IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1996 SESSION

FILED

August 22, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01C01-9511-CR-00363**
Appellee,	)	
	)	**SUMNER COUNTY**
VS.	)	
	)	**HON. JANE W. WHEATCRAFT,**
DAVID HUMPHREYS,	)	**JUDGE**
	)	
Appellant.	)	(Sale of cocaine)

FOR THE APPELLANT:

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(On Appeal)

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted for selling cocaine. He was convicted by a jury, and was subsequently sentenced as a Range II multiple offender to ten years in the Tennessee Department of Correction. A five thousand dollar ($5,000) fine was also assessed.

The defendant now appeals as of right, raising the following issues:

1. The evidence was insufficient to support his conviction;

2. He was improperly classified as a Range II multiple offender;

3. The State engaged in prosecutorial misconduct so severe as to entitle him to a new trial;

4. He received ineffective assistance at trial;

5. The trial court erred when it allowed into evidence an audio tape made of the defendant's meeting with the confidential informant, and a transcript thereof;

6. The trial court erred when it denied the defendant's motion for a mistrial following the confidential informant's two statements that she had purchased cocaine from the defendant in the past;

7. The trial court erred when it did not permit the defendant to pass to the jury copies of the judgment forms of the confidential informant's prior convictions;

8. The trial court was biased in favor of the prosecution;

9. The trial court erred when it denied his motion that the State produce arrest histories and prior convictions of its witnesses;

10. The trial court erred when it commented about defense tactics and admonished defense counsel for his objections; and

11. His constitutional rights were violated because the jury pool contained no blacks and the jury venire was not from the community in which the offense occurred.

After a careful review of the record, we find no error and affirm the judgment below.

Detective Don Linzy testified that he had arranged with a confidential informant, Lee Templeton, to purchase twenty dollars ($20) worth of cocaine from the defendant. Incident to this arrangement, Detective Linzy and Sandra Vance met with Templeton on July 1, 1993, at her residence. Vance searched Templeton, not including a body cavity search, and wired her with a transmitting device under her clothes. Linzy and Templeton then drove in an unmarked car to the defendant's house; Detective Linzy parked on the street. While they were in the car, the detective gave Templeton a twenty dollar ($20) bill and wrote down the serial number of that bill. He watched Templeton go up to the defendant's house, knock and then go into the house. After approximately thirty seconds, Templeton left the house and returned to the car where she gave the detective a "small plastic bag containing a white powder." This substance was later determined to be cocaine. Linzy listened to Templeton's meeting with the defendant via the transmitter and recorded what was said onto an audio tape. This audio tape was admitted into evidence and played for the jury. A transcript of the tape, prepared by Detective Linzy and Templeton, was also provided to the jury.

After the buy, Detective Linzy obtained a search warrant for the defendant's residence, which was executed approximately six hours after the drug purchase occurred. During the search, the police found one thousand seven hundred seventy-six dollars ($1,776) in cash under some clothes in a laundry basket in one of the bedrooms. The cash consisted of ten and twenty dollar bills, and included the twenty dollar bill that Templeton had used to make the cocaine purchase. The police also found in the bedroom some rolling papers and some alum. Detective Linzy testified that alum is a food preservative which could be used for cutting cocaine. A Western Union money transfer receipt indicating a transfer of one thousand two hundred dollars ($1,200) was also found. The detective testified that the defendant had told him that the receipt was for "money sent to his man that day." The police found no cocaine in the house.

Templeton testified that, after the defendant had let her into his house, they conversed for a brief time, she showed him the twenty-dollar bill and he gave her twenty dollars worth of cocaine. She testified that he had taken the cocaine out of a prescription bottle that contained little bags of cocaine. She admitted that she was currently on parole and community corrections, and that she had prior felony convictions for forgery, burglary and possession of marijuana while in jail.

The defendant put on no proof.

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

The defendant was charged with the sale of cocaine in violation of T.C.A. § 39-17-417 which provides, in pertinent part, that “[i]t is an offense for a defendant to

knowingly: . . . Sell a controlled substance[.]" Cocaine is a controlled substance. T.C.A. §39-17-408(b)(4). The proof adduced in this case was more than sufficient to convict the defendant of the crime charged. This issue is without merit.

The defendant next contends that the trial court erred when it classified him as a Range II multiple offender. "A 'multiple offender' is a defendant who has received: (1) A minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes[.]" T.C.A. § 40-35-106(a)(1). In this case, the defendant was convicted of a class C felony. Prior to trial, the State filed a "notice of intent to seek enhanced punishment" which listed two prior convictions: possession of cocaine for resale, and receiving and concealing stolen property under two hundred dollars ($200). These are class C and E felonies, respectively. T.C.A. § 40-35-118. These convictions were also included in the presentence report admitted into evidence at the sentencing hearing. Furthermore, the State requested to add to the record certified copies of these convictions, to which the defendant did not object, and the trial court granted the State's request. There was sufficient evidence for the trial court to have found beyond a reasonable doubt that the defendant was a multiple offender, and the defendant was therefore properly sentenced within Range II. T.C.A. § 40-35-106(c). This issue is without merit.

