

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1998 SESSION

<p>F I L E D</p> <p>December 29, 1998</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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STATE OF TENNESSEE,)
)
 Appellee,)
)
 v.)
)
 BENJAMIN BLACKWELL, JR.,)
)
 _____Appellant._____)

C.C.A. No. 02C01-9712-CC-00469
 Madison County
 Honorable Franklin Murchison, Judge
 Murder Second Degree

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OPINION FILED: _____

AFFIRMED

L. T. LAFFERTY, SENIOR JUDGE

O P I N I O N

The appellant, Benjamin Blackwell, Jr., herein referred to as the defendant, appeals as of right from a judgment of the Madison County Circuit Court wherein a jury found the defendant guilty of murder second degree. In accordance with the jury's verdict, the trial court sentenced the defendant to 18 years in the Department of Correction. The defendant has presented five issues for appellate review:

1. Whether mutual combat between two drunken adult unarmed men in a parking lot is factually insufficient to support a conviction of murder second degree.
2. Whether the trial judge erred in giving an incomplete instruction on the range of punishment which completely disregarded Tenn. Code Ann. § 40-35-201.
3. Whether the trial judge erred in admitting autopsy photographs of Craig Williams which were graphic, horrible and did not accurately depict the condition of Craig Williams after the fight.
4. Whether the trial judge committed reversible error in refusing to give the jury a curative instruction as requested concerning the oral statement of co-defendant, Kimberly Lewis, allegedly made to Jackson Police Officer Urig, at the time of Lewis's testimony.
5. Whether the trial judge erred in concurring in the verdict of the jury instead of independently weighing the evidence as required by Rule 33(f) of the Tennessee Rules of Criminal Procedure.

After a thorough review of the evidence in the record, briefs of all parties, and the applicable law, the trial court's judgment is affirmed.

FACTUAL BACKGROUND

At approximately 4:00 a.m. on September 29, 1995, the defendant and the victim, Craig Williams, began fighting on the parking lot of K-Mart in Jackson, Madison County, Tennessee. As a result of this fight, Williams died from blows to the head. The defendant and a co-defendant, Kimberly Lewis, were charged with murder second degree. On May 30, 1997, a jury found the defendant guilty of murder second degree and the co-defendant,

Kimberly Lewis, not guilty.

Since the defendant questions the sufficiency of the evidence to support murder second degree, we set forth the salient facts in this case.

Sergeant J. D. Hale, patrol shift supervisor for the Jackson Police Department, testified he and Officer Randy Urig responded to a fight call, received at 4:25 a.m. on September 29, 1995 at the Planet Rock nightclub parking lot. Sergeant Hale did not see a fight or any disturbance and watched a crowd leave the Planet Rock. Sergeant Hale entered the nightclub after receiving a call that a person inside was not breathing. In the back office of the Planet Rock, Sergeant Hale found Craig Williams, unconscious and slumped over in a chair. Sergeant Hale described Williams's skin color as very pale and abnormal. He could not detect a heartbeat or pulse on Williams. Sergeant Hale observed an abrasion to Williams's left temple extending under the eye to the top of the cheekbone.

Officer Randy Urig, patrolman for the Jackson Police Department, testified he responded to the same fight call as Sergeant Hale. Officer Urig heard another call that Emergency Medical Services had been dispatched to the Planet Rock. Officer Urig accompanied Sergeant Hale inside the Planet Rock and observed Craig Williams in the rear office in a chair. It appeared Williams was not breathing. Officer Urig talked to several persons in the club and obtained the name of a suspect, who left the club in a small red car. The first three numbers of the license plate were 188. Officer Urig went to the home of Kimberly Lewis, where he arrested the defendant, Ms. Lewis, and two other persons.

Donna Johnson, crime scene technician for the Jackson Police Department, testified she was sent to the home of Kimberly Lewis to collect evidence. Officer Johnson retrieved a pair of cowboy boots and a plaid shirt. She also took photographs of a red Nissan automobile parked at Ms. Lewis's residence. Officer Johnson later obtained a pair of women's shoes and a satin skirt from Kimberly Lewis.

