

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,

RESPONDENT,

v.

MYSON D. DONAHUE,

APPELLANT.

DOCKET NUMBER WD67745

DATE: February 10, 2009

Appeal From:

JACKSON COUNTY CIRCUIT COURT

THE HONORABLE JON REGINALD GRAY, JUDGE

Appellate Judges:

En Banc: NEWTON, C.J., LOWENSTEIN, SPINDEN, SMART, ELLIS,
HOWARD, HOLLIGER, HARDWICK, WELSH, DANDURAND and AHUJA, JJ.

Attorneys:

S. KATE WEBBER, ESQ., KANSAS CITY, MO, **for appellant.**

SHAUN J. MACKELPRANG, ESQ., and DANIEL N. McPHERSON, ESQ.,
JEFFERSON CITY, MO, **for respondent.**

MISSOURI APPELLATE COURT OPINION SUMMARY
COURT OF APPEALS -- WESTERN DISTRICT

STATE OF MISSOURI,

RESPONDENT,

v.

MYSON D. DONAHUE,

APPELLANT.

WD67745

Jackson County

Before the Court en banc: NEWTON, C.J., LOWENSTEIN, SPINDEN¹, SMART, ELLIS, HOWARD, HOLLIGER¹, HARDWICK, WELSH, DANDURAND and AHUJA, JJ.

Myson D. Donahue appeals his conviction, after a jury trial, for first degree murder, pursuant to Section 545.030 RSMo (2000), for which he was sentenced to life in prison without the possibility of parole. Donahue claims that the evidence was insufficient to support the required elements of deliberation and intent and asks for plain error review of a claim of juror misconduct.

AFFIRMED.

The Court en banc holds:

The record provides ample evidence from which the jury could find that Donahue knew or was aware that his conduct was practically certain to cause death. Donahue repeatedly firing a sawed off rifle into a well-lit and populated gas

¹ The judges whose names appear above have resigned from the court since the case was submitted and are, therefore, recused.

station from an adjoining, slightly elevated lot. The first shot struck a vehicle parked near a gap in a fence between the gas station and the lot from which Donahue fired, overgrown with bushes and shrubs. A second shot struck and killed the victim who was standing near the car that was struck. The jury, as trier of fact, could have determined that the two shots were fired from the opening between the fence and the bushes into a well-lit area where cars and individuals were present and disbelieve Donahue's claim that he was randomly shooting over the top of the fence.

Deliberation can be inferred from Donahue's own statement that he fired five or six shots and had to stop to "unjam" the weapon between shots. The jury could conclude that Donahue had more than sufficient opportunity to desist from firing the fatal shot after the bullet hit the car and Donahue had to "unjam" the weapon between shots. That Donahue fled the area, initially going to a friend's home, a hotel, and then out of town, directly after the incident, supports the inference of deliberation and consciousness of guilt. The evidence was sufficient from which a reasonable juror could find Donahue guilty beyond a reasonable doubt.

Donahue's claim of juror misconduct is without merit. After the alleged misconduct was brought to the trial court's attention and Donahue requested a hearing, the trial court informed Donahue that the remedy would be a mistrial. Donahue withdrew the request and agreed to "press forward with the trial." Where the defendant eschewed a hearing, this court will not convict the trial court of error in not conducting the hearing *sua sponte*.

The judgment of the trial court is affirmed.

Majority Opinion by: Harold L. Lowenstein, Judge

February 10, 2009

Dissenting Opinion by Judge Joseph M. Ellis: The author would hold:

(1) In holding that the evidence supports Appellant's conviction for first-degree murder, the Majority gives the State the benefit of unreasonable, speculative, and forced inferences.

(2) No evidence was presented that could support a finding that Appellant fired his gun from the opening in the fence as relied upon by the Majority. Since the State failed to prove, either through direct evidence or inference, that Appellant knew Mr. Johnson was present, it obviously failed to prove that Appellant knew or was aware that his conduct was practically certain to cause Mr. Johnson's death.

(3) Likewise, the evidence was not sufficient to support a finding that Appellant deliberated before killing Mr. Johnson. The fact that Appellant reloaded his weapon is not sufficient to establish deliberation in and of itself. Nothing about Appellant's behavior in leaving the scene and later leaving town would allow a reasonable trier of fact to conclude, beyond a reasonable doubt, that Appellant fled because he had coolly reflected upon killing Mr. Johnson, as opposed to fleeing because he had shot Mr. Johnson knowing that his conduct was practically certain to cause his death (murder in the second degree) or because he had recklessly caused the death of Mr. Johnson (involuntary manslaughter).

THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.