IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1998 SESSION

FILED

September 29, 1998

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	No. 01C01-9709-CC-00414
	)	
Appellee	)	
	)	Robertson County
vs.	)	
	)	Honorable Robert W. Wedemeyer,
JAMES ROY JERNIGAN,	)	Judge
	)	
	)	(Aggravated Burglary)
Appellant.	)	

FOR THE APPELLANT:

MICHAEL R. JONES
Public Defender
110 Public Square
Springfield, TN 37172

FOR THE APPELLEE:

JOHN KNOX WALKUP
Attorney General & Reporter

LISA A. NAYLOR
Assistant Attorney General
Criminal Justice Division
425 Fifth Ave. North
2d Floor, Cordell Hull Bldg.
Nashville, TN 37243-0493

JOHN WESLEY CARNEY, JR.
District Attorney General
204 Franklin St.
Suite 200
Clarksville, TN 37040-3420

DENT MORRISS
Assistant District Attorney General
500 S. Main St.
Springfield, TN 37172

OPINION FILED: _____

AFFIRMED

CURWOOD WITT
JUDGE

OPINION

A jury in the Robertson County Circuit Court convicted the defendant, James Roy Jernigan, of aggravated burglary, and the trial court sentenced him to serve ten years in the Department of Correction as a Range III, persistent offender. The defendant now appeals his conviction and sentence alleging that various acts of prosecutorial misconduct denied him a fair trial and that the state failed to prove beyond a reasonable doubt that he was eligible for sentencing as a Range III, persistent offender. After reviewing the record before us and the applicable law, we affirm the judgment of the trial court.

The grand jury returned a three-count indictment against the defendant which included a charge of the aggravated burglary of the residence of Paul Yates as the first count, the aggravated burglary of the Humber apartment as the subject of the second count, and evading arrest in the third count. All three cases proceeded to trial on February 7, 1996. After the jury had been sworn and counsel had made their opening arguments, the assistant district attorney advised the trial judge that Paul Yates, the victim in count 1, was ill with the flu. An unidentified woman had called at 8:00 a.m. and reported that Yates was ill. At that time, the prosecutor spoke with Mr. Yates, and he agreed to come to court if a car were sent to pick him up. However, when the officer arrived at about noon, Yates was in bed and appeared to be quite ill. He told the officer that he did not want to testify. The trial judge decided not to order the sheriff to bring Yates to court, and the prosecutor then dismissed the first count of the indictment. Although given the opportunity, defense counsel declined to comment on the matter.

The trial proceeded on the two remaining charges. These charges arose from the burglary of an apartment occupied by Terri Humber and her sixteen-year old daughter, Kristi. Shortly before 1:00 a.m. on May 16, 1995, the Humbers were sleeping in the bedroom of their ground-level apartment when Kristi was

wakened by someone touching her on the leg. When she opened her eyes, she saw a bearded man kneeling next to the bed. As she started to raise up, he ran from the room. She woke her mother who was sleeping next to her and told her that someone was in the house. Through the doorway, Kristi saw a second man in the living room. Both men fled. Using a telephone near the bed, Terri Humber dialed 911 and reported that two men had broken in. Because three patrol cars happened to be passing nearby, the men were apprehended within moments and were returned to the scene of the offense. Kristi Humber identified the defendant, who was clad in a white t-shirt and shorts, as the bearded man whom she saw kneeling by her bed. She identified the co-defendant, Ricky Rippy, as the other intruder.[1] Rippy was wearing a blue t-shirt and jeans. Terri Humber had also seen the man in the white t-shirt run from the bedroom. Although she couldn't recall seeing the defendant previously, she immediately recognized the man in the blue t-shirt as Ricky Rippy. Rippy, his wife, and his mother-in-law had moved out of the apartment next to the Humbers two days prior to the burglary.

Two of the three officers who arrived at the scene testified at trial. Officer Mark Sletto explained that Officer Gober had arrived first. As Sletto drove by slowly, he saw a man run out from behind the house with Officer Gober in pursuit. At first, Sletto started to follow along in his patrol car, but then he saw a second man running in the opposite direction. Sletto turned to pursue him, but this man was apprehended by Detective Madison Burnette who leaped from his patrol car and ordered the suspect to stop. The man whom Burnette arrested was the defendant, James Roy Jernigan. After the Humbers identified the two men as the intruders, the officers examined the back doors to the house. They noted that the glass in a door leading onto the back porch was broken. The latch on the door leading into Humber's kitchen looked as though it had been forced. At some point, Burnette turned the defendant over to Sletto for transport and questioning. Sletto

---

[1] The cases were severed for trial. Rippy did not testify at Jernigan's trial. The record indicates that although the state had subpoenaed him, he could not be located on the day of trial.

noted that the defendant had been drinking, but as the defendant was able to walk and talk without any difficulty, Sletto proceeded to interrogate him. At 1:20 a.m., the defendant signed and initialed a statement that Sletto had written out in his own hand.[2] Officer Gober, who was no longer employed by the Springfield Police Department, did not appear to testify at the trial.

