IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY SESSION, 1995

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9409-CR-00312**
	)	
Appellee,	)	
	)	
	)	**DEKALB COUNTY**
VS.	)	
	)	**HON. LEON BURNS**
ROBERT SENICK and	)	**JUDGE**
RALPH TENNYSON,	)	
	)	
Appellants.	)	(Felony Drug Possession and Conspiracy))

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

FOR THE APPELLANT:

F. MICHIE GIBSON, JR.
1416 Parkway Towers
404 James Robertson Parkway
Nashville, TN 37219

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

CHARLOTTE H. RAPPUHN
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

BILL GIBSON
District Attorney General

JOHN A. MOORE
OWEN BURNETT
Assistant District Attorneys General
145 S. Jefferson Avenue
Cookeville, TN 38501

OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure by two Defendants from jury convictions for each Defendant of one count of possession with intent to deliver or sell over ten pounds of marijuana and one count of conspiracy to possess with intent to deliver or sell over ten pounds of marijuana. The Defendants were tried jointly. Defendant Senick was sentenced as a Range II offender to concurrent sentences of seven years on the first count and three years on the second count. Defendant Tennyson was sentenced as a Range I offender to concurrent sentences of three years on the first count and two years on the second count. We affirm the convictions of each Defendant.

Each Defendant argues his own separate issues in this appeal. Defendant Senick argues three issues: (1) That the trial court abused its discretion in not granting his motion for a change of venue or mistrial; (2) that the trial court erred in not suppressing certain evidence at trial; and (3) that the trial court erred in allowing testimony concerning allegations of other crimes by the Defendant.

Defendant Tennyson argues seven issues in his appeal: (1) That there was insufficient evidence that the Defendant had knowledge of the existence of a conspiracy, the intent to join a conspiracy, or participated in a conspiracy with the requisite criminal intent; (2) that the trial court erred in allowing prejudicial hearsay statements of Defendant's co-defendant to be admitted; (3) that the trial court erred in denying Defendant's motion for a severance; (4) that the trial court erred in denying Defendant's motion for a mistrial when the State introduced phone records of Defendant Senick during cross-examination of Defendant Senick; (5) that the trial court

erred in prohibiting Defendant's counsel from questioning an agent of the Tennessee Bureau of Investigation (T.B.I.) concerning the details of his investigation; (6) that there was insufficient evidence to sustain a conviction for the offense of possession with intent to sell or deliver over ten pounds of marijuana; and (7) that the trial court erred in sentencing the Defendant for a period of confinement in excess of the minimum time within the range for the respective convictions.

The Defendant Senick is the owner of a business known as the Bat Magic Garden Center. This business is where the arrests occurred. A confidential informant for the T.B.I., known during this investigation as "Paco," informed the T.B.I. that Defendant Senick was interested in purchasing some marijuana. At this point, a T.B.I. agent and Paco set up a "reverse sting." In a reverse sting, the undercover officer is the one who sells the illegal substances instead of buying the illegal substances.

Paco set up a deal with Defendant Senick for the purchase of 100 pounds of marijuana on October 22, 1992. An undercover agent went with Paco in a rental truck, posing as his supplier, to complete the transaction. Paco initially went to Bat Magic alone to see who was at the store. At the store he found the Defendant Senick, the Defendant Tennyson, Tennyson's wife[1] and another co-defendant Ronnie Dale Reed.[2] Upon his arrival, Defendant Senick told Paco that they did not have enough money for the full 100 pounds. Instead they had enough money for fifteen pounds, and if that transaction went smoothly, they would be able to get money for another fifty pounds from an individual in Cookeville, and more money from an individual in Woodbury for another twenty-five pounds.

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[1] Mrs. Tennyson was found not guilty in a joint trial with the two defendants in the case sub judice.

[2] Mr. Reed was tried in a separate trial. Originally, he was a co-defendant in the case sub judice.

