IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

AUGUST 1999 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 03C01-9807-CC-00257
Appellee,	*	JEFFERSON COUNTY
VS.	*	Honorable Ben W. Hooper II, Judge
WALTER LEE ALLEN,	*	(Robbery)
Appellant.	*	

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

JOHN EVERETT WILLIAMS,
Judge

OPINION

The defendant, Walter Lee Allen, appeals from a guilty verdict returned by a Jefferson County jury for robbery, a Class C felony. See Tenn. Code Ann. § 39-13-401. The defendant was sentenced to the Department of Correction for ten years as a Range II Multiple Offender, consecutive to a sentence imposed in Hamblen County. The defendant contends in this appeal that:

1. His actions do not constitute "violence" as set out in Tennessee Code Annotated § 39-13-402

2. and therefore there was insufficient evidence to convict him of the offense alleged in the indictment.

3. The prosecutor was guilty of prosecutorial misconduct in his closing argument, and therefore the trial court should have granted a mistrial.

4. The trial court improperly confused the jury by charging all portions of the Criminal Responsibility Statute.

5. The trial court erred in its failure to charge the jury concerning facilitation of a felony.

6. The trial court erred in sentencing the defendant by failing to consider two mitigating factors and by imposing service consecutive to his Hamblen County sentence.

After careful review of the record and the applicable law, we AFFIRM the judgment from the trial court.

FACTS

The facts in this case are not in dispute. Kathy Shoun was employed at the Fast-Stop Market, a gas station and food market, in White Pine. She was working the second shift by herself when a man entered the store and spoke to her. He asked her if she was alone. The man then pulled a gun out of his shorts, pointed it at her, and demanded that she give him the money. As she was handing over the money, the appellant, the accomplice of the gunman, walked to the store and stood silently in the doorway. The entry of the appellant did not phase the gunman. The gunman did not look back nor did he act scared

or surprised that someone else had entered the store standing in the only exit. The store building was so small that while the gunman was standing in front of the counter, the appellant had no choice but to stand in the doorway.

The appellant stood in the doorway silent, while the victim gave the gunman money from the cash register, while the gunman told the victim to give him her purse, while the gunman reached over the counter, grabbed the deposit bag, looked in it and saw that it was empty, while the victim explained to the gunman that she could not open the safe and while the gunman ordered the victim to move out from behind the counter and go to the corner of the store. This entire time the gunman was displaying a gun in plain view of the victim and the appellant. The gunman and the appellant fled from the store together. At trial, Ms. Shoun identified Mr. Haney as the gunman and Mr. Allen, the appellant, as the accomplice. Ms. Shoun testified that Mr. Allen never said a word to her, never threatened her in any way, and never touched her. Mr. Allen wore sunglasses during the robbery. The appellant's defense was mistaken identity.

ANALYSIS

Insufficient Evidence and Fatal Variance

The defendant contends that a material variance exists between the allegations in the indictment and the evidence proven at trial: The indictment alleges aggravated robbery by violence, but the proof showed only robbery by fear. Similarly, he contends that the evidence is insufficient to prove robbery by violence. The state contends that the codefendant's actions, for which the defendant is responsible, of pointing the gun, cocking the gun, and demanding cash from the cashier can be construed as violence. Thus, it argues that the evidence is sufficient.

Robbery is defined as the "intentional or knowing theft of property from the person of another by violence or putting the person in fear." See Tenn. Code Ann. § 39-13-401. Violence and putting a person in fear are alternative means of committing the offense of robbery. See Tenn. Code Ann. § 39-13-402(a)(1).

The indictment in the present case alleges that the defendant:

> did unlawfully, feloniously, intentionally and knowingly obtain property, to wit: U.S. monies, food stamps, and personal property from the person of Kathy Shoun, by violence and accomplished with a deadly weapon, to wit: a gun, with the intent to deprive said Kathy Shoun of the property and without her effective consent in violation of Tenn. Code Ann. § 39-13-402.

(emphasis added). The defendant argues that because the proof showed only that the victim was placed in fear, not that the robbery was committed by violence, the evidence is insufficient and a fatal variance exists in the indictment.

Our determination of this issue hinges upon the definition of violence and a determination of whether the defendant's actions constitute violence. Violence is not defined in our criminal code. However, the state argues that a panel of this Court has previously addressed this issue and determined that violence is synonymous with force. See State v. Tony Fitz, No. 02C01-9712-CC-00486, Tipton County (Tenn. Crim. App. filed Oct. 19, 1998, at Jackson), app. granted, (Tenn. Apr. 5, 1999). Thus, because the defendant's actions amounted to force, they necessarily amounted to violence. Force is defined in our code as "compulsion by the use of physical power or violence. . . ." See Tenn. Code Ann. § 39-11-106(a)(12).

