IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	MONROE COUNTY
	)	No. E2013-00456-CCA-R3-CD
v.	)	
	)	
WALTER FRANCIS FITZPATRICK, III,	)	
	)	
Appellant.	)	

ON APPEAL AS OF RIGHT FROM THE JUDGMENT
OF THE MONROE COUNTY CRIMINAL COURT

BRIEF OF THE STATE OF TENNESSEE

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STATEMENT OF THE CASE

A Monroe County Grand Jury indicted Walter Francis Fitzpatrick, III, ("the defendant") for tampering with governmental records, in violation of Tenn. Code Ann. § 39-16-504. (I, 1-2.)[1] The defendant, initially proceeding pro se, filed numerous motions with the trial court, including two motions, Defense Motions # 14 and 15, challenging Faye C. Tennyson's service on the Grand Jury that indicted the defendant. (I, 97-106.) The Honorable Walter C. Kurtz, Senior Judge, entered an order summarily dismissing many of the defendant's motions, including Defense Motion #14. (I, 140-41.)[2] In this order, the trial court indicated that it would hear the defendant's remaining motions, including "Defendant's evidence related to his allegations of improprieties in the grand jury proceeding[.]" (*Id.*)

The trial court heard the defendant's motions on June 28, 2012. (II, 152-54.) The trial court denied the defendant's motions pertaining to Ms. Tennyson's grand jury service. (*Id.*) The defendant, through counsel, filed a motion to reconsider the trial court's decision regarding Ms. Tennyson's grand jury service. (II, 161-62.) The defendant also filed a "Statement of Undisputed Facts and Supporting Authority in Support of Defendant's Motion to Reconsider Motion to Dismiss." (II, 168-75.) The trial court heard this motion, along with other motions filed by the defendant,

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[1] References to the record will be indicated by volume, as marked thereon by the appellate court clerk, and by page number.

[2] Defense Motion # 14 was styled "Motion to Take Judicial Notice Regarding Sessions Court Judge J. Reed Dixon's Order to Form a Special Grand Jury Disqualifying Faye C. Tennyson as a Grand Juror." (I, 97-103.)

on October 3, 2012. (II, 176-77.) The trial court entered an order denying the defendant's motions, citing "reasons stated orally by the Court." (*Id.*)

A petit jury convicted the defendant as charged. (II, 180.) On December 3, 2012, the trial court sentenced the defendant to 11 months and 29 days in the county jail. (II, 181.) The sentence was suspended to supervised probation following the service of 20 days in incarceration and subject to other conditions. (*Id.*) The defendant filed a timely motion for new trial on December 28, 2012. (II, 182-89.) The trial denied the motion on January 16, 2013. (II, 190-91.) The defendant filed a timely notice of appeal on February 12, 2013. (II, 192-93.)

STATEMENT OF THE FACTS

In 2009, the defendant informed Monroe County Circuit Court Clerk Martha M. Cook that he intended to seek an indictment charging President Barack Obama with treason. (III, 34.) Ms. Cook provided the appropriate forms to the defendant, and he eventually appeared before the Monroe County Grand Jury. (*Id.*) The Grand Jury did not indict President Obama. (III, 35.)

Following his failed attempt to indict the President, the defendant became upset with the judicial system. (*Id.*) He began aggressively investigating the jury selection process in Monroe County. (IV, 128.) The defendant visited Ms. Cook's office once or twice monthly requesting various records regarding the jury selection process. (III, 35.) The defendant always recorded his conversations with Ms. Cook. (III, 45.) Although Ms. Cook attempted to assist the defendant, she could not give him answers that "he wanted to hear." (III, 44-45.) Their relationship eventually became contentious. (III, 45.)

On December 7, 2011, potential jurors assembled at the Monroe County Courthouse for the impaneling of grand and petit juries. (III, 23-25.) The potential jurors brought personal information forms that had been sent to them by clerk's office along with their summons. (III, 23.) Ms. Cook saw the defendant sitting in the first row of the courtroom during the jury selection process. (III, 36.) The defendant asked a potential juror, James D. Kirk, if he could see Mr. Kirk's

information form. (IV, 150.) Mr. Kirk acquiesced, and the defendant took notes based upon the questions asked on the juror questionnaire. (IV, 150-52; Ex. 15.)