In his third issue, the defendant complains about prosecutorial misconduct. Specifically, he complains that the State did not properly inform him about its agreement with Templeton in exchange for her testimony; failed to produce statements by witness Sandra Vance; limited his lawyer's contact with witnesses; elicited testimony from Templeton about her prior cocaine purchases from the defendant; and made improper closing arguments. We first note that the defendant's motion for new trial does not contain any allegations with respect to any failure by the State to produce Vance's

statements or limiting his lawyer's contact with witnesses before trial. These allegations of error are therefore waived. T.R.A.P. 3(e).

Prior to trial, the defendant filed a motion "to require the State to reveal agreements between the State and prosecution witness(es)." The trial court granted this motion. On the day of trial, the prosecuting attorney informed defense counsel that the confidential informant had approached Detective Linzy in hopes that she would be granted some "consideration" on some pending charges if she cooperated in undercover work. According to the district attorney, "[s]he was told she would ultimately get consideration for her cooperation." However, because the confidential informant was subsequently rearrested, no consideration was ever given by the State. The trial court established that "[n]othing specific was ever offered or given because of her new [arrests.]" The defendant now complains that he should have been given this information earlier. However, during trial, defense counsel ably cross-examined both Detective Linzy and Templeton about this issue.

While we acknowledge that a criminal defendant is entitled to information that a prosecution witness has been offered concessions in exchange for his or her testimony, see, e.g., Hartman v. State, 896 S.W.2d 94, 101 (Tenn. 1995), there is no requirement that this information be disclosed at any particular time prior to trial. Moreover, even if the prosecution erred by not revealing this information earlier, we fail to see how this "error" harmed the defendant. The relevant witnesses were thoroughly cross-examined on this issue and the jury clearly had sufficient evidence before it to determine that Templeton had some personal interest in participating in the buy and/or testifying at trial. Obviously, it concluded that her interest did not overcome the evidence of the defendant's guilt. This issue is without merit.

The defendant also contends that the State erred when it elicited testimony from Templeton about her previous cocaine purchases from the defendant. At trial, Templeton testified that she had not asked the defendant for the cocaine while she was in his house; rather, she simply showed him the twenty dollar bill while they "chitchat[ed]." The State then asked, "How did he know you wanted to buy cocaine if you didn't ask?" Templeton responded, "I had bought cocaine for about a year from him before this." The defendant fails to cite us to any authority which indicates that this question constituted prosecutorial misconduct. Even if it was error, the trial court gave a curative instruction (see discussion below) which we presume the jury followed. State v. Blackmon, 701 S.W.2d 228, 233 (Tenn. Crim. App. 1985). Therefore, any error was harmless. This issue is without merit.

The defendant additionally complains about the State's closing argument. Specifically, he points to the State's alleged remarks that "facts may be inferred from silence,"[1] that the defendant "destroyed Lee Templeton's life," and that the defendant's child "wasn't screaming [during the search] because of the actions of the police officers [in conducting the search], he was screaming because that man (indicating appellant) sold dope in his house." No objections were raised to these remarks at trial. Accordingly, this issue is waived. State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993).

The defendant also complains that the trial court erred when it denied his motion for mistrial based on Templeton's two statements that she had previously purchased cocaine from the defendant. The first such statement is set forth above, and defense counsel objected upon hearing it. The trial court overruled this objection.

[1] In point of fact, this is not what the State said during argument. The State's actual argument included the following: "Why are there no words on the buy tapes? I submit to you because that simply indicates design. And that silence spoke volumes. She hands the man a twenty-dollar bill -- if this is not design, if this is not a predisposition, I don't know what is -- she hands him a twenty-dollar bill and he knows exactly what she wants. No words. No words necessary." We caution the defendant's lawyer not to misquote the record.

Subsequently, during cross-examination, defense counsel inquired as to Templeton's forgery convictions. Specifically, defense counsel asked, "You forged one of your own mother's checks?" Templeton responded, "Yes, for cocaine that I bought from Mr. Humphrey." Defense counsel made no motion to strike this response. However, at the close of the State's proof, he did ask for a mistrial on the grounds of this testimony. The trial court denied the mistrial, but gave a curative instruction to the jury during her charge. That instruction was:

> The Defendant, David Humphreys, is only standing trial for the alleged sale of cocaine as the State asserts occurred on July the 1st, 1993.
>
> Yesterday during the State's proof one of the State's witnesses, Ms. Templeton, made a reference to a prior bad act which the defendant may or may not have committed. I'm instructing you, as members of the jury, that in weighing the evidence any such fact about Mr. Humphreys prior to July 1st, 1993 is irrelevant and should not be considered by you when determining whether the State can overcome the presumption of innocence and, in fact, prove the guilt of the defendant beyond a reasonable doubt."

The trial court's ruling on a motion for mistrial will not be reversed on appeal absent an abuse of discretion. See State v. Smith, 871 S.W.2d 667, 672 (Tenn. 1994) ("the determination of whether to grant a mistrial and allow a retrial rests within the sound discretion of the trial court.") Here, the trial court determined that a mistrial was not necessary and that any error could be rectified through a curative instruction. This was not an abuse of discretion. This issue is without merit.