In Fitz, the defendant was indicted and convicted of robbery by violence. The proof at trial showed that the defendant entered a convenience store and when the cashier opened the register drawer, he pushed the cashier with both

hands in the shoulders, hitting the cashier hard enough to knock the cashier back into the wall. See Fitz, No. 02C01-9712-CC-00486. On appeal, the defendant contended that the state failed to prove the element of violence. He argued that although his actions amounted to force, violence requires something more than force.

A panel of this Court rejected the defendant's contention, concluding that a showing of physical force is sufficient to establish the element of violence. The court determined that the terms "force" and "violence" may be used synonymously such that violence is shown by a defendant's exertion of "some type of physical force upon the victim." See Fitz, No. 02C01-9712-CC-00486 (emphasis original).

The state asks this Court to follow the Fitz court's holding that violence is synonymous with force and to conclude that because force was displayed in the present case, violence was proven. The flaw in the state's argument, however, is that the Fitz court specifically required a showing of physical force which is absent in the present case. Thus, the Fitz decision is not persuasive.

Before the enactment of the present statute, robbery was historically defined in Tennessee as the "felonious and forcible taking from the person of another, goods or money of any value, by violence, or putting the person in fear." See Tenn. Code Ann. § 39-3901 (1956); Hammond v. State, 43 Tenn. 129, 133 (Tenn. 1866). Essentially, violence and fear were two alternative means of showing force, with violence being distinguished from fear by the proof of some overt, physical act. Thus, if one proved violence, one necessarily proved one of the methods of force. However, the inverse is not true. That is to say, proof of force did not necessarily mean proof of violence -- it could simply mean proof of

fear. In Hammond, the Tennessee Supreme Court held that "[r]obbery is a species of larceny, involving the same elements and turpitude, aggravated by taking from the person, by open violence, or putting the person in fear." Id. at 134 (emphasis added). Similarly, in James v. State, the Supreme Court determined that robbery by violence is tantamount to battery, whereas robbery by fear is tantamount to assault. See 385 S.W.2d 86, 88 (Tenn. 1964).

Although the foregoing cases were construed under our state's earlier robbery statutes, the current statute maintains the distinction between robbery by violence and robbery by fear. Thus, analysis under previous case law is instructive and relevant. See Tenn. Code Ann. § 39-11-104 ("The provisions of this title shall be construed according to the fair import of their terms, including reference to judicial decisions and common law interpretations, to promote justice, and effect the objectives of the criminal code."). We also note that the criminal code interpretations include references to prior law.

The earlier cases and our previous robbery statutes demonstrate that proof of violence has historically required a showing of some physical contact and that this requirement distinguishes robbery by violence from robbery by fear. We believe that, likewise, our current robbery statute requires a physical act against a person to establish violence. Thus, we agree with Fitz to the extent that it holds that a showing of physical force is sufficient to prove violence under the robbery statute. We also note that this is consistent with our current statutory definition of force, which no longer encompasses fear but is instead defined in terms of physical violence.

In the present case, there has been no showing of physical force toward the victim. Thus, there has been no showing of violence, and we agree with the

defendant that the evidence is insufficient to prove robbery by violence. The evidence is sufficient, however, to prove robbery by fear, and we must now address whether a fatal variance exists between the indictment and the proof in this case such that the defendant's conviction cannot stand.

Our Supreme Court has relaxed the common law rule requiring strict conformity between the allegations of the indictment and the proof at trial. In State v. Moss, 662 S.W.2d 590, 592 (Tenn. 1984), the court held as follows:

> Unless substantial rights of the defendant are affected by a variance, he has suffered no harm, and a variance does not prejudice the defendant's substantial rights (1) if the indictment sufficiently informs the defendant of the charges against him so that he may prepare his defense and not be misled or surprised at trial, and (2) if the variance is not such that it will present a danger that the defendant may be prosecuted a second time for the same offense; all other variances must be considered to be harmless error.

In the present case, there has been no showing that substantial rights of the defendant were prejudiced. The indictment sufficiently informed the defendant that he was charged with aggravated robbery. Although the indictment stated that the means of robbery was by violence, and the proof showed that it was by fear, the defendant has not established that the variance hampered his defense or that he was surprised at trial. In fact, a review of the record shows that the defendant's primary defense was identity. In addition, we conclude that the variance in this case does not put the defendant in jeopardy of being prosecuted a second time for the same offense. Under these facts, we conclude that the variance in this case is not fatal and that the evidence sufficiently establishes the offense of robbery by putting a person in fear.