Paco then returned to where the agents were waiting for him to inform them what happened and to see what the agents wanted to do. Paco was not wearing a wire because the Defendant Senick had a radio frequency detector in his business. Paco and the undercover agent returned to the Bat Magic store. They spoke with the Defendant Senick, and he repeated that they had the money for fifteen pounds on hand and would be able to get the rest in increments. Paco and the undercover agent left and gave the Defendants time to get organized. The agents had intended to make a sale of 100 pounds of marijuana. Usually they would not do a reverse sting for fifteen pounds of marijuana. However, they decided to continue with the sting.

Paco and the undercover agent returned to Bat Magic to make the sale with back-up officers behind a fake wall in the truck, as well as other officers located in the area of the Bat Magic store. Paco and the undercover agent entered the establishment. The undercover agent spoke with Defendant Senick. The agent asked the Defendant if the individuals who wanted the fifteen pounds of marijuana were still at the store, and Defendant Senick indicated that they were in the pool room. Defendant Tennyson, his wife and Reed were in the pool room at the time. The agent and Defendant Senick went into the office which had a glass door that led to the pool room. The agent told Defendant Senick that they would go ahead with the deal, but he needed to count the money first. The Defendant walked into the pool room and spoke to Reed, who handed him a paper bag, and then spoke to the Tennysons.

The agent told Defendant Senick that during the transaction he did not want any other customers in the store. He then asked Defendant Senick if everyone in the store was "a player." Senick told the agent that they could lock the doors and that everyone was indeed a player. The agent returned and got the rental truck, and he informed the backup units that the sale was occurring. The agent took the marijuana into the store and went into a back room. Defendant Senick followed him into the room. Senick

opened the bag with the marijuana and nodded to Defendant Tennyson, who proceeded to come to the back room. Reed also came into the room. The three men were in the back room with the agent. Mrs. Tennyson was in the pool room, and Paco went out to give the signal to the back-up units. At that point, the back-up units came in, and the participants were arrested.

I. Defendant Senick

A.

Defendant Senick's first issue is that the trial court abused its discretion in refusing to grant his motion for change of venue or mistrial. The Defendant argues that the jury was tainted by a potential juror's statement in the second voir dire that she had heard that the Defendant sold marijuana at the Bat Magic Garden Center. He argues that because a similar statement was made in the first voir dire, which ended in a mistrial, it was "impossible for anyone to effectively voir dire a jury without a juror repeating a prejudicial remark about the Defendant because of the small size of the community."

Venue for a trial may be changed, "if it appears to the court that, due to undue excitement against the defendant in the county where the offense was committed or any other cause, a fair trial probably could not be had." Tenn. R. Crim. P. 21(a). The decision to change venue rests in the sound discretion of the trial court. Rippy v. State, 550 S.W.2d 636, 638 (Tenn. 1977). Absent a clear abuse of discretion, the trial court's decision will not be overturned. Id. To reverse a conviction on the basis of the denial of a motion for change of venue the defendant must prove that the jurors who actually sat on the jury and heard the case were biased or prejudiced against him. State v. Evans, 838 S.W.2d 185, 192 (Tenn. 1992), cert. denied, 114 S.Ct. 740 (1994). We

conclude that the trial court did not abuse its discretion in denying the Defendant's motion for a change of venue. There does not appear to have been much publicity concerning the case sub judice. The trial court mentioned an article that appeared in the local paper when the incident occurred which would have been about a year before the trial. When asked, the majority of the jurors replied that they had not even read the article. The majority of the potential jurors knew where the Bat Magic Garden Center was but did not know anything about it. The potential juror who made the comment was dismissed from the panel.

Even if the trial court had abused its discretion in denying the motion, the Defendant is unable to show that the jury was prejudiced against him. After the prejudicial comment was made by the potential juror, the trial court informed the potential jurors that the comment was not evidence and asked each seated juror if the comment would influence their verdict. Each juror replied that the comment would not affect their verdict. In Evans, our supreme court held that a defendant was not able to show prejudice because the jurors admitted that they had read or heard reports of the murder, but stated that the previously learned information would not affect their judgment in the case. Evans, 838 S.W.2d at 192. When discussing qualified jurors, the United States Supreme Court has stated, "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 723 (1961).