The defendant next complains that the trial court erred when it did not allow the judgment forms relative to Templeton's prior convictions to be passed to the jury. The defendant's lawyer ably cross-examined Templeton on her criminal history and she freely admitted to all of her prior convictions. The trial court ruled that passing the judgment forms to the jury was unnecessary and might cause confusion. We see no abuse of discretion by the trial court in making this ruling. This issue is without merit.

The defendant also complains that the trial court was biased in favor of the prosecution. This allegation was not raised in the defendant's motion for new trial and is therefore waived. T.R.A.P. 3(e). Moreover, a review of the record reveals no such bias. This issue is without merit.

The defendant next complains that he received ineffective assistance of counsel at trial. Specifically, he contends that counsel failed to investigate the case adequately, opened the door to irrelevant but prejudicial evidence during opening statement, and failed to interview witnesses prior to trial.

In reviewing the petitioner's Sixth Amendment claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To prevail on a claim of ineffective counsel, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness" and that this performance prejudiced the defense. There must be a reasonable probability that but for counsel's error the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 692, 694 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985).

At the hearing on the defendant's motion for new trial, the trial court stated, "I thought [the defendant's trial counsel] did an excellent job. Frankly, he raised every issue known to man. If I would rule against him, he would raise it again and again. And I really feel that, even though it was his first [jury] trial, that he worked very hard on the case. I think that he interviewed witnesses beforehand. He was very well prepared, and I really felt that he had done an excellent job. . . . I thought [the defendant] was very well represented." The findings of a trial judge on factual issues have the weight of a jury

verdict, and these findings will not be set aside unless the evidence preponderates against them. State v. Tate, 615 S.W.2d 161, 162 (Tenn. Crim. App. 1981). The evidence does not do so here. Moreover, even assuming, arguendo, that the defendant's trial counsel's performance fell below the standard imposed, the defendant has failed utterly to demonstrate that he was prejudiced by his lawyer's performance. This issue is without merit.

In his next issue, the defendant challenges the trial court's ruling allowing into evidence the audio tape made of Templeton's meeting with the defendant during which the cocaine sale occurred, and the transcript thereof. The defendant merely concludes that this evidence was prejudicial and cites no specifics or authority. This Court will not disturb a trial court's ruling on the probative value of evidence absent an abuse of discretion. State v. Hayes, 899 S.W.2d 175, 183 (Tenn. Crim. App. 1995). No such abuse is present here. This issue is without merit.

The defendant's next contention is that the trial court erred when it denied his pretrial motion to require the State to produce criminal histories on all of its witnesses. In point of fact, the State provided the defendant with the criminal history of Templeton. The trial court found that the State's remaining witnesses were "part of law enforcement." Accordingly, the court declined to order a search be done on those witnesses. The defendant cites us to no authority holding that the trial court's ruling was in error. Nor does the defendant offer any argument about how this ruling prejudiced him. Therefore, any alleged error was harmless. This issue is without merit.

The defendant next complains that the trial court erred when it "commented about defense tactics" and "admonish[ed]" defense counsel for his objections. These allegations were not raised in the defendant's motion for new trial and are therefore

waived. T.R.A.P. 3(e). Moreover, the record does not support the defendant's allegations that the trial court erred in these respects. This issue is without merit.

Finally, the defendant contends that his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution were violated because the jury pool contained no blacks and the jury venire was not from the community in which the offense occurred. The defendant cites to nothing in the record that supports the latter of these two allegations. This issue is therefore waived. T.R.A.P. 27(a)(6) and (7); Tenn.Ct.Crim.App.R. 10(b); State v. Killebrew, 760 S.W.2d 228, 231-32 (Tenn. Crim. App. 1988). As to the former allegation, the trial court stated during the hearing on the defendant's motion for new trial that "there was no systematic exclusion of any juror who was black, nor has there ever been in Sumner County. . . .[T]here are plenty of jury pools where we have black jurors. It just so happened on that particular panel we did not."

In State v. Evans, our Supreme Court found that

> In order to establish, in the context of jury selection, a prima facie case of purposeful discrimination under the Fourteenth Amendment, the Defendant must show that (1) he is a member of an excluded, recognizably distinct class; (2) the class to which the Defendant belongs has been underrepresented on venires for a significant period of time; and (3) the selection procedure is susceptible to abuse. To establish that the venire violates the Sixth Amendment's right to a jury representing a fair cross-section of the community, a defendant must establish that (1) the excluded group is a 'distinctive group' in the community; (2) representation of the group in the jury pool is not fair and reasonable in relation to the number of group members in the community; and (3) underrepresentation of the group is due to systematic exclusion in the jury selection process.

838 S.W.2d 185, 193 (Tenn. 1992) (citations omitted). The defendant here, like the defendant in Evans, has failed to establish a prima facie case of purposeful discrimination under either the Fourteenth or Sixth Amendments. This issue is without merit.

For the reasons set forth above, the judgment below is affirmed.

_____
JOHN H. PEAY, Judge

CONCUR:

_____
DAVID G. HAYES, Judge

_____
WILLIAM M. BARKER, Judge