The potential jurors passed their information sheets to the judge, who randomly selected two panels of 18 grand jurors. (III, 27.) Once the panels were selected, Ms. Cook gave the sheets[3] to her Deputy Clerk, Renay Ezell, who accompanied the grand jurors downstairs to the chancery courtroom. (III, 38-39.) Although no one was supposed to be in the chancery courtroom except for the grand jurors, the defendant eventually made his way into the courtroom. (IV, 125, 153.) Ms. Ezell placed the information sheets on the table, along with other packets of information for the jurors. (IV, 122-23.)

The selecting judge eventually asked the grand jurors to return to the upstairs courtroom. (III, 46.) The defendant attempted to follow the grand jurors, but he was stopped. (IV, 152-53.) At this point, he returned to the empty chancery courtroom. (IV, 153.) The defendant took the jury selection documents, including the juror information sheets, from the table and left the courthouse. (*Id.*)

Once she realized the documents were missing, Ms. Cook started searching for them. (III, 47.) The missing documents were the originals. (III, 57.) Without these

[3] After the grand jury completes its service, Ms. Cook explained, these information sheets become public record. (III, 29-30.) They remain private during the term in order "to protect the integrity of the grand jury." (III, 30.)

documents, she did not know who had been selected as grand jurors.[4] (III, 32.) After an unsuccessful search, Ms. Cook asked to see the courthouse surveillance footage. (III, 47.) On this video, Ms. Cook observed the defendant taking the documents from the table it the chancery courtroom. (III, 48; Exs. 11-12.)

Ms. Cook attempted to call the defendant to ask him to return the documents, but her efforts were unsuccessful. (III, 55.) Detective Conway Mason of the Monroe County Sheriff's Department visited the defendant's home to retrieve the documents. (III, 84.) The defendant's car was present, but no one answered the door of his home. (III, 87.) Det. Mason and his partner left a note on the door asking the defendant to return the documents. (III, 85; Ex. 14.)

At some point on December 7, 2011, Helen Thurston, the defendant's landlord at the time, saw the defendant walking through her field during a heavy snow. (IV, 116-17.) About an hour later, the defendant returned. (IV, 117.) When asked why he was walking in the snow, the defendant replied, "For my health." (IV, 117-18.) The defendant commented to Ms. Thurston that the police were nearby. (IV, 118.) The defendant stated that the police were probably looking for him because he had something that belonged to them. (*Id.*)

Authorities obtained search and arrest warrants and visited the defendant's home again that evening. (III, 88.) Authorities did not find the missing documents,

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[4] Ms. Cook eventually obtained the jurors' names by listening to the court reporter's recording of the proceedings. (III, 32.) She then had to send these jurors another letter in order to regain the information on the sheets. (III, 33.)

but Det. Conway did find the defendant's handwritten notes from his court visit earlier that day. (III, 90-93; Ex. 15.)

During his investigation of this case, Det. Conway found the missing grand jury documents posted on a website known as "Post and Email." (III, 96-97.) Det. Conway described the "Post and Email" as a government-conspiracy website ran by Sharon Rondeau in Connecticut. (III, 96.) The defendant was a frequent contributor to the content of the website. (*Id.*) Det. Conway printed the posted materials and confirmed that they matched the stolen documents. (III, 97; Ex. 16.)

Using the assistance of the F.B.I., Monroe County authorities retrieved two U.S.P.S. envelopes that had been mailed from the defendant to Ms. Rondeau on December 7, 2011. (III, 102-03; Exs. 17-18.) One envelope contained the missing jury information sheets. (III, 102; Exs. 1, 17.) The other envelope contained the other missing jury selection pamphlets. (III, Exs. 2, 3, 6, 18.)

The defendant acknowledged that he took the items from the courtroom table, including the sheets in Exhibit 1. (IV, 147-49.) He further acknowledged that the room was empty when he took these documents. (IV, 153.) He claimed that he knew that he was being recorded when he took the papers but that he did not think that taking the documents was illegal. (IV, 146.)

Offer of proof

During the defendant's direct examination, the trial court received an offer of proof outside the hearing of the jury. (IV, 131-39.) Defense counsel argued that the

facts elicited during the offer of proof established the defense of necessity. (IV, 130.) During the offer, the defendant stated that his concerns over the jury selection process in Monroe County had led him to contact the F.B.I. (IV, 133.)

