IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1996 SESSION

FILED

July 8, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9503-CR-00102**
Appellee,	)	
	)	**CUMBERLAND COUNTY**
VS.	)	
	)	**HON. LEON BURNS,**
WAYNE HYMES RICHARDS,	)	**JUDGE**
a/k/a PETE RICHARDS,	)	
	)	
Appellant.	)	(Delivery of marijuana)

FOR THE APPELLANT:

STEVEN C. DOUGLAS
P.O. Box 422
Crossville, TN 38557

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General & Reporter

HUNT S. BROWN
Asst. Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0493

WILLIAM E. GIBSON
District Attorney General

OWEN G. BURNETT
Asst. District Attorney General
145 S. Jefferson St.
Cookeville, TN 38501

JOHN NISBET
Asst. District Attorney General
205 East 2nd St.
Crossville, TN 38555

OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was originally indicted separately for two offenses of the sale of marijuana. He was subsequently reindicted, with each new indictment charging him with alternate counts of the sale or delivery of marijuana. Case number 3453 alleged an offense date of July 28, 1992; case number 3454 alleged an offense date of July 30, 1992. Case number 3454 was tried by a jury in March 1994, resulting in a mistrial. The State then moved to consolidate the two cases, which the court granted over the objection of the defendant. The two cases were then tried together by a jury, and the defendant was convicted of two counts of delivery of marijuana.

The defendant now appeals as of right, raising three issues. In his first issue he contends that the trial court erred when it ordered the two cases to be consolidated. He also claims that the trial court erred by allowing the State to introduce into evidence a photograph which had not been provided to him in compliance with Tenn. R. Crim. P. 16. In his third issue he challenges the sufficiency of the evidence. After a review of the record, we affirm the judgment below.

The defendant was arrested pursuant to an undercover police operation. Officer Craig Smith was introduced to the defendant by a confidential informant on July 28, 1992. Officer Smith, while accompanied in his vehicle by the confidential informant, picked up the defendant at a residence on Justice Street in Cumberland County. They discussed buying marijuana, coming to terms on the purchase price, quantity, and how and where the defendant would obtain the drug. Officer Smith gave the defendant one hundred fifty dollars ($150) for the purchase of one ounce of marijuana, and then dropped the defendant off “in close proximity to where he needed to go.” This location

was a residence in the Chestnut Hill area.

Officer Smith testified that, pursuant to the defendant's instructions, he and the informant had then travelled a short way down the road, waited five or ten minutes, and then "eased back up the road, and he was walking down the road and then got back in the car with us and handed me the bag of marijuana." The bag of plant material which the defendant delivered to Officer Smith was subsequently analyzed and determined to be marijuana.

Officer Elmore, who acted as the surveillance and "back up" officer in a separate vehicle for this transaction, testified and corroborated Officer Smith's testimony about where he picked up the defendant and where they went.

On July 30, 1992, Officer Smith and the confidential informant again picked the defendant up at the same address on Justice Street and proceeded to the same residence in Chestnut Hill. The defendant established the price of one hundred sixty-five dollars ($165) for another ounce of marijuana, which Officer Smith paid to him. This time Officer Smith and the confidential informant were allowed to wait in the driveway while the defendant went inside. After the defendant's initial trip into the house, he returned and told Officer Smith that "he couldn't get it because the guy was in the shower," so they decided to wait. On the defendant's recommendation they drove a short distance away, waited five or ten minutes, and then returned to the driveway. The defendant again went into the residence and, according to the officer, after a few minutes the defendant "came back out, and he had a bag of marijuana, approximately an ounce, and gave it to me." This substance was also later determined to be marijuana.

