

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL SESSION, 1996

**FILED**  
June 27, 1996  
Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE, )

Appellee, )

VS. )

JOSHUA MCCRAY, )

Appellant. )

C.C.A. NO. 03C01-9503-CR-00078

JEFFERSON COUNTY

HON. REX HENRY OGLE  
JUDGE

(Aggravated Robbery)

ON APPEAL FROM THE JUDGMENT OF THE  
CIRCUIT COURT OF JEFFERSON COUNTY

FOR THE APPELLANT:

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FOR THE APPELLEE:

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District Attorney General

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Sevierville, TN 37862

OPINION FILED \_\_\_\_\_

AFFIRMED

DAVID H. WELLES, JUDGE

# OPINION

This is a direct appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Defendant was convicted by a jury of aggravated robbery. He appeals his conviction. We affirm the judgment of the trial court.

In January of 1993, a Burger King in Jefferson City was robbed. Two men entered the restaurant, ordered cheeseburgers, and asked for applications. One of the men jumped the counter and put a pistol to the manager's throat. The second man held the customers at bay while the manager and the first man went to the safe. Several hundred dollars was taken in the robbery. The manager noticed a third man reaching his hand through the drive-through window and shaking the drawer. Witnesses identified the Defendant as the robber who held the gun to the manager.

The Defendant argues three issues: (1) That the trial court erred in granting the state a continuance because of the absence of a witness; (2) that the trial court erred in failing to suppress the Defendant's statement to a detective; and (3) that the Defendant was denied his right to a fair trial and due process in that the State was guilty of prosecutorial misconduct because the Defendant was not provided with certain discoverable and exculpatory information (photograph albums shown to eyewitnesses).

I.

The Defendant first argues that the trial court erred in granting the State a continuance because a State witness was absent. The prosecutor asked for the continuance and stated that the witness was indispensable and would not give any cumulative testimony. He asked for a bench warrant for the witness's arrest to ensure her presence. The trial court granted the continuance and set the new date for two days later.

The granting or denial of a continuance is a matter left to the discretion of the trial judge, whose decision will not be disturbed absent "a clear showing of gross abuse of this discretion to the prejudice of the defendant." Baxter v. State, 503 S.W.2d 226, 230 (Tenn. Crim. App. 1973). This court has previously stated that "[t]he only test is whether the defendant has been deprived of his rights and an injustice done." State v. Goodman, 643 S.W.2d 375, 378 (Tenn. Crim. App. 1982).

The Defendant does not argue how he was deprived of his rights by the granting of the continuance. We do not find any evidence of undue or unfair prejudice to the Defendant. Therefore, we cannot conclude that the trial judge abused his discretion in granting the continuance.

This issue is without merit.

## II.

The Defendant's second argument is that the trial court erred in failing to suppress the Defendant's statement made to a detective. At the hearing on the Motion to Suppress, the detective testified that he gave the Defendant his Miranda warnings and then took the Defendant's statement. The Defendant then signed a Miranda rights waiver before the detective wrote out the Defendant's statement.

The Assistant Public Defender, who represented the Defendant at his Preliminary Hearing, also testified at the suppression hearing. She testified that she interviewed the detective before the Preliminary Hearing. After she reviewed her notes from the interview, she testified that the detective told her that he took the Defendant's statement and then advised the Defendant of his Miranda rights. On cross-examination, she testified that she could not remember the conversation without her notes.

At the end of the suppression hearing the trial judge found that the Defendant's statement had been made after he had been advised of his Miranda rights. When a trial court makes a finding of fact after a hearing on the merits, the factual findings are binding on the appellate court unless there is evidence which preponderates against the trial court's finding. State v. Aucoin, 756 S.W.2d 705, 710 (Tenn. Crim. App. 1988); State v. Johnson, 717 S.W.2d 298, 304-05 (Tenn. Crim. App. 1986). The evidence in the record does not preponderate against the trial court's findings. The Assistant Public Defender's testimony was based not on her memory, but on her notes. These notes were

discussed in great detail at the hearing and appear to be quite cryptic. She stated in her testimony that “in looking at [the notes] it’s clear to me what the, I guess, the bare bones of our conversation was.” She was unable to testify to the specifics of the interview, such as when and where it occurred. We do not find evidence which preponderates against the trial court’s findings.

The detective told the Defendant what he was accused of and the date that the incident occurred. The Defendant’s statement was that he was in Georgia on the date in question and gave the detective a woman’s name with whom he said he had been. Even if it was error to fail to suppress the Defendant’s statement, it was harmless. This statement is not incriminating. There were several eyewitnesses who testified as to the perpetrator’s identity. We cannot conclude that the exclusion of this statement would have changed the outcome of the trial. Therefore, any error was harmless. T.R.A.P. 36(b); Tenn. R. Crim. P. 52(a).

### III.

The Defendant’s third argument is that he was denied his constitutional rights to a fair trial and due process in that the State was guilty of prosecutorial misconduct because the State failed to provide the Defendant with certain discoverable and exculpatory information, which consisted of photograph albums shown to the eyewitnesses to the crime. The Defendant argues that he was not informed that witnesses at the crime scene were shown a mug book on the night of the crime. He argues that one of the witnesses stated in her testimony that she picked out someone from the book at that time. The Defendant’s photograph was not in the book. He argues that the identification from the book is

exculpatory information that should have been provided to him. The officer who took the book to the crime scene testified that the witness did not inform him of any identifications from the book.

In Brady v. Maryland, the United States Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.” Brady, 373 U.S. at 87. The Court later stated in United States v. Agurs, 427 U.S. 97 (1976), that if the evidence that was not supplied to the defense would not deprive the defendant of a fair trial, then there is no constitutional violation. Id. at 108. The Court then held that “evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” United States v. Bagley, 473 U.S. 667, 682.

In the case sub judice, there is no evidence that the prosecution knew that the witness had made an identification at the restaurant. The detective testified that the witness did not inform him of an identification. If the State did not know about the identification then it did not suppress such information in violation of Brady. We also conclude there was no prosecutorial misconduct for the same reason. We also point out that at trial the witness testified about the identification from the book and the defense was able to cross-examine her concerning the identification. The defendant also recalled the witness as his own. We cannot conclude that disclosure of the exculpatory identification would have changed the

outcome of the trial because the information was in fact placed in evidence at the trial. Therefore, there was no Brady error and no prosecutorial misconduct because the State did not know of the evidence, and there further was no reversible error because the information came into evidence at trial. This issue is without merit.

We affirm the judgment 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 M. BARKER, JUDGE