

OPINION

The defendant, Michael Brice, appeals as of right from his convictions of one count of burglary, one count of aggravated robbery and five counts of aggravated assault. These convictions were based entirely on the testimony of several eyewitnesses who were present at the Hardee's where the crime took place. The defendant raises three issues on appeal. First, he contends that double jeopardy prohibits his being convicted of both aggravated assault and aggravated robbery arising out of a single incident. Next, he challenges the sufficiency of the evidence. Finally, he asserts that the judge committed reversible error by his refusal to give a special jury instruction regarding the eyewitness testimony and the identification of the defendant. Upon careful consideration of these issues, we affirm the decision of the trial court.

The evidence adduced at trial revealed that two black men entered a Hardee's in Bristol on the evening of Sunday, September 8, 1991 around 9:30 p.m. Both of the men's faces were partially covered by masks. Six people-- four employees and two customers-- were present at the Hardee's during the commission of the offense. Because the defendant's conviction was based entirely on his being identified by certain of these witnesses and because the identifications were somewhat inconsistent, the identification testimony shall be outlined in detail. Prior to trial, each witness was shown a photographic array containing six photographs including the defendant's photograph and that of Gerald Thomas, the co-defendant who entered a guilty plea to the robbery and testified for the defense. The defendant was pictured in photograph number two and Mr. Thomas was in photograph number four.

Rhonda Denise Smith, one of the customers, identified photograph number four from the array, but said if she had to choose another one, it would be photograph number two. At trial she pointed to the defendant as one of the robbers, but wrongly asserted very emphatically that he was the one in

photograph number four that she had previously recognized. The other customer, Melissa Michelle Radar, identified the man in photograph number four as the one most like the robber who held a gun to her head. She pointed to the man in photograph number two as the other one at whom she had merely glanced from fifteen feet away. At trial, she testified that the defendant was one of the two robbers. Two of the employees, Walter Glenn Doan, Jr. and Diona Nicole Glover, were unable to identify the defendant at trial. However, both had picked his photograph from the photo array about two months after the robbery. Mr. Doan had additionally picked photo number five as a possibility. Another employee, Dottie Ann Snodgrass, claimed that she only got a glance and was not sure if the robber had on a mask or not but, she was sure that the defendant was one of the two robbers. She had also identified the photographs numbered two and four from the array before the trial. The final employee, Cheryl Blevins, identified only photo number two from the array and was absolutely sure that the defendant was one of the men who robbed the Hardee's.

On the other hand, the defendant presented evidence which suggested he was not involved in the robbery of the Hardee's. The principal witness was Gerald Thomas who had already confessed to the crime. He claimed to have been high on cocaine on the night of the robbery. Although he did not remember committing the crime, he pleaded guilty because he had been identified by several of the witnesses. He was certain, though, that the defendant was not involved. They were apparently old friends and Mr. Thomas' testimony was that he had not seen the defendant since mid-1984. The defendant also took the stand denying his involvement in the robbery. On direct examination, he responded frankly to questions regarding his prior convictions for selling cocaine. He contradicted Mr. Thomas' testimony by saying he ran into Mr. Thomas once in August of 1991 and talked to him for about ten minutes. The defendant was unable to provide an alibi for the night of the robbery as, he testified, "it was just an ordinary day" for him.

I.

We first address the defendant's contention that double jeopardy prohibits his being convicted of both aggravated assault and aggravated robbery arising out of a single incident. The victim of the aggravated robbery was Ms. Blevins and the victims of the five counts of aggravated assault were the other three employees besides Ms. Blevins, as well as the two customers who were present at Hardee's during the incident. In upholding multiple armed robbery charges, this Court quoted dicta by the Tennessee Supreme Court that: "[d]ual or multiple convictions of robbery have been sustained where a defendant robs two or more persons, although the robberies took place as a single act, at the same time and in the same place." State v. Grooms, 653 S.W.2d 271, 276 (Tenn. Crim. App. 1983), (quoting State v. Henderson, 620 S.W.2d 484, 486 (Tenn. 1981)). In Grooms, there was a separate charge for each victim who was present at the pharmacy where the robbery occurred and who was robbed of his own property. In this case, the defendant's double jeopardy contention is "not tenable" because the multiple convictions are "legally justified." Moore v. State, 563 S.W.2d 215, 217 (Tenn.Crim.App. 1977). Ms. Blevins was the only victim from whose person property was taken by "putting (her) in fear" and by use or display of a deadly weapon-- elements of the aggravated robbery charge. Tenn. Code Ann. §§ 39-13-402(a)(1) and 401(a). The evidence further supports the finding that each of the other five persons present during the crime were made to "reasonably fear imminent bodily injury by use or display of a deadly weapon," which constitutes aggravated assault. Tenn. Code Ann. §§ 39-13-102(a)(1)(A) and 101(a)(2). Therefore, this issue has no merit.

II.

In the defendant's second issue, he asserts that the evidence at trial was insufficient to support his convictions. As usual, there was a conflict in the evidence presented by the prosecution and the defense at trial. Faced with several positive eyewitness identifications on the one hand and the allegedly

exonerating testimony of Mr. Thomas and the defendant on the other hand, the jury chose to accredit the state's witnesses and to adopt the state's theory of the case. We have no freedom to reweigh the evidence on appeal and can only test it for legal sufficiency. The principles which govern this court's review of a conviction by a jury are well established. This court must review the record to determine if the evidence adduced at trial was sufficient "to support the finding of the trier of fact of guilt beyond a reasonable doubt." Rule 13(e), Tenn. R. App. P. This rule is applicable to determinations of guilt predicated upon direct evidence, circumstantial evidence, or a combination thereof. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

A jury verdict of guilty, approved by the trial judge, accredits the testimony of the state's witnesses and resolves all conflicts in favor of the theory of the state. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Moreover, a verdict against the defendant removes the presumption of innocence and raises a presumption of guilt on appeal, State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973), which the appellant has the burden of overcoming. State v. Brown, 551 S.W.2d 329, 330 (Tenn. 1977).

