IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

APRIL SESSION, 1998

FILED

August 27, 1998

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9707-CR-00237**
	)	
Appellee,	)	
	)	**DAVIDSON COUNTY**
V.	)	
	)	
	)	**HON. THOMAS H. SHRIVER, JUDGE**
MARCUS L. NELSON,	)	
	)	
Appellant.	)	**(AGGRAVATED ROBBERY)**

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

The Defendant, Marcus L. Nelson, appeals as of right from his conviction in the Davidson County Criminal Court. Following a jury trial, Defendant was convicted of aggravated robbery and was sentenced to serve nine (9) years in the Tennessee Department of Correction. In addition to arguing that the evidence was insufficient to sustain a conviction of aggravated robbery, the Defendant argues the trial court erred in instructing the jury on the range of penalties advising the purported minimum length of time Defendant would serve prior to being eligible for parole. We affirm the judgment of the trial court.

When an accused challenges the sufficiency of the convicting evidence, the standard is whether, after reviewing the evidence in the light most favorable to the prosecution, 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 (1979). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Because a verdict of guilt 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); State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

Questions concerning the credibility of the witnesses, 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, not this court. State v. Pappas, 754 S.W.2d 620, 623

(Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1987). Nor may this court reweigh or reevaluate the evidence. Cabbage, 571 S.W.2d at 835. A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. Grace, 493 S.W.2d at 476.

Jason Raybon testified that on August 13, 1995, he had just finished playing basketball at approximately 8:00 p.m. While getting in his car to leave, he was approached by a friend, Sandy. As they were talking, Raybon asked Sandy if he wanted a ride to the store. Sandy agreed and some of his friends also got into Raybon's vehicle to go to the store. These friends were "Big O" and the Defendant. Raybon did not know the Defendant but had seen him numerous times at the basketball court and at Maplewood High School.

Raybon drove about one (1) block to Magic's, a local store in Nashville. Sandy was sitting beside Raybon, with Big O and the Defendant behind him. Sandy and Big O got out and went inside the store. The Defendant got out of the back seat and sat down beside Raybon, then asked Raybon to take him back to where he had picked him up at the basketball courts. When Raybon refused, Defendant again asked him to leave but Raybon declined to leave because he needed to talk with Sandy. When Sandy and Big O returned to the car, they left and went back to the spot where Raybon picked them up. When no one got out of the car, Raybon asked, "Aren't you getting out?" Defendant said he was not and asked to be driven back to the basketball court. Raybon drove around the corner towards the basketball courts. He drove through a dark parking lot and the Defendant shoved the car into park.

Defendant said, “Get out, give me everything you’ve got.” When Raybon replied that he did not have anything, Defendant put a gun to his head, cocked it and repeated his demands that Raybon give him everything. Raybon repeated that he had nothing except for two dollars ($2.00) in his pocket, but Defendant could have that if he wanted it. As Raybon reached for the money, he started getting out of the car. Sandy and Big O were also getting out of the back seat, while Sandy kept saying, “He’s cool, man. He’s cool. Leave him alone. He’s cool.” Defendant started stepping over from the passenger side of the vehicle to the driver’s side, forcing Raybon out with the gun to his head. Raybon got out and Defendant drove off.

As Raybon and Sandy were walking off the scene, Raybon asked for the Defendant’s name. Raybon thought Sandy told him the Defendant’s name was “Mont.” Raybon ran back to the store and called the police. Officer Holliday responded to that call and Raybon gave him a description of the suspect and the details of the offense. Raybon also told Holliday that the Defendant’s nickname was Mont. On the following day, Raybon was called to the police station by Detective Collins to come and look at a photo lineup. When Raybon saw the photographs, the Defendant’s photo was not among the lineup.

Five (5) or six (6) days later, Raybon again looked at a photo lineup. During that time period, he learned that the Defendant’s nickname was “Monk” rather than “Mont.” Raybon told Detective Collins of this information and was then given a different lineup to examine. Raybon immediately identified Defendant from the photographs. Raybon’s vehicle was found near the water company by his sister, but the carpet had been ripped out and the gears and air conditioner were removed.