Dr. O'Brien Clarey Smith, forensic pathologist, testified he performed an autopsy on Craig Williams on September 29, 1995. Based on his autopsy findings, Dr. Smith testified Craig Williams died as a result of blows to the head, which produced internal bleeding, brain swelling, and death thereafter. Dr. Smith determined the victim received a minimum of eight blows, two of which were severe. The victim received a severe blow to the left temple and behind the right ear. The blows were caused by a pattern of some particular type of blunt instrument. When shown a pair of cowboy boots, Dr. Smith was of the opinion those boots could have produced the pattern behind the victim's right ear and the base of the neck, but not the pattern on the victim's left temple. Dr. Smith believed it took a moderate degree of force to cause the injuries sustained by the victim. The autopsy revealed the victim had a blood-alcohol content of .20 percent.

Charles Dillinger, security guard/doorman at the Planet Rock, testified he was working on September 29, 1995. Dillinger had to intervene in an argument between Craig Williams, the defendant, and three other persons. Dillinger told all parties to sit down or leave. In Dillinger's opinion, both Craig Williams and the defendant were intoxicated. However, the argument between Williams and the defendant continued and Dillinger had them leave. As the defendant and his party left the club, Dillinger attempted to stop Williams because he was "way too drunk," but Williams continued outside. Dillinger testified the two men got face-to-face, and he stepped between them and told them he was going to call the police. The defendant shoved Williams, and Dillinger left to call the police. After making the call, Dillinger returned to the parking lot and saw two cars and a truck leaving K-Mart's parking lot. Dillinger returned to the club and observed Craig Williams in the back office. Dillinger checked the victim's pulse, which was "real faint." The victim's breathing was erratic and he made a few gurgling sounds. Dillinger observed blood around the victim's mouth and nose.

Allen Burney testified he arrived at the Planet Rock between 2:30 and 3:00 a.m. on September 29, 1995 and met Scott Holloway. Burney testified he later went outside the club looking for a ride when he saw a crowd on the K-Mart parking lot. Burney saw two

men fighting, inflicting serious injury on each other. Burney observed Craig Williams stumble and fall off balance from a blow. Williams was on his side, face down, and attempting to get up when the defendant kicked him "pretty hard" in the temple. Burney testified the defendant was wearing boot-type shoes.

Scott Holloway testified he was at the Planet Rock on September 29, 1995, in the early morning hours, when he heard a fight was taking place outside. Holloway went outside where he saw Williams and a larger man with a tattoo walking to the parking lot. The two men were arguing and then the man with the tattoo pushed Williams. Holloway saw this man on top of Williams, hitting him in the head. Holloway observed the man strike Williams four or five times with what he presumed to be a closed fist.

William Western testified he was driving by the parking lot near the Planet Rock between 4:00 and 4:35 a.m. on September 29, 1995. Western heard someone yell and saw a person kicking something on the ground. Western pulled into the parking lot, threw his headlights on the crowd, and saw a person on the ground. Western heard a girl scream, "Let's get out of here now." Western recalled the person doing the kicking was stocky built and was not wearing a shirt. Western testified the stocky person and three or four others got into a small red car and left. Western obtained the license plate numbers 188-J as the car left.

Kevin Dismuke testified he was at the Planet Rock on September 29, 1995 and saw Craig Williams and the defendant arguing. Dismuke testified the defendant and Kimberly Lewis went outside, followed by Williams. Dismuke attempted to get Williams to go back in the club, but the defendant and Williams started fighting. Dismuke went in the club to call the police. Upon Dismuke's return, Dismuke saw Williams on his hands and knees attempting to get up. Dismuke saw the defendant kick Williams on the side of the face. After the defendant left, Dismuke went to Williams, who was breathing but unconscious. Dismuke assisted in getting Williams inside the club.

Richard Scobille testified he was at the Planet Rock at 2:30 a.m. on September 29, 1995, and saw Craig Williams who was “very much intoxicated.” Scobille testified the bouncer had to go to the rear of the club and quell an argument between Williams and someone. Scobille observed Williams go outside and come back in. Then the defendant and his party went outside. Scobille testified Williams and the defendant got into a shouting match and the defendant threatened to “kick his ass.” The defendant took off his shirt while ranting, raving, and cursing at Williams. Scobille testified the defendant shoved Williams in the chest and then walked to the K-Mart parking lot. Williams followed him. Scobille observed a scuffle and went inside the club to call the police. Upon Scobille’s return, he observed Williams lying on his back on the ground with the defendant sitting on top of his chest. The defendant held Williams with his left hand and struck him with his right fist eight to ten times. Scobille described the blows as “very hard” to the left side of the head. While Williams was on the ground, Kimberly Lewis approached and kicked Williams several times about the upper torso. The defendant got off Williams’s chest. Williams tried to get up, but spun around and fell back to the ground face down. Then the defendant went up to Williams and kicked him in the back of the head twice with the cowboy boots he had on. As Scobille and another person approached, the defendant and three others left in a car. Scobille assisted Williams inside the club.