The Defendant did not include an argument in his brief as to why he should have been granted a mistrial. This issue is waived as the Defendant has failed to cite any authority to support his argument. Tenn. Ct. Crim. App. R. 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1988).

This issue has no merit.

B.

Defendant Senick's second issue is whether the trial court erred in not suppressing as evidence the radio frequency detector, an Ohaus electronic scale, and a copy of High Times magazine. The Defendant argues that the trial court erred in denying his motion because his motion to suppress shows that the Defendant was arrested at 1:25 p.m. and the search warrant was not obtained until 3:51 p.m. He also argues that the officers should have secured a search warrant before the occurrence of the undercover operation, and it should have been served contemporaneously to arrest.

The Defendant appears to be arguing that the time between the arrest and the execution of the search warrant constituted a seizure. However, in the case sub judice there was no seizure in the officers' securing of the premises while waiting to obtain a search warrant. In Segura v. United States, 468 U.S. 796 (1984), the Supreme Court stated, "securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or it contents." Id. at 810. This would also apply to a place of business.

If the officers began the search of the Bat Magic Garden Center before the arrival of the warrant, then there would have been a warrantless search. However, there is no evidence that a search took place before the obtaining of the search warrant. The officer assigned to be evidence custodian testified at trial. He specifically stated that during the execution of the search warrant, the other officers would bring him each piece of evidence to be recorded. This officer identified the radio frequency detector, the Ohaus scale, and the High Times magazine as being among those pieces of evidence. Because there is no evidence in the record to suggest that the officers

found these items of evidence prior to the execution of the search warrant, there is no constitutional violation.

Therefore, this issue has no merit.

C.

The Defendant's third issue is whether the trial court erred in denying his motion to prohibit testimony concerning allegations of other crimes which were not alleged in the indictment. At the close of the Defendant's case and prior to the State's rebuttal testimony, there was a jury-out hearing. The State informed the court and the two Defendants that it wanted to put on a rebuttal witness who would testify concerning previous drug-related convictions of Defendant Senick. These convictions were for possession, possession for resale, and a conviction for trafficking in another state. This testimony was to show a predisposition of the Defendant to deal with drugs to rebut a defense witness' testimony that Paco entrapped the Defendant.

Defense counsel argued that the only way previous convictions could come into evidence is through the testimony of the Defendant, who had not testified. After much argument and discussion, the trial judge decided to allow the testimony. The defense counsel decided to reopen proof, and the Defendant testified. He testified during direct examination concerning his prior convictions, and the State reviewed them in its cross-examination.

This court dealt with a similar situation in State v. Milburn Greene, No. 317, Hamblen County (Tenn. Crim. App., Knoxville, filed Nov. 7, 1990), perm. to appeal dismissed, (Tenn. 1991). In that case, the defendant filed a motion in limine to prevent his prior convictions from coming in at trial. Id. at 5. The trial judge later ruled that the

convictions could come in to impeach the defendant. Id. Defense counsel then brought the conviction out in direct examination. Id. at 6. When the defendant appealed on the grounds that the trial court's ruling was error, this court said, "when, as here, defense counsel elects to elicit the conviction during direct-examination, he waives all issues relating to the admissibility of the conviction." Id. The same is true in this case. The Defendant waived this issue by eliciting the convictions during direct-examination.

We also conclude that the ruling of the trial court was correct. In State v. Elendt, 654 S.W.2d 411 (Tenn. Crim. App. 1983), this court addressed the issue of whether or not evidence of other crimes is admissible when the Defendant presents a defense of entrapment.

> By raising the defense of entrapment the appellant opened himself to a "searching inquiry into his own conduct and predisposition as bearing upon that issue." Sorrells v. United States, 287 U.S. 435, 451, 54 S.Ct. 210, 216, 77 L.Ed. 413 (1932). . . . Such evidence of subsequent acts is admissible because it is relevant to the "predisposition" of the defendant to commit the act charged. Relevancy is measured in terms of similarity of offenses and proximity in time. People v. Tipton, [78 III.2d 477, 36 III. Dec. 687, 401 N.E.2d 528, 532 (1980)].

