

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
JUNE 1998 SESSION

F I L E D
November 4, 1998
Cecil W. Crowson
Appellate Court
Clerk

STATE OF TENNESSEE,)
)
Appellee,)
)
vs.)
)
MICHAEL A. BORDIS, SR.,)
)
Appellant.)

C.C.A. No. 01C01-9612-CR-00508
Davidson County
Hon. J. Randall Wyatt, Jr., Judge
(Second Degree Murder)

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O P I N I O N F I L E D : _ _ _ _ _

A F F I R M E D

C U R W O O D W I T T , J U D G E

O P I N I O N

The defendant, Michael A. Bordis, Sr., stands convicted of second degree murder as a result of his son's death from starvation.¹ Following his jury trial in the Davidson County Criminal Court, he received a maximum sentence of 25 years. In this appeal, Bordis alleges error in the trial court's admission of a witness's testimony that Bordis had been untruthful when he gave an earlier statement. Because we find that the defendant has waived our consideration of the issue, we affirm the judgment of the trial court.

The following facts are pertinent to this appeal.² The defendant summoned law enforcement officers to his home, where they discovered the lifeless body of his infant son. The defendant and his wife were questioned by law enforcement officers and a child protective service worker, Eureva Elmore. During subsequent investigation, Ms. Elmore learned that the defendant and his wife later admitted that much of what they told her had not been true.³

¹This is Bordis's second appearance in this court. He was originally convicted of first degree murder for his son's death, but a panel of this court reversed that conviction and remanded for a new trial. State v. Bordis, 905 S.W.2d 214 (Tenn. Crim. App. 1995). On retrial, the state obtained the conviction now before us.

²The evidence at trial materially conformed to the evidence adduced at the defendant's first trial. That evidence is detailed in our previous opinion, Bordis, 905 S.W.2d 214, and a lengthy recitation is not necessary for resolution of this appeal.

³The record does not reveal how Ms. Elmore gained this information.

At trial, the state called Ms. Elmore, who testified about her observations at the Bordises' apartment and her conversation with the Bordises. During redirect examination, Ms. Elmore testified that after talking with the Bordises, she later learned that they had admitted being untruthful with her.⁴ The defendant raised a hearsay objection after Ms. Elmore had responded to the question. The court overruled the objection. On recross-examination, Ms. Elmore stated again that "the story changed" after her interview of the Bordises. When asked whether there were inconsistencies in what the Bordises told her initially, she answered, "In what they were saying about each other, there was not any argument about that. What they told me, initially, was not the truth." The defense objected based upon the witness's statement being "totally improper," and the trial court instructed the witness to answer the defense's questions and not volunteer any additional information. The court further stated that the witness was "entitled to explain her answer. I don't know if she's entitled to give an opinion about certain matters, so let's get back to the questioning, let her answer the questions, and everything's going to be fine."

In the appellate record, we have been favored with the extremely brief transcript of the hearing on the motion for new trial, consisting of two and one quarter pages. At that hearing, the defendant characterized the primary issue in the case as sufficiency of the evidence and made no argument on any other issue. The

⁴This evidence was adduced in response to cross-examination about the Bordises' statements to the witnesses.

assistant district attorney referred to two issues, "the first issue regarding Ms. Elmore" and sufficiency of the evidence. With respect to the former, the state argued "I think the record will reflect that she's not testifying as to the truth of the matter but to explain to the jury why she did what she did when she made that statement." The trial court summarily overruled both issues. The appellate record does not contain a written motion for new trial as contemplated by Tennessee Rule of Criminal Procedure 33(b).⁵

Against this backdrop, we are called upon to consider whether admission of Ms. Elmore's testimony was reversible error. The defendant claims error on two bases. First, he argues that contrary to Tennessee Rule of Evidence 608(a), Ms. Elmore impermissibly gave opinion testimony which was not related to the defendant's character for truthfulness or untruthfulness and which was not based on her own knowledge of the defendant's character in this regard. Second, he argues, the testimony was hearsay. We find, however, that the defendant has waived our consideration of these issues.

"[I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence . . . unless the same

⁵In his brief, the defendant acknowledged that the written motion was not in the record and claimed he had "initiated the necessary procedures to supplement the record in this regard." However, this court has never received a motion to supplement the record.

was specifically stated in a motion for a new trial" or the issue will be treated as waived. Tenn. R. App. p. 3(e). A motion for new trial must be made within 30 days of the date the order of sentence is entered, and it must be memorialized in written form. Tenn. R. Crim. P. 33(b). The record before us contains no such timely filed, written motion. In light of the absence from the appellate record of a proper motion for new trial, the defendant has waived our consideration of the issue presented.

Accordingly, we affirm the judgment of the trial court.

CURWOOD WITT, JUDGE

CONCUR:

JOE G. RILEY, JUDGE

R. LEE MOORE, JR., SPECIAL JUDGE