On June 28, the defendant met with F.B.I. Special Agent Roxanne West, and he presented the evidence that he possessed at the time. (IV, 136.) According to the defendant, Special Agent West informed him, "This isn't enough, you need a smoking gun." (*Id.*)

During the defendant's conversation with Mr. Kirk on December 7, 2011, the defendant claimed that Mr. Kirk told him that Mr. Kirk had attended the jury selection process in 2010. (IV, 133.) Mr. Kirk stated that Judge Amy Reedy had invited those unselected jurors in 2010 to volunteer for service in 2011. (*Id.*) Mr. Kirk volunteered, according to the defendant's account of the conversation, and was subsequently selected for grand jury service in 2011. (*Id.*) Mr. Kirk did not testify at any point during these proceedings.

When the defendant learned that Mr. Kirk had been "hand selected," that was the "first jolt" that hit him like an "electric shock" or a "light[ning] bolt." (IV, 134.) When the defendant saw the documents on the table in the chancery courtroom, he believed that they would not be available to him later if he did not take them. (IV, 136.) He stated,

> I recognized that they were packages that had been put together up I this room, and I recognized them as that—I just watched a Judge, in my opinion mind, break the law. In violation of Tennessee state law, she

was handpicking jurors. I had talked to somebody she had invited back to volunteer. I knew he had been added in a process that's not legal under Tennessee State law.

(IV, 137.)[5]

[5] The trial court excluded the proffered testimony. (IV, 143.) Despite the trial court's ruling, the defendant nevertheless testified to the jury,

> I believed that based upon the information I had collected and—and what I had learned as of the 7th of December when I came in one year ago, I believed that in that day, using these documents on this bench, I had just watched a crime be committed by a judge.

(IV, 157.) The defendant continued,

> So when I saw . . . the documents downstairs, my frame of mind was that this was evidence that I had been directed, told that I needed, by an official from the Federal Bureau of Investigation.

(IV, 158.) The trial court ordered the jury to disregard both of these statements by the defendant. (IV, 157-58, 162.)

ARGUMENT

I. THE DEFENDANT'S ISSUE REGARDING THE SUCCESSIVE SERVICE OF THE GRAND JURY FOREPERSON IS WAIVED AND MERITLESS.

The defendant argues that the trial court erred by denying his motion to dismiss based upon the foreperson's service on successive grand juries. (Def's Br. at 14.) The defendant has waived this issue for failing to perfect an adequate record on appeal. The defendant's claim is also meritless.

The appellant bears the burden of having a transcript prepared such as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of the appeal. Tenn. R. App. P. 24(b). "Absent the necessary relevant material in the record an appellate court cannot consider the merits of an issue." *State v. Ballard,* 855 S.W.2d 557, 560-61 (Tenn. 1993); *Oody,* 823 S.W.2d at 559. The failure to include a complete transcript relevant to an issue presented for review is wholly detrimental to an appellant's case, since "[i]t is well-established that an appellate court is precluded from considering an issue when the record does not contain a transcript or statement of what transpired in the trial court with respect to that issue." *State v. Draper,* 800 S.W.2d 489, 493 (Tenn. Crim. App. 1990). In such a case, "the appellate court must conclusively presume that the ruling of the trial judge was correct[.]" *Id.* Therefore, an appellant's failure to include a transcript of the relevant proceedings results in waiver of any challenge to the lower court's ruling. *Id.*; *see also Ballard,* 855 S.W.2d at 560-61.

The trial court held two hearings—one on June 28, 2012, and one on October 3, 2012—to adjudicate the defendant's claims regarding the service of the foreperson on successive grand juries. The trial court entered orders following each of these hearings denying the defendant relief on this point. (II, 152-54, 176-77.) In the second order, the trial court indicated that it was denying relief "for the reasons stated orally by the Court" during the hearing on October 3, 2012. (II, 176.)

The defendant failed to include the transcript of either of these hearings in the record on appeal. The failure to include these transcripts prevents a showing of what evidence, if any, the defendant presented to support the claims raised in his motion. While the defendant alleges in his motions that Faye Tennyson served on successive grand juries, this was never established by proof at hearing. On this record, it is unknown if Ms. Tennyson in fact served on successive grand juries. *See State v. Burton*, 751 S.W.2d 440, 450 (Tenn. Crim. App. 1988) (recitation of facts and arguments contained in a brief or a pleading are not evidence of the facts recited). Further, the failure to include the transcript of these hearings makes it impossible to know "what transpired in the trial court with respect to that issue." *Draper*, 800 S.W.2d at 493.

Assuming *arguendo* that the defendant did present an adequate record on appeal and did show that Ms. Tennyson served on successive grand juries, his claim would fail on the merits. The role of the grand jury foreperson in Tennessee is "ministerial and administrative." *State v. Bondurant*, 4 S.W.3d 662, 675 (Tenn.