J. R. Golden, investigator for the violent crimes bureau of the Jackson Police Department, testified he interviewed the defendant at 11:00 a.m. on September 29, 1995 and obtained a statement. After acknowledging his *Miranda* rights, the defendant related he and Arlie Pounds were shooting pool in the Planet Rock when he saw Kimberly Lewis and Craig Williams dancing and exchanging words. Williams wanted to fight Pounds and the bouncer told them to go outside. Outside, Williams and Pounds argued; then Williams pushed Ms. Lewis. The defendant took off his shirt. The defendant and Williams walked over to K-Mart’s parking lot. The defendant and Williams began swinging at each other, and the defendant wrestled Williams to the ground. The defendant got on top of Williams and punched him in the head a few times. Then the defendant got up, and Williams started up towards him. The defendant kicked him in the jaw. The defendant left with Ms.

Lewis, Arlie Pounds, and Jessica Damlow. Investigator Golden testified he obtained blood samples at 2:00 p.m. from the defendant, which were analyzed by the Tennessee Bureau of Investigation. The sample indicated a blood-alcohol content of .05 percent.

It was stipulated by both the state and the defense for the benefit of the jury that the defendant's blood-alcohol content would have been higher at the time of offense. Also, no blood was found on the defendant's cowboy boots.

In behalf of both defendants, Ms. Jessica Damlow testified she, Kimberly Lewis, the defendant, and Arlie Pounds arrived at the Planet Rock at about 2:30 a.m. Ms. Damlow testified that Ms. Lewis became upset with Craig Williams over a dance, which caused the defendant to become upset. Williams and Pounds got into a staring contest and the defendant advised them to settle down. Williams and the defendant argued, and the bouncer told them they would have to leave. As they got outside, the defendant took off his shirt and Williams stated, "I'm not fighting, you know, this is stupid." Then, Williams changed his attitude and began calling the girls derogatory names. Ms. Damlow testified Ms. Lewis slapped Williams. Ms. Damlow and the bouncer went inside. Ms. Damlow went back outside and saw Williams roll twice. Ms. Damlow heard the police was coming so she, the defendant, Pounds, and Ms. Lewis got in their car and left.

Arlie Pounds testified he, the defendant, Ms. Lewis, and Ms. Damlow arrived at the Planet Rock at 2:30 a.m. Pounds observed Ms. Lewis and Craig Williams dancing and Williams followed her to their table. It was obvious Williams was intoxicated because he was boisterous and was slurring his speech. Pounds testified a bouncer made Williams leave when another bouncer told the defendant if there was going to be a fight, it had to be outside on K-Mart's lot. As they got outside, the defendant and Williams had "fighting words." The defendant and Williams swung at each other several times and missed. Williams tackled the defendant and got on top of him. The defendant flipped Williams over and struck him three or four times. The defendant then got up and went to the car. Pounds looked back and saw Williams walking unassisted towards the club.

In his own behalf, the defendant testified that prior to arriving at the Planet Rock, he had drunk some beer from a six-pack and consumed more at Gilligan's. At Planet Rock, the defendant and Arlie Pounds bought a couple of beers. The defendant testified he observed Craig Williams and Kim Lewis dancing. Williams began rubbing on Ms. Lewis and getting too close to her. Williams followed Ms. Lewis to the table and became very obnoxious. Then, the defendant and Williams exchanged words. A bouncer came to the table and told the party to settle down. Williams went outside, and a bouncer told the defendant and Pounds that they were wanted outside. The defendant went outside where Williams was cursing and the defendant retorted. The defendant took his shirt off and both men walked to K-Mart's parking lot.

The defendant testified he and Williams swung at each other, but missed. Then, Williams and the defendant fell to the ground. Williams got on top of the defendant and struck him in the face. The defendant testified he rolled Williams over, got on top of him, and "busted" him a few times in the face. The defendant got up and as Williams was getting up, the defendant kicked him in the jaw. As the defendant and his party were leaving, the defendant saw Williams get up on his own. The defendant had no intention to kill Craig Williams.