The defendant testified in his own behalf at trial. He said that he was an alcoholic and had been drinking heavily all day. He and Rippy had been friends and drinking buddies for about twenty years. The defendant had often been to Rippy's Locust Street apartment, and he had not known that Rippy had moved. He was sitting outside the back door when he heard a bump from inside the porch. When he looked inside, he saw Rippy going into the kitchen. He followed Rippy but stayed right beside the kitchen door. When someone yelled, he ran. The defendant testified that he was wearing a blue t-shirt and shorts and that he was carrying a six pack of beer in a garbage bag.

After the state rested and before the defendant testified, the defense moved the court to dismiss Count 3 because the state had failed to prove the elements of evading arrest. The prosecutor conceded that without Officer Gober's testimony, the state would be unable to sustain its burden of proof on that count. Defense counsel moved for a mistrial because the three counts had been read to the jury and argued during the opening statements. The trial judge dismissed the third count of the indictment but denied the defendant's motion for a mistrial. The

---

[2] The defendant has raised no issue related to the admissibility of his statement. In its entirety the statement says: "Mr. Rippy picked me up in a cab at my residence and went to 403 N. Locust St. Mr. Rippy got a key out of his pocket and opened the back door. Mr. Rippy stated he opened the door and told me to come in. I hesitated and entered the residence. I did not see him open the second door because I was outside, but I did hear a grunt and a bump into the door. That's when he came out and told me to come in. He stated that we were there to get his car from his wife, Brenda Boshane. We got into the apartment and then someone yelled and I left the apartment then was caught by the police."

jury returned a guilty verdict on the single remaining count of aggravated burglary.

I. Prosecutorial Misconduct; Denial of Mistrial

The defendant does not challenge the sufficiency of the evidence; rather, he contends that the trial court erred by denying his requests for mistrial due to the prosecutor's repeated misconduct. The entry of a mistrial is appropriate when the trial cannot continue for some reason, or if the trial does continue, a miscarriage of justice will occur. State v. McPherson, 882 S.W.2d 365, 370 (Tenn. Crim. App. 1994). The decision to grant a mistrial is within the sound discretion of the trial court, and this court will not disturb the trial court's determination unless a clear abuse of discretion appears on the face of the record. Id. Having reviewed the record, we find that although some of the prosecutor's actions were questionable, they were not so prejudicial as to warrant a new trial.

A. Dismissal of Two Counts of the Indictment

First, the defendant argues that the state's dismissal of two counts of the indictment after counsel had addressed the jury in their opening statements seriously prejudiced his right to a fair trial. The defendant contends that the prosecution knew at the outset that it had no proof to substantiate the counts that were ultimately dismissed. The record does not support the defendant's factual contentions. According to the assistant district attorney, he spoke with Paul Yates early on the day of trial. Although Mr. Yates was ill, he agreed to testify if the prosecutor sent a car to fetch him. The jury was then selected and sworn, the prosecutor read all three counts of the indictment, and counsel presented their opening arguments. During the lunch break. when the sheriff's deputy arrived to bring the witness to court, Mr. Yates declined. According to the deputy, Yates was in bed with a high fever and a very hoarse throat. After some discussion with the prosecutor, the trial judge decided not to order a bench warrant for Yates's appearance. With respect to the non-appearance of Office Gober who would have

provided testimony concerning the evading arrest charge, the sheriff's records showed that Gober's subpoena had been served, and nothing in the record indicates that the assistant district attorney was aware prior to trial that he would not appear.