1999). "The judge of the court authorized by law to charge—and receive the report of—the grand jury shall appoint the grand jury foreperson." Tenn. R. Crim. P. 6(g)(1). The foreperson shall possess all the qualifications of a juror. Tenn. R. Crim. P. 6(g)(2). "The foreperson shall hold office and exercise powers for a term of two (2) years from appointment." Tenn. R. Crim. P. 6(g)(3).

Concerning the service of grand jury forepersons on successive terms, this Court has held, "We find no authority holding and can think of no valid reason why a grand jury foreman appointed for two years under [the statute] is disqualified to serve longer either by reappointment or holding over." *Nelson v. State*, 499 S.W.2d 956 (Tenn. Crim. App. 1972); *see also Joseph B. Thompson v. State*, No. E2004-00920-CCA-R3-PC, 2005 WL 2546913, at *25 (Tenn. Crim. App. Oct. 12, 2005) (copy attached).

Generally, before a criminal defendant may successfully challenge an indictment or venire because of improper jury selection procedures, he must show that he was prejudiced or that the improper procedures resulted from purposeful discrimination or fraud. *State v. Stephens*, 264 S.W.3d 719, 731 (Tenn. Crim. App. 2007). However, proof of actual prejudice is not required in circumstances when the deviation is "flagrant, unreasonable, and unnecessary." *Id.* (quoting *State v. Lynn*, 924 S.W.2d 892, 898 (Tenn. 1996)). "In the absence of fraud, no irregularity with respect to this title or the procedure under this title shall affect the validity of the

selection of any grand jury . . . unless the regularity has been objected to before the jury is sworn." Tenn. Code Ann. § 22-2-213.

The defendant's argument on this point is based entirely on the text of Tenn. Code Ann. § 22-2-314:

> A juror who has completed a jury service term shall not be summoned to serve another jury service term in any court of this state for a period of twenty-four (24) months following the last day of such service; however, the county legislative body of any county, may, by majority vote, extend the twenty-four-month period.

See 2008 Tenn. Pub. Acts, ch. 1159, § 1 (effective Jan. 1, 2009). The defendant contends that this legislative act overrides the prior judicial decisions allowing the successive service of a grand jury foreperson.

The State respectfully submits that the defendant misapprehends the purpose of section 314. Section 314 does not speak to the qualifications of a citizen to serve as a juror.[6] Section 314 simply prohibits the government from requiring citizens to appear for jury service too frequently. Further, the foreperson of the grand jury is not "impaneled" from the "summoned" members of the "jury pool." *See* Tenn. Code Ann. §§ 22-2-306, -307, and -310. The foreperson is "appoint[ed]" by the trial court. Tenn. R. Crim. P. 6(g)(1). As such, section 314, by its terms, does not apply to the appointment process of the grand jury foreperson.

[6] Juror qualification and competency standards are proscribed in Tenn. Code Ann. §§ 22-1-101 through -106.

Further, the defendant has failed to show that the selection of the grand jury foreperson in his case created prejudice. There is no showing of any statutory deviation here that is "flagrant, unreasonable, and unnecessary[;]" therefore, prejudice cannot be presumed and proof of actual prejudice must be present in the record. *See Stephens*, 264 S.W.3d at 731 (Tenn. Crim. App. 2007); *State v. Lynn*, 924 S.W.2d 892, 898 (Tenn. 1996). The record is absent of any evidence that the service of the grand jury foreperson in this case "more probably than not affected the judgment" or otherwise "result[ed] in prejudice to the judicial process." Tenn. R. App. P. 36(b). The defendant is not entitled to relief.

II. THE TRIAL COURT PROPERLY EXCLUDED THE PROFFERED TESTIMONY OF THE DEFENDANT.

The defendant contends on appeal that the trial court erred by excluding his testimony as proffered in the offer of proof. (Def's Br. at 13.) The defendant argues that this exclusion left him with no defense because he was not allowed to explain why he took the documents. The defendant further argues that that his excluded testimony would have supported the statutory justification of necessity. The defendant's testimony as preserved in his offer of proof was irrelevant. The trial court acted within its discretion in excluding this evidence.

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Under Tennessee Rule of Evidence 402, relevant evidence is generally admissible. However, it may be excluded if its probative value is substantially outweighed by "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403.