Elendt, 654 S.W.2d at 414. These convictions are admissible to demonstrate the Defendant's predisposition to possess and sell marijuana.

The Defendant also argues that even though the convictions are admissible they should not have been admitted because their probative value is outweighed by the danger of unfair prejudice. Even relevant rebuttal evidence should not be admitted if its probative value is outweighed by its prejudicial effect on the jury. State v. Lunati, 665 S.W.2d 739, 747 (Tenn. Crim. App. 1983).

The probative value of this evidence outweighed its prejudicial effect. The evidence was presented solely to demonstrate the Defendant's predisposition to dealing with drugs. When a defendant attempts to portray himself as an innocent citizen who was entrapped by the police, that defendant cannot complain when evidence to the contrary is admitted to rebut that portrayal. State v. Larry Huskey, No. 03C01-9107-CR-235, Sevier County, slip. op. at 7 (Tenn. Crim. App. Knoxville, filed May 28, 1992).

Therefore, this issue has no merit.

II. Defendant Tennyson

A.

Defendant Tennyson's first issue is whether there was sufficient evidence that he had knowledge of the existence of a conspiracy, the intention to join a conspiracy, or participated in a conspiracy with the requisite criminal intent. We will also address the Defendant's sixth issue, whether there was sufficient evidence to support his conviction for the offense of possession with intent to sell or deliver over ten (10) pounds of marijuana, at this time.

When an accused challenges the sufficiency of the convicting evidence, this court must review the record to determine if the evidence adduced during the trial was sufficient "to support the findings by the trier of fact of guilt beyond a reasonable doubt." T.R.A.P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (Tenn. 1956). This court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Herrod, 754 S.W.2d 627, 632 (Tenn. Crim. App. 1988).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). In State v. Grace, 493 S.W.2d 474 (Tenn. 1973), the Tennessee Supreme Court said, "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." Id. at 476.

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, id., the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record and the inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt. Matthews, 805 S.W.2d at 780.

A conspiracy is committed when "two (2) or more people, each having the culpable mental state required for the offense which is the object of the conspiracy and

each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct," constituting the offense. Tenn. Code Ann. § 39-12-103(a). Mere knowledge, acquiescence or approval of the act, without cooperation or agreement to cooperate, is not enough to make an individual a part of a conspiracy. State v. Cook, 749 S.W.2d 42, 44 (Tenn. Crim. App. 1987), perm. to appeal denied, id. (Tenn. 1988); Solomon v. State, 168 Tenn. 180, 76 S.W.2d 331, 334 (1934). An agreement for a conspiracy does not need to be evidenced by a writing. Cook, 749 S.W.2d at 44; Randolph v. State, 570 S.W.2d 869, 871 (Tenn. Crim. App.), cert. denied, id. (Tenn. 1978). A conspiracy may be proven by circumstantial evidence and by the conduct of the parties in the execution of the criminal conduct. Cook, 749 S.W.2d at 44-45; Randolph, 570 S.W.2d at 871.

There is considerable evidence which supports the jury finding the Defendant guilty of conspiracy. It is undisputed that the Defendant was present during the sale. The undercover agent who made the sale testified that Defendant Senick indicated that Defendant Tennyson was going to purchase fifteen (15) pounds of the original one hundred (100) pounds of marijuana during his initial conversation with Senick. The second time the undercover agent spoke with Defendant Senick, Senick again indicated that Defendant Tennyson wanted to go through with the fifteen pound deal.

When the agent returned to the store and told Defendant Senick that he was going to do the fifteen pound deal, but wanted to count the money, Defendant Senick walked over to Reed who handed him a paper bag, spoke with Defendant Tennyson and his wife and returned to the officer with the money in the bag. The agent told Defendant Senick that he did not want any customers at the store when the sale was made. He asked the Defendant if everyone was a "player." Defendant Senick replied that everyone was a player. When the agent delivered the marijuana, Defendant Senick walked to the door of the poolroom, where the other Defendant was and nodded

his head. Defendant Tennyson then walked over and said he would like to see the marijuana. During the cross-examination of Defendant Senick, he admitted that he made several phone calls to Defendant Tennyson during the week immediately before the sale.