Even if the facts were otherwise, we would be unable to determine on the record before us the degree to which the prosecutor's alleged misconduct prejudiced the defendant. The transcript of the trial does not contain either the jury voir dire or the opening statements. Without those portions of the trial, we do not know to what extent the facts in counts 1 and 3 were discussed prior to their dismissal. It is the appellant's obligation to preserve an adequate record in order to allow for a meaningful appeal. State v. Banes, 874 S.W.2d 73, 82 (Tenn. Crim. App. 1993). We cannot consider an issue which is not preserved in the record. Id. Moreover, the record indicates that when the assistant district attorney moved to dismiss the first count of the indictment, the trial court specifically asked the defense counsel if he had any comments. Defense counsel responded that he had none. No motion for mistrial was made until after the state rested and the trial court granted the defendant's motion to dismiss count 3 for insufficient evidence. The defendant cannot now expect relief when he failed to object to the dismissal of count 1 or to request a mistrial immediately. See Tenn. R. Crim. P. 36(a). On these facts, we cannot find that the trial court abused its discretion.

B. References to the Co-Defendant's Statement

The defendant also contends that the trial court erred in not granting his motions for a mistrial when the prosecutor referred to the co-defendant's statement and improperly cross-examined the defendant about facts relevant to the Yates burglary. Specifically, the defendant complains that the prosecutor acted improperly by asking him if the purpose of the burglary were to get money to purchase cocaine and whether the defendant and Rippy had stopped at Yates's house before they arrived at Humber's apartment.

We address first the prosecutor's reference to the co-defendant's statement. At the beginning of the state's cross-examination of the defendant, the following colloquy took place:

Prosecutor:	Mr. Jernigan, your alcohol is not the only kind of intoxicant that you like to use, it is [sic]?
Defense Counsel:	Your Honor, we would object to that.
The Court:	I will overrule the objection.
Prosecutor:	I will be more specific, Your Honor. Mr. Rippy, I will withdraw that. Mr. Jernigan - - let me ask you another way. You really went over to that apartment to rob folks in there to get some money to get some cocaine, didn't you?
Defendant:	No, sir, I did not.
Prosecutor:	You know that's what Ricky Rippy --
Defense Counsel:	Your Honor I would object to that. We will move for a mistrial.
The Court:	I sustain the objection and deny the motion for a mistrial.[3]

This situation is unusual. The prosecutor's questions themselves did not indicate that the content of the question was based on Rippy's statement. However, the prosecutor's unfinished remark that "You know that's what Ricky Rippy . . . " may well have been a reference to the co-defendant's statement. Because Rippy was not available to testify, such a reference was clearly improper. The criminally accused has the right to confront those who testify against him.[4] U.S. Const.

---

[3] We note that at no time during the course of this trial did either counsel state the grounds for any objection. The trial court allowed no responses to objections and gave no reasons for its rulings. Our review is hampered when we do not know the grounds for an objection and the trial court's rationale for sustaining or denying it.

[4] The defendant does not argue that the prosecutor's remark was a violation of his Sixth Amendment right to confront witnesses. He contends only that the reference was improper and prejudicial. This court, however, has the

amend. VI.; Tenn. Const. art.1, § 9. Admission of an incriminating statement of a non-testifying co-defendant violates a defendant's constitutional right of confrontation. Bruton v. United States, 391 U.S. 123, 126, 88 S. Ct. 1620, 1622 (1968); Smart v. State, 544 S.W.2d 109, 112 (Tenn. 1976). Although in this case the defendants were not tried jointly, the statements of a non-testifying co-defendant would generally be inadmissible both on constitutional and hearsay grounds. To the extent that the prosecutor's remark communicated that Rippy said that they were looking for money to purchase cocaine, the remark clearly violates the defendant's right to confront the witnesses against him. In this instance, however, defense counsel objected before the prosecutor was able to complete the sentence. The trial court immediately sustained the objection, and the prosecutor moved on to another topic. The state's case against the defendant is strong. The victims unhesitatingly identified the defendant who had been apprehended within moments of the commission of the offense. The defendant admitted both in his statement to the police and in his trial testimony that he entered the apartment. On this record, we find that although the oblique reference to the co-defendant's statement was undoubtedly a violation of the defendant's constitutional rights, it had no effect on the jury's verdict and was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967).

We also find that, in context, the prosecutor's reference to the defendant's use of cocaine was objectionable.[5] Rule 608 requires adequate notice, a jury-out hearing, and a finding that the probative value outweighs the prejudicial effect before the state may use specific instances of conduct to impeach a defendant.

---

authority to review the record for apparent errors. Tenn. R. Crim. P. 52(b); Tenn. R. App. P. 13(b); State v. Givhan, 616 S.W.2d 612, 613 (Tenn. Crim. App. 1980). This constitutional error is apparent on the face of the record.