Prosecutorial Misconduct

Next, the defendant contends that the prosecution committed prosecutorial misconduct in his closing argument and that the trial court erred in failing to grant a mistrial in response to this prosecutorial misconduct. In relevant part, the District Attorney General stated during his closing argument before the jury:

> They have impressed upon you how important this trial is. It certainly is important; it's important to both these defendants, but it's important to the victim in this case as well. It is important to every citizen in Jefferson County because there is no difference in any of you, or anybody else in the county, than this lady sitting right here, who is the victim in that robbery. No differences, except fate cast her in that place at that time when [the co-defendant] pulled that gun and stuck it in her face.

In response, the defendant stated, "we would object to the Attorney General placing the jurors in the position of the victim." The court then instructed the jury, "[y]ou all will not look at it in that fashion."

Our Supreme Court has recognized that closing argument is a valuable privilege for both the state and the defense and has allowed wide latitude to counselmen arguing their cases to the jury. See State v. Bybee, 885 S.W.2d 797, 807 (Tenn. 1994). Nonetheless, closing argument is subject to the discretion of the trial judge, and must be temperate, predicated on evidence introduced during the trial, and relevant to the issues being tried. See State v. Keen, 926 S.W.2d 727, 736 (Tenn. 1994). In determining whether a closing argument entitles a defendant to a new trial, an appellate court must find that the statements were improper and that they prejudiced the verdict. See State v. Sutton, 562 S.W.2d 820, 823 (Tenn. 1978). Our Supreme Court in State v. Cauthern, 967 S.W.2d 726, 737 (Tenn. 1998), set out five factors for examining possible prejudice:

1. The conduct complained of, viewed in light of the facts and circumstances of the case;

2. The curative measures undertaken by the court and the prosecution;

3. The intent of the prosecutor in making the improper statement;

4. The cumulative effect of the improper conduct and any other errors in the record; and

5. The relative strength or weakness of the case.

After reviewing the remarks of the District Attorney General in their appropriate context, we conclude that the statements were not intended to ask the jury to place itself in the place of the victim, but rather were directed at emphasizing the random nature of the crime, a crime in which the defendants did not care whom they victimized. The defendant's characterization of this statement as "error" is therefore inaccurate.[1]

Jury Charge on Criminal Responsibility

Next, we address the defendant's contention that the trial court improperly confused the jury by charging all portions of the criminal responsibility statute. The trial court has a constitutional duty to give the jury a complete and correct charge. See State v. Teal, 793 S.W.2d 236, 249 (Tenn. 1990). In this case, both the state and the defendant agree that criminal responsibility was an issue. Here the defendant requested that only one part of the charge be given to the jury so as to avoid confusion. We conclude that the trial court's decision to charge the jury with the complete instruction was proper. The defendant has failed to point to any case law holding that a thorough and complete charge would be grounds for reversal; instead, he merely concludes that such was clear error. We disagree.

[1] Even if we agreed with the defendant that this argument was impermissible, we would nonetheless hold the error harmless in light of all the facts.

Jury Charge on Facilitation

The defendant contends that the trial court erred in failing to instruct the jury on Facilitation of a felony. See Tenn. Code Ann. § 39-11-403. He argues that an instruction on facilitation was required because the offense of facilitation is a lesser included offense of Tennessee Code Annotated § 39-11-402, "Criminal Responsibility for Conduct of Another."

The state answers that facilitation of a felony is not a lesser included offense of "criminal responsibility" because "criminal responsibility" is not an offense at all, but merely a theory of liability. It therefore follows that "criminal responsibility" has no lesser included offenses.

We believe our Supreme Court has recently answered this question in State v. Burns, 6 S.W.3d 453 (Tenn. 1999). There they state "Facilitation of a felony is a lesser degree of criminal responsibility than that codified at Tenn. Code Ann. § 39-11-402."

In Burns, the Supreme Court adopts the following definition of "lesser included" offenses to be used in our trial courts:

> An offense is a lesser included offense if:
> (a) All of its statutory elements are included within the statutory elements of the offense charged; or
> (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing
> (1) a different mental state indicating a lesser kind of culpability; and/or
> (2) a less serious harm or risk of harm to the same person, property, or public interest; or
> (c) it consists of:
> (1) facilitation of the offense charged as of an offense that otherwise meets the definition of lesser included offense in part (a) or (b) or
> (2) an attempt to commit the charged as an offense that otherwise meets the definition of lesser included offense in part (a) or (b); or

(3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser included offense in part (a) or (b).

Following the guidance set out by Justice Barker in the Burns opinion, we conclude that the offense of aggravated robbery upon the theory of criminal responsibility includes all elements of facilitation of aggravated robbery. Therefore, facilitation meets the definition of a lesser included offense under part (a) of the newly adopted test set forth in Burns. We further conclude that, under part (c) of the lesser included offense definition newly adopted, facilitation of aggravated robbery is a lesser included offense of the charged offense of criminal responsibility of aggravated robbery in this case.