We conclude that there is sufficient evidence for a rational trier of fact to find Defendant Tennyson guilty of conspiracy.

The Defendant also argues that there was not sufficient evidence to support his conviction of possession. In drug possession cases, possession can be either actual or constructive. State v. Brown, 823 S.W.2d 576, 579 (Tenn. Crim. App. 1991); State v. Cooper, 736 S.W.2d 125 (Tenn. Crim. App. 1987). This court set out a definition of constructive possession in Cooper:

> Before a person can be found to constructively possess a drug, it must appear that the person has "the power and intention at a given time to exercise dominion and control over . . . [the drugs] either directly or through others." State v. Williams, [623 S.W.2d 121, 125 (Tenn. Crim. App. 1981)], quoting from United States v. Craig, 522 F.2d 29 (6th Cir. 1975). See United States v. Holland, 445 F.2d 701, 703 (D.C. Cir. 1971). In other words, "constructive possession is the ability to reduce an object to actual possession." State v. Williams, supra, quoting from United States v. Martinez, 588 F.2d 495 (5th Cir. 1979). See Harris v. Blackburn, 646 S.W.2d [sic] 904, 906 (5th Cir. 1981). The mere presence of a person in an area where drugs are discovered is not, alone, sufficient to support a finding that the person possessed the drugs. Harris v. Blackburn, 646 F.2d 904, 906 (5th Cir. 1981). See Dishman v. State, 460 S.W.2d 855, 858 (Tenn. Crim. App. 1970); Whited v. State, 483 S.W.2d 594 (Tenn. Crim. App. 1972). Likewise, mere association with a person who does in fact control the drugs or property where the drugs are discovered is insufficient to support a finding that the person possessed the drugs. Harris v. Blackburn, supra. See Dishman v. State, supra; Whited v. State, supra.

State v. Cooper, 736 S.W.2d at 129.

In the case sub judice, we have already found that there is sufficient evidence to find the Defendant guilty of conspiracy. In a conspiracy, "The act of one is considered the act of all and, therefore, is imputable to all." State v. Lequire, 634 S.W.2d 608, 613 (Tenn. Crim. App. 1981), perm. to appeal denied, id. (Tenn. 1982). "Once a conspiracy has been established, evidence of any act or declaration of a conspirator during the conspiracy, and in furtherance of it, is admissible as substantive evidence against any co-conspirator on trial for the commission of the target crime." Id.

There is no question but that Defendant Senick had actual possession of the marijuana. The undercover agent had taken the money in the brown paper bag, and Defendant Senick had opened one of the bags that contained the marijuana. Defendant Tennyson said that he wanted to see the marijuana. Defendant Tennyson was in constructive possession of the marijuana because he had the power and intention to exercise dominion and control over it, as well as being able to reduce the marijuana to actual possession. In addition to these facts, there was a conspiracy to possess the marijuana. The action of Defendant Senick having actual possession is imputable to Defendant Tennyson. We conclude that there is sufficient evidence for a rational trier of fact to find Defendant Tennyson guilty of possession.

Therefore, this issue has no merit.

B.

The Defendant's second issue is whether the trial court erred in allowing prejudicial hearsay statements and declarations of his co-conspirators to be admitted as evidence at trial. The Defendant has failed to make references to the record as to where these hearsay statements are to be found. Failure to make appropriate

references to the record may result in waiving the issue. Tenn. Ct. Crim. App. R. 10(b); Killebrew, 760 S.W.2d at 231; see also T.R.A.P. 27(a)(7) and (g). However, we choose to address this issue to the extent possible.