[5] The prosecutor twice referred to cocaine during the defendant's cross examination. The reference, quoted in full in the text above, occurred at the beginning of the prosecutor's cross-examination. The second occurred later when the prosecutor asked the defendant if there had been any crack cocaine in the motel room to which the defendant and Rippy had paid a visit. Defense counsel raised no objection to the second statement at trial and has not included any mention of this question in his brief. Therefore we do not consider it in our resolution of this issue. See Tenn. R. App. P. 3 (e), 36 (a).

Tenn. R. Evid. 608(b)(3). Nothing in the record indicates that any of these requirements were satisfied.[6]

The second question that the defendant contends was improper occurred after the reference to cocaine. The prosecutor asked, "Were you at Mr. Yates' house for a while?" The defendant began to answer when defense counsel objected. After the trial court overruled the objection, the prosecutor asked, "Were you at Mr. Yates' house for part of the evening, the few hours before this happened?" The defendant responded, "We went by there." The defendant argues that because the state had dismissed the first count of the indictment in which Yates was the victim, this statement was highly prejudicial. Unlike the question dealing with cocaine, we have found nothing that would suggest to the jury that this question was related to the co-defendant's statement. However, we find that this question was improper as a reference to other criminal conduct by the defendant. See Tenn. R. Evid. 608(b)(3). Moreover, the fact that the two men had been by Yates's house was completely irrelevant to the determination of whether the defendant had entered the Humber apartment with the intent to commit theft. Tenn. R. Evid. 401.

We must now determine whether the trial court should have granted a mistrial based on the cumulative weight of the improper questions. Factors which must be considered in determining whether improper prosecutorial conduct affected the jury verdict to the prejudice of the defendant are (1) the conduct complained of viewed in context and in light of the facts and circumstances of the case; (2) the curative measures undertaken by the Court and the prosecution; (3) the intent of the prosecutor in making the improper statement; (4) the cumulative effect of the improper conduct and any other errors in the record; and, (5) the relative strength or weakness of the case. Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App.

---

[6] In addition, the state does not argue nor do we find anything in the defendant's direct testimony that "opened the door" to impeachment by contradiction on the use of illegal drugs.

1976). Two factors weigh against the state. First, the prosecutor was well aware that the first count had been dismissed and that the confrontation clause as well as the hearsay rule would bar the admission of Rippy's statements that incriminated the defendant. Second, even though the trial court sustained one of the defense objections, it took no curative action at all, and the state repeated its error by asking another improper question. However, the other three factors weigh heavily against the defendant. The questions were brief and obtained no overtly incriminating responses. Although no trial is perfect, this transcript contains few potentially prejudicial errors. Moreover, we are hampered in our effort to determine the cumulative effect of the prosecutor's actions by the fact that the record contains neither the voir dire nor the opening statements.

The record before us does not support a conclusion that a miscarriage of justice occurred by continuing the trial after the prosecutor's improper questions. See State v. McPherson, 882 S.W.2d 365, 370 (Tenn. Crim. App. 1994). The decision to grant a mistrial is within the sound discretion of the trial court. No clear abuse of discretion appears on the face of the record, and, therefore, we may not disturb the trial court's decision to deny the defendant's motions for mistrial. Id.

II. Sentencing

At the conclusion of the sentencing hearing, the trial court found that the state had proven beyond a reasonable doubt that the defendant was eligible for sentencing as a Range III, persistent offender. The court found no enhancement or mitigating factors and imposed the minimum sentence of ten years. The defendant contends that the trial court erred in sentencing him as a Range III offender because the evidence in the record is not sufficient to prove beyond a reasonable doubt that he pleaded guilty to a felony on indictment #6882. The state argues that the certified copy of the judgment form which indicates that the conviction is a felony satisfies the state's burden of proof regardless of what other proof may exist in the record.

Since the defendant received the minimum sentence possible as a Range III offender, we limit our review to a determination of the propriety of the sentencing range.

Tennessee Code Annotated section 40-35-107 provides that an offender who has received any combination of five or more prior felony convictions within the conviction class or higher or within the next two lower felony classes is a persistent offender subject to an increased sentence of which 45% must be served before the offender is eligible for parole. Tenn. Code Ann. § § 40-35-107 (1), - 112 (c), -501 (a)(7)(e). In its notice of enhancement, the state alleged the defendant had received five class D and E felony convictions.[7] The pre-sentence report repeats this information.

