

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE SESSION, 1996

FILED

September 30, 1996

C.C.A. NO. 02C01-9509-CR-00274

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

VS.)

FRENCH R. SELDON,)

Appellant.)

C.C.A. NO. 02C01-9509-CR-00274

SHELBY COUNTY

HON. BERNIE WEINMAN
JUDGE

(Aggravated Robbery)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF SHELBY COUNTY

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant appeals his conviction as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. He was convicted on a jury verdict of aggravated robbery and was sentenced as a Range II multiple offender to fifteen years to be served in the Department of Correction.

The Defendant presents two issues for review: (1) That the evidence presented at trial was insufficient to support the verdict of guilt, and (2) that the trial court erred in denying the Defendant's motion for a mistrial after the State's witnesses referred to other crimes committed by the Defendant.

On June 19, 1993, Princella Turner, a prostitute, was concluding a "transaction" when she exited a car on the corner of Woodbine and Kerr, in Memphis. A group of men from the neighborhood were sitting under a tree near the corner. She was approached by one of the men, whom she knew as "Frenchie." She identified "Frenchie" as the Defendant. He demanded her money and began to hit her on the head with his fist. When she would not surrender the money, the Defendant hit her on the head with a quart-sized beer bottle. Ms. Turner relinquished the twenty dollars she had in her hand. The Defendant rejoined the group of men, looked back at Ms. Turner and yelled that she should have had more money. The Defendant then walked down Woodbine.

Ms. Turner went to a pay telephone and called the police. Officers responding to the call investigated and searched the area, but did not locate the

Defendant. On June 22, Ms. Turner telephoned the police and reported seeing the Defendant on James Street. The police arrested the Defendant, who gave an alias. They later established his true name to be French Seldon, or “Frenchie”. The police brought him to the Little Gun Motel, where Ms. Turner identified the Defendant as her assailant.

At the conclusion of the State’s proof, the defense moved for a judgment of acquittal. The motion was denied by the trial court. Defense counsel also requested that the trial court declare a mistrial because the State’s witnesses had alluded to other crimes committed by the Defendant and that, despite the court’s curative instructions, this prejudiced the Defendant. The trial court denied the request. The defense offered no proof.

The Defendant first argues that the evidence submitted at trial was insufficient to convict him of Aggravated Robbery beyond a reasonable doubt. When an accused challenges the sufficiency of the convicting evidence, the standard is whether, after reviewing the evidence in the light most favorable to the prosecution, 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 (1979). Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1987). Nor may this court reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. Cabbage, 571 S.W.2d at 835. Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Grace, 493 S.W.2d at 476.

The Defendant does not challenge the sufficiency of the evidence to support all the elements of aggravated robbery. Rather, he argues that the testimony of the victim, Princella Turner, is so untrustworthy that it should not support a guilty verdict. Defendant bases this assertion on the fact that Ms. Turner is a prostitute and that her violation of the law negates her credibility.

Assessing the credibility of witnesses is the province of the jury and such issues are properly resolved by the trier of fact. Pappas, 754 S.W.2d at 623. Evidence that a witness is a prostitute, standing alone, is not sufficient to discredit the witness' testimony in order to disturb a jury verdict. See State v. Willie C. Carpenter, No. 1197, Hamilton County, slip. op. at 5 (Tenn. Crim. App., Knoxville, May 1, 1991); State v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990); Johnson v. State, 598 S.W.2d 803, 805 (Tenn. Crim. App.), perm. to appeal denied, id. (1980).

The Defendant has offered no illumination of the facts that demonstrates why the jury could not have convicted the Defendant of aggravated robbery beyond a reasonable doubt. As the Defendant has not met this burden, this issue is without merit.

The Defendant further argues that the trial court erred by not granting a mistrial because the State's witnesses alluded to other crimes committed by the Defendant. He contends that he was prejudiced by the statements of Ms. Turner and Officer Willie Miles, who made the arrest.

It is within the discretion of the trial court to assess whether an occurrence during the trial justifies the entry of a mistrial. State v. McPherson, 882 S.W.2d 365, 370 (Tenn. Crim. App.), perm. to appeal denied, id.(1994). The entry of a mistrial is appropriate when a miscarriage of justice will occur if the trial continues. Id. Absent a clear abuse of discretion on the face of the record, this Court will not disturb the decision of the trial court. Id.; State v. Jones, 802 S.W.2d 221, 222 (Tenn. Crim. App. 1990), perm. to appeal dismissed, id. (1991).

First, the Defendant notes that on cross-examination, Ms. Turner was asked whether she gave the police a description of the robber. She was unresponsive and stated that a description was not necessary because "the police already know him because he's known in the neighborhood for doing . . . what he did to me," referring to the Defendant. At this point, defense counsel did not object, nor did counsel request a curative instruction.

Failure to make a contemporaneous objection waives consideration by this court of the issue on appeal. See T.R.A.P. 36(a); Teague v. State, 772 S.W.2d 915, 926 (Tenn. Crim. App. 1988); perm. to appeal denied, id. (Tenn. 1989). State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1988). Furthermore, a party who participates in or invites error is not entitled to relief. T.R.A.P. 36(a). Therefore, this issue is waived.

Second, the Defendant cites two statements made by the State's witness, Officer Miles, to which defense counsel objected and received curative instructions by the trial court. On direct examination, the witness stated that Ms. Turner told him she had been robbed by "a particular guy who had been robbing several women." On cross-examination, the witness, when asked whether he had located other witnesses to the robbery, answered: "None that I recall. There were other victims"

The trial judge did not abuse his discretion in denying Defendant's motion for a mistrial. There is no evidence in the record that suggests the prosecution deliberately elicited the unresponsive answer of the witness. The trial court immediately issued curative instructions to the jury to disregard both statements. This is sufficient to cure the error. See State v. Walker, 910 S.W.2d 381, 396-97 (Tenn. 1995); Jones, 802 S.W.2d at 222-23. A jury is presumed to have followed the curative instructions. Walker, 910 S.W.2d at 397. Accordingly, this issue is without merit.

The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

JERRY L. SMITH, JUDGE