IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JULY 1996 SESSION

FILED

November 12, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. No. 02C01-9505-CR-00146**
	)	
Appellee,	)	**SHELBY COUNTY**
	)	**Hon. Arthur T. Bennett, Judge**
VS.	)	
	)	**(Aggravated Robbery)**
JACK D. WILLIAMS,	)	
	)	
Appellant.	)	**No. 91-06115 BELOW**

FOR THE APPELLANT:

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OPINION FILED:_____

AFFIRMED

CORNELIA A. CLARK, SPECIAL JUDGE

OPINION

Defendant was convicted by a jury of aggravated robbery. He was sentenced to eight years as a standard offender and was assessed a fine of $2,000.00. Defendant appeals of right and raises three issues: (1) whether he was entitled to a new trial because two jurors appeared to be sleeping during material testimony; (2) whether his right to speedy trial was violated when the trial continuances granted led to the unavailability of a material witness; and (3) whether the proof is sufficient to support the guilty verdict. We find that the defendant's issues on appeal lack merit, and affirm the judgment of the trial court.

On February 21, 1991, Dr. Judith Soberman attended a dinner for women in medicine at Grisanti's Restaurant in Memphis. She arrived about 7:00 p.m. and parked her car in the restaurant parking lot underneath a light. She left the restaurant between 9:00 and 9:15 p.m. As she neared her car she heard a man say something like, "Hey". She looked up and observed a man coming toward her. She began to open her car door, but the man started to run toward her, reached her car door, and prevented her from getting in the car. The man grabbed her arm and shoulders. She started to yell. She could see that he had a gun in his hand. Dr. Soberman took her keys, attempted to slash at the man, and then tossed her keys away. She began to yell, scream, kick and push, but could not get away from him. As the pair struggled, they moved away from the car. Dr. Soberman, wearing high heels, ultimately lost her balance and fell to the ground. The man grabbed her large leather bag and ran off. People immediately came running out of the restaurant and began to chase the man.

The confrontation between the two people took thirty to forty-five seconds. Dr. Soberman got a good look at her attacker. One salient item was that he was wearing a white cap.

The owner of the restaurant and his son heard a noise from the parking lot and saw the struggle. They immediately ran outside and chased the assailant as he ran off. They caught up with the assailant, but the elder Mr. Grisanti heard Dr.

Soberman yelling that he had a gun. Both men then gave up the chase, but the younger Mr. Grisanti got into his truck to help find the man in question. Several minutes later he saw the same man walking into a nearby convenience store. He tracked down a police officer and informed him where the man was located.

The officer who arrested defendant located him outside the same convenience market, where he was using a pay phone. The defendant matched the description previously given to the officer. The officer found a loaded pistol in defendant's back rear pocket. Defendant also had a white cap in his possession. The officer drove defendant to the restaurant, which was about two minutes from the convenience market. He made sure the cap defendant had with him was not on his head at the time of the identification. This was about fifteen to twenty minutes after the initial encounter.

When the police car arrived at the scene, Dr. Soberman was standing about fifteen to twenty feet away in the doorway of the restaurant. She was able to see defendant's face, and positively identified him as the person who attacked her. She was not allowed to go directly up to the car and look in the window. She also could not see defendant's clothing while he was seated in the police car. She could see that he was not wearing a hat. Another officer testified that the initial description given by Dr. Soberman at the scene was consistent with the description of defendant's appearance and clothing.

The day after the robbery, a nearby store owner noticed a leather bag near his trash can and gave it to the police. It belonged to Dr. Soberman. Some contents were also returned. Dr. Soberman did not recover eighty dollars, a traveler's check, and a small dictaphone.

Defendant testified at trial and denied having anything to do with the crime. On the day of the offense he was working in construction and got off work about

5:00 p.m. He went home from work, gathered his laundry, and took it to the laundromat to wash. Upon arrival he went to the market next door to purchase detergent and get coins for the machine. He completed his laundry and returned home. He put away his clothes and left his house again to place a phone call to a friend. He went into a convenience store, purchased some beer and obtained quarters, and then went to the phone booth outside. During his phone conversation he was approached by a police officer who searched him, placed him in the patrol car, and eventually took him to Grisanti's. He acknowledged that he always carried a loaded gun for his own protection.

I.

Defendant first contends that he is entitled to a new trial because two jurors slept through a material part of the original trial testimony and were therefore incapable of rendering a fair verdict. This issue was raised for the first time in the motion for new trial. Defendant apparently brought it to his counsel's attention only after the trial was concluded. Defendant contends that the event occurred on the second day of the two-day trial during the testimony of police officers Richard Davis and Dexter Moss. The only information presented about this issue during the motion for new trial was the statement of counsel. The entire colloquy proceeded as follows:

> MR. HEAD: Your Honor, one last argument.
>
> THE COURT: All right. You may summarize.
>
> MR. HEAD: Your Honor, please, it was brought to my attention after talking to my client that apparently there were two jurors that were asleep for a substantial part of the trial. I believe it was jurors--one juror by the name of Ruthy Joiner and a juror by the name of Janet Nicks. It had been brought to my attention that we feel--
>
> THE COURT: When did your client tell you that?
>
> MR. HEAD: I'm sorry, Your Honor.
>
> THE COURT: When did your client tell you that?
>
> MR. HEAD: We talked about it sometime after the trial, Your Honor, when we were ---

