IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JULY 1999 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 03C01-9809-CR-00339
Appellee,	*	CAMPBELL COUNTY
VS.	*	Hon. W. Lee Asbury, Judge
MATTHEW S. FITZGERALD,	*	(Two Counts of Child Endangerment)
Appellant.	*	

For Appellant:

Michael G. Hatmaker
Attorney
P.O. Drawer 417
571 Main Street
Jacksboro, TN 37757

For Appellee:

Paul G. Summers
Attorney General and Reporter

Michael J. Fahey, II
Assistant Attorney General
Criminal Justice Division
425 Fifth Avenue North
Nashville, TN 37243

Paul Phillips
District Attorney General
P.O. Box 10
Huntsville, TN 37756

Michael O. Ripley
Assistant District Attorney General
P.O. Box 323
Jacksboro, TN 37757

OPINION FILED:_____

AFFIRMED

GARY R. WADE, PRESIDING JUDGE

OPINION

The defendant, Matthew S. Fitzgerald, was convicted of two counts of child endangerment, Class A misdemeanors. Tenn. Code Ann. § 55-10-414(1). The trial court merged the judgment on Count Two into Count One and imposed an eleven-month, twenty-nine day sentence at seventy-five percent. The defendant was ordered to serve thirty days in jail, had his driver's license revoked, and was fined $1,000.00.

In this appeal of right, the single issue presented by the defendant is whether the trial court abused its discretion by failing to declare a mistrial. We find no abuse of discretion and affirm the judgment of the trial court.

At 3:30 A.M. on April 6, 1997, Jellico City Police Officer Scott Lindsay observed a vehicle, which he described as traveling at a high rate of speed, skid as the driver made a right turn. The officer followed the vehicle into a parking lot at the Jellico Motel and identified the defendant as the driver. At trial, the officer testified that the defendant, who had two of his minor daughters as passengers in his car, smelled of alcohol. In response to questioning at the scene, the defendant admitted having consumed approximately six beers. His speech was impaired and his eyes appeared to be glassy and watery. According to Officer Lindsay , the defendant failed two field sobriety tests. The officer stated that in his opinion the defendant was under the influence of an intoxicant at the time of the arrest. Officer Joe Perkins, Jr., who assisted in the arrest, corroborated much of Officer Lindsay's testimony.

The defendant, a truck driver from Illinois, was the custodian of his three children. At trial, he testified that he was visiting friends, Keith and Joyce

Chesser, in Campbell County and had spent much of the prior day in their company. He related that he had one beer at the Chesser residence during the afternoon hours of the prior day and another at a bar at approximately 6:30 P.M. The defendant stated that, after snacking, he had a "couple of beers" at a bar, making a total of four for the entire day. He recalled that he and Chesser then visited some friends and ate at a fast food restaurant before returning to the Chesser residence where he picked up his two daughters and began his drive back to the Jellico Motel. The defendant denied that he was either driving recklessly or under the influence.

At the conclusion of the proof, the trial court instructed the jury on the elements of child endangerment which provides in pertinent part as follows:

> A person who violates § 55-10-401, and who at the time of the offense was accompanied by a child under thirteen (13) years of age:
> (1) Commits the offense of child endangerment, a Class A misdemeanor, punishable by a mandatory minimum incarceration of thirty (30) days and a mandatory minimum fine of one thousand dollars ($1,000.00), which incarceration and fine shall be in addition to any other incarceration and fine required by law....

Tenn. Code Ann. § 55-10-414. As a part of the instruction, the trial court defined the offense of driving under the influence of an intoxicant as set out in Tenn. Code Ann. § 55-10-401:

> (a) It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while:
> (1) Under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system; or
> (2) The alcohol concentration in such person's blood or breath is ten hundredths of one percent (.10%) or more....

After a period of deliberation, the jury returned to ask whether a breathalyser examination had been performed on the defendant. The trial court responded that the jury had been presented with "all of the evidence that you are going to hear in this case." After deliberating further, the jury returned to the courtroom where the following exchange took place:

> THE COURT: Ladies and gentlemen, have you reached a verdict in this case as to any part of it?
>
> JUROR: Your honor, we've come to a decision on one count.
>
> THE COURT: All right. Would you like to --
>
> JUROR: But on the other count we're hung.
>
> THE COURT: All right. Would you like to announce your verdict as to which count--let's start with count number one. Do you have a verdict as to count number one?
>
> JUROR: Which count was number one? I mean, that was -- that was DUI; right? Count number one, I think, was DUI.

