IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1997 SESSION

FILED

June 12, 1998

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	No. 01C01-9611-CC-00494
	)	
Appellee	)	
	)	HICKMAN COUNTY
V.	)	
	)	HON. HENRY DENMARK BELL,
EARL HAYNES,	)	JUDGE
	)	
Appellant.	)	(Aggravated Assault)
	)	
	)	

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OPINION FILED: _____

REVERSED AND REMANDED

William M. Barker, Judge

OPINION

The appellant, Earl Haynes, appeals as of right his conviction in the Hickman County Circuit Court of aggravated assault. He received a sentence of six years as a Range II Multiple Offender to be served consecutively to a sentence he is currently serving.

On appeal, appellant raises the following issues: (1) whether the trial court erred in admitting hearsay testimony from David Westbrooks pursuant to the business records exception; (2) whether the trial court should have given the jury a missing witness instruction; (3) whether the trial court should have charged the lesser offense of assault; and (4) whether appellant received the effective assistance of counsel. Following a review of the record, we reverse appellant's conviction and remand to the trial court for a new trial.

The incident giving rise to appellant's conviction occurred December 19, 1993 at the Turney Center Prison in Hickman County where appellant and the victim, Walter Long, were incarcerated. At approximately 6:00 p.m. that evening, a correctional officer at the prison walked by appellant and Long, who were having a conversation in the prison yard. As he passed the men, he heard one say "What'd you disrespect me for?" He turned around and saw appellant pull a prison-made knife out of the back of his pants, swing at the victim, and strike him in the upper left chest. Appellant ran, but was quickly apprehended by nearby officers.

The officer identified the knife as eight to ten inches long and as having a red piece of yarn on the handle. When appellant was stopped, he was accompanied by Kenneth Rush, another inmate. A search of both men revealed two knives in the sleeves of Rush's coat. No weapons were found on appellant, but one of the knives recovered had a red shoestring on the handle and was identified as the one which appellant used. Neither knife was submitted for forensic testing.

David Westbrooks, an internal affairs officer at the Turney Center, investigated the altercation. He testified that Long suffered a small puncture wound to his left breast area and was treated in the infirmary and released. Westbrooks spoke with both Long and appellant in the course of his investigation. When he spoke to appellant, appellant reported that "a very large man" stabbed him in the genital area just minutes before he attacked Long.[1] That man was later identified as Walter Long.[2] Westbrooks observed an injury to appellant's left testicle and he testified that appellant received medical treatment for the wound. Westbrooks also stated that criminal charges were pending against Long.

Finally, Westbrooks testified that disciplinary charges were brought against appellant within the prison system. He stated that appellant pled guilty to assault and was disciplined accordingly.

The defense offered no proof and the jury convicted appellant of aggravated assault, the indicted charge. At a subsequent sentencing hearing, the assistant district attorney informed the trial court that the State and the appellant had reached an agreement on the sentence appellant would receive. Appellant's counsel confirmed that they had agreed on a six year sentence, the minimum in the range, to be served consecutively to appellant's current sentence. After verifying that appellant agreed to the sentence, the trial court sentenced appellant accordingly.

Appellant first argues that the trial court erred in admitting certain hearsay testimony from David Westbrooks under the business records exception. See Tenn. R. Evid. 803(6). He contends that Westbrooks' testimony was inadmissible because it was premised upon prison records which were not introduced into evidence and because Westbrooks was not the custodian of the records.

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[1]Testimony demonstrated that Long was between 6'2" and 6'4" tall and weighed approximately 260 pounds. According to testimony, Long was "massively larger than [appellant]."

[2]Westbrooks' testimony is somewhat unclear, but apparently appellant was reluctant to identify his assailant. From his trial testimony, we are unable to discern how Westbrooks determined that it was Long who assaulted appellant.

Appellant's first contention is without merit. He argues that the business records hearsay exception permits admission of the records only and does not cover testimony based upon those records. In the absence of those records being admitted into evidence, he argues that Westbrooks' testimony was inadmissible hearsay. However, our review of the relevant case law indicates that courts do not draw such a distinction. See Alexander v. Inman, 903 S.W.2d 686, 700 n.27 (Tenn. Ct. App. 1995); State v. Hailey, 769 S.W.2d 228, 230-31 (Tenn. Crim. App. 1989); State v. Blackmon, 701 S.W.2d 228, 231 (Tenn. Crim. App. 1985) (permitting hearsay testimony based on business records that were not admitted into evidence).