Decisions regarding the admission or exclusion of evidence are entrusted to the trial court's discretion. *State v. Hester*, 324 S.W.3d 1, 59 (Tenn. 2010). Reviewing courts will not disturb these decisions on appeal unless a clear abuse appears on the face of the record. *State v. Franklin*, 308 S.W.3d 799, 809 (Tenn. 2010). A trial

court abuses its discretion only when it applies an incorrect legal standard or makes a ruling that is "illogical or unreasonable and causes an injustice the party complaining." *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007) (quoting *State v. Ruiz*, 204 S.W.3d 772, 778 Tenn. 2006)).

The defendant contends that the testimony in his offer of proof was relevant to prove the justification of necessity. Under the code, criminal conduct is justified as a necessity if:

> (1) The person reasonably believes the conduct is immediately necessary to avoid imminent harm; and
>
> (2) The desirability and urgency of avoiding the harm clearly outweigh the harm sought to be prevented by the law proscribing conduct, according to ordinary standards of reasonableness.

Tenn. Code Ann. § 39-11-609. This codification of the common law defense "excuses criminal liability in those exceedingly rare situations where criminal activity is an objectively reasonable response to an extreme situation." *Id.* Sentencing Comm'n Comments.

The United States Supreme Court has explained that "if A destroyed [a] dike in order to protect more valuable property from flooding, A could claim a defense of necessity." *United States v. Bailey*, 444 U.S. 394, 410 (1980); *State v. Culp*, 900 S.W.2d 707, 709 n.2 (Tenn. Crim. App. 1994) (citing *Bailey*, describing necessity as a "choice of evils" that "traditionally covered the situation where forces beyond the actor's control rendered illegal conduct the lesser of two evils"). The Sentencing

Commission Comments to section 609 explain that "the necessity defense would bar a trespass conviction for a hiker, stranded in a snowstorm, who spends the night in a vacant cabin rather than risking death sleeping in the open."

Necessity has traditionally been used appropriately when the extreme situation is brought on by something other than a human act. *State v. Davenport*, 973 S.W.2d 283, 287 (Tenn. Crim. App. 1998) (citing Neil P. Cohen, et al., *Prevalence and Use of Criminal Defenses; A Preliminary Study*, 60 Tenn. L. Rev. 957, 966 (1993)). Further examples of necessity include a ship violating an embargo law to avoid a storm, a pharmacist providing medication without a prescription to alleviate someone's suffering during an emergency, or where two sailors are shipwrecked and one pushes the other off the float to save his own life. *Id.* (citing 11 David L. Raybin, *Tennessee Practice* § 28.118 (1985 & Supp. 1997)). To be entitled to the defense of necessity, the appellant must show an immediately necessary action, justifiable because of an imminent threat, where the action is the only means to avoid the harm. *State v. Watson*, 1 S.W.3d 676, 678 (Tenn. Crim. App. 1999); *State v. Green*, 915 S.W.2d 827, 832 (Tenn. Crim. App. 1995).

Upon receiving the defendant's offer of proof, the trial court ruled as follows:

> The state's objection is sustained. This is not a description of defense of necessity or justification. The defense of necessity justification does not turn vigilantes loose to patrol the jury selection process.
>
> And, yes, there are sometimes mistakes made in the jury selection process, i.e., racial discrimination, perhaps favoritism and the like, and

> our appellate court decisions are full of decisions that . . . deal with those issues.
>
> The defense of necessity doesn't allow somebody to purloin an official government record. So this objection is sustained.

(IV, 143.) The trial court did not abuse its discretion.

The defendant's offer of proof did not make the existence of the necessity defense more probable or less probable. Tenn. R. Evid. 401. In fact, the defendant's offer of proof is entirely irrelevant to the existence of the necessity defense, as codified. The defense must be based upon a *reasonable* belief of necessity to avoid imminent harm. Tenn. Code Ann. § 39-11-609(1). When the defendant purloined these documents, no imminent harm—such as a snowstorm approaching a stranded hiker—was threatened. Any subjective belief held by the defendant that such theft was necessary was objectively unreasonable. Ms. Cook testified that these documents would become public record at the end of the grand jury's service. (III, 29-30.) Instead of breaking the law, the defendant could have obtained these information sheets lawfully at that time.

None of the evidence in the defendant's offer of proof is relevant to show that the defendant had a *reasonable* belief that his conduct was necessary to avoid imminent harm. His subjective beliefs were not reasonable, and no imminent harm was at hand, as contemplated by the statute. This evidence had no probative value to any issue "of consequence," and its introduction would have only served to confuse

the issues and mislead the jury. *See* Tenn. R. Evid. 401, 403. The trial court acted within its discretion in excluding this portion of the defendant's testimony.