The trial court then reminded the jury that count number one was the offense of child endangerment as it related to the defendant's daughter, Sarah Fitzgerald, and that count number two was the same except that it related to Samantha Fitzgerald. In response to the continuing questions by the court, the jury then reported guilty verdicts on both charges. At that point, defense counsel asked for permission to confer at the bench out of the presence of the jury after which the trial court was able to ascertain from the foreman of the jury that they "couldn't all agree on the DUI." Afterward, the court further instructed as follows:

> Do you all clearly understand that absent a finding of DUI in this case, there can be no finding of child endangerment? Does everyone sitting in the box clearly understand that? Before a person can be found guilty of DUI ... or operating a motor vehicle while under the

> influence of an intoxicant, it has to be established that they were impaired to the extent that they could not properly operate an automobile.
>
> The offense of child endangerment was committed only if DUI has occurred and a child under 13 is in the automobile. If you're unable to agree on a verdict as to the DUI, is that what you're all saying to me? Then your verdict regarding child endangerment cannot be accepted by the Court.
>
> Now, do you wish to deliberate further? Do you wish to announce to the Court now what your verdict is regarding this case?

After this clarification, the foreman of the jury answered, "Your Honor, I guess we need to go back to the jury room and take hold of this or something." The trial court explained the elements of child endangerment and directed the jury to "[r]etire to the jury room to consider [the matter] further[, w]e'll be glad to await your return." When the jury retired, defense counsel moved for a mistrial based upon the lack of unanimity expressed by the jurors as to the issue of driving under the influence. The trial court denied the motion and the jury eventually returned a verdict of guilty on both counts.

In this appeal, the defendant claims that the jury could not return verdicts of guilt on child endangerment absent a unanimous conclusion that he was operating his vehicle while under the influence of an intoxicant. The defendant cites Leach v. State, 552 S.W.2d 407 (Tenn. Crim. App. 1977), in support of his claim. In Leach, the jury asked the trial court how much time the defendant would be required to serve if they imposed a three-year sentence. The trial court instructed the jury on parole eligibility but provided no admonishment that the jury not place undue emphasis on the supplemental instruction. Id. at 408. The jury returned a verdict of second degree murder. Id. This court held that the jury had impermissibly established the sentence before making a determination of which crime the defendant had committed among the charge in the indictment and any of its lesser

included offenses. Id. The defendant reasons that the jury acted similarly here, unable to decide whether the defendant was guilty of driving under the influence but of the opinion that the defendant had endangered his two children and thus warranted some punishment.

In State v. Mounce, 859 S.W.2d 319, 320 (Tenn. 1993), our supreme court considered a case in which an obviously confused jury unanimously agreed to a particular fine when only eight of the jurors had voted guilty as to the charge. The trial court had declared a mistrial upon receiving the information. Id. Our supreme court ruled that "the trial court had the power and the duty to return the jury [for further deliberations] with instructions that their verdict, whatever it might be, had to be unanimous." Id. at 322. Our high court determined that a mistrial should be declared only after a conclusion that the jurors were hopelessly deadlocked, indicating a manifest necessity for the mistrial. Id.

In State v. Jefferson, 938 S.W.2d 1, 21-22 (Tenn. Crim. App. 1996), this court determined that the proper procedure upon the return of an unacceptable verdict was as follows:

> When a jury, as the trier of fact, returns an incomplete or inaccurate verdict that does not conform to the applicable law, the verdict is illegal, a nullity, and, therefore, void. As a result, a trial court cannot accept the verdict because a judgment cannot be pronounced upon a void verdict. If the verdict is to be corrected, the trial court must take immediate action before the jury is discharged. The trial court should advise the jury that the court cannot accept the verdict, direct the jury to either reread the charge given by the court or the court can give a supplemental charge, and have the jury retire to consider its verdict.

(Footnotes and citations omitted).

In our view, the trial judge conducted this trial exactly as he should have under the circumstances. Here, the jurors were properly instructed and given a reasonable opportunity to resolve their differences. It was only upon their report that they had done so that the trial court accepted the verdict.

Accordingly, the judgment is affirmed.

_____
Gary R. Wade, Presiding Judge

CONCUR:

_____
David H. Welles, Judge

_____
Joe G. Riley, Judge