Burns further provides:

(1) If a lesser offense is not included in the offense charged, then an instruction should not be given, regardless of whether evidence supports it, and

(2) If, however, the trial court concludes that a lesser offense is included in the charged offense, the question remains whether the evidence justifies a jury instruction on such lesser offense.

In determining whether the evidence justifies a jury instruction on lesser included offenses, Burns again sets out a two-step analysis:

> First, the trial court must determine whether any evidence exists that reasonable minds could accept as to the lesser included offense. In making this determination, the trial court must view the evidence liberally in the light most favorable to the existence of the lesser included offense without making any judgments on the credibility of such evidence. Second, the trial court must determine if the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser included offense.

Viewed in the light set forth above, we conclude that evidence exists that reasonable minds could accept that is legally sufficient to support a conviction for facilitation of aggravated robbery.

We must now determine whether the trial court's failure to charge facilitation of aggravated robbery requires a new trial or is harmless. In the instant case the jury found the defendant guilty of criminal responsibility for Robbery, a Class C felony. We note facilitation of aggravated robbery is a Class C felony. Upon careful consideration we have determined that the trial court's failure to instruct the jury as to facilitation of aggravated robbery is harmless error because the jury was instructed as to the lesser included offense of criminal responsibility for Robbery and found the defendant guilty of the lesser. Therefore, we hold this error harmless.

The more difficult question is whether the defendant is entitled to a new trial as a result of the trial court's failure to charge facilitation of robbery. Robbery, a Class C felony, is elevated to aggravated robbery, a Class B felony, when the robbery is accomplished with a deadly weapon. There exists no dispute that a deadly weapon was used in this robbery.

We further conclude that facilitation of robbery is a lesser included offense of criminal responsibility for robbery under part (a) and (c) of the newly adopted Burns definition.

However, we conclude in the instant case, that the lesser included offense of facilitation of robbery should not have been charged because the evidence did not justify the charge of robbery. When we view the evidence pursuant to the two step analysis set forth in Burns we conclude that this defendant was entitled to a jury charge on criminal responsibility for aggravated robbery and facilitation of aggravated robbery and nothing more. Therefore, the trial court's failure to

charge facilitation of robbery is not error because the proof did not justify such a charge.

Sentencing

Finally, the defendant alleges two sentencing errors. First, he argues that the trial court improperly failed to find and apply two mitigating factors. Second, he argues that the trial court improperly imposed service of his ten-year sentence consecutive to a sentence from Hamblen County.

We review a criminal sentence de novo on the record with a presumption of correctness. See Tenn. Code Ann. 40-35-401(d); State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). This presumption applies if the record affirmatively shows that the trial court considered the sentencing principles and all relevant factors and circumstances. See State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). Where the record indicates that the proper factors were considered, we will accept the trial court's decision even if we would have preferred a different result. See State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). Furthermore, the burden is on the appellant to demonstrate that his sentence is improper. See State v. Johnson, 909 S.W.2d 461, 464 (Tenn. Crim. App. 1995).

We conclude that the defendant has failed to meet his burden and demonstrate that the trial court erred. The trial court conducted a full sentencing hearing and heard all enhancing and mitigating factors offered by the parties. The court then found several enhancing factors, supported by the record, and specifically rejected the mitigating factors: (1) That the defendant's criminal

conduct neither caused not threatened serious bodily injury; and (4) that the defendant played a minor role in the commission of the offense. See Tenn. Code Ann. § 40-35-113. The trial court emphasized the fact that this robbery was, in fact, committed with a gun and therefore posed a serious risk of harm and noted that while the defendant did not personally wield the weapon during the robbery, his role cannot properly be described as minor. Accordingly, the trial court gave no weight to these mitigating factors, and we find no reason to disturb that decision. See Shelton, 854 S.W.2d at 123.

Next, we reject the defendant's complaint of improper consecutive sentencing. The defendant's Hamblen County sentence was obtained and imposed prior to the instant conviction and sentence. Therefore, imposition of consecutive service was proper. See State v. Bigbee, 885 S.W.2d 797, 817 (Tenn. 1994). We note that Allen is a proper candidate for consecutive sentencing under Tennessee Code Annotated § 40-35-115(b)(1), as the trial court found him to be a "professional criminal." Accordingly, we do not disturb his sentence.

CONCLUSION

Accordingly, we AFFIRM the judgment from the trial court.

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JOHN EVERETT WILLIAMS, Judge

CONCUR:

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JOSEPH M. TIPTON, Judge

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ALAN E. GLENN, Judge