Officer Calahan provided the surveillance and “back up” on this transaction, again from a separate vehicle. His testimony corroborated Officer Smith’s as to where the defendant was picked up and where they then went. Officer Calahan also testified that he monitored the conversation and heard an unidentified third voice. At one point, Officer Calahan testified, this voice said, “ ‘He’s in the shower. We need to come back. We'll go down -- let’s go down to the store for a few minutes.’ ” A short while later, the officer heard the same voice say, “ ‘I’m going in.’ " Officer Calahan testified that “he was in the house for just a few minutes and came back out, and then there was a conversation about what he had brought back to the car.” Specifically, Officer Calahan testified, the unidentified third voice stated, “ 'This Bud’s for you.' ” This officer testified further that, “In drug talk, bud is the potent part of the marijuana plant that has the highest value, and it carries the most kick, and that’s the expensive, most expensive part of the marijuana plant.”

The defendant put on no proof but challenged the State's case on the issue of his identity.

The defendant first argues that the trial court erred when it joined cases numbered 3453 and 3454 for trial. Although the technical record contains no document reflecting the court’s order, apparently the court ordered the consolidation following a motion by the State, to which the defendant objected. Tenn. R. Crim. P. 13(a) provides: “The court may order consolidation of two or more indictments . . . for trial if the offenses . . . could have been joined in a single indictment . . . pursuant to Rule 8.” Joinder is appropriate where either “the offenses are based upon the same conduct or arise from the same criminal episode [where] such offenses are known to the appropriate prosecuting official at the time of the return of the indictment(s),” Rule 8(a), or “if the

offenses constitute parts of a common scheme or plan or if they are of the same or similar character," Rule 8(b). It is apparent from the facts of this case that the only proper joinder could have been under Rule 8(b).

However, a defendant whose offenses are joined under Rule 8(b) is then entitled to a severance "unless the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others." Tenn. R. Crim. P. 14(b)(1). The defendant contends that his offenses were not part of a common scheme or plan and that the evidence of one would not be admissible upon the trial of the other and therefore consolidation was improper. We disagree.

Offenses are part of a common scheme or plan if they are "so similar in modus operandi and occur within such a relatively close proximity of time and location to each other that there can be little doubt that the offense[s] were committed by the same person." State v. Steve Mosley, No. 01C01-9211-CC-00345, Dickson County (filed Sept. 9, 1993, at Nashville). In this case the offenses occurred within forty-eight hours and each involved a sale of a single ounce of marijuana for a price set by the defendant and paid in cash to the defendant. Each involved the same buyer and companion (the confidential informant). In both cases the undercover officer picked the defendant up at the same place and then drove to the same residence. Each time the defendant then left the other two and entered the residence where he obtained the marijuana. Both times the defendant then rejoined the other two men and delivered the marijuana. These similarities between the two offenses are sufficient to establish a common scheme or plan. See, e.g., State v. Mosley, supra. (Rule 8(b) consolidation proper where "four of the indicted offenses occurred within a three-day period and the other occurred approximately six weeks later. All of the offenses involved the same controlled

substance, the same defendant, the same informants and the same witnesses. It was such a continuous episode and so closely related that the proof was essentially the same in each case.")

We also find that evidence of one of the offenses was admissible on the trial of the other. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes." Tenn. R. Evid. 404(b). Other purposes for which such evidence is admissible include identity, guilty knowledge, intent, and motive. Robert Lee Morris v. State, No. 03C01-9409-CR-00343, Hamilton County (filed July 5, 1995, at Knoxville). In this case, as pointed out by the defendant, identity was an issue. Moreover, one of the elements of the crime of delivery of a controlled substance is that the defendant did so "knowingly." T.C.A. § 39-17-417(a)(2). Given that the two offenses were so similar, evidence of the defendant's participation in each offense was probative of both his identity and his guilty knowledge as to the other offense. Accordingly, so long as the "probative value [of the evidence of the other crime] is outweighed by the danger of unfair prejudice," Tenn. R. Evid. 404(b)(3), the evidence was properly admissible. While the record contains no ruling by the trial court with respect to this issue, our review of the transcript of the trial convinces us that the probative value of each offense with respect to the defendant's identity and state of mind outweighed any danger of unfair prejudice. Accordingly, both prongs of the test under Rule 14(b) are met and the consolidation was therefore not subject to severance and was proper.