THE COURT: I said, when did you--Did you see someone sleeping? Although sleeping is no grounds for--

MR. HEAD: Well, I--

THE COURT: But usually when I see somebody napping or looks weary or doing that, I'll try--I'll take a recess or tell them to try to stay awake so they can hear the evidence or take a recess until they can do that. That's the procedure. Now, I was asking that because if you bring it to my attention, you see somebody look like they're sleeping or falling off, let the Court know; and we'll have a recess, give them some water and things like that.

MR. HEAD: Unfortunately, Your Honor, my client probably was not aware of all those procedures at the time.

THE COURT: No, I'm talking about--That's why I asked you if you knew--

MR. HEAD: Oh, I'm sorry. I'm sorry.

THE COURT: If you knew--During the time the trial was going, did he say that so and so is sleeping?

MR. HEAD: It was after that we discussed it, Your Honor.

THE COURT: Did you see them sleeping? Or he told you that he saw them sleeping--

MR. HEAD: He advised--

THE COURT: --after the trial.

MR. HEAD: He advised me that he saw them sleeping; and, of course, I saw somebody kind of--their head shaking; but I didn't know how long it was or what a substantial part of it was. And so after discussing it, he brought it to my attention more so.

THE COURT: All right.

MR. HEAD: And I just want to bring that to the Court and have it on the record.

THE COURT: All right. Thank you.

MR. HEAD: Thank you very much, Your Honor.

The mere fact that a juror becomes drowsy for a short time is not of itself a ground for a new trial. State v. Chestnut, 643 S.W.2d 343, 346 (Tenn. Crim. App. 1982). In order to be a ground for new trial an objection must be promptly raised and prejudice must be shown. Id. This issue was not raised to the trial court at any time during the trial. Even during the motion for new trial counsel for defendant could not assert any facts to show prejudice.

This issue has no merit.

II.

The defendant was arrested February 21, 1991 and was tried October 3, 1994. He contends that his right to speedy trial was violated because the delay resulted in his inability to locate and present Pamela Williams, a material witness.

Both federal and state constitutions and our statutes guarantee criminal defendants a speedy trial. U. S. Const. amend. VI; Tenn. Const. art. 1, §9; T.C.A. §40-14-101. If the defendant was in fact denied a speedy trial, then his conviction must be reversed and the charges dismissed. To determine if a defendant's right to a speedy trial has been violated, this court must apply a balancing test which requires the consideration of four factors: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether the defendant was prejudiced by the delay. State v. Bishop, 493 S.W.2d 81, 83-84 (Tenn. 1973); Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The single most important factor is whether the defendant was prejudiced by the delay, and the most important issue concerning prejudice is the impairment of the ability to prepare a defense. State v. Vance, 888 S.W.2d 776 (Tenn. Crim. App. 1994).

We begin our analysis by noting there is little proof in the record relevant to the factors to be considered. It is defendant's duty to have prepared an adequate record in order to allow a meaningful review on appeal. See T.R.A.P. 24(b); State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983). State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988). When little evidence is preserved in the record for review, we are hampered in our consideration of the issue.

The length of the delay from indictment to trial was forty-four (44) months. This is a lengthy delay and warrants review on the merits and application of the balancing test. The reasons for the delay vary. The first trial setting was for June 1, 1992. The case was ultimately continued nine times. On several of those occasions the state requested the continuance or no reason is shown in the record. On at least four of those occasions, the defendant made the request for continuance. It appears that the cause for at least some of the defense requests was the continued inability to locate the witness in question, Pamela Williams. Defendant was afforded several opportunities to locate the witness. Absent more specific information, we cannot conclude that the reasons for delay weigh in favor of a finding of speedy trial violation.

The third Barker factor asks whether the defendant asserted his right to a speedy trial. No speedy trial motion was ever filed, and the issue was not raised until the motion for new trial. The record does not reflect that the defendant objected to any of the continuances earlier granted. This factor has not been met.

The fourth factor is prejudice to the defendant. Defendant cannot show he has suffered prejudice when the trial was delayed at his request on prior occasions precisely because the same witness had not appeared. At the beginning of trial, the court indicated that it would issue an instanter subpoena if that witness had been subpoenaed at the previous setting. That apparently had not been done.

During the motion for new trial counsel made a statement about the expected testimony of this witness.[1] According to counsel, she was employed at the convenience market and knew defendant. She would have testified that she saw

[1]The witness was present during the argument of the motion for new trial but was not permitted to testify. Counsel did attempt to summarize the substance of her testimony.

the defendant in the market just before he was picked up and that he looked calm. His demeanor was such that it did not appear he had just run from a robbery. Even assuming the witness had so testified, this proof does not directly contradict any proof presented by the officer who arrested defendant, nor does it present substantial confirmation that the defendant did not commit the crime. Therefore, prejudice has not been shown.

