond a reasonable doubt. There has been no showing, apart from counsel's speculation, that the death penalty qualifications of the jurors contributed to the guilty verdict in this case. As noted earlier in this opinion, the evidence was clearly sufficient for any rational trier of fact to find the Appellants guilty beyond a reasonable doubt. Jackson, 99 S.Ct. at 2782.

Further, there is no authority for a pre-trial presentation of the State's case to the judge outside the jury's presence to "test fully" the State's case as suggested by the Appellants. Indeed, such a procedure would have serious double jeopardy implications. These issues have no merit.

In the eighth issue, the Appellants contend that the verdict is void or voidable because one juror, Deanna Little, had a civil case pending at the time she served as a juror in the Appellants' cases.

Under the provisions of Tenn. Code Ann. §22-2-103, a party is entitled to challenge for cause any potential juror who has a suit pending for trial at the same term of court.

In this case, the trial began on August 30, 1993 and concluded on September 11, 1993. According to the documentary evidence, a suit styled Thomas Smithson v. Larry G. Little and wife Deanna L. Little was filed against Ms. Little and her husband

on September 7, 1993. At the time she was selected as a juror the case had not even been filed. Thus, she did not, at the time of her selection as a juror, have a suit pending "for trial" at the same term of court, since she had not even been served with process at the time of her selection. This issue is patently without merit.

In the final issue, the Appellants contend the trial judge erred by ordering partial consecutive service of their sentences.

Under Tenn. Code Ann. § 40-35-115(b)(4), the trial judge can impose consecutive sentences upon a defendant who is found to be, inter alia, a dangerous offender whose behavior exhibits little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high.

In this case, after killing Ms. Besson, the Appellants continued their vicious attacks upon Mr. Simmons, with a knife and with their shotguns. Steve Anglin had three prior convictions of assault and battery, having been charged with aggravated assault in 1985, 1987 and 1989. The first two convictions resulted in the payment of fines and costs. The final conviction resulted in probation for eleven months and twenty-nine days. Steve Anglin had just completed his probation a few months before these offenses occurred. Billy Anglin had prior convictions for public intoxication, concealing stolen property, burglary in the first degree and driving under the influence of an intoxicant. In our view, the key to the imposition of partial consecutive sentences was the viciousness of the attack on Mr. Simmons just moments after the shooting of Ms. Besson as she lay dying on the ground nearby. If there ever were any defendants whose behavior exhibited "little or no regard for human life," these Appellants are the ones. These issues have no merit.

Finding no merit to any of the issues presented by the Appellants, the convictions and the resulting sentences are affirmed.

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JERRY SCOTT, SPECIAL JUDGE

CONCUR:

(NOT PARTICIPATING)_____
JOE B. JONES, JUDGE[4]

_____
PAUL G. SUMMERS, JUDGE

[4]Judge Jones, the Presiding Judge of the Court of Criminal Appeals, died a short time before the date the opinion in this case was to be released. The members of this panel of the Court remember Judge Jones fondly and appreciate the opportunity we had to work with him on this case and numerous others. He is missed by all of his colleagues and former colleagues on the Court.