The co-defendant, Kimberly Lewis, testified she, the defendant, Arlie Pounds, and Jessica Damlow were at the Planet Rock when she saw Craig Williams, who she had known all her life. Williams was heavily intoxicated and asked Ms. Lewis to dance. The defendant got angry over the way Williams danced with Ms. Lewis. At the table, Williams and the defendant exchanged words. Ms. Lewis described the defendant as "really drunk." A bouncer came to the table and told Williams to leave. After Williams left, word was sent that the defendant and Pounds were wanted outside. Outside, the defendant and Williams started fighting. Ms. Lewis attempted to settle down Williams. Williams seemed to settle down, but then began cursing at Ms. Lewis. At this exchange of words, the defendant took off his shirt and walked to K-Mart's lot. Both men swung at each other and missed. Both men fell to the ground with Williams on top. The defendant flipped Williams over and

started punching him several times. Ms. Lewis approached both men and yelled at the defendant, "Let's go." When Ms. Lewis did not receive a response from the defendant, she "kind of kick[ed] at Ben." The defendant got up and as Williams was attempting to get up, the defendant kicked him and he fell down. Ms. Lewis denied kicking the victim, Craig Williams.

Based upon all the testimony, the jury found the defendant guilty of murder second degree and Ms. Lewis not guilty.

APPELLATE ISSUES

A. Insufficiency of Evidence to Support Murder Second Degree

The defendant strongly contends that mutual combat between two drunken men is factually insufficient to support a guilty verdict of murder second degree. The state counters there are sufficient facts for the jury to have determined the defendant knowingly killed the victim, Craig Williams. In addition, the defendant requests this court to take judicial notice of the deposition of Dr. James H. Shull, taken in a related civil case, as to whether the victim would have lived had he received prompt medical treatment. Dr. Shull did not testify at the criminal trial. We decline to accept the defendant's request to review this deposition, since this evidence was not contemplated by Rules 13(c) and 14 of the Tennessee Rules of Appellate Procedure.

When reviewing a trial court's judgment, the appellate court will not disturb a verdict of guilty unless the facts in the record and inferences which may be drawn from it are insufficient as a matter of law for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. Tenn. R. App. P. 13(e); *State v. Tuggle*, 639 S.W.2d 913 (Tenn. 1982); *State v. Brewer*, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996). Initially, a defendant is cloaked with the presumption of innocence. *Tuggle*, 639 S.W.2d at 914. However, a jury conviction removes the presumption of innocence and replaces it with one of guilt, so

that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. *Id.* In determining the sufficiency of evidence, this court does not reweigh or reevaluate the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). On appeal, the state is entitled to the strongest legitimate view of the evidence and all legitimate or reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). It is the appellate court's duty to affirm the conviction if the evidence viewed under these standards was sufficient for any rational trier of fact to have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994). This rule is applicable to findings of guilt predicated upon the direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

Tennessee Code Annotated § 39-13-210(a)(1) defines second degree murder as "a knowing killing of another." Tennessee Code Annotated § 39-11-302(b) defines knowing as follows:

"Knowing" refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

Thus, the state must establish beyond a reasonable doubt that a defendant commits murder second degree when the defendant, in certain situations, has an awareness that his conduct was reasonably certain to cause a result or the result. The distinction between murder second degree and voluntary manslaughter is that voluntary manslaughter requires that the killing result from a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.

In *Hunt v. State*, 202 Tenn. 227, 303 S.W.2d 740 (1957), our supreme court held that when a death occurs from a mutual combat, the proof supports only a conviction for

voluntary manslaughter, not second degree murder. Mutual combat has been defined as “one into which both parties enter willingly, or in which two persons, upon a sudden quarrel, and in hot blood, mutually fight.” Black’s Law Dictionary 266 (6th ed. 1990). In *State v. Johnson*, 909 S.W.2d 461, 464 (Tenn. Crim. App.), *per. app. denied* (Tenn. 1995), our court wrote:

Mutual combat is not a statutory defense. *See generally*, Tenn. Code Ann. §§ 39-11-203, -204, and -501 through -621. The underlying facts may qualify, however, as “adequate provocation sufficient to lead a reasonable person to act in an irrational manner.” Tenn. Code Ann. § 39-13-211(a). Whether the acts constitute a “knowing killing” (second degree murder) or a killing due to “adequate provocation” (voluntary manslaughter) is a question for the jury.

