IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1998 SESSION

FILED

December 9, 1998

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**NO. 01C01-9707-CR-00263**
Appellee,	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**HON. SETH NORMAN,**
KEVIN TAYLOR,	)	**JUDGE**
	)	
Appellant.	)	(Felony Murder; Attempted
	)	Especially Aggravated Robbery)

FOR THE APPELLANT:

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(Trial and Appeal)

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OPINION FILED: _____

AFFIRMED

JOE G. RILEY,
JUDGE

O P I N I O N

Defendant, Kevin Taylor, was convicted by a Davidson County jury of felony murder and attempted especially aggravated robbery. He was sentenced to life imprisonment and 10 years, respectively, to run concurrently. On appeal he presents the following issues for our review:

(1) whether the evidence was sufficient to support the convictions;

(2) whether the trial court erred in allowing the prosecuting attorney during *voir dire* to comment upon defendant's refusal to allow his pretrial statement to be taped;

(3) whether the state failed to provide the defense with exculpatory evidence;

(4) whether the trial court erred in refusing to suppress the defendant's pretrial statement;

(5) whether the chain of custody of the bullet fragments was properly established;

(6) whether there was a fatal variance between the indictment and the proof as to the items alleged to be the object of the attempted robbery;

(7) whether the trial court erred in allowing witnesses to define the street term "jack move;" and

(8) whether the trial court erred in refusing to grant a new trial on the basis of newly discovered evidence.

After a careful review of the record, we affirm the judgment of the trial court.

FACTS

On December 26, 1994, the 20-year old victim, Joshua Sabine, drove to Nashville with James DeMoss, Rex Clayton and 15-year old Brian Binkley. The victim was driving, and Binkley was in the front passenger seat. DeMoss and Clayton were in the rear seat. The victim intended to purchase some wheel rims in Nashville.

The victim drove near a housing project in West Nashville where Cordell Sykes, the co-defendant, asked the victim if he had come for the rims. Sykes requested that they come back in approximately 30 minutes.

Upon their return Sykes approached the driver's door and advised the victim that he was unable to get the wheel rims. The defendant approached the passenger door and endeavored to sell drugs to the car occupants. Binkley advised him they were not interested in purchasing drugs, and the defendant walked around to the driver's door. Sykes then reached into the vehicle to place the gear shift in "park" and struggled with the victim. At that time another person began shooting into the vehicle. Binkley testified that both of Sykes' hands were inside the vehicle at the time of the shooting, and Sykes did not have a weapon.

Regina Tyson and Tara Williams were together at the scene at the time of the shooting. Tyson testified she observed the defendant and Corey Gooch walk by her. The defendant took Gooch's baseball cap, placed it upon his head and lowered it just above his eyebrows. The defendant also slid a gun into his black leather jacket and stated he was "going to show them how to do a jack move." She explained that "jack move" means robbing someone.

Tyson further testified that both Sykes and the defendant were at the Blazer when she heard gunshots. She then observed Sykes flee while the defendant simply walked across the street, got in his car and drove away. The only person she saw with a gun that night was the defendant.

Corey Gooch testified that he was with the defendant on the night in question. He observed the defendant at the vehicle and saw Sykes on the driver's side struggling with the driver. He also observed the defendant at the vehicle when he heard the shots but was unable to determine who actually fired the shots. Gooch saw the defendant later that evening, and the defendant stated there was a radio in the vehicle but things "didn't work out." Gooch assumed the defendant was trying to get the radio.

The victim was shot in the hail of gunfire. Binkley grabbed the steering wheel, pushed the accelerator and sped from the scene. The parties drove to a

convenience store and called 9-1-1. The victim subsequently died from the gunshot wounds.

The forensic pathologist testified that the victim had three gunshot wounds; namely, one to the left part of the back, one to the back of the left hand and one to the upper left arm. Since the back wound had "stippling," that shot was fired from a distance of less than three feet.

The defendant was arrested several months after the incident. In his initial statement to the police, he stated he was across the street when the shooting began. After further interrogation, he admitted approaching the passenger side trying to sell drugs and then going around to the driver's side where he stood beside Sykes. He told the officers that Sykes was the person who shot the victim. The defendant denied to the officers that he was wearing a black leather jacket. This was contrary to the trial testimony of Binkley, Tyson and Gooch.

The defense offered no evidence at trial.

SUFFICIENCY OF THE EVIDENCE

Defendant contends the evidence is insufficient to support the guilty verdicts for felony murder and attempted especially aggravated robbery. In Tennessee, great weight is given to the result reached by the jury in a criminal trial. A jury verdict accredits the state's witnesses and resolves all conflicts in favor of the state. State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994); State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. Id.; State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Moreover, a guilty verdict removes the presumption of innocence which the appellant enjoyed at trial and raises a presumption of guilt on appeal. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). The appellant has the burden of overcoming this presumption of guilt. Id.

Where sufficiency of the evidence is challenged, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or crimes beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); State v. Abrams, 935 S.W.2d 399, 401 (Tenn. 1996). The weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury as the triers of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Brewer, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996).