Nevertheless, we are unable to address the merits of the business records issue because appellant has failed to make appropriate references to the record. Tenn. Ct. Crim. App. R. 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988). In order to review this issue, it is imperative for appellant to direct us to which of Westbrooks' statements that he is challenging as hearsay. Unfortunately, his brief fails to do so. Westbrooks' testimony encompassed thirty-eight pages of transcript. While appellant broadly attacks Westbrooks' testimony regarding medical records, disciplinary proceedings, and appellant's guilty plea in prison disciplinary proceedings, he fails to refer to the applicable pages in the record. We cannot speculate as to which portions of the testimony that appellant believes were admitted in error. As a result, the issue is waived. State v. Robert Anthony Devito, No. 01C01-9509-CC-00285 (Tenn. Crim. App. at Nashville, November 27, 1996) (concluding that hearsay issue was waived for failure to make appropriate references to record).

Appellant also contends that he was entitled to a missing witness instruction in light of the State's failure to call the victim to testify at trial. He argues that it would only have been "natural" for the State to call Long because he had more particular knowledge of the facts. In denying appellant's request, the trial court stated that a missing witness instruction is not warranted when the witness is available to either party. We agree.

Generally, when a party fails to call an available, material witness who would be expected to offer favorable testimony, the trial court may instruct the jury that such failure leads to an inference that the witness' testimony would have been unfavorable to that party. State v. Francis, 669 S.W.2d 85, 88 (Tenn. 1984); Delk v. State, 590 S.W.2d 435, 440 (Tenn. 1979). However, that inference does not arise when the witness is equally available to both parties. State v. Bigbee, 885 S.W.2d 797, 804 (Tenn. 1994); State v. Eldridge, 749 S.W.2d 756, 758 (Tenn. Crim. App. 1988); State v. Overton, 644 S.W.2d 416, 417-18 (Tenn. Crim. App. 1982); Bolin v. State, 472 S.W.2d 232, 235 (Tenn. Crim. App. 1971).

At appellant's trial, counsel freely admitted that Long was present in the courtroom and that he had spoken to Long. He stated that Long was willing to testify on appellant's behalf.[3] Clearly, the victim was available to both the prosecution and defense. Appellant may not now profit from his decision not to call Long as a defense witness. Eldridge, 749 S.W.2d at 758.

Appellant next argues that the trial court erred in denying his request to instruct the jury on the lesser offense of assault. He contends that assault is a lesser included offense of aggravated assault and the trial court had a duty to charge the jury on that offense. We agree that assault should have been charged to the jury.

It is incumbent upon a trial court to give the jury a complete charge of the law based upon the facts of the case. State v. Harbison, 704 S.W.2d 314, 319 (Tenn.), cert. denied, 476 U.S. 1145, 106 S.Ct. 2261, 90 L.Ed.2d 706 (1986) (citation omitted). The defendant is entitled to jury instructions on the indicted offense and instructions on any lesser grade offenses or lesser included offenses which are supported by the proof at trial. Tenn. Code Ann. §40-18-110 (1990); State v. Trusty, 919 S.W.2d 305, 311 (Tenn. 1996); State v. Ruane, 912 S.W.2d 766, 782 (Tenn. Crim. App. 1995).

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[3]According to statements of defense counsel, Long would have testified that appellant "did not in any way scratch him." The medical report of Long's visit to the prison infirmary reflects that Long reported he was scratched in a basketball game.

The duty is central to a defendant's right to trial by jury and is mandatory "where there are any facts that are susceptible of inferring guilt of any lesser included offense or offenses." State v. Wright, 618 S.W.2d 310, 315 (Tenn. Crim. App. 1981) (citations omitted).

While somewhat agreeing with defense counsel that the factual proof supported an instruction on assault, the trial court declined to give that instruction based on the language used in the indictment.[4] As a result, the only offense upon which the jury received instruction was aggravated assault.

Assault is a lesser grade offense of aggravated assault. See Tenn. Code Ann. §39-13-101 (1991); Tenn. Code Ann. §39-13-102 (Supp. 1993); Trusty, 919 S.W.2d at 310. Because all the elements of assault are included in the offense of aggravated assault, it is a lesser included offense as well. Trusty, 919 S.W.2d at 311. Therefore, if supported by the evidence at trial, the trial court had a mandatory duty to charge the jury on the elements of assault.