The defendant contends that he participated in mutual **unarmed** combat, and that although death occurred, there are no facts to support the element of a “knowing killing” or even that of voluntary manslaughter. The proof in this record establishes that the defendant and the victim engaged in a fight after a heated exchange of “fighting words.” Several witnesses saw the defendant on top of the victim, fiercely striking the victim with his fist numerous times. The proof indicates the defendant started to leave, but saw the victim on his knees attempting to get up and then proceeded to kick the victim twice in the head, causing severe internal injuries which resulted in death. Although the defendant contends he has been unable to find any decisions upholding a murder second degree conviction in unarmed fights, we find these facts are strikingly similar to the holding in *State v. Jack Maxie Welch*, Dyer County No. 02C01-9604-CC-00134 (Tenn. Crim. App., Jackson, July 25, 1997). In *Welch*, the defendant, after drinking excessively, got into a physical fight with a longtime friend and while the victim was on the ground, the defendant repeatedly kicked the victim in the abdomen. This court concluded “that the appellant was consciously aware of the nature of his conduct and that the conduct, i.e. repeated kicks to the abdomen, was reasonably certain to cause death.” *Id.*

In conclusion, the trial court charged the jury with the elements of murder second degree, voluntary manslaughter, reckless homicide, and criminally negligent homicide, as

well as the defense charges of self-defense and intoxication. The jury had the benefit of observing all the witnesses and concluded the defendant was guilty of murder second degree. We find the facts support the jury's verdict. There is no merit to this issue.

B. Range of Punishment Charge

In this issue, the defendant contends the trial court failed to charge the jury on the meaning of a sentence of imprisonment for the offenses charged and all lesser included offenses. The state argues the defendant has not raised the issue properly for an appeal.

From our review of the entire record, we find the defendant has waived this issue of an improper jury instruction as to the range of punishment. Rule 3(e), Tennessee Rules of Appellate Procedure, provides in part that "in all cases tried by a jury, no issue presented for review shall be predicated upon error . . . upon which a new trial is sought, unless the same was specifically stated in the motion for a new trial; otherwise such issues will be treated as waived." This court has consistently held that issues concerning instructions given or refused by the trial court are waived if the issues were not included in the motion for a new trial. *State v. Keel*, 882 S.W.2d 410 (Tenn. Crim. App.), *per. app. denied* (Tenn. 1994); *State v. Jones*, 733 S.W.2d 517, 524 (Tenn. Crim. App. 1987). Nor do we find that this issue would fall under the "plain error" provisions of Rule 52(b), Tennessee Rules of Criminal Procedure. Since the defendant failed to raise an objection at trial as to the trial court's jury instructions on the range of punishment and failed to allege as error in the motion for new trial, there is no merit to this issue.

C. Autopsy Photographs

In this issue, the defendant contends the trial court failed to properly weigh the probative value of the autopsy photographs against the possibility of unfair prejudice. The state counters the trial court did not abuse its discretion in admitting the autopsy photographs.

A review of the record establishes 24 autopsy photographs taken by Dr. O. C. Smith were introduced into evidence, Exhibit 4A-X, for the jury's consideration. The defendant, more specifically, objected to Exhibit 4-W, a photograph of the right scalp and ear of the victim with blood concentrated about the rear of the ear. In ruling on the admissibility of the photographs, the trial court stated, "These pictures are not inflammatory, and they are not gruesome or gory and they are not the type of pictures that would inflame or upset the jury. . . . [T]he pictures will go in." As part of his argument, the defendant urges the photographs fail to depict the victim's appearance at the conclusion of the fight, thus they were not relevant and only inflamed the jury.

