IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER SESSION, l994

FILED

September 27, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE	)	
	)	
APPELLEE	)	NO. 0lC0l-9408-CR-00267
	)	
	)	DAVIDSON COUNTY
V.	)	
	)	HON. ANN LACY JOHNS, JUDGE
	)	
ALVIN DEFOREST GRIFFIN	)	(Robbery - two counts)
	)	
APPELLANT	)	

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AFFIRMED

OPINION FILED:_______________________

JERRY SCOTT, PRESIDING JUDGE

O P I N I O N

The appellant, Alvin DeForest Griffin, appeals as a matter of right from a judgment entered on March 18, 1994,[1] in the Criminal Court of Davidson County.

The jury returned a verdict of guilty against the appellant for two counts of robbery.[2] After a sentencing hearing, the trial court sentenced the appellant to a term of four years on each count, to be served consecutively. The court further ordered that the appellant be placed in the Community Corrections Program after serving four months of this sentence day for day at one hundred percent.

On appeal, the appellant presents two issues for review by this Court: (a) whether the trial court erred by excusing a prospective juror for cause who had expertise in a matter not at issue in the case and (b) whether the trial court erred in admitting into evidence testimony by a police officer concerning the escalating crime rate of robbery in the month of December. Having found no reversible error as to either issue, we affirm.

On May 23, 1992, and December 23, 1992, the Holiday Inn on Trinity Lane in Nashville, Tennessee, was robbed. Sara Kelly, a desk clerk at the hotel, was on duty when both incidents occurred. During the December robbery, she recognized the perpetrator as being the same man who robbed the hotel in May. Approximately five days after the December robbery, Ms. Kelly, while working a second job at a gas station, recognized a customer as the man who robbed the Holiday Inn. She procured the license number of the vehicle the man was driving and contacted the police. Subsequently, Ms. Kelly identified the appellant's photograph in a photographic lineup as the robber, as did the security guard who witnessed the May robbery. Both witnesses also identified the appellant at trial.

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[1]An order clarifying the original judgment was entered on May 6, 1994.

[2]He was indicted for one count of aggravated robbery and one count of robbery. The jury found him guilty of robbery on both counts.

In his defense, the appellant presented an alibi through the testimony of his wife for the time period of each robbery. In addition, the defense emphasized the disparities in the descriptions of the robbery perpetrator which were given by the witnesses. Obviously, the jury accepted the state's proof and rejected the defense contentions. There is no challenge to the sufficiency of the evidence.

In his first issue, the appellant contends that the trial court erroneously excused for cause a prospective juror who had some expertise in drug and alcohol abuse when substance abuse was not at issue in this case. A "clear showing of an abuse of discretion" by the trial court is the proper standard of review for issues regarding the qualifications of jurors. Burns v. State, 591 S.W.2d 780, 782 (Tenn. Crim. App. 1979). After a thorough review of the record, we find no abuse by the trial court.[3]

Even assuming this Court had found error in the trial court's action, the appellant would still be without remedy. Article I, § 9 of the Tennessee Constitution provides that in criminal prosecutions the accused has the right to be tried by "an impartial jury" of the county where the crime shall have been committed. Thus fundamental law guarantees a criminal defendant the inviolable right to an "unprejudiced, unbiased and impartial jury." State v. Smith, 857 S.W.2d 1, 20 (Tenn. 1993); Long v. State, 187 Tenn. 139, 144, 213 S.W.2d 37, 40 (1948). To that end, our Rules of Criminal Procedure allow the accused to reject prospective jurors who are biased and prejudiced or thought to be so, Tenn. R. Crim. P. 24; however, he has no right to have any particular jurors

[3]The record is replete with statements by the prospective juror to the effect that, if alcohol was involved in the crimes, she was not sure that she could lay aside her expertise and simply apply the judge's instructions to the facts of the case. The voir dire of this prospective juror ran twenty-two pages in the record. Moreover, it was undisputed that there would be testimony at trial that the perpetrator of one of the robberies smelled of alcohol and appeared to be intoxicated. Although the issue of alcohol use or intoxication was undoubtedly of slight significance in the context of the more probative issues in the case, we decline to hold that the trial judge's abundance of caution amounted to an abuse of her discretion.

impaneled. State v. Smith, supra; State v. Poterfield, 746 S.W.2d 441, 446 (Tenn. 1988); See Graham v. United States, 257 F.2d 724, 729 (6th Cir. l958). The appellant does not proffer any challenge concerning the impartiality of the jury which convicted him. Therefore, "no advantage could accrue to [him] should a new trial be awarded. The only effect of such new trial would be that the [appellant] would be enabled to obtain an impartial jury; but he has already had the benefit of such a jury."[4] State v. Henry, 23 Tenn. (4 Hump.) 270, 271 (1842).