For the same reasons, the defendant cannot show that he was deprived of his right to present a defense as contemplated by *Chambers v. Mississippi*, 410 U.S. 284 (1973) and *State v. Brown*, 29 S.W.3d 427 (2000). *Brown* set forth three considerations for determining whether the exclusion of evidence rises to the level of a constitutional violation:

(1) Whether the excluded evidence is critical to the defense;
(2) Whether the evidence bears sufficient indicia of reliability; and
(3) Whether the ~~evidence~~ supporting exclusion of the evidence is substantially important.

Id. at 434-35. Excluded evidence is not critical if it has little probative value and the exclusion does not undermine an element of the defense. *State v. Flood*, 219 S.W.3d 307, 316-17 (Tenn. 2007).

As shown, the excluded evidence had no probative value, and it was therefore not critical to the defense. The evidence bears no sufficient indicia of reliability. Much of the testimony relates to the hearsay declarations of Special Agent Roxanne West and prospective juror Kirk. (IV, 134, 136.) Special Agent West and Mr. Kirk did not testify during these proceedings to corroborate the claims made by the defendant.

Chambers and its progeny involve cases where clearly relevant evidence has been excluded by the mechanical operation of an evidentiary rule. *See Chambers*, 410

U.S. at 294 (Mississippi's "voucher" rule prevented the appellant from adversely examining witness McDonald regarding his repudiated confession for the crime on trial, and hearsay rules prevented appellant from eliciting third-party testimony that McDonald had confessed to them); *see also Brown*, 29 S.W.3d at 434 (after State offered proof of hymenal tear to prove sexual penetration, defense was barred from presenting hearsay evidence that victim had admitted to engaging in sexual intercourse with a third-party, thus providing a possible alternate explanation for the injury). Unlike these examples, the defendant's proffered testimony was entirely irrelevant to any issue before the jury. Due process concerns do not allow a defendant to introduce irrelevant evidence that would confuse and mislead the trier of fact. The defendant is not entitled to relief.

III. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S REQUEST TO INSTRUCT THE JURY ON NECESSITY.

The defendant argues that the trial court erred by refusing to instruct the jury on the statutory justification of necessity. The justification of necessity was not fairly raised by the admissible proof. The trial court properly denied the defendant's request for this jury instruction. The defendant is not entitled to relief.

A criminal defendant is entitled to have the jury instructed on the justification of necessity only if it is "fairly raised by the proof." Tenn. Code Ann. § 39–11–203(c); *Davenport*, 973 S.W.2d at 287. Because necessity is not classified as an affirmative defense, a criminal defendant need not prove it by a preponderance of the evidence. *Id.* Where the proof, however, "fairly raises" the defense, the trial court "must submit the defense to the jury and the prosecution must 'prove beyond a reasonable doubt that the defense does not apply.'" *Culp*, 900 S.W.2d at 710 (quoting *State v. Hood*, 868 S.W.2d 744, 748 (Tenn. Crim. App. 1993)). To determine whether a general defense has been fairly raised by the proof, a court must consider the evidence in the light most favorable to the defendant and draw all reasonable inferences in the defendant's favor. *State v. Ledarren S. Hawkins*, --- S.W.3d, W2010-01687-SC-R11-CD, 2013 WL 3082995, at *4 (Tenn. June 20, 2013) (copy attached).

The test for whether a special instruction must be given is whether "there is any evidence which reasonable minds could accept as to any such [defense] . . . ."

Davenport, 973 S.W.2d at 287 (quoting *Johnson v. State,* 531 S.W.2d 558, 559 (Tenn. 1975)). This is a mixed question of law and fact, which is reviewed de novo, with no presumption of correctness. *Hawkins*, 2013 WL 3082995, at *3; *State v. Rogers*, 188 S.W.3d 593, 628-29 (Tenn. 2006). It is prejudicial error if the jury instructions mislead the jury as to the applicable law or fail to "fairly submit" the relevant legal issues, such as available defenses. *State v. Vann*, 976 S.W.2d 93, 101 (Tenn. 1998).

The admissible proof in this case does not fairly raise the justification of necessity. As argued *supra*, the excluded portion of the defendant's testimony was not relevant to the justification of necessity or any other issue before the trier of fact. The trial court's instruction in this case fully and fairly stated the applicable law. The defendant is not entitled to relief.

CONCLUSION

For the reasons stated, the decision of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent by first class mail, postage prepaid to

Van R. Irion
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on this 20th day of September, 2013.

KYLE HIXSON
Assistant Attorney General