Officer Ernesto Holliday of the Metro Police Department received a call of a car jacking on August 13, 1995. When Holliday arrived on the scene at 701 Dickerson Road, Raybon was standing outside in front of a market. Holliday took a report of the car jacking and got a description of the Defendant. Raybon described a black male, approximately twenty (20) years of age with black hair and brown eyes, wearing a white t-shirt and black khakis. He also stated that Defendant was approximately six (6) feet two (2) inches in height and weighed one hundred eighty-five (185) pounds. Raybon said the Defendant's nickname was "Mott." Holliday did not ask Raybon to spell the Defendant's nickname. Raybon instructed Holliday that Sandy and Big O were present during the car jacking.

Raymond Radar works in the identification section of the Metro Police Department. Radar processed Raybon's car for any latent prints left in the vehicle, but none were found.

Detective Danny Collins helped with the investigation in this case. He began checking the files regarding the description he was given of the Defendant. He checked the nickname file for the name "Mott" and had no suspects whatsoever. He called Raybon on August 14, 1995. Raybon instructed Collins that Defendant's nickname was "Mont." The physical description Raybon provided was as follows: black male; approximately twenty-one (21) or twenty-two (22) years of age; six feet tall; 190 pounds; dark brown complexion, and clean shaven with short cropped hair. Collins again checked the nickname file under the name "Mont" and found three (3) suspects with two (2) who lived in the nearby area. Collins asked Raybon to come to the police station to see if he could identify the Defendant from photographs of the

suspects. The Defendant's photo was not in this group of photographs. Raybon could not identify the Defendant from that group of photos.

On August 16, 1995, Raybon called Collins and told him that the Defendant's name was "Monk" and not "Mont." Collins again searched the nickname file and located suspects with similar physical descriptions as Raybon had earlier provided. When Raybon viewed these photographs, he identified the Defendant in the photographs as the person who had stolen his car at gunpoint.

The State concluded its case-in-chief.

Tiffany Shantelle Nelson testified for the defense. She is married to the Defendant and could not recall that he ever brought a maroon Nissan automobile or any car stereo equipment to their home. Also, Nelson had never seen Defendant with a gun.

The Defendant testified that he is six feet four inches tall, weighing 195 pounds. He knows the victim from his neighborhood and playing basketball, although he did not know Raybon's real name. Defendant stated that Raybon knew him as "Monk." Defendant did not see Raybon on August 13, 1995, nor does he know Sandy or Big O. Defendant further denied robbing Raybon's car from him at gunpoint.

Aggravated robbery is a robbery "[a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon." Tenn. Code Ann. § 39-13-402(a)(1). Robbery is defined as

"the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401(a). Defendant argues that the victim's testimony alone is insufficient to prove beyond a reasonable doubt that Defendant committed the offense of aggravated robbery. Raybon testified that Defendant grabbed a loaded weapon, cocked the gun and put it to Raybon's head, and then demanded that Raybon get out of the car and give Defendant everything he had. After repeated demands, Raybon complied and Defendant drove the car away from the scene. The car was found the next day and had been stripped of its carpet, stereo system and air conditioner. The identification of a defendant as the person who committed the offense is a question of fact for the jury to determine. State v. Strickland, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993), perm. to appeal denied (Tenn. 1994). The testimony of Raybon identifying the Defendant as the perpetrator of the crime is sufficient, in and of itself, to support a conviction. Id. The victim's testimony alone is also sufficient to establish the elements of aggravated robbery.

The Defendant also argues that the inconsistencies in Raybon's testimony provide reasonable doubt as to his committing the offense. Any discrepancies in Raybon's testimony are immaterial, and the jury has already resolved any contradictions against the Defendant by virtue of the guilty verdict. The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury as trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984).