Moreover, the appellant's sole assertion of prejudice---that the trial court's dismissal of the prospective juror afforded the State an extra peremptory challenge---has been previously rejected by this Court as constituting grounds for reversal. In State v. Davis, 649 S.W.2d 12, l4-l5 (Tenn. Crim. App. 1982), a case cited in the appellant's brief, this Court stated:

> Even if the trial judge erred in excusing these jurors for cause with the result of allowing the state an additional peremptory challenge, reversal is not required where there is no showing of prejudice to the defendant. State v. Wingard, 480 S.W.2d 915 (Tenn. 1972). There is nothing in this record to show the jury was not fair and impartial.

Inherent in the words in Davis is that an erroneous dismissal of a prospective juror which results in an additional peremptory challenge for the State does not, without more, constitute prejudice as contemplated under our constitutional right to an impartial jury. In short, the appellant has suffered no injury or prejudice because a new trial could only grant him what he has already had, an impartial jury.

In his other issue the appellant contends that the trial court erroneously permitted the State to present testimony by a police officer concerning the escalating crime rate of robbery in December 1992. The appellant's contention is premised upon the following exchange at trial:

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[4]"When the record shows that the jurors were 'elected, impaneled, tried and sworn,' it is presumed that they were fair and impartial jurors since the Trial Judge has the exclusive right to pass upon the selection of jurors." Long, 187 Tenn. at 145, 213 S.W.2d at 40. Clearly, those prerequisites were satisfied in this case.

> STATE: Did there come a time in December of 1992 that your duties changed?
>
> OFFICER: Yes, ma'am.
>
> STATE: And what was that?
>
> OFFICER: At east station, every December, the armed robbery crime rate goes up. It is kind of like skyrocketing each year.
>
> APPELLANT'S ATTY: If it please the Court Your Honor I'm going to object. I don't see how this is relevant.

Immediately thereafter, a bench conference took place at which the trial court agreed that "it would be inappropriate to introduce just general evidence about the escalating crime rate." At the conclusion of the bench conference, the trial proceeded without further mention of escalating crime rates.

In essence, the appellant contends that the trial court erred by failing to specifically sustain his objection, strike the improper testimony from the record, and instruct the jury to disregard the testimony. We cannot disagree with this assertion. However, no relief is required where an appellant has "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a). Our Supreme Court recently stated:

> [W]hen a defendant stands silent at a time when he could have objected to the action taken by the trial court, he has acquiesced in that course of action. Obviously, the rationale for requiring an objection to a mistake is that it gives the trial judge an opportunity to cure a situation that one or both parties perceive to be in error. A party ought not be permitted to stand silently by while the trial court commits an error in procedure, and then later rely on that error when it is to his advantage to do so.

State v. Mounce, 859 S.W.2d 319, 322-23 (Tenn. 1993).[5] After the initial objection and bench conference which ensued, counsel for the appellant, knowing that the trial court agreed that the "escalating crime rate" testimony was improper, stood silently by while the trial resumed. No attempts were made to bring the trial judge's procedural omission to her attention. Without question, such a course of action was "reasonably available" to the appellant, and might

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[5]We acknowledge that Mounce is factually dissimilar from the present case in that in Mounce the Supreme Court was addressing a double jeopardy question. However, we believe the principle and analysis promulgated therein are wholly transferrable to the present case.

well have served "to prevent or nullify the harmful effect" of what was undoubtedly an oversight on the part of the trial court. See Tenn. R. App. P. 36(a). Accordingly, this issue was waived.[6]

The judgments of conviction are affirmed.

JERRY SCOTT, PRESIDING JUDGE

CONCUR:

JOSEPH B. JONES, JUDGE

PAUL G. SUMMERS, JUDGE

[6]In the larger context of the whether the appellant received a fair trial, this Court would have found this error harmless beyond a reasonable doubt had it been adequately preserved for appeal. The record does not support a finding that the appellant was prejudiced in any manner.