IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1996 SESSION

FILED

February 11, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	NO. 03C01-9511-CC-00343
	)	
Appellee	)	RHEA COUNTY
	)	
V.	)	HON. BUDDY PERRY, JUDGE
	)	
FLOYD LEON HYATTE	)	(First Degree Murder)
	)	
Appellant	)	
	)	

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OPINION FILED:_____

AFFIRMED

William M. Barker, Judge

Opinion

The Appellant, Floyd Leon Hyatte, appeals as of right his conviction of first degree murder. He was sentenced to life in prison. The arguments presented on appeal are:

(1) The Appellant's Fifth Amendment right against self-incrimination was violated when, during jury deliberations, the foreman of the jury commented that the appellant would have testified on his own behalf if he had not been guilty.

(2) The State suppressed exculpatory evidence when it caused or permitted the victim's jacket to be destroyed.

(3) The Appellant was convicted solely on uncorroborated accomplice testimony.

After reviewing the record on appeal, we find no reversible error and, therefore, affirm the trial court's judgment.

On February 14, 1993, Valentine's Day, the Appellant shot and killed Johnny Joe Dillard. The following events led up to the murder. On that Sunday morning, Billy Coleman, Arlene "Sissy" Price, Larry Goss, Johnny Dillard, and James Nixon were "partying", i.e. drinking beer, in James Nixon's apartment in the Taylor Hills Housing Projects in Dayton, Tennessee. Over the course of the day, a few other individuals stopped by, drank beer, and then left.

Later in the afternoon, probably between 4:00 and 5:30 p.m., Billy Coleman and Sissy Price were getting ready to leave the gathering. Suddenly, and for no apparent reason, Johnny Dillard stabbed Billy Coleman in the back with a kitchen knife and ran out the door.[1] Outside the Nixon apartment, ten-year old Bobby Combs witnessed Johnny Dillard run to the top of the Taylor Hills Projects and into the woods behind the residential area.

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[1] The knife wound in Billy Coleman's back, however serious, was not fatal and after being treated at the Rhea County Emergency Clinic and Erlanger Hospital, he recovered fully.

Combs then went up to the Appellant's residence, which was located near the top of the hill at the Taylor Hills Projects, and told the Appellant's wife that Billy Coleman had been stabbed. Hearing this the Appellant and Greg Garmany left the Appellant's house. On the street outside the house they encountered Bobby Combs and he showed them where Dillard ran into the woods. The Appellant and Garmany walked up to the edge of the woods and as they were coming back into the projects, Bobby Combs overheard one of them saying "let me get this gun out of my pocket and put it in safety." The Appellant and Garmany then got into Sissy Price's light blue Ford Granada and drove away.

On their way through Taylor Hills, the Appellant and Garmany first encountered Maria Jones, who was visiting friends in the area that day. According to Ms. Jones, the Appellant asked her whether she had seen a white man running through the area. The Appellant and Garmany continued driving until they encountered Jamie Johnson, who was in the Taylor Hills Projects helping his sister move. The Appellant asked Mr. Johnson if he had seen a white man, and then told him that the white man had stabbed a friend of his and that "he'd have it took care of."

The Appellant's companion, Greg Garmany, testified as to what happened after they left the Taylor Hills Projects. Garmany testified that he and the Appellant started driving towards an area called Mountain View. After arriving in Mountain View they came to a stop sign, where they decided to wait for a few minutes. Suddenly Johnny Dillard appeared in the distance. The Appellant called his name in an attempt to get him to come to the car. As Dillard approached, the Appellant stuck his left arm through the window holding a .25 caliber handgun and fired at least four shots in Dillard's direction. Garmany testified that he did not know that the Appellant intended to shoot Dillard and that he turned his head away when the Appellant fired the gun. The Appellant and Garmany then left Mountain View and first drove towards Graysville and then turned towards Oster Hill, where the Appellant threw the .25 caliber handgun

into some bushes.[2] The Appellant then drove back to Taylor Hills and went to his residence where he was questioned by the police later that evening.

At the scene of the shooting, Dillard apparently managed to walk to a residence on Old Graysville Road. By then the blood loss made him too weak to continue further and he collapsed behind the residence. Maria Poinsett, who was babysitting at the Old Graysville Road residence, discovered Dillard's body between 6:00 - 6:30 p.m. She called her parents who notified the authorities. The Medical Examiner testified at trial that Johnny Dillard suffered at least three fatal gun shot wounds and that each one of the three wounds would have been sufficient to cause Dillard's death.

The Appellant was later indicted and arrested for the murder of Johnny Dillard. A jury of his peers found him guilty of first degree murder and he was sentenced to life imprisonment in the Tennessee Department of Corrections.

I.

The Appellant first contends that his Fifth Amendment right against self-incrimination was violated when, during jury deliberations, the foreman of the jury commented that the Appellant would have testified on his own behalf if he had not been guilty.