The Defendant identifies the statements in question in this manner, "Just because Senick whispered in the appellant's ear while [the undercover agent] was present does not prove anything. Just because Senick said everyone was a player assumes Senick is telling the truth. Nonetheless, this statement should not have been admitted." The undercover agent testified to both these statements. We first point out that the undercover agent's testimony that Defendant Senick whispered or spoke to Defendant Tennyson would not constitute a hearsay statement. "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion." Tenn. R. Evid. 801. The undercover officer did not testify as to what was said or to any assertion of the Defendant. The officer was testifying to his observations during the undercover operation and that testimony was not hearsay.

Prior to the undercover agent's testimony, defense counsel argued that the undercover agent's testimony concerning statements made by Defendant Senick that would incriminate Defendant Tennyson could not come into evidence because of Rule 14 of the Rules of Criminal Procedure, which concerns a severance. There was no discussion concerning hearsay issues in regard to this testimony. However, the Defendant did argue the hearsay issue in his motion for new trial. Also, defense counsel did not object during the undercover officer's testimony when he testified that the Defendant Senick stated that Defendant Tennyson was a player. The failure of defense counsel to make a contemporaneous objection waives consideration by this court of the issue on appeal. See T.R.A.P. 36(a); Teague v. State, 772 S.W.2d 915, 926 (Tenn. Crim. App. 1988), perm. to appeal denied, id. (Tenn.), cert. denied, 493 U.S. 874 (1989); Killebrew, 760 S.W.2d at 235. Therefore, this issue is waived.

Therefore, this issue is without merit.

C.

The Defendant's third issue is whether the trial court erred in denying his motion for a severance. The Defendant argues that under the two prong approach of Tennessee Rules of Criminal Procedure Rule 14(b)(1) his severance motion should have been granted. However, Rule 14(b)(1) concerns the severance of offenses that "have been joined or consolidated for trial." We assume in the case sub judice the Defendant wished to have his trial severed from his co-defendant under Rule 14(c).

Tenn. R. Crim. P. 14(c)(2)(i) and (ii) provide that the court shall grant a severance of defendants if deemed appropriate to promote a fair determination of the guilt or innocence of a defendant. The decision as to whether or not to grant a severance is left to the sound discretion of the trial judge, and this decision will not be disturbed unless the defendant is unfairly or unduly prejudiced. State v. Wiseman, 643 S.W.2d 354, 362 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1982); Hunter v. State, 222 Tenn. 672, 681, 440 S.W.2d 1, 6 (1969); Woodruff v. State, 164 Tenn. 530, 538-39, 51 S.W.2d 843, 845 (1932). Stated in another manner, a trial court will not be found to have abused its discretion in denying a severance unless "the defendant was clearly prejudiced to the point that the trial court's discretion ended and the granting of [a] severance became a judicial duty." State v. Burton, 751 S.W.2d 440, 447 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1988) (quoting Hunter v. State, 222 Tenn. at 681, 440 S.W.2d at 6).

The Defendant argues that his severance motion should have been granted because he needed to prove that the arrests were the result of a long conspiracy investigation of his co-defendant, and he could not prove the length of this investigation

because prior bad acts of the co-defendant were not admissible at trial. At trial, defense counsel began to cross-examine the case agent concerning the on-going investigation of Defendant Senick. This investigation went on for six months. Defendant Tennyson was not involved in any of the transactions until the one that is the subject of the case sub judice. Senick's counsel objected to the testimony, at which time there was a jury-out hearing. Defense counsel wanted this fact in evidence to prove that his client was not involved with the transaction in question. At the jury-out hearing, the trial judge ruled that this information was irrelevant to the case sub judice, and that defense counsel could ask the case agent if he knew Defendant Tennyson before this transaction. We agree with the trial court. The fact that the Defendant was not involved in previous transactions with Defendant Senick does not prove his innocence on this occasion, and would not have been relevant at a separate trial or at this trial. The granting of the severance motion would not have made this evidence admissible at trial.

