IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1996 SESSION

STATE OF TENNESSEE,	)
	) C.C.A. No. 02C01-9605-CR-00173
Appellee,	)
	) Shelby County
V.	)
	) Honorable Bernie Weinman, Judge
	)
CTJUAN D. JAMES,	) (Especially Aggravated Robbery)
	)
Appellant.	)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

O P I N I O N

The appellant, Ctjuan D. James, was convicted of especially aggravated robbery. He was sentenced to fifteen years incarceration. On appeal, he argues that:

1. The trial court erred in failing to charge his "theory of defense";
2. The trial court erred in allowing the victim, who remained in the courtroom during the defense's proof, to testify as a rebuttal witness;
3. A new trial should be granted due to juror misconduct; and
4. The evidence was insufficient.

Finding no prejudicial error, we affirm.

FACTS

The victim escorted a young lady to her third floor apartment. As the victim was leaving, the appellant and two other men confronted him. The victim saw that the appellant had a knife so he attempted to jump over the third floor balcony. The assailants attempted to hold him. The victim, however, fell to the ground and broke his shoulder. The victim then tried to flee. He, however, was caught, kicked, and beaten by the appellant and the two assailants. They then took the victim's car keys, money, watch, jacket, and shoes and fled in the victim's car.

I

The appellant's first issue alleges that the trial court erred in failing to charge his theory of defense. The appellant's theory of defense was that the intent to rob the victim was not "present at the time of the victim's beating." Therefore, he argues, the jury should have been instructed that the intent to rob must have been present prior to the beating. The state argues that the requested instruction was not the law.

Especially aggravated robbery is robbery accomplished with a deadly weapon and "[w]here the victim suffers serious bodily injury." Tenn. Code Ann. § 39-13-403 (1991 Repl.). Robbery is defined as the intentional or knowing theft of property from a person by violence. Tenn. Code Ann. § 39-13-401 (1991 Repl.).

Especially aggravated robbery merely requires that: (1) the victim was robbed; (2) the robbery was accomplished by use of a deadly weapon, and (3) the victim suffered serious bodily injury. We are unpersuaded by the appellant's argument that the state must show that the intent to rob preceded the acts causing serious bodily injury. The intent to rob could have been formed either prior, during, or ensuing the acts causing serious bodily injury. This issue is devoid of merit.

II

The appellant's second issue argues that the trial court erred in permitting the victim to testify during rebuttal proof. The appellant's argument is premised on the fact that the victim was not sequestered during the defense's proof. He further argues that the state had an obligation to ensure that the victim was sequestered prior to using the victim as a rebuttal witness.

The appellant, on cross-examination, denied that the victim was wearing a jacket when the robbery occurred. The victim was recalled in rebuttal. His rebuttal testimony pertained to the jacket and how the jacket was recovered and identified. During the state's proof, the victim had previously testified that his jacket was among the items taken from his possession.

Whether to permit the rebuttal testimony was within the sound discretion of the trial court. Ezell v. State, 413 S.W.2d 678 (Tenn. 1967); State v. Taylor, 645 S.W.2d 759 (Tenn. Crim. App. 1982). Moreover, any error, at most, was

harmless. The rebuttal testimony was merely cumulative to his direct testimony during the state's proof. This issue is without merit.

III

The appellant next contends that a juror failed to disclose a prior business relationship with the appellant. He argues that the juror's inclusion deprived him of a fair and impartial jury. We disagree.

During voir dire, the prospective jurors were asked whether they knew the appellant. The juror in question offered no response. Following the appellant's conviction, the appellant's counsel learned that the appellant was employed and terminated by the juror's company.

Disqualification of a juror falls into two categories: (1) propter affectum, and (2) propter defectum. Propter affectum disqualifications are based upon a juror's bias. Partin v. Henderson, 686 S.W.2d 587, 589 (Tenn. App. 1984). Objections based upon general disqualifications, such as age, residence, relationship, and feeble mindedness are of the propter defectum class. The appellant's challenge alleges juror bias. Accordingly, his claim falls into the propter affectum class. This class can be challenged at almost any time during or after trial.

The juror testified at the motion for a new trial hearing. She stated that she did not remember the appellant at the time of trial. She testified that she employs forty to fifty employees a year. She further testified that she did not have an independent recollection of the appellant at the time of the motion for a new trial hearing. Moreover, the appellant apparently did not even recognize the juror at the time of his trial.

The trial court found that the juror's peripheral dealings with appellant did not affect the verdict. A trial court's findings are conclusive on appeal unless the evidence preponderates against them. State v. Zimmerman, 823 S.W.2d 220, 224 (Tenn. Crim. App. 1991). We agree with the trial court. This issue is without merit.

IV

The appellant's last assignment of error alleges that the evidence was insufficient to support his conviction. We disagree.

From the evidence proffered at trial, the jury could have inferred that the appellant and two other assailants robbed the victim at knife point. The victim attempted to escape by jumping off a three story balcony. He suffered a broken shoulder when he hit the ground. The victim attempted to flee but was caught. The appellant and the two other assailants then beat, kicked, and robbed the appellant. This issue is without merit.

AFFIRMED

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PAUL G. SUMMERS, Judge

CONCUR:

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JOHN H. PEAY, Judge

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DAVID G. HAYES, Judge