IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
MARCH SESSION, 1995

FILED

November 15, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 01C01-9408-CR-00266
Appellee	)	
	)	DAVIDSON COUNTY
vs.	)	
	)	Hon. **SETH NORMAN**, Judge
CYRUS DEVILLE WILSON,	)	
	)	(First Degree Murder)
Appellant	)	

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Cyrus D. Wilson, appeals from a conviction for first-degree murder entered by the Criminal Court for Davidson County. The appellant raises three issues for our review. First, the appellant argues that the state's failure to disclose certain statements made by the appellant to Officer Wright, Frederick Davis, and Rodriguez Lee constitutes prosecutorial misconduct. Second, the appellant contends that the trial court improperly allowed a material witness to testify during the state's rebuttal. Third, the appellant asserts that the trial court erred in allowing witnesses to testify whose names were allegedly not disclosed to the defense prior to trial nor listed on the indictment.

After reviewing the record, we affirm the appellant's conviction.

I. Factual Background

On September 15, 1992, Metro Davidson police officers found the body of Christopher Luckett partly lodged underneath a chain link fence in East Nashville. The victim had sustained a fatal gunshot wound to the head. The officers also found empty shotgun shells, shotgun "wadding," and a blue duffel bag at the crime scene. On February 2, 1993, the Davidson County Grand Jury indicted the appellant for the victim's murder. The case proceeded to trial on January 31, 1994.

At trial, the state first called Chiquita Lee, the victim's sister, in order to establish the victim's age and health. Ms. Lee testified that the victim was nineteen years old at the time of his murder and that he had a deformity in his right arm that prevented its full use. Defense counsel objected on the ground

that the state had not given prior notice of their intent to call Ms. Lee as a witness. The trial court overruled the objection.

The state next presented evidence to establish a motive for the murder. Officer Phillip Wright testified that during routine patrol on or about July 20, 1992, he was stopped by the appellant who reported that the victim, Luckett, had stolen his car. Officer Wright further testified that, when asked if he wanted to swear out a warrant against the victim, the appellant replied "not right now." Defense counsel objected to this testimony on the ground that the appellant's statement to Officer Wright had not been disclosed prior to trial. Again, the trial court overruled the objection.

Next, the state called two eyewitnesses to the murder. The first, Rodriguez Lee, testified that the appellant had a twelve-gauge shotgun which came from Mr. Lee's house. Lee added that he saw the appellant remove the gun from a blue duffel bag. Lee stated that he saw the appellant chasing the victim on the night of the murder. He further testified that the victim got stuck underneath a patio fence. Lee then stated that he heard the victim plead "[p]lease don't kill me." According to Lee, the appellant paid no heed to the victim's pleas for mercy. Instead, he fired point-blank into the victim's face. Marquis Harris, another witness for the prosecution, also testified that he saw the appellant shoot the victim in the face.

Other witnesses corroborated this testimony. Steve Crawley testified that he saw the appellant three weeks prior to the murder carrying a shotgun. Crawley also testified that he witnessed the appellant on the night of the murder "acting shaky and nervous." Another witness, Frederick Davis, testified that he overheard the appellant state that "he was going to get" the victim for stealing the appellant's car.

The appellant testified as a witness on his own behalf. The appellant denied any involvement in the murder, contending that he was at home with his girlfriend at the time of the shooting. The appellant did admit that, after the victim stole his car, he threatened to "get" the victim. On cross-examination, the state asked the appellant if, on the night of the shooting, he was in possession of a shotgun. The appellant responded that he was not. The state then inquired if all the other witnesses who testified that the appellant did have a shotgun around the time of the shooting were "lying." The appellant responded affirmatively.

At the close of the defense's case in chief, the state called Detective Bill Pridemore as a rebuttal witness. Prior to trial, Pridemore had made a summary of statements given to him by Rodriguez Lee during questioning. The statements corroborated Lee's trial testimony. On direct examination, the state asked Pridemore to recount his summary of these statements. Defense counsel objected on the ground that Pridemore was a material witness, and thus, should not be permitted to testify as a rebuttal witness. The state argued that the appellant had "opened the door" when he testified on cross-examination that anyone who said he possessed a shotgun on the night of the murder was "lying." The trial judge overruled defense counsel's objection.