In his second issue, Defendant claims the trial court erred in denying his motions (1) for an amended instruction on the range of punishment and (2) to strike

the portion of the range of punishment instruction which advises the jury of the minimum length of time the Defendant would serve prior to parole eligibility. Defendant argues this portion of the instruction is unconstitutional. The following instruction was given to the jury:

> The punishment for this offense [aggravated robbery] is imprisonment for not less than 8 years nor more than 12 years and a fine not to exceed $25,000.
>
> The jury will not attempt to fix any sentence. However you may weigh and consider the meaning of a sentence of imprisonment.
>
> You are further informed that the minimum number of years a person sentenced to imprisonment must serve before reaching the earliest release eligibility date is .94 years.
>
> Whether a defendant is actually released from incarceration on the date when first eligible for release is a discretionary decision made by the Board of Paroles and is based on many factors. The Defendant may be required to serve the entire sentence imposed by the court.
>
> If you find the defendant not guilty or have reasonable doubt as to his guilt, you must find him not guilty.

Defendant's trial counsel filed a motion to charge the jury on the range of punishment and a motion to exclude an instruction on parole eligibility as required by Tennessee Code Annotated section 40-35-201. The trial court overruled the Defendant's motion regarding the exclusion of that information since it was required by statute, but granted the motion on charging the jury on range of punishment. While Defendant now claims this instruction he requested was unconstitutional and violated his due process rights, we decline to find that the trial court erred. The statute does not violate the doctrine of separation of powers nor does it deprive the Defendant of his right to a fair trial pursuant to his right of due process. Therefore, the statute is constitutional under the circumstances of this case. State v. Howard

E. King, C.C.A. No. 02-S-01-9703-CR-00021, ___ S.W.2d ___ , slip op. at 2, Shelby County (Tenn., Jackson, July 6, 1998).

Similar to the defendant in King, Defendant relies upon Farris v. State, 535 S.W.2d 608 (Tenn. 1976), arguing that this statute is unconstitutionally vague. In Farris, the instruction given by statute "provided no reasonable guidance as to the ramifications of the parole system." King, C.C.A. No. 02-S-01-9703-CR-00021, slip op. at 10. Conversely, the statute in question here does not leave the jury to speculate about the benefits of the parole system, but requires the Department of Correction to compute exact figures to determine the application of various factors relevant to release eligibility. Id. Jurors are provided with "explicit, objective and unambiguous guidance sufficient to overcome any allegation of vagueness." Id. at 11.

Also, the Defendant contends that the instruction violated his rights to a fair trial by an impartial jury based upon a misleading and inaccurate portion of the jury instructions. Similar to the defendant in King, the Defendant in the case sub judice compares jury instructions charged to his jury on sentencing to those jury instructions in State v. Cook, 816 S.W.2d 322 (Tenn. Crim. App. 1991). The jury instructions given on the range of punishment in Cook were not proper as the jury was only instructed on Range I punishment when the defendant was actually subject to punishment as a Range II offender. See King, C.C.A. No. 02-S-01-9703-CR-00021, slip op. at 13. Defendant's jury instructions in the case sub judice informed the jury as to the shortest possible sentence of eight (8) years and the longest possible sentence of twelve (12) years as a Range I Offender. Tenn. Code Ann. § 40-35-112 (a)(2). Additionally, the jury was instructed as to the minimum portion that

Defendant would serve before becoming eligible for parole. The jury in this case was properly instructed as to the requirements of the statute. See id. at 13. Under the circumstances of this case and the jury instructions given under Tennessee Code Annotated section 40-35-201(b)(2), the Defendant was not deprived of his due process right to a fair trial. Id. at 17.

Finally, the Defendant claims that the statute in question is invalid based upon Farris as an exercise by the legislature in judicial authority. "[H]aving already acknowledged the authority of the legislature to provide a range of punishment instruction, we must also acknowledge that an explanation of the reality of early release and parole is no further an encroachment into the judicial function." Id. at 8. As the jury must decide the issue of guilt or innocence and the trial court must determine the ultimate sentence, Tennessee Code Annotated section 40-35-201(b)(2) does not violate the Separation of Powers Clauses of the Tennessee Constitution. Id.

We affirm the judgment of the trial court.

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THOMAS T. WOODALL, Judge

CONCUR:

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GARY R. WADE, Presiding Judge

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L. T. LAFFERTY, Special Judge