The Defendant also argues that "the evidence of the phone records would not have come in through the State's case in chief." When the State cross-examined Defendant Senick, he was asked about certain phone calls he made to Defendant Tennyson prior to the date of the transaction in question. The State discovered these calls from phone records for Defendant Senick. The Defendant does not explain why the State would not be able to bring out the phone records in its case in chief. If the State wanted to present the records, a custodian of the records could have been subpoenaed along with the records to authenticate the records. We also point out that the phone records were first mentioned by defense counsel when he cross-examined the case agent. He asked the case agent if the T.B.I. had subpoenaed the phone records for Bat Magic prior to the investigation. The agent answered that they had not, but they did subpoena the phone records after the arrests occurred. Defense counsel then asked if it was correct that there were no calls to Defendant Tennyson. The

witness answered that it would not be correct. Granting the severance motion would not have prevented evidence of the phone records from coming in during a separate trial of the Defendant.

We do not find that the Defendant was prejudiced to the extent that the trial court had a judicial duty to grant the severance motion.

Therefore, this issue is without merit.

D.

The Defendant's fourth issue is whether the trial court erred in denying the Defendant's motion for a mistrial when the State introduced phone records linking the Defendant and the co-defendant in the cross-examination of Defendant Senick. The decision to grant a mistrial is within the sound discretion of the trial court and will not be disturbed on appeal unless the trial judge abused his discretion. State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990); see State v. Mounce, 859 S.W.2d 319, 322 (Tenn. 1993). Generally, a mistrial will only be declared in a criminal case when there is "manifest necessity" requiring such action by the trial judge. State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991) (citing Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977)).

We cannot conclude that the trial court abused it discretion in its denial of the Defendant's motion for mistrial. The evidence concerning the phone records that precipitated the motion had already been referred to in the trial. In fact, evidence that the Defendant and his co-defendant had been in contact by phone was brought out by defense counsel in his cross-examination of a State witness. Because the evidence had already been referred to, there was not manifest necessity to grant a mistrial.

Therefore, this issue is without merit.

E.

The Defendant's fifth issue is whether the trial court erred in prohibiting Defendant's counsel from questioning the T.B.I. agent in charge of the case about the details of his investigation. "The propriety, scope, manner, and control of the examination of witnesses is a matter within the discretion of the trial judge, which will

not be interfered with in the absence of an abuse thereof. A wide discretion in this matter is necessarily left to the court." Coffee v. State, 188 Tenn. 1, 4, 216 S.W.2d 702, 703 (1948); see State v. Conrad Bond, No. 669, Sullivan County (Tenn. Crim. App., Knoxville, filed June 10, 1985). This rule applies to cross-examination of witnesses. State v. Fowler, 213 Tenn. 239, 253, 373 S.W.2d 460, 466 (1963); State v. Pendergrass, 795 S.W.2d 150, 156 (Tenn. Crim. App. 1989), perm. to appeal denied, id. (Tenn.), cert. denied, 496 U.S. 937 (1990).

Defense counsel wanted to question the case agent about the ongoing investigation into Defendant Senick's activities. The defense wanted to bring this information into the evidence because Defendant Tennyson had not been involved in the prior transactions that the agent knew about. At a jury-out hearing, the trial court ruled that the agent could not be cross-examined about this information. The trial court stated on the record that this information did not prove that Defendant Tennyson was not involved in the transaction in the case sub judice. The trial court did not feel that it was proper for this information to damage the Defendant Senick. We cannot conclude that the trial judge abused his discretion by denying the Defendant the opportunity to cross-examine the witness concerning this evidence.

Therefore, this issue is without merit.

F.

The Defendant's final issue is whether the trial court erred in sentencing the Defendant for a period of confinement in excess of the minimum time within the range for the respective convictions. We are unable to consider this issue because the record does not include a transcript of the Defendant's sentencing hearing. It is the Defendant's duty to have prepared an adequate record in order to allow a meaningful

review on appeal. T.R.A.P. 24(b); State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1988); State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983). When no evidence is preserved in the record for review, we are precluded from considering the issue. Id.

Therefore, this issue is without merit.

We affirm the decision of the trial court.

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DAVID H. WELLES, JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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WILLIAM S. RUSSELL, SPECIAL JUDGE