After careful consideration, we find this issue has no merit.

III.

Defendant finally challenges the sufficiency of the convicting evidence, based on lack of physical evidence connecting him to the crime scene and inaccuracy of the eyewitness identification.

When an accused challenges the sufficiency of the 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 reevaluate 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). Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this court. Id. at 835.

A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the state, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Because a verdict of guilty 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).

The primary issue raised by the defendant is the adequacy of the identification by the victim and the discrepancies in the descriptions given by the victim at various times. At trial Dr. Soberman was questioned at length about the discrepancies in details she provided the police. At one point she told police that the person who attacked her had a large silver gun that seemed to widen as it went toward the robber's hand. The defendant's .25 automatic was not large. At different times she gave descriptions of the individual and his gun. Some details varied. In general she described him as being in his twenties, five feet ten inches, one hundred fifty to one hundred sixty pounds, wearing a red shirt, textured jacket, dark pants, a white hat, a gold chain, and white shoes that were not smooth. He was African-American with a medium complexion and dark eyes. A police officer testified that her description was consistent with defendant's appearance.

Concerning any discrepancies in the various descriptions given the police, Dr. Soberman testified that she was very angry when she originally described her attacker on the phone to the dispatcher, because she feared the police were not coming. By the time the man was brought back to the restaurant for identification she was entirely calm.

In State v. Strickland, 885 S.W.2d 85, 87-88 (Tenn. Cr. App. 1993), this court held that the testimony of a victim identifying a perpetrator is sufficient in and of itself to support a conviction. From a review of the entire record, we can only conclude that the evidence is sufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt.

In his appellate brief defendant raised for the first time a question concerning

the jury instruction on identification. In a recent opinion, the Tennessee Supreme Court modified the law regarding jury instructions on the identification of criminal defendants. In State v. Dyle, 899 S.W.2d 607 (Tenn. 1995), the court held that identity will be a material issue when the defendant puts it at issue or the eyewitness testimony is uncorroborated by circumstantial evidence. The court promulgated a new jury instruction on identification and held that it was plain error not to give the instruction when witness identification was a material issue[2] and the instruction was requested by defendant's counsel.

In Dyle the Supreme Court held that the value of identification evidence depends on several factors:

> (1) the witness' capacity and opportunity to observe the offender;
>
> (2) the degree of certainty expressed by the witness regarding the identification and the circumstances under which it was made, including whether it is the product of the witness' own recollection;
>
> (3) the occasions, if any, on which the defendant failed to make an identification of the defendant, or made an identification that was inconsistent with the identification at trial; and
>
> (4) the occasions, if any, on which the witness made an identification that was consistent with the identification at trial, and the circumstances surrounding such identification.

State v. Dyle, 899 S.W.2d 607, 612 (Tenn. 1995). Defendant did not raise the jury instruction issue at any time prior to filing his brief in this court. However, we consider this issue on the merits because the Supreme Court in Dyle made its ruling specifically applicable to all cases tried or on appeal as of or after the date of its release.

Because defense counsel did not request any special instruction, our review must be based upon the harmless error standard. Id. at 612. There can be no

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[2]Neither party argued the issue whether the existence of other corroborating evidence eliminated the question of identification as a materiall issue. See 899 S.W.2d at 612.

reversal, “except for errors which affirmatively appear to have affected the result of the trial on the merits”. Tenn. R. Crim. P. 52(a).

In our view, the failure to give the instruction was harmless error. The proof of identification was sufficient. The victim observed her assailant in a lighted area for an adequate period of time to see him clearly. Her descriptions were generally consistent. There was no point at which the victim misidentified or failed to identify the defendant. It was the prerogative of the jury to assess the credibility of those who testified. Any error created by the failure to provide the Dyle instruction was harmless.

For the reasons set out in the discussion above, we find that the defendant’s issues on appeal all lack merit. The judgment of the trial court is affirmed.

_____
CORNELIA A. CLARK
SPECIAL JUDGE

CONCUR:

_____
JOHN H. PEAY, JR.
JUDGE

_____
DAVID H. WELLES
JUDGE

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STATE OF TENNESSEE,	)	**C.C.A. No. 01C01-9505-CR-00146**
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Appellee,	)	**SHELBY COUNTY**
	)	**Hon. Arthur T. Bennett, Judge**
VS.	)	
	)	**(Aggravated Robbery)**
JACK D. WILLIAMS,	)	
	)	

Appellant.) **No. 91-06115 BELOW**

JUDGMENT

Came the appellant, Jack Williams, by counsel and also came the attorney general on behalf of the state, and this case was heard on the record on appeal from the Criminal Court of Shelby County; and upon consideration thereof, this court is of the opinion that there is no reversible error in the judgment of the trial court.

It is, therefore, ordered and adjudged by this court that the judgment of the trial court is affirmed, and the case is remanded to the Criminal Court of Shelby County for execution of the judgment of that court and for collection of costs accrued below.

Costs of the appeal will be paid into this Court by the appellant, Jack Williams, for which let execution issue.

Per Curiam
Peay, Welles, Clark