Moreover, the defendant has not established that he has been clearly prejudiced by the consolidation of these offenses. "On appeal, a denial of the severance

will not be reversed unless it appears that the defendant was clearly prejudiced." State v. Mosley, supra. This same standard is applicable to a complaint of wrongful consolidation. Id. This issue is without merit.

The defendant also complains because the trial court allowed the State to introduce into evidence a copy of the his driver's license photograph which had not been previously provided to the defendant in compliance with Tenn. R. Crim. P. 16. Prior to the initial trial of case number 3454 (which resulted in a mistrial), the defendant's counsel made several discovery requests. The State responded to these requests, but never furnished the defendant with a copy of the copy of the defendant's driver's license which Officer Smith had obtained within a day or two of the July 28 offense. The driver's license of which the copy was made contained a photograph of the defendant, and the copy had been enlarged. This item had not been used by the State in the first trial. However, during Officer Smith's testimony at the second trial, the State introduced it to bolster Officer Smith's identification of the defendant. The defendant objected, and the trial court ruled it admissible, stating, "I would think that if the officer obtained the photograph of the driver's license soon after the first buy, and that helps him with his identification, or it verifies, at least in his mind, that it's the same person, then I think he could testify to that." The court further stated, "I don't see any great prejudice by it. I don't think the state purposely withheld the picture to attempt to gain any sort of advantage, and I don't think that the introduction of that picture would be prejudicial. They may use the driver's license picture if he ties that in with some proximity to the time frame of the crime."

Tenn. R. Crim. P. 16(a)(1)(C) provides:

Upon request of the defendant, the state shall permit the defendant

> to inspect and copy or photograph . . . papers, documents, photographs, . . . or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of his defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.

Even assuming, arguendo, that the State violated this provision, however, the defendant is not entitled to a new trial. Rule 16 provides further:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such a party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

Tenn. R. Crim. P. 16(d)(2). Thus, sanctions for noncompliance are left to the sound discretion of the trial judge. We will not reverse the lower court's holding absent an abuse of discretion. We see no such abuse here.

"[E]vidence should not be excluded except when it is shown that a party is actually prejudiced by the failure to comply with the discovery order and that the prejudice cannot be otherwise eradicated." State v. Garland, 617 S.W.2d 176, 185 (Tenn. Crim. App. 1981). The defendant has shown no such prejudice here. When Officer Smith initially took the witness stand, the prosecuting attorney asked if he had had "occasion to come in contact with the defendant, Pete Richards?" Officer Smith responded, "Yes, I did." The State then proceeded, "Let me ask you for the record if you see him in the courtroom today, and if you could identify him, if you would?" Officer Smith then replied, "I do see him, and he's sitting right over there (indicating)." The officer's unequivocal in-court identification of the defendant came long before the court allowed the introduction of the facsimile of the defendant's driver's license. The later use of this photograph in no way altered the results of the trial, and was harmless error, if error at all.

Finally, the defendant complains that the evidence is not sufficient to support the verdicts of guilt in these cases. We disagree.

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).

In this case, the jury heard testimony from Officer Smith that he twice picked the defendant up; paid the defendant the amount of money requested for an ounce of marijuana; drove the defendant to a specific location; waited for the defendant to return; and received an ounce of marijuana from the defendant after the defendant returned to his car. The jury also heard testimony establishing that the marijuana had been chemically analyzed and was, in fact, marijuana. There was also the corroborating testimony from the two officers who conducted the surveillance. Officer Calahan testified that, while he could not identify the voice of the third occupant of Officer Smith's car, he did hear this voice state, "I'm going to go in the house," and, later, "This Bud's for you." Officer Calahan also explained why this phrase might have special meaning in the context of a marijuana deal.

This evidence was more than sufficient for the jury to have properly found the defendant guilty of both counts. This issue is without merit.

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

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JOHN H. PEAY, Judge

CONCUR:

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DAVID G. HAYES, Judge

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WILLIAM M. BARKER, Judge