

## CONCURRING AND DISSENTING OPINION

I concur with each of the conclusions of the majority except as to the sufficiency of the evidence to establish first degree murder. With regard to that issue, I respectfully dissent.

There is no evidence in this record which would support the conclusion that this murder was committed after cool reflection, with a mind free from the influence of the excitement of passion. The cool purpose necessary for the element of deliberation is not shown by the evidence.

The Tennessee Supreme Court has in two recent unanimous opinions redefined and distinguished two distinct and essential elements of first degree murder; premeditation and deliberation. State -v- Brown, 836 SW2d 530 (Tenn. 1992); State -v- West, 844 SW2d 144 (Tenn. 1992) Without proof of each of these essential elements, a conviction of first degree murder cannot be upheld. <sup>1</sup>

I would agree with the majority that, taking the evidence in the light most favorable to the state, the jury could have found from a combination of direct and circumstantial evidence, that defendant premeditated the killing; i.e., he had formed an intent or design to kill prior to the actual killing.<sup>2</sup> However, each of the facts relied upon by the majority to prove premeditation occurred prior to the snatching of defendant's child by the victim and her sister. In order to find deliberation, there must be proof to indicate that the killing itself was committed with "cool purpose", with a mind "free from the influence of the excitement of passion," and "free from the passion of the moment". Therefore, if we are to find deliberation here, it must be found from evidence of facts which occurred after the child snatching. After Nina ran from the trailer with "little Ricky", defendant retrieved his Russian built SKS semi-automatic assault rifle from the living room floor. He immediately went to

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<sup>1</sup> Effective July 1, 1995, The Tennessee Legislature amended Tenn. Code Annotated 39-13-201 in part to delete the element of deliberation.

<sup>2</sup> The majority opinion cites several threats to kill the victim or others who attempted to get his baby. The majority opinion also cites the facts that defendant carried his loaded assault rifle around in his car while he was looking for his wife on October 25 and 26, as well as the fact that defendant left the loaded assault rifle in the living room of his trailer easily accessible if anyone came to "get his baby".

the car, arriving as the car doors were being closed. He pointed the rifle at Nina and told her to give him the child. Immediately, Christy blew the horn. At the sound of the car horn, Ricky shot into the car striking Christy in the leg. A melee of activity erupted. Vanessa ran from the car and Christy got out of the car and ran for safety. At the same time Nina, who had already gotten out of the car with "little Ricky", began to walk away. Defendant shot her in the buttocks at close range, walked to her, kicked her as the baby began to crawl away, and then shot her numerous times as she lay wounded on the ground. Indeed, a heinous and atrocious killing, but not a deliberate one. There is simply no evidence of the "cool purpose."

It is difficult to envision a set of circumstances more likely to engender passion in a parent's mind than the snatching of a child by one parent from the other during the emotional turmoil of separation.

A telling and uncontradicted fact in this record is that Ricky Thompson, immediately after shooting his wife numerous times with an assault rifle as she lay wounded on the ground in close proximity to the child, turned his gun on his own empty motor vehicle and "shot the hell out of his car." Hardly the act of a mind, "free from the influence of the excitement of passion," or, "free from the passion of the moment."

In Brown, the Supreme Court decried the recent tendency of Appellate Courts to blur the distinction between the requirements for premeditation and the requirements for deliberation. State -v- Brown, 836 SW2d 530 at page 540, 541 (Tenn. 1992). The Supreme Court in Brown quoted with emphasis the following from Warton's:

'Deliberation' is the 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, 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 such circumstances, and for such a period of time as to permit a 'careful weighing' of the proposed decisions.

C. Torica Warton's Criminal Law, section 140 (14th Ed. 1979)

In Brown, the Court said that the element of deliberation contemplates a lapse of time between the decision to kill and the actual killing. As the Court in Brown pointed out:

"the deliberation and premeditation must be akin to the deliberation and premeditation manifested where the murder is by poison or lying in wait -- the cool purpose must be formed and the deliberate intention conceived in the mind, in the absence of passion, to take the life of the person slain." Id. at 539 (quoting Rader -v- State, 73 Tenn. 610, 619-20 (1880)).

The Supreme Court in Brown also held that :

"the fact that repeated blows (or shots) were inflicted on the victim is not sufficient, by itself, to establish first degree murder. Repeated blows can be delivered in the heat of passion, with no design or reflection. Only if such blows are inflicted as the result of premeditation and deliberation can they be said to prove first degree murder." Id. at 543.

The majority opinion, it seems to me, runs afoul of the Supreme Court's instruction in Brown that we must not blur the distinction between premeditation and deliberation. The circumstances cited by the majority to support premeditation and deliberation in this case do, in my opinion, support a finding of the jury of premeditation. However, I would hold that there is no evidence of deliberation and that accordingly, the conviction in this case should be reduced to second degree murder.

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JOHN A. TURNBULL  
SPECIAL JUDGE