In examining the sufficiency of the evidence, this court does not reevaluate the weight or credibility of the witnesses' testimony as these are matters entrusted exclusively to the jury as the triers of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Wright, 836 S.W.2d 130, 134 (Tenn. Crim. App. 1992). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). The relevant question on appeal is whether,

after viewing the evidence in the light most favorable to the State, any rational trier of fact could have determined that the essential elements of the crime were established beyond a reasonable doubt. Rule 13(e), Tenn. R. App. P.; Jackson v. Virginia, 443 U.S. 307, 314-324, 99 S. Ct. 2781, 2786-2792, 61 L. Ed. 2d 560 (1979). The evidence was clearly sufficient to support findings of guilt of burglary, aggravated robbery and aggravated assault beyond a reasonable doubt. This issue has no merit.

III.

The defendant's final issue relates to the trial court's failure to properly instruct the jury as to the evaluation of eyewitness testimony. The defendant argues that, despite the fact that his basic theory of defense was misidentification, the trial court failed to give even a basic instruction regarding eyewitness testimony and the evaluation thereof. In the charge, the trial judge included the following:

The burden is on the State to prove beyond a reasonable doubt that the Defendant was at the scene of the crime when it was committed. If you find from your consideration of all the evidence that the State has failed to prove beyond a reasonable doubt that the Defendant was at the scene of the crime when it was committed, you must find the Defendant not guilty.

However, this was the only instruction relating to the identification of the defendant. The state contends that this was an adequate statement of the law as it was very similar to the pattern jury instruction on identity.

In a recent opinion, the Tennessee Supreme Court modified the law in our state regarding jury instructions on the identification of criminal defendants finding the foregoing pattern jury instruction drawn from T.P.I.--Crim. § 42.05 to be inadequate where identity is a material issue. State v. Dyle, 899 S.W.2d 607, 612 (Tenn. 1995). "Identity will be a material issue when the defendant puts it at issue or the eyewitness testimony is uncorroborated by circumstantial evidence." Id., 899 S.W.2d at 612, fn. 4. For such cases, the court promulgated the following instruction:

One of the issues in this case is the identification of the defendant as the person who committed the crime. The state has the burden of proving identity beyond a reasonable doubt. Identification testimony is an expression of belief or impression by the witness, and its value may depend upon your consideration of several factors. Some of the factors which you may consider are:

- (1) The witness' capacity and opportunity to observe the offender. This includes, among other things, the length of time available for observation, the distance from which the witness observed, the lighting, and whether the person who committed the crime was a prior acquaintance of the witness;
- (2) The degree of certainty expressed by the witness regarding the identification and the circumstances under which it was made, including whether it is the product of the witness' own recollection;
- (3) The occasions, if any, on which the witness failed to make an identification of the defendant, or made an identification that was inconsistent with the identification at trial; and
- (4) The occasions, if any, on which the witness made an identification that was consistent with the identification at trial, and the circumstances surrounding such identifications.

Again, the state has the burden of proving every element of the crime charged, and this burden specifically includes the identity of the defendant as the person who committed the crime for which he or she is on trial. If after considering the identification testimony in light of all the proof you have a reasonable doubt that the defendant is the person who committed the crime, you must find the defendant not guilty.

Id. The court concluded that the failure to include this instruction when it has been requested by defendant's counsel and identification is a material issue is plain error. Id. However, if the defendant's counsel neglects to request such an instruction when identity is a material issue, the failure of the trial court to give the instruction is reviewable under a Rule 52(a), Tenn.R.Crim.P., harmless error standard. Id. The Dyle court held that its ruling was applicable to cases that are now on appeal such as the case we are herein reviewing. Id.

Initially, we note that this is a case in which identity is the material issue. By presenting the defense that he was not one of the two men at the Hardee's,

the defendant clearly put identity at issue. Since the defendant's counsel did not request a specific instruction concerning the identification testimony, we review it under the harmless error standard. The cited rule provides that "[n]o judgment of conviction shall be reversed on appeal except for errors which affirmatively appear to have affected the result of the trial on the merits." Rule 52(a), Tenn. R. Crim. P.

In this case, there were six persons at the scene of the crime. Though with varying degrees of certainty, all six of the eyewitnesses chose the defendant from the photographic lineup as one of the men who robbed the Hardee's and assaulted them. Furthermore, four eyewitnesses testified at trial that they recognized the defendant as having been one of the two criminals. We cannot dispute that this is a case where the more specific identification jury instruction would have clearly benefitted the jury in properly evaluating the identification testimony. However, with such heavily corroborated identification testimony, we cannot say that the instruction's absence affirmatively appears to have affected the result of this trial. It is highly unlikely-- almost unthinkable-- that a jury would have discounted the testimony of all the witnesses had there been greater specificity in the jury charge. The error was clearly harmless and this issue has no merit.

Finding no merit to any issue, the judgment is affirmed.

JERRY SCOTT, PRESIDING JUDGE

CONCUR:

DAVID H. WELLES, JUDGE

WALTER C. KURTZ, SPECIAL JUDGE