At the hearing on the Appellant's motion for a new trial, juror Leonard Zunk testified that the jury foreman, William Arnold, commented during deliberations that the Appellant would have testified if he were not guilty. Zunk further testified that as many as five jurors participated in the conversation concerning the Appellant's failure to testify. Thereafter, the trial court called every one of the jurors to testify regarding the matter. Some of them had no memory of any conversation regarding the Appellant's failure to testify. Some said maybe the conversation did occur, but they could not recall for certain; still others recalled that a brief conversation about that

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[2] Greg Garmany later showed the police where he said the Appellant threw the gun, but in spite of a thorough search the murder weapon was never found.

subject did occur. All jurors, including Zunk and William Arnold, however, specifically testified that the Appellant's failure to testify in his own behalf in no way influenced their verdict. Accordingly, the trial court ruled that the Appellant was entitled to no relief based upon any alleged jury misconduct. We agree.

Tennessee Rule of Evidence 606(b) governs under what circumstances jurors are competent to testify regarding the validity of a verdict. The rule provides, in pertinent part, that:

> [A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotion as influencing that juror to assert to or dissent from the verdict . . . concerning the juror's mental processes, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion . . . .

Id.

We find that the statements complained about in this case are insufficient to impeach the jury verdict. Clearly, the statements do not involve "extraneous prejudicial information" and likewise do not reflect that any "outside influence" was improperly brought to bear upon any juror. See State v. Blackwell, 664 S.W.2d 686 (Tenn. 1984) (holding that racial remarks made to pressure other jurors to convict an African-American were insufficient to invalidate a jury verdict); State v. Frazier, 683 S.W.2d 346, 353 (Tenn. Crim. App. 1984) (holding that premature jury deliberations in violation of judge's instructions is insufficient to invalidate a jury verdict); State v. Hailey, 658 S.W.2d 547, 553 (Tenn. Crim. App. 1983) (finding that pressure and intimidation by other jurors will not impeach a jury verdict).

Extraneous prejudicial information or outside influence includes such things as "the reading of prejudicial newspaper editorials by the jury during its deliberation, the imparting of prejudicial information to the jury by an officer having charge of it, or when a bailiff who is a witness in the trial of the case is present in the jury room during the jury's deliberation." Montgomery v. State, 556 S.W.2d 559, 562 (Tenn. Crim. App.

1977). We do not consider the statements complained about in this case to be either outside influence or extraneous prejudicial influence.

The Appellant, relying on State v. Fuino, 608 S.W.2d 892 (Tenn. Crim. App. 1980), argues that the jurors' statements amounted to extraneous prejudicial information. The Appellant's reliance is misplaced. In Fuino, two appellants' were on trial for assault and murder. At the end of the trial, when the judge instructed the jury on the applicable law, he instructed them on first degree murder without informing them that they would later have to determine how the appellants' sentences were to be served. This instruction was erroneous and not in accordance with Tennessee Pattern Jury Instruction - Criminal, sections 20.01 and 20.02.[3] The trial judge then instructed the jury on the lesser included offenses, what sentences ranges they carried, and that the trial court would impose those sentences. Due to the incomplete instruction, the jury foreman made erroneous statements of law which caused the jury to misinterpret how the law should be applied to the case before them. On appeal this Court held that the jury foreman's statements regarding how the law should be applied in that case constituted extraneous prejudicial error and that "[t]he jurors were induced to agree by misrepresentation and mistake." Fuino, 608 S.W.2d at 895-96. This Court also said that since the trial judge failed to properly instruct the jurors, it cannot be said the jurors simply misunderstood the jury charge. Id at 896. We do not find that Fuino is applicable to this case because the trial judge correctly charged the jurors on the law as it should be applied to this case. Moreover, each juror testified that the failure of the Appellant to testify did not influence their verdict. This issue is without merit.

II.

[3] This section has been renumbered and is now Tennessee Pattern Jury Instruction - Criminal § 7.01.

The Appellant next contends that the State suppressed exculpatory evidence when it caused or permitted the victim's jacket to be destroyed. This issue is likewise without merit.

After the February 14, 1993, shooting the victim's body was transported to a local funeral home. At the funeral home, the victim's body was undressed before it was sent to the Tennessee Medical Examiner for the autopsy. The funeral home kept the victim's clothes for two to three weeks and then contacted the police department asking what it should do with the clothes. Somebody at the police department told the funeral home personnel that they would collect the clothes if they needed them. Three to four days later the clothes were destroyed by funeral home personnel. The Appellant now claims that the victim's jacket should have been preserved and tested for gunpowder residue and polorizable fibers that were found in the victim's gunshot wounds.

The Appellant's theory at trial was that Sissy Price shot Johnny Dillard at close range in the apartment where the stabbing occurred and that the shot was muffled by a pillow or some other material containing polorizable fibers. The Appellant claims that the jacket could have shown traces of gunpowder which would have shown that Johnny Dillard was shot at close range and that the polorizable fibers came from a pillow or other material and not from the victim's clothes.

It is well-established in American jurisprudence that whenever a defendant requests exculpatory evidence the prosecuting attorneys have a duty to provide any such exculpatory evidence if relevant to the defendant's guilt or innocence. Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963); State v. Philpott, 882 S.W.2d 394, 402 (Tenn. Crim. App. 1994). Whether the Brady rule regarding exculpatory evidence has been violated depends on whether the defendant can satisfy the following test:

> 1) The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);

2) The State must have suppressed the information;
3) The information must have been favorable to the accused; and
4) The information must have been material.

State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995) (citing State v. Evans, 838 S.W.2d 185 (Tenn. 1992); State v. Spurlock, 874 S.W.2d 602 (Tenn. Crim. App. 1993); Workman v. State, 868 S.W.2d 705 (Tenn. Crim. App. 1993); State v. Marshall, 845 S.W.2d 228 (Tenn. Crim. App. 1992); Strouth v. State, 755 S.W.2d 819 (Tenn. Crim. App. 1986)). Under the fourth prong of the test, exculpatory evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, __ U.S. __, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995) cited in Edgin, 902 S.W.2d at 390 (Opinion on Petition for Rehearing). In Kyles, the United States Supreme Court further stated that:

> [t]he touchstone of materiality is a "reasonable probability" of a different result . . . [where] . . . [t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he [or she] received a fair trial . . . [and whether] . . . the Government's evidentiary suppression "undermine[d] confidence in the outcome of the trial."

Id (citations omitted).

In the case before us, the Appellant has failed to establish a Brady violation. First, we have been unable to find any requests from the Appellant's counsel to the State to produce any of the victim's clothes. We are also unable to see how the victim's jacket could be considered obviously exculpatory evidence requiring the State to furnish it absent a request. Second, the Appellant has failed to show that the State or the police authorities negligently or intentionally suppressed the evidence at issue. The record shows that the victim's clothes were available at the funeral home from the time of the shooting until they were destroyed by funeral home personnel. Third, the record shows that the clothes were never in the State's custody and that they were destroyed only a few days after the state was notified where the clothes were located. It would have been impossible for the State to suppress evidence that was never in its

custody. Fourth, the Appellant has failed to show that the victim's jacket would have provided favorable or material evidence. All the Appellant has offered is pure speculation of what evidence might have been established if the victim's jacket had been tested. We do not find that the Appellant has suffered a Brady violation.

III.

The Appellant's third and final issue is that he was convicted solely on uncorroborated accomplice testimony. This issue is also without merit.

In Tennessee a defendant cannot be convicted solely on uncorroborated accomplice testimony. Sherrill v. State, 321 S.W.2d 811,814 (Tenn. 1959); State v. Gaylor, 862 S.W.2d 546, 552 (Tenn. Crim. App. 1992). An accomplice is "a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime." Clapp v. State, 30 S.W.2d 214, 216 (Tenn 1895); State v. Lawson, 794 S.W.2d 363, 369 (Tenn. Crim. App. 1990). Accomplice testimony will be considered corroborated if "there is some other evidence fairly tending to connect the defendant with the commission of the crime." Marshall v. State, 497 S.W.2d 761, 765-66 (Tenn. Crim. App. 1973); see Clapp, 30 S.W.2d at 216. This other evidence "must be some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference . . . that the defendant is implicated in [the commission of a crime] . . . . This corroborative evidence may be . . . entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction . . . ." Hawkins v. State, 469 S.W.2d 515 (Tenn. Crim. App. 1971) quoted in Gaylor, 862 S.W.2d at 552. Whether an accomplice's testimony has been sufficiently corroborated is a question for the jury. Gaylor, 862 S.W.2d at 552.

In this case, Greg Garmany was the State's only witness regarding what happened after he and the Appellant left Taylor Hills. The Appellant argues that Greg Garmany was an accomplice to the Appellant and that his testimony implicating the Appellant as the killer was not corroborated. We disagree. Assuming arguendo that

Greg Garmany was an accomplice to the Appellant, we find that there was sufficient corroborating evidence to support the Appellant's conviction.

Immediately after the Appellant and Garmany heard about the stabbing, they got Bobby Combs to show them where Johnny Dillard ran into the woods. The Appellant and Garmany then went up to the woods to look for Dillard. Before coming back into the projects, Bobby Combs overheard either the Appellant or Garmany state "let me get this gun out of my pocket and put it in safety." Moreover, before the Appellant and Garmany left Taylor Hills they encountered Ms. Jones and asked her whether she had seen a white man running through the area. They then encountered Mr. Johnson and the Appellant asked him whether he had seen a white man, and told him that this white man had stabbed his friend and that he would take care of the situation. Finally, there was also testimony at trial from Billy Coleman, who asked the Appellant approximately three moths after the stabbing if he knew who had killed Johnny Dillard. The Appellant apparently responded to the inquiry by stating: "Never underestimate the power of friends."

Moreover, the trial judge properly instructed the jury on the law pertaining to accomplice testimony and the jury found that either Greg Garmany was not an accomplice and his testimony did not need corroboration or that Greg Garmany was an accomplice and that his testimony was sufficiently corroborated. We do not find any reversible error.

For the reasons stated above, we affirm the judgment of the trial court.

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WILLIAM M. BARKER, JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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DAVID G. HAYES, JUDGE