IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MAY 1996 SESSION

STATE OF TENNESSEE,	)
	) C.C.A. No. 02C01-9601-CC-00008
Appellee,	)
	) Dyer County
V.	)
	) Hon. Joe G. Riley, Judge
	)
REIKO NOLEN,	) (Especially Aggravated Robbery)
	)
Appellant.	)

FOR THE APPELLANT:

Charles S. Kelly
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(On Appeal)

G. Stephen Davis
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(At Trial)

FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

PAUL R. SUMMERS,
Special Judge

O P I N I O N

The appellant, Reiko Nolen, was convicted of especially aggravated robbery[1] and received a twenty-year sentence. In this appeal he claims that:

1. He was denied the effective assistance of counsel,

2. The trial court erred in overruling his motion for a mistrial when the victim made reference to the appellant's prior criminal history,

3. His sentence is excessive, and

4. The evidence is insufficient to support the verdict.

Following our review, we affirm the convictions and sentences.

The testimony at trial revealed that on or about September 17, 1994, the victim and two of his friends were parked in the "projects" area of Dyersburg, Tennessee. A blue Chevrolet with tinted windows pulled beside them. The victim said he could not see who occupied the Chevrolet. However, he knew the car belonged to a man they called "Dark Wing." The victim moved his vehicle to another area.

The victim went to the apartment of a woman he had met earlier but she was not at home. When he proceeded towards the home of his friend, Anthony Scott, he saw the blue Chevrolet driving up the street. The passengers in the vehicle rolled their windows down as the vehicle rolled slowly by. The victim said the first person he saw in the vehicle was the appellant, who was sitting in the back seat. The appellant said to the victim, "I got [sic] you now." Because the victim had had problems with the appellant in the past, he became frightened and ran. As the victim ran, he heard a gunshot and fell to the ground. He said he felt as if he had broken his leg and could not move his lower body.

[1]The appellant was also charged with attempted felony murder. However, the trial judge declared a mistrial as to this count when the jury could not reach a unanimous verdict.

The victim testified that he saw the appellant leaning down with a gun. The other occupants stole the victim's beeper and $35.00. They unsuccessfully tried to steal the victim's tennis shoes. The perpetrators sped away when they heard someone approach.

Deshawn Curry was in the area and heard the shooting. Curry explained that when he heard someone yelling, he called 911. He also heard tires squealing and saw the victim through his binoculars.

Officer Chuck Barrineau responded to the call and found the victim with a gunshot wound in his lower back. The victim identified the appellant as the man who had shot him. The victim was flown to Memphis where he was hospitalized for three weeks. The bullet could not be removed. The victim underwent extensive physical therapy to learn to walk again. He also lost control of his bladder.

The appellant testified on his own behalf. He denied that he was inside the vehicle belonging to Dark Wing or that he shot the victim. Instead, he argued that he had checked into a hotel near the time of the incident. The appellant offered the testimony of his mother and his mother's boyfriend. Both essentially said that the appellant seemed surprise when they told him the police were looking for him as a suspect in the shooting. The appellant also introduced the receipt from Budget Motel where he claims he stayed on the night in question.

I. Ineffective Assistance of Counsel

In his first issue, the appellant insists that he was denied the effective assistance of counsel when defense counsel "opened the door" to testimony of

appellant's previous criminal conduct.[2] In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court established a two-prong analysis when an appellant claims that counsel's assistance was so defective so as to require a reversal. First, the appellant must show that counsel's performance was deficient and second, that the deficient performance prejudiced him to the point that (s)he was deprived of a fair trial. Id. at 687.

In Tennessee, our Supreme Court held that the appropriate test for determining whether counsel provided effective assistance of counsel at trial is whether his or her performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

The appellant's claim centers around a response he gave to defense counsel's question. As his last question on direct examination, counsel asked the appellant if he had ever had a problem with the victim. The appellant unequivocally answered, "no." A bench conference ensued from which the trial judge determined that the state would be permitted to delve into this subject because the appellant "opened the door."

The district attorney questioned the appellant about an incident which had occurred some two weeks earlier. The appellant described the event as an attempted drug sale to the victim involving $200. He said that before the sale was consummated, the police arrived and he left with the victim's money. However, he denied that he robbed the victim or that he used a gun. On rebuttal, the state elicited testimony from the victim regarding the incident. The victim said the appellant tried to sell him dope but he told the appellant he did not

[2]The trial judge conducted a jury-out hearing on the admissibility of testimony regarding a previous incident involving the victim and appellant. The judge ruled that the prejudice outweighed the probative value of the testimony. He instructed counsel that the only permissible mention of the incident would be that the two had had trouble previously.

"fool with drugs anymore." According to the victim, the appellant retrieved a sawed-off shotgun from his vehicle and took the $200.

The appellant argues that counsel's question constituted a deficient performance which prejudiced him. We disagree. To prove the first prong of the Strickland test, the appellant must prove that counsel's representation fell below an objective standard of reasonableness. Id. at 688. This evaluation must be accompanied by a strong presumption in the reviewing court that counsel's conduct falls within the wide range of acceptable professional assistance. Id. at 689. In this instance, the presumption has not been overcome. Counsel's question does not rise to the level of a deficient performance.

Even assuming the representation was deficient in any way, the appellant has similarly failed to meet the second prong of the Strickland test. In this prong, the appellant must prove that he was prejudiced by showing there was a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Id. at 694.