Although we are unable to discern a particular theory of defense from the record, the proof was susceptible of supporting a conviction for simple assault. In spite of testimony that appellant struck the victim with a knife, appellant was not in possession of a knife when apprehended. There was no medical testimony to demonstrate that the wound suffered by the victim was caused by a knife.[5] We note that the victim's accident report from the prison infirmary indicates that the wound was a "scratch."[6] Neither did the State present forensic proof to demonstrate that the recovered knife had traces of the victim's blood or skin. Therefore, the facts were susceptible of inferring guilt on the lesser offense of simple assault. Appellant was

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[4]The language of the indictment stated that appellant "unlawfully, feloniously, willfully and knowingly did cause bodily injury to Walter Long by use of a deadly weapon."

[5]Although a picture of Long's wound is included in the record, it is of poor quality and the nature of the wound is not readily apparent.

[6]This report was not passed to the jury.

entitled to an instruction on that offense. State v. Franklin Jenkins, No. 01C01-9601-CC-00030 (Tenn. Crim. App. at Nashville, October 24, 1997).

While it may be abundantly clear to this Court or to the trial judge that appellant is guilty of the greater offense, the determination of disputed facts is within the exclusive province of the jury. State v. Boyce, 920 S.W.2d 224, 227 (Tenn. Crim. App. 1995). Without an instruction on assault, the jury was not given the opportunity to weigh the evidence with respect to that offense. The failure of the trial court to charge the jury on simple assault deprived appellant of his right to a jury trial on that offense. Id. Appellant is entitled to a new trial.

Appellant's final issue alleges that he received the ineffective assistance of counsel at trial. He argues that trial counsel's failure to object to certain hearsay testimony, failure to serve a motion on the State in advance of trial, and counsel's failure to call the victim to testify were errors that fell below the range of competence demanded of attorneys in criminal cases.

This Court has commented on numerous occasions that raising the issue of ineffective assistance of counsel on direct appeal is a procedure that is "fraught with peril." See e.g. State v. Thompson, 958 S.W.2d 156, 161-62 (Tenn. Crim. App.), perm. app. denied (Tenn. 1997); State v. Anderson, 835 S.W.2d 600, 607 (Tenn. Crim. App. 1992); State v. Slater Belcher, No. 03C01-9608-CC-00299 (Tenn. Crim. App. at Knoxville, November 26, 1997), perm. app. filed (Tenn. January 26, 1998); State v. Derenzy Turner and Vernon West, No. 02C01-9512-CR-00390 (Tenn. Crim. App. at Jackson, June 11, 1997), perm. app. denied (Tenn. 1998); State v. Richard Madkins, No. 02C01-9511-CR-00351 (Tenn. Crim. App. at Jackson, August 22, 1997); State v. Jimmy L. Sluder, No. 1236 (Tenn. Crim. App. at Knoxville, March 14, 1990), perm. app. denied (Tenn. 1990). Generally, the practice is disfavored because steps are not taken to prepare an adequate record on the issue in the trial court. In a claim of ineffective assistance, the appellant has the burden of showing not only that counsel's performance was deficient, but also that he was prejudiced by the

deficiency. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In the absence of an evidentiary hearing on the issue, the trial record will rarely demonstrate the prejudice necessary to sustain the claim.

Although the issue of ineffective assistance was raised in appellant's motion for new trial and new counsel was appointed, there was no proof submitted on the issue at the hearing on the motion for new trial, and the trial court made no factual findings with regard to this issue. Without counsel's testimony and other relevant proof, we would be forced to speculate as to counsel's reasoning for his actions and whether any prejudice resulted from the alleged deficiencies. State v. Derenzy Turner and Vernon West, slip op. at 17. Therefore, we decline to address the issue on the merits.

In light of the trial court's error in failing to charge the lesser included offense of assault, we conclude that appellant is entitled to a new trial. Accordingly, we reverse the judgment of the trial court and remand for further proceedings in accordance with this opinion.

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William M. Barker, Judge

CONCUR:

_____
Joe B. Jones, Judge[7]

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Paul G. Summers, Judge

[7]Judge Jones died on May 1, 1998 following a distinguished career as a trial attorney and as a member of this Court since his appointment in November, 1986. He will be greatly missed.