It is within the sound discretion of the trial court to admit a photograph, and its determination shall not be reversed absent a clear showing of abuse. *State v. Bordis*, 905 S.W.2d 214, 226 (Tenn. Crim. App.), *per. app. denied* (Tenn. 1995); *State v. Banks*, 564 S.W.2d 947, 949 (Tenn. 1978). Before a photograph may be admitted as evidence, it must be relevant to an issue that the jury must decide; and the probative value must outweigh any prejudicial effect that it may have upon the trier of fact. *State v. Braden*, 867 S.W.2d 750, 758 (Tenn. Crim. App.), *per. app. denied* (Tenn. 1993); *State v. Aucoin*, 756 S.W.2d 705, 710 (Tenn. Crim. App. 1988), *cert. denied*, 489 U.S. 1084, 109 S.Ct. 1541, 103 L.Ed.2d 845 (1989). As to the photographs' relevancy, Dr. Smith stated:

The photographs record in greater detail or written observations or hand drawings can convey--the appearance or the shape or the character of some of the injuries that Mr. Williams sustained. They would be--also--able to show the relative proportion of the injuries to the body, since a prepared body diagram is fairly generic in its makeup and people come in different sizes and shapes. The photographs more readily depict the actual character or extent of the injury.

We agree with the trial court the photographs were not gory or so prejudicial as to inflame the jury in their deliberations. The photographs were relevant to assist the jury in determining the victim's cause of death. There is no merit to this issue.

D. Trial Court's Failure to Give Curative Instruction

In this issue, the defendant complains the trial court failed to give a curative instruction to the jury during the testimony of the co-defendant, Kimberly Lewis. The state contends Lewis was properly impeached with a prior inconsistent statement, and the trial court included in its jury instructions a charge on the admissibility of prior inconsistent statements.

During the direct testimony of Kimberly Lewis, she testified the defendant kicked the victim one time. However, during cross-examination, Ms. Lewis was asked if she told Officer Urig the defendant kicked the victim twice with his boots. Whereupon, the defendant requested a curative instruction for the jury that Ms. Lewis's response not be considered against the defendant. The trial court declined to give a curative instruction on the basis the proposed question and answer of Ms. Lewis went to her credibility. The trial court, as to the prior inconsistent statement, advised the defendant "that's in the jury instructions and you can argue that." Prior inconsistent statements are admissible for impeachment purposes. Tenn. R. Evid. 613. The trial court found the testimony of Ms. Lewis subject to an attack with a prior inconsistent statement to be admissible and properly instructed the jury on the use of prior inconsistent statements. We cannot say the trial court abused its discretion in refusing to give a curative instruction. If it was error, it was harmless error at most. There is no merit to this issue.

E. Failure of Trial Court to Act as Thirteenth Juror

The defendant argues the trial court failed to fulfill its duty to make a proper thirteenth juror determination as to the jury's verdict. The state counters that the trial court did expressly adopt the jury's verdict.

As to the trial court acting as a thirteenth juror, we are governed by the requirements of Rule 33(f) of the Tennessee Rules of Criminal Procedure. Rule 33(f) provides:

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 his brief, the defendant quotes the trial court in denying the motion for a new trial, “This was a jury trial. The court case was tried, and I feel like it was tried fairly . . . That’s what juries are for, to find the facts.” In its full ruling, the trial court stated:

There was a lot of evidence in this case. I went and reviewed my notes, and there was a lot of evidence in this case. This Court doesn’t know what the facts were. I heard the evidence like everybody else here did and like the jury did, and it was a lot of evidence about a severe beating that was given to Mr. Williams by the Defendant Mr. Blackwell, and, of course, as you know, the evidence varied on the subject. But there was several witnesses who testified that the kickings, or kicks, severe kicks, severe beatings, that Mr. Williams was down and out and out of it, and, of course, you have the testimony of the pathologist, Dr. Smith. But the Court is of the opinion that the evidence was ample for the jury to make the finding that they did find.

* * * * *

It’s a hard case, hard on everybody concerned, but the jury has spoken and the Court upholds the verdict of the jury in this case.

From a review of the entire ruling by the trial court, we find the trial court did function as a thirteenth juror as contemplated by Rule 33(f). Since the trial court did not express any dissatisfaction with the jury verdict and in essence adopted the verdict, it was not error for the trial court to deny the motion for a new trial. *State v. Burlison*, 868 S.W.2d 713, 719 (Tenn. Crim. App. 1993); *State v. Braden*, 867 S.W.2d 750, 762 (Tenn. Crim. App.), *per app. denied* (Tenn. 1993). There is no merit to this issue.

In summary, the trial court’s judgment is affirmed.

L. T. LAFFERTY, SENIOR JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

DAVID G. HAYES, JUDGE