At the close of the evidence, the jury found the appellant guilty of first degree murder. As a result of the conviction, the trial court imposed a life sentence. The appellant now seeks our review of his conviction.

II. Non-Disclosure of Appellant's Statement

The appellant claims that his conviction should be reversed as the state failed to disclose statements that the appellant made to Officer Phillip Wright,

Frederick Davis, and Rodriguez Lee. We disagree.

The state has a constitutional duty to disclose any and all exculpatory evidence to the defense.[1] See Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97 (1963). In the case now before us, the appellant's statements are not exculpatory, but rather, inculpatory. The statements reflect the appellant's anger and ill intent toward the victim, Christopher Luckett, for allegedly stealing the appellant's automobile. Therefore, since the statements are not exculpatory, the state's disclosure of these statements is governed by Tenn. R. Crim. P. 16(a)(1)(A). This rule states, in pertinent part, that:

> [u]pon request of a defendant the state shall permit the defendant to inspect . . . the substance of any oral statement which the state intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person known to the defendant to be a law enforcement officer . . .

Tenn. R. Crim. P. 16(a)(1)(A)(emphasis added).

Under this rule, the appellant is required to make a request that the oral statements be disclosed. Defense counsel stated that there had been a previous hearing on the matter and that a motion in limine had been filed but had been overruled by the trial court. However, the appellant has not presented any proof to show that such a request exists.[2] Accordingly, this court is not bound to consider this issue as the record is incomplete.[3] See State v. Matthews, 805

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[1]Exculpatory evidence is evidence which is favorable to the defendant and is material either to guilt or to punishment and tends to prove the defendant's innocence. United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380 (1985).

[2]Tenn. R. App. P. 24(b) requires that the appellant prepare a transcript of as much of the evidence and proceedings necessary to convey a fair, accurate, and complete account of what transpired with respect to those issues that are the basis of the appeal.

[3]It is likewise necessary to note that appellant's first argument is technically waived as appellant's brief fails to comply with Tenn. R. App. P. 27(a)(4), -(a)(7), and -(g). (failure to correctly state issue, failure to brief issue, failure to make reference to the record). Accord Tenn. R. Crim. P. 10 (b).

S.W.2d 776, 784 (Tenn. Crim. App. 1990). However, we elect to address this issue on its merits.

In order for disclosure to be triggered, the defendant's statement must be made to a person known to be a law enforcement officer and must be made in response to interrogation. Because Officer Wright is the only person who was known to appellant to be a police officer at the time of the appellant's statement, the statements to Frederick Davis and Rodriguez Lee are not affected by Rule 16(a)(1)(A). Moreover, Tenn. R. Crim. P. 16(a)(2) expressly provides that the statements of state witnesses are not subject to disclosure through pretrial discovery. See also State v. Turner, 675 S.W.2d 199 (Tenn. Crim. App. 1984) (holding that failure to give defense counsel the oral statement made by defendant to non-law enforcement officials did not violate discovery rule). The only remaining question is whether the appellant's statements to Officer Wright were made "in response to interrogation."

"Interrogation" occurs whenever a person in custody (or otherwise deprived of his freedom of action) is subjected to either express questioning or its functional equivalent by law enforcement officials. Rhode Island v. Innis, 446 U.S. 291, 300-02, 100 S.Ct. 1682, 1689-90 (1980). A review of the statements at issue reveals that they were not made in response to interrogation. The record indicates that the appellant made the statements prior to the murder, when he "flagged down" Officer Wright to report the theft of his vehicle. If the defendant initiates the contact and makes a spontaneous statement, no "interrogation" occurs. State v. Taylor, No. 89-93-III (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1990). A volunteered oral statement made outside the context of interrogation is not subject to discovery by the defendant. Taylor, No. 89-93-III (citing State v. Balthrop, 752 S.W.2d 104, 108 (Tenn. Crim. App. 1988)). Thus, the state was under no duty to disclose the

appellant's oral statements to Officer Wright and the trial court properly admitted the testimony.