The trial judge agreed that the door had been opened and permitted inquiry into the alleged earlier robbery. However, when the questioning began, the trial judge instructed the jury that the question would relate only to credibility and not to the appellant's propensity to commit the crime for which he was charged. The trial judge mitigated any prejudicial effect with his limiting instruction and we must presume the jury complied with it. Frazier v. State, 566 S.W.2d 545, 551 (Tenn. Crim. App. 1977). Furthermore, based on the strength of the evidence, the result would not have been different.

The appellant has failed to meet his burden under either the Strickland or Baxter standards. This issue is without merit.

II. Motion for Mistrial

Secondly, the appellant argues that the trial judge should have declared a mistrial following the victim's reference to a "drug bust" involving the appellant. The prosecutor was establishing the victim's prior knowledge of the vehicle driven by Dark Wing when he asked, "You knew that car ... [i]t had been impounded once before by the Dyersburg Police Department, hadn't it." The victim responded, "Yes sir, 'cause Reiko Nolen got busted with drugs in it."

Defense counsel objected and moved for a mistrial. The trial judge denied the motion but gave the following limiting instruction: "Disregard the last statement of the witness ... it's non-responsive ... [and] it's irrelevant." In a criminal case, a mistrial will be declared only if there is a "manifest necessity" requiring such action. Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of that discretion. State v. Jones, 733 S.W.2d 517, 522 (Tenn. Crim. App.1987). The appellant has the burden of establishing the existence of a "manifest necessity." Arnold, 563 S.W.2d at 794. Here, he has failed to meet his burden.

The brief answer given by the victim does not constitute a "manifest necessity." The trial judge's immediate curative instruction likely curtailed any prejudicial effect the statement may have had. Again, we must presume the jury followed the court's instruction. Frazier, 566 S.W.2d at 551.

Furthermore, the reference to the "drug bust" is clearly dissimilar to the especially aggravated robbery charge for which he was being tried. The strength of the proof likely outweighed any prejudicial effect the statement may have had. Any error would have been harmless beyond a reasonable doubt. Tenn. R. Crim. P. 36(b). This issue is meritless.

III. Excessive Sentence

The appellant's third complaint is that his sentence is excessive. Our review of the trial court's sentence is de novo with a presumption that the determinations of the trial judge are correct. Tenn. Code Ann. § 40-35-401(d) (1990). State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993). The presumptive sentence shall be the minimum sentence in the range if no enhancement or mitigating factors exist. Tenn. Code Ann. § 40-35-210(c) (1990). When enhancement and mitigating factors exist, the trial judge must start at the minimum sentence in the range and enhance the sentence within the range as appropriate. The trial judge will then reduce the sentence within the range as appropriate in light of the mitigating factors. Tenn. Code Ann. § 40-35-210(d) & (e) (1990).

As enhancement factors, the trial judge found that: the appellant has a previous history of criminal behavior or criminal convictions; the appellant has a previous history of unwillingness to comply with conditions of release into the community; and the appellant was on bail when the offenses were committed. Tenn. Code Ann. §§ 40-35-114(1), (8) & (13) (1990). In mitigation the trial judge found that the appellant, because of his youth, lacked substantial judgment in committing the offense. Tenn. Code Ann. § 40-35-113(6) (1990).

The appellant argues that enhancement factor one should not have been considered because his three prior convictions were misdemeanors. We disagree. Factor one simply requires a finding that the appellant has a history of criminal convictions or criminal behavior. The record supports such a finding.

The appellant makes one other general challenge to the weight and consideration given to the enhancement and mitigating factors. As a Range I offender, the appellant faced a sentence ranging from fifteen to twenty-five years. Tenn. Code Ann. §§ 39-13-403 (1991) & 40-35-112(a)(1) (1990). In light

of the three enhancement factors and one mitigating factor, the mid-range sentence was entirely proper. The weight given enhancement or mitigating factors lies within the sound discretion of the trial judge. State v. Moss, 727 S.W.2d 229, 238 (Tenn. 1986). We find no abuse of discretion. The appellant has failed to overcome the presumption of correctness. This issue is without merit.

IV. Sufficiency of the Evidence

Though worded in various ways, the appellant's final issue is simply a challenge to the sufficiency of the evidence. In a sufficiency of the evidence challenge, the relevant question on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or crimes beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); State v. Duncan, 698 S.W.2d 63 (Tenn. 1985); T.R.A.P. 13(e).

In Tennessee, great weight is given to the result reached by the jury in a criminal trial. A jury verdict accredits the testimony of the state's witnesses and resolves all conflicts in favor of the state. State v. Williams, 657 S.W.2d 405 (Tenn. 1983). Moreover, a guilty verdict replaces the presumption of innocence enjoyed at trial with the presumption of guilt on appeal. State v. Grace, 493 S.W.2d 474 (Tenn. 1973). The appellant has the burden of overcoming the presumption of guilt. Id. On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832 (Tenn. 1978).

Especially aggravated robbery is defined as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear ... [a]ccomplished with a deadly weapon ... and ... [w]here the victim suffers serious bodily injury." Tenn. Code Ann. §§ 39-13-401(a) & -403(a)(1) & (2)

(1991). The testimony indicated that the victim was shot in the lower back with a handgun. While the victim was lying on the ground, he was robbed of cash and a beeper. Further proof revealed that the victim suffered serious bodily injury. Although the appellant may argue that he did not actively participate in the robbery, he was still criminally responsible for the conduct of his cohorts, which the trial judge so charged. Without question, the evidence is sufficient to support the jury's verdict.

The judgment of the trial court is affirmed.

PAUL R. SUMMERS, Special Judge

CONCUR:

PAUL G. SUMMERS, Judge

DAVID G. HAYES, Judge