A sentence must be based on evidence in the record of the trial, the sentencing hearing, the presentence report, and the record of prior felony convictions filed by the district attorney general as required by Tennessee Code Annotated section 40-35-202(a). Tenn. Code Ann. § 40-35-210(g); State v. Holman, No. 02C01-9207-CR-00170, slip op. at 4 (Tenn. Crim. App., Jackson, July 21, 1993), perm. app. denied (Tenn. 1993). The state has the burden of providing adequate, competent evidence of prior convictions. State v. Brenda Cummings, No. 03C01-9403-CR-00083, slip op. at 7 (Tenn. Crim. App., Knoxville, Aug. 23, 1995). In this case, the state produced certified copies of the indictments and the judgment forms for each of the five convictions. With respect to #6882, the record includes not only the indictment and the judgment form but also the guilty plea petition, the trial court's order accepting the guilty plea, and a document entitled "Misdemeanor Probation Order." The order, which the trial judge signed on the same day the judgment was entered, indicates that the defendant was convicted for sale of a

---

[7] The five convictions included one conviction for a Class D burglary, and four convictions for Class E felonies: petit larceny; sale of a Schedule VI controlled substance; possession of a Schedule VI controlled substance for resale; and possession of a prohibited weapon.

Schedule VI controlled substance and was sentenced to serve his entire sentence of eleven months and twenty-nine days on probation. The defendant contends that this order coupled with an erroneous date on the judgment form raises reasonable doubt as to the nature of the conviction.

We have carefully reviewed the documents in the record and find that they are sufficient to prove beyond a reasonable doubt that the defendant's guilty plea on March 9, 1988 was to a felony possession of marijuana for resale.

First, we note that the offending judgment form indicates that the offense occurred on September 27, 1988 rather than on September 27, 1987. Because the judgment was entered on March 9, 1988, the date is obviously a simple typographic error that is irrelevant for the purpose of determining whether the conviction offense was a felony.

Next, we find that the information on the judgment form is corroborated by other competent proof in the record. The indictment charges the defendant with possession of a Schedule VI controlled substance with the intent to sell and cites to Tennessee Code Annotated section 39-6-417.[8] The petition for acceptance of a guilty plea states that the petitioner was pleading guilty to "possession schedule VI for resale." The judgment indicates the same offense, defines it as a felony, and imposes a one-year sentence of which sixty days must be served in the county jail with the balance on probation. Section 39-6-417 clearly states that possession of a Schedule VI substance for resale is a felony. Every document in the record is consistent in that each one indicates that the conviction offense was possession for resale and not simple possession.

---

[8] In 1987, the statute made it "unlawful for any person to manufacture, deliver, sell, or possess with intent to manufacture, deliver or sell, a controlled substance . . . ." Tenn. Code Ann. § 39-6-416 (1982) (repealed Nov. 1, 1989). A violation of the section was a felony for which a court could impose a sentence of not less than one but not more than five years. Tenn. Code Ann. § 39-6-416 (1) (F) (1982)(repealed Nov. 1, 1989).

Moreover, the defendant was not surprised by the existence of the alleged felony conviction. The state complied with the notice requirements of section 40-35-202. The defendant did not testify or provide any other proof to show that he pleaded guilty to a misdemeanor charge on March 3, 1988 rather than a felony. In short, nothing in the record indicates that the defendant pleaded guilty to a misdemeanor possession charge in case #6882.

Although it is incumbent upon the state to provide evidence of sufficient quality to allow the trial court to find that the requisite convictions exist, State v. Jones, 901 S.W.2d 393, 391 (Tenn. Crim. App. 1995) (quoting from State v. Dale E. Phillip, No. 01C01-9303-CC-00106, slip op. at 10 (Tenn. Crim. App., Nashville, Dec. 30, 1993), perm. app. denied (Tenn. 1994)), a single typographic error and a mislabeled probation order do not create sufficient doubt to undermine the validity of the trial court's determination that the defendant had five times been convicted of felonies. Therefore, we affirm the trial court's decision to sentence the defendant as a Range III, persistent offender.

We affirm the defendant's conviction and his sentence as imposed by the trial court. However, we have noted a discrepancy in the judgment form entered in this case. The form incorrectly indicates that the defendant is a Range I offender. Therefore, the judgment form shall be corrected by this court's judgment to show that he was sentenced as a Range III, persistent offender, who must serve 45% of his sentence to be eligible for parole.

_____
CURWOOD WITT, Judge

CONCUR:

_____
JOE G. RILEY, Judge

_____
R. LEE MOORE, JR., Special Judge