III. Rebuttal Evidence of the State

The appellant next contends that the trial court erred in allowing Detective Pridemore to testify as a rebuttal witness. The state offered the testimony of Pridemore to rebut the appellant's testimony during cross-examination. The appellant impeached the testimony of the state's eyewitness, Rodriguez Lee, by stating that anyone who said that the appellant had a shotgun in his possession on the night of the murder was "lying." Lee had testified on direct that he saw the appellant pursue and shoot Luckett with a sawed-off shotgun. On rebuttal, Pridemore read from a written summary of Lee's taped statement to the police, in which Lee claimed that the appellant stole the sawed-off shotgun from Lee and then used the shotgun to murder Luckett. The evidence offered in rebuttal sought to rehabilitate the credibility of Lee after the appellant's attack.

Before we can decide whether the trial court properly allowed Detective Pridemore to testify as a rebuttal witness, we must determine whether Pridemore's testimony was otherwise admissible pursuant to the Tennessee Rules of Evidence. In essence, the state used a prior consistent hearsay statement of Lee in order to corroborate Lee's testimony at trial. The Federal Rules of Evidence explicitly provide that a prior consistent statement by a witness "offered to rebut an express or implied charge of recent fabrication or improper influence or motive" is not hearsay and is admissible in evidence. Fed. R. Evid. 801(d)(1)(B). The Tennessee Rules of Evidence do not specifically address the use of prior consistent statements.[4] Nevertheless, this court has

[4]The Tennessee Rules of Evidence do address the admissibility of prior *in*consistent statements. See Tenn. R. Evid. 613.

held that, as under the federal rule, prior consistent statements *are* admissible to rehabilitate a witness when insinuations of recent fabrication have been made, or when deliberate falsehood has been implied. State v. Jones, No. 03C01-9301-CR-00024 (Tenn. Crim. App. at Knoxville, Sept. 15, 1994). Unlike the federal rule, however, Tennessee law provides that prior consistent statements are not substantive evidence and are only relevant to rehabilitate the credibility of the witness under attack. Id.

Clearly, the state could have proffered Detective Pridemore's testimony during its case in chief. The record reveals that Lee was vigorously cross-examined on his account of events on the night of the murder and his prior *in*consistent statements given to the police. Among other questions, defense counsel asked Lee about the murder weapon and his prior statement to the police that he did not see the sawed-off shotgun on the night of the murder. Defense counsel, thereby, implied recent fabrication and "opened the door" to the introduction of any prior consistent statements.

The issue, then, is whether Pridemore's testimony was properly introduced in rebuttal rather than during the state's case in chief. Rebuttal testimony is that which tends to explain or controvert evidence produced by an adverse party. Cozzolino v. State, 584 S.W.2d 765, 768 (Tenn.), reh'g denied, (1979). Generally, any evidence offered in direct response to or in contradiction of material evidence offered by the accused or elicited on cross-examination is admissible in rebuttal. State v. Smith, 735 S.W.2d 831, 835 (Tenn. Crim. App. 1987); State v. Smith, No. 88-264-III (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1989); see also 23A C.J.S. *Criminal Law* § 1219 (1989). The rationale behind rebuttal evidence is "[s]ince the state does not and cannot know what evidence the defense will use until it is presented at trial, the state is given the right of rebuttal." State v. Williams, 445 So.2d 1171, 1181 (La. 1984).

Like any other evidence, rebuttal evidence must be relevant and material to the facts at issue in the case. State v. Lunati, 665 S.W.2d 739, 768 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1983), cert. denied, 466 U.S. 938, 104 S.Ct. 1913 (1984). Generally, the determination of the admissibility of rebuttal evidence lies in the discretion of the trial court. Id. This court will not interfere with the exercise of this discretion unless there has been clear abuse of discretion appearing on the face of the record. State v. Scott, 735 S.W.2d 825, 828 (Tenn. Crim. App. 1987).

Indeed, we have observed that it is within the discretion of the trial court to permit the state, in a criminal case, to introduce in rebuttal even testimony which *should* have been introduced in chief. Johnson v. State, 469 S.W.2d 529, 530 (Tenn. Crim. App. 1971). Clearly, in the instant case, the better practice would have been to introduce Detective Pridemore's testimony during the state's case in chief, when the issue of Lee's credibility was first raised by defense counsel. On redirect, the state effectively rehabilitated their witness. Although Lee conceded that he had given a prior inconsistent statement to the police, he explained that he told the inconsistent story because he was afraid of the appellant. He "thought that [the appellant] was going to do [him] the same way." Lee further testified that he then gave the police an accurate account of the murder, including the facts that the appellant had stolen the murder weapon from Lee and that Lee saw the appellant use the shotgun on the night in question. Thus, Pridemore's testimony was more a continuation of the state's proof in chief than a rebuttal in any sense. Nevertheless, because of the broad discretion granted the trial court in admitting or excluding rebuttal evidence, even when somewhat cumulative, we conclude that there was no error .[5] See 23A C.J.S.

