IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MAY 1996 SESSION

STATE OF TENNESSEE,	)
	) C.C.A. No. 02C01-9601-CC-00037
Appellee,	)
	) Madison County
V.	)
	) Hon. Franklin Murchison, Judge
	)
MARCUS KEITH ROBERTSON,	) (Aggravated Assault)
	)
Appellant.	)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

O P I N I O N

The appellant, Marcus Keith Robertson, was convicted by a jury of aggravated assault and received a four-year sentence. In this appeal he raises the following issues:

1. Whether the trial court erred in failing to instruct the jury on the lesser included offense of assault;

2. Whether the indictment contained a fatal defect;

3. Whether trial counsel was ineffective;

4. Whether the trial judge erred in allowing the prosecutor to cross-examine the appellant about prior arrests and convictions; and

5. Whether the trial court erred in failing to give a limiting instruction as to the use of the prior arrests and convictions.

Following our review, we affirm the judgment of the trial court.

The victim testified that he was outside his mother's home on December 25, 1994, when he observed a red Chevrolet Blazer drive past. He described an incident involving the Blazer which had occurred the previous night.[1] Realizing that trouble could ensue, the victim ordered the children into the house. When the Blazer stopped at the end of the street, the appellant and others exited the vehicle. Though the testimony was somewhat conflicting, it appears that at least four men were in the vehicle. The appellant and a man named Torry approached the victim. The appellant asked the victim if he was Roosevelt Willis. The victim responded, "[w]hat if it is?" The appellant then said "you gonna die mother f_ _ _ er, you kicked my truck last night." The victim said the appellant then cocked a small pistol he was holding in his hand.

The victim testified that he was frightened and thought he was going to be

[1]The victim described the incident which had occurred the previous night while he and his girlfriend were exiting an establishment called Sesame Street. It appears the driver of the Blazer was negotiating a turn and came towards them. The victim said that in anger, he kicked the vehicle. When the driver of the vehicle exited, she cursed the victim and said "you don't mess with a Robertson." It was later determined that the vehicle belonged to the appellant but had been borrowed by his cousin that night. When the appellant drove by on Christmas day, the victim recognized the license plate number of the Blazer.

shot. He said that he asked the appellant to get estimates of the damage to the vehicle and told him he would pay for the repairs. When the victim's mother called the police, the appellant and others left in the Blazer.

The victim's girlfriend and mother corroborated the victim's testimony. The girlfriend had seen the small pistol in the appellant's hand and had heard the victim being threatened by the appellant. The victim's mother heard the appellant repeatedly threatening the victim and saw an object that appeared to be a gun.

The appellant testified in his own behalf. He said that when he arose on Christmas day, his cousin told him that someone had kicked the Blazer the night before. When he saw the damage, the appellant and his friends got into the Blazer and went looking for the victim. The appellant did not know the victim but knew from his cousin that he drove a silver car. He said that he drove to the victim's house to discuss the damages to his vehicle. The appellant admitted that he was angry but denied that he carried a pistol. Two defense witnesses also denied the presence of a gun. The appellant said that when the victim offered to pay, he immediately calmed down.

I.

In appellant's first issue he contends that the trial court committed reversible error by failing to charge the lesser included offense of assault. It is well settled that a trial court has a duty to instruct the jury on all lesser included offenses whether or not it is requested to do so. State v. Jones, 889 S.W.2d 225, 230 (Tenn. Crim. App. 1994). However, where the evidence clearly establishes the appellant's guilt on the greater offense, it is not error to fail to charge on a lesser included offense. State v. King, 718 S.W.2d 241, 245 (Tenn. 1986).

The state presented evidence to support its claim that the appellant

committed aggravated assault by displaying a deadly weapon. The appellant testified that he did not have a gun and did not threaten the victim. By his own proof and position at trial, the appellant negated the elements of simple assault. As argued by the state, the nature of the evidence left the jury with an all or nothing decision. The appellant could be found guilty of aggravated assault or no offense at all. Here, the jury chose to believe the state's witnesses. The trial judge's failure to charge the lesser included offense of simple assault was not reversible error.

II.

In his second issue, the appellant challenges a defect in the indictment. During the trial, the judge recognized surplusage in the indictment and informed the attorneys. The appellant was charged in the indictment with aggravated assault which requires the mental elements of intentionally or knowingly. Tenn. Code Ann. § 39-13-102 (1991). However, the indictment erroneously included the mental element of recklessly. No objection was made at that time.

Objections based on defects in the indictment must be raised prior to trial. Tenn. R. Crim. P. 12(b)(2). Thus, this issue is waived. Nonetheless, when the trial judge read the jury charge, he properly cited the requisite elements of aggravated assault. Error, if any, was harmless.

III.

Thirdly, the appellant argues that he received the ineffective assistance of counsel. However, this issue is prematurely before this Court. The Post-Conviction Procedure Act calls for a full and complete hearing on ineffective assistance of counsel claims. Tenn. Code Ann. § 40-30-201 (Supp. 1995). Without such a hearing, we are unable to determine why defense counsel pursued a line of questioning found objectionable by appellate counsel. Further, the appellant must meet his burden of establishing a deficient performance and resulting prejudice as set forth in Strickland v. Washington, 466 U.S. 668 (1984)

and Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). Without counsel's testimony, it is unlikely he could meet this burden.

IV.

In his fourth issue, the appellant complains that the trial court erred when it allowed the prosecutor to cross-examine him concerning prior charges and convictions. On direct examination, the appellant testified that the only time he had been in trouble was when he was arrested as a juvenile on a disorderly conduct charge. However, on cross-examination the appellant admitted that he had an earlier trespassing charge also as a juvenile. He further remembered two convictions for driving on a revoked license. The appellant now complains that this questioning was improper and did not go to his credibility. We disagree.

Because the appellant testified that he had been in trouble only one time, he "opened the door" to the state's questioning. He cannot create this false impression before the jury and expect the state to sit idly by. The appellant took the shield which protected him from a general attack on his credibility and used it as a sword by interjecting an apparently false statement. State v. Bray, 669 S.W.2d 684, 687-88 (Tenn. Crim. App. 1983). Because the appellant left himself open to impeachment, we find that the trial judge did not abuse his discretion in allowing the complained of cross-examination.

V.

Finally, the appellant argues that the trial court errantly failed to give a limiting instruction as to the use of the testimony concerning the prior arrests and convictions. The appellant, however, failed to request a limiting instruction. Therefore, this issue is waived. See State v. Cameron, 909 S.W.2d 836 (Tenn. Crim. App. 1995); Pennington v. State, 573 S.W.2d 755 (Tenn. Crim. App. 1978). Additionally, the failure to give limiting instructions was neither fundamental nor prejudicial error. State v. Howell, 868 S.W.2d 238, 255-56

(Tenn. 1993). "[T]he blame for the failure to give limiting instructions 'must be laid at the defendant's feet.'" Id. (citation omitted). This issue is without merit.

The judgment of the trial court is affirmed.

PAUL G. SUMMERS, Judge

CONCUR:

DAVID G. HAYES, Judge

PAUL R. SUMMERS, Special Judge