IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1998 SESSION



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| STATE OF TENNESSEE, | ) | |
| | ) | |
| Appellee, | ) | No. 01C01-9707-CC-00256 |
| | ) | |
| | ) | Dickson County |
| v. | ) | |
| | ) | Honorable Allen W. Wallace, Judge |
| | ) | |
| DENNIS R. GILLILAND, | ) | (Felony Murder) |
| | ) | |
| Appellant. | ) | |

**CONCURRING OPINION**

I concur with the results and most of the reasoning in the lead opinion. However, I question its reliance upon completion of the story to allow for evidence of the defendant's involvement in two deaths only weeks before the victim's death.

At the motion in limine on this issue, the state argued that evidence of the Walton killings had to be presented in order to show that the defendant possessed a .20 gauge shotgun loaded with a .20 gauge slug and that he had the motive to kill the victim for his money. The proof related to the fact that while the defendant, victim and others played pool and drank beer in the basement of Donnie Murphy's house, the defendant and victim began discussing the Walton killings.

Donnie Murphy testified that the victim indicated disbelief about the defendant hitting something at seventy-five yards and asked about the gun the defendant was using. The defendant retrieved a single shot, .20 gauge shotgun from the trunk of his car. He opened it and a live .20 gauge shell was ejected. The victim looked at the slug and the shotgun. The defendant and the victim continued talking

about the shooting and the victim said that he would have done the same thing under the circumstances, that is, if someone shot at him, he would shoot back. The victim then said that he would bet the defendant everything in the victim's pocket that he would do the same thing. The victim withdrew a wad of money, which included, according to Donnie Murphy, two one hundred dollar bills. The defendant looked at the money and said that he was not impressed.

The state argued that the evidence of the prior killings was so intertwined with the proof regarding the shotgun and the victim's money that it was necessary to understand why the defendant was showing his shotgun and the victim was displaying his money. It also argued that there was no prejudice to the defendant because it was evident that the defendant acted in self-defense in the prior shootings. In admitting the questioned evidence, the trial court stated that it was relevant in terms of "painting a picture" regarding the defendant displaying his shotgun and seeing the victim's money. It acknowledged that the evidence would be prejudicial but did not believe that it would be unfairly so. During the trial, the trial court instructed the jury that it could not consider evidence of the Walton shooting for any purpose other than its use to paint a picture of the defendant being in possession of the gun and the disclosure of the money.

The lead opinion states that the references to the Walton killings "were necessary to explain the complete story of the subject homicide," citing Neil P. Cohen, et al, Tennessee Law of Evidence, § 404.6, at 169 (3d ed. 1995). However, I do not believe that this treatise supports the admission of the prior killings into evidence in this case.

First, I note that Cohen acknowledges that the "full story" concept is sometimes called "res gestae," allowing for "proof of acts occurring before and after the

event in issue." Cohen, § 404.11 at 184. As an example, the treatise cites State v. Gann, 733 S.W.2d 113 (Tenn. Crim. App. 1987), in which prior sexual relations between the adult defendant and minor victim were introduced to "explain the circumstances surrounding the acts charged in the indictment." Id. at 115.

However, the case upon which Gann is based, Sanderson v. State, 548 S.W.2d 337 (Tenn. Crim. App. 1976), was expressly overruled in State v. Rickman, 876 S.W.2d 824, 829 n.7 (Tenn. 1994). As importantly, though, the concept of res gestae has been thoroughly discredited as a separate exception to the rule that other bad acts or offenses are inadmissible. See Gibbs v. State, 201 Tenn. 491, 497, 300 S.W.2d 890, 892 (1957). This is because the concept has been viewed as vague and imprecise. Even Cohen has occasion to criticize the concept. "Lawyers and judges should never stoop to utter the term 'res gestae.' The term defies definition, causes confusion, and thwarts efforts at serious analysis." Cohen, § 803(2).1 at 532.

I view the concept of the "full story," particularly as used in the present case, to suffer from the same problems relative to res gestae. Cohen expresses a similar concern:

> The easy elasticity of this label invariably seems to swallow the rule prohibiting other crimes evidence so as to show criminal propensity. Crimes introduced to tell the "complete story" will rarely be probative of a fact in issue in the trial of the crime charged and, therefore, rarely justify the prejudice created by their admission. For this reason, crimes admitted as part of the "same transaction" should be limited to those so inextricably connected in time, place, or manner that the jury would be unable to comprehend the essential nature of the charged crime without hearing evidence of the "other" crime.

Cohen, § 404.11 at 184. Abiding by such a limitation, the evidence of the Walton killings was unnecessary for the jury's understanding of the essential nature of the charged offense. Moreover, the relevance of the defendant possessing a gun and ammunition similar to those used in the murder and of the defendant seeing the victim

in possession of a substantial amount of cash would not diminish in the least by excluding the Walton killings from the evidence. That is, it would make no difference if the evidence related to the victim and defendant talking about hitting a target from seventy-five yards instead of to killing a person.

Ultimately, though, I do not believe that the admission of the evidence more probably than not affected the result. See T.R.A.P. 36(b). The references to the killings were minimal in relation to the other proof in the five days of evidence presented at trial. The jury was advised by the prosecutor in the opening statement that the shooting was in self-defense. There are few references to the Walton shooting in the evidence and, in context, the focus was on the defendant's display of his shotgun and shotgun slugs.[1] The trial court instructed the jury during the trial that the incident could only be considered relative to the weapon and the victim's money. Also, the evidence against the defendant is sufficiently strong that I am confident that the Walton shooting evidence was immaterial to the jury's verdict. Therefore, I agree that the conviction should be affirmed.

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Joseph M. Tipton, Judge

[1] There was one occasion in which the state elicited from Bill Freeman that while the defendant was at his farm, the defendant began talking about the Walton shooting, stating that there was just cause. However, there was no objection to this testimony.