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[5]As previously stated, the testimony of Detective Pridemore was admissible solely for the purpose of rehabilitating the credibility of Lee. Jones, No. 03C01-9301-CR-00024. While this issue was not raised by the appellant, we note that the record does not indicate that the trial court gave a contemporaneous limiting instruction that Pridemore's testimony could be

Criminal Law § 1219(a) (1989).

IV. Failure to Name Witnesses in Indictment

In his final issue, the appellant contends that the trial court should have precluded Chiquita Lee and Frederick Davis from testifying due to the state's failure to give notice of their testimony. Tenn. Code Ann. § 40-17-106 (1990) places a duty on the state to list on the indictment the names of all witnesses it intends to present at trial. The purpose of this section is to limit the possibility of surprise and to provide the defendant a basis upon which to prepare a theory of defense against his accusers. State v. Street, 768 S.W.2d 703, 710-711 (Tenn Crim. App. 1988). However, the courts in this state have consistently held that section 40-17-106 is merely directory, rather than mandatory.[6] See, e.g., State v. Harris, 839 S.W.2d 54, 69 (Tenn.), reh'g denied, (1992); Street, 768 S.W.2d at 710-711; State v. Morris, 750 S.W.2d 746, 749 (Tenn. Crim. App. 1987), perm. to appeal denied, (Tenn. 1988). Therefore, a witness is not disqualified from testifying by the absence of his name on the indictment. Harris, 839 S.W.2d at 69; accord Street, 768 S.W.2d at 710-711; Morris, 750 S.W.2d at 749. Nor does this failure entitle the defendant to relief unless prejudice, bad faith, or undue advantage can be shown. Harris, 839 S.W.2d at 69; State v. Baker, 751 S.W.2d 154, 164 (Tenn. Crim. App. 1987); Morris, 750 S.W.2d at

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considered only on the issue of credibility, and not as substantive evidence of the truth of the matters asserted in Lee's statement to the police. See Tenn. R. Evid. 105.

The trial court's error was harmless beyond a reasonable doubt. The state presented overwhelming evidence of the appellant's guilt. Two eyewitnesses observed the appellant shoot the victim at point-blank range. Several other witnesses testified that they overheard the appellant say that he would "get" the victim for stealing his car. The appellant himself admitted that he was angry at the victim because of the theft. Therefore, the admission of Pridemore's testimony in rebuttal, absent a limiting instruction, did not affect the outcome of the trial, and we deem any error to be harmless in accordance with Tenn. R. Crim. P. 52(a).

[6]Rule 16, Tenn. R. Crim. P., likewise, does not require nor authorize pre-trial discovery of the names and addresses of the state's witnesses.

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In the case before us, the record is completely void of evidence to suggest the presence of prejudice, bad faith, or undue advantage. At trial, the prosecutor stated that she had informed defense counsel three weeks prior to trial about calling Chiquita Lee and about the substance of her testimony. As to Frederick Davis, the prosecutor stated that she did not know Mr. Davis' name until a few days prior to trial. As soon as she learned of Mr. Davis' identity, she notified defense counsel of the state's intent to call this witness. Moreover, the record reflects that defense counsel was given every opportunity to investigate and interview Mr. Davis prior to his testimony at trial. We find that the appellant was not prejudiced by the state's failure to name these witnesses on the indictment, nor did the state act in bad faith. Accordingly, this issue is without merit.

V. Conclusion

After a review of the record, we conclude that the appellant's issues are without merit. For the reasons mentioned above, we affirm the appellant's conviction for first degree murder.

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DAVID G. HAYES, Judge

CONCUR:

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JERRY SCOTT, Presiding Judge

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JOSEPH M. TIPTON, Judge