Looking at the evidence in a light most favorable to the state, the evidence is sufficient to support the convictions for felony murder and attempted especially aggravated robbery. The state's proof revealed that the defendant placed a gun in his jacket and stated his intention to commit a robbery. He was then seen standing beside Sykes at the driver's door. The passenger in the front seat testified that at the time of the shooting Sykes' hands were in the vehicle, and Sykes did not possess a weapon. Thus, the jury could logically infer that the defendant killed the victim in the perpetration of an attempted robbery. The elements of felony murder are, therefore, satisfied. *See* Tenn. Code Ann. § 39-13-202(a)(2). Furthermore, the proof was sufficient to establish the elements of attempted especially aggravated robbery. *See* Tenn. Code Ann. §§ 39-12-101; 39-13-403(a).

This issue is without merit.

***VOIR DIRE* COMMENT**

During *voir dire* the prosecuting attorney stated that, although the defendant gave an oral statement during interrogation, he refused to make a taped statement. The defendant contends this was an improper comment on the defendant's right to silence.

The defendant waived his right to silence by giving the officer his version of the shooting incident. In fact, the defendant gave inconsistent versions of the incident. The defendant, however, refused to allow the taping of his statement.

When the accused gives a voluntary statement after being informed of his constitutional rights, it is not error to comment on the scope of this statement and that the questioning was terminated at some point by the accused. *See* Ware v. State, 565 S.W.2d 906, 908 (Tenn. Crim. App. 1978); State v. Everett D. Cain, C.C.A. No. 02C01-9504-CR-00104, Shelby County (Tenn. Crim. App. filed July 26, 1996, at Jackson), *perm. to app.* denied February 3, 1997 (Tenn.). Furthermore, if the comment during *voir dire* was improper, it was harmless beyond a reasonable doubt. Tenn. R. App. P. 36(a). The officer subsequently testified without objection that the defendant refused to give a taped statement.

This issue is without merit.

PENDING PROBATION VIOLATION OF WITNESS

A.

Defendant contends the state failed to reveal exculpatory evidence regarding the witness, Corey Gooch. At the conclusion of all the proof, defense counsel stated that he had received notice of the state's intent to call Gooch as a witness only one week prior to the trial.

Counsel stated he was unable to contact Gooch based upon the address given him by the state. He stated he learned, after Gooch's testimony, that Gooch had a pending probation violation. Counsel related that a probation violation hearing was held in the same trial court, before the same judge, approximately three weeks prior to his testimony in this trial. He stated it was taken under advisement by the trial judge and reset for further consideration in approximately two weeks. Counsel did not state how he learned of this information.

Counsel contended the probation violation warrant showed a different address than the old address given him by the state. The prosecuting attorney stated that the address given defense counsel "was available to the state, where I

had our record's clerk run the probation violation warrant. That is the address which appeared on the computer printout." The prosecuting attorney further stated that Gooch's "criminal record is a matter of public record."

Defense counsel's request was to strike Gooch's testimony. The trial court concluded that the state had no obligation to "continually notify defense counsel where the witnesses are located" and overruled the request.

B.

In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. at 1196-97; *see also* Hartman v. State, 896 S.W.2d 94 (Tenn. 1995). The duty to disclose extends to all "favorable information" regardless of whether the evidence is admissible at trial. State v. Marshall, 845 S.W.2d 228, 232-33 (Tenn. Crim. App. 1992); Branch v. State, 4 Tenn. Crim. App. 164, 168, 469 S.W.2d 533, 536 (1969). In United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481 (1985), the Supreme Court held that both exculpatory and impeachment evidence fall under the Brady rule. However, the state is not required to disclose information that the defendant already possesses or is able to obtain. State v. Marshall, 845 S.W.2d at 233.

Before an accused is entitled to relief under this theory, the accused must establish several prerequisites: (a) the prosecution must have suppressed the evidence; (b) the evidence suppressed must have been favorable to the accused; and (c) the evidence must have been material. *See* United States v. Bagley, 473 U.S. at 674-75, 105 S.Ct. at 3379-80; Brady v. Maryland, 373 U.S. at 87, 83 S.Ct. at 1196-97; State v. Edgin, 902 S.W.2d 387, 390 (Tenn. 1995). Evidence is considered material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceeding would have been different. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); State v. Edgin, 902 S.W.2d at 390.

Moreover, we note that the defendant has the burden of proving a constitutional violation by a preponderance of the evidence. State v. Spurlock, 874 S.W.2d 602, 610 (Tenn. Crim. App. 1993). Thus, the burden rests upon the defendant to establish a Brady violation. State v. Edgin, 902 S.W.2d at 389.

C.

Defense counsel's focus at trial was not so much on the state's failure to advise of the pending probation violation as the failure of the state to give defense counsel a current address for Gooch. The address was the sole focus of the trial court's ruling. We conclude there is no error in that regard. Nevertheless, this Court is concerned as to whether the state withheld evidence of the pending probation violation against Gooch.

Defense counsel stated to the trial court that Gooch's file reflected a probation violation hearing in the same trial court on April 26, with the matter being taken under advisement and reset for further hearing on May 31. The trial of the current case was conducted on May 13, 14 and 15. If counsel's statements were accurate, the fact that a state witness had a pending probation violation, taken under advisement in the same court, with a disposition date two weeks after the current trial is obviously exculