IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
NOVEMBER SESSION, 1996

STATE OF TENNESSEE,	)	
	)	**No. 02C01-9512-CR-00359**
Appellee	)	
	)	**SHELBY COUNTY**
vs.	)	
	)	**Hon. JOSEPH B. DAILEY, Judge**
DONALD C. WILLIAMS,	)	
	)	**(Aggravated Robbery)**
Appellant	)	

For the Appellant:

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(ON APPEAL)

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(AT TRIAL)

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Donald C. Williams, was convicted by a Shelby County jury of aggravated robbery, Tenn. Code Ann. §39-13-402(a)(1) (1991), and sentenced to twelve years confinement in the Department of Correction. On appeal, the appellant challenges the sufficiency of the identification evidence.

1. Factual Background

The appellant's case proceeded to trial on February 28, 1995. The State's principal witness was Jermaine Butler, the victim in this case. Butler recounted that, on June 5, 1993, he drove his girlfriend to her mother's home in the Foote Homes apartment complex in Memphis. As he was leaving the complex, he slowed his vehicle in order to drive over a speed bump. A man ran up to the passenger side of Butler's car, pointed a small, semi-automatic pistol at Butler, asked him if he was a police officer, and "patted [him] down." The assailant then stated. "I'm sprung, I don't want to blow your brains out, but give me what you got." Butler gave the assailant approximately thirty or forty dollars, whereupon the assailant ran away. Butler drove to a nearby store, where he encountered a police officer to whom he reported the robbery and gave a description of the person who had robbed him.

On June 12, 1993, Butler and several friends returned to the complex where the robbery had occurred. On this occasion, Butler observed his assailant sitting on a porch. He contacted the police and led several officers to his assailant. The police arrested the person whom Butler had identified.

Butler further testified that, during the robbery, his assailant was very close, and Butler was able to see his face.[1] It was approximately 6:00 a.m. and "pretty light outside." The sun had already risen. Butler stated that his assailant "had like a Jheri curl. It was not real long. Kind of long. A light beard and mustache." He also informed the police that his assailant was approximately six feet tall and weighed approximately two hundred and twenty-five pounds.[2] At trial, Butler identified the appellant as his assailant and asserted that he had no doubts concerning his identification.[3] Butler also stated that he had positively identified the appellant during a photographic lineup and at a preliminary hearing.

Daisy Henderson testified on behalf of the appellant. She stated that, on the evening of June 4, 1993, and during the early morning hours of June 5, 1993, she was having a birthday party for her daughter at her home in the Foote Homes apartment complex. The appellant arrived at her home at 2:00 a.m. or 3:00 a.m. Approximately one hour later, she accompanied the appellant to the home of a neighbor, Patricia Bobo. After twenty or thirty minutes, she left the appellant at Ms. Bobo's home. When she returned to Ms. Bobo's home between 6:40 a.m. and 7:00 a.m., the appellant was asleep on the couch.

Patricia Bobo testified that, on the morning of June 5, 1993, she encountered the appellant at Daisy Henderson's home. At approximately 4:00 a.m., she allowed the appellant to go to her apartment in order to sleep. Ms. Bobo returned to the party. She left the party at approximately 5:40 a.m. The

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[1]Mr. Butler conceded that he did not notice whether or not his assailant had distinguishing marks on his face or hands. The appellant testified that, at the time of the offense, he had a gold tooth. He had also tattooed on his hands "SEX," "MONEY," and "Mr. Love."

[2]The appellant testified that he is six feet, one inch tall and weighs two hundred and sixty pounds.

[3]Following the appellant's testimony, Butler additionally testified that he recognized the appellant's voice as the voice of his assailant.

appellant and another acquaintance, Robbie Webb, were sleeping in the living room. Ms. Bobo went upstairs and watched television. She asserted that she would have heard the door being unlocked if someone had left the apartment. She went back downstairs sometime after 6:00 a.m. On cross-examination, Ms. Bobo conceded that she had been drinking at the party, but maintained that she is not a "heavy drinker."

Robbie Webb testified that he attended the party at Ms. Henderson's home. At approximately 3:00 a.m. or 4:00 a.m., he went to Ms. Bobo's apartment to sleep. The appellant was asleep on the couch. Mr. Webb slept on a love seat. He awoke sometime between 6:00 a.m. and 7:00 a.m. in order to open the door for Ms. Henderson. The appellant was still present in the apartment.

The appellant testified on his own behalf. On June 4, 1993, the appellant had just been released from prison on parole and was visiting family. In the early morning hours of June 5, he decided to attend the party at the home of Daisy Henderson. He stated that, when he left the party, he went to Ms. Bobo's apartment and slept on her couch until 10:00 a.m. or 11:00 a.m. He testified that Ms. Bobo is his sister-in-law. He denied robbing Mr. Butler.

On cross-examination, the appellant stated that the term "sprung" indicated drug addiction. He admitted previously pleading guilty to two drug-related offenses. He also admitted selling drugs, including cocaine and marijuana, more than two hundred times between 1988 and 1992. However, he denied any addiction.

2. Analysis

Again, the appellant challenges the sufficiency of the identification

evidence. A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant must establish that the evidence presented at trial was so deficient that no "reasonable trier of fact" could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); Tenn. R. App. P. 13(e). Guilt may be predicated upon direct evidence, circumstantial evidence, or both. State v. Carey, 914 S.W.2d 93, 95 (Tenn. Crim. App. 1995).

An appellate court may neither reweigh nor reevaluate the evidence when determining its sufficiency. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and 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, and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990). "A jury verdict approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory." State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). The State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. Id. See also State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992).

"It is well established that the identification of a defendant as the person who committed the offense for which he is on trial is a question of fact for the determination of the jury upon consideration of all competent proof." State v. Strickland, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993). See also State v. Williams, No. 01C01-9505-CR-00146 (Tenn. Crim. App. at Jackson, November 12, 1996); State v. Rollins, No. 03C01-9308-CR-00250 (Tenn. Crim. App. at

Knoxville), perm. to appeal denied, (Tenn. 1995).[4] Moreover, this court has held that the identification testimony of a victim is, by itself, sufficient to support a conviction. Id. We conclude that the evidence adduced at trial is sufficient.

Accordingly, we affirm the judgment of the trial court.

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[4]Again, the trial occurred on February 28, 1995, prior to our supreme court's opinion in State v. Dyle, 899 S.W.2d 607 (Tenn. 1995). That opinion was released on May 15, 1995. In Dyle, 899 S.W.2d at 612, the Supreme Court promulgated an identity instruction which must be given to the jury by the trial court when identification is a material issue and it is requested by defense counsel. In the instant case, because the trial occurred prior to the Dyle opinion, defense counsel did not request and the trial court did not give the Dyle instruction. Rather, the trial court instructed the jury:

> The Court charges you that the identity of the defendant, Donald C. Williams, must be proven in the case on the part of the State to your satisfaction, beyond a reasonable doubt. In other words, the burden of proof is on the State to show that the defendant now on trial before you is the identical person who committed the alleged crime with which he is charged. In considering the question of the identity of a person, the Jury may take into consideration the means and opportunity of identification, if any; whether it was light or dark; the distance intervening; the dress or clothing worn; the character and color of same; the size, height, and color of the individual; whether known to him, and if so, how long, and if seen before, under what circumstances; whether running or moving rapidly, standing still, walking fast or slow at the time claimed to the person testifying; the color of the hair; hat worn; facial expression or features and appearance; whether with or without moustache [sic] and beard; whether person said to be identified was white, black, dark, yellow, or light color; masked or not; the voice and speech.
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> All these things when shown in the proof may be considered by the Jury in determining the question of identity. The word identity means the state or quality of being identical, or the same; it means sameness. Identification means the act of identifying or proving to be the same. The word "Identify" means to establish the identity or to prove to be the same as something described, claimed or asserted.
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> The Court charges you that if you are satisfied from the whole proof in this case, beyond a reasonable doubt, that the defendant, Donald C. Williams, committed the crime charged against him, and you are satisfied, beyond a reasonable doubt, that he has been identified as the person who committed the crime charged, then it would be your duty to convict him. On the other hand, if you are not satisfied with the identity from the proof, or you have a reasonable doubt as to whether he has been identified from the whole body of the proof in the case, then you should return a verdict of not guilty.

Dyle is applicable both to those cases on appeal when the opinion was released and to those cases tried after that date. Id. The appellant filed his notice of appeal on June 16, 1995. Thus, the case was not "on appeal" when the opinion in Dyle was released. Nevertheless, applying the principles set forth in Dyle, in the context of the evidence in this case and the above instruction, we conclude that any error was harmless. Id.; Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

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DAVID G. HAYES, Judge

CONCUR:

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GARY R. WADE, Judge

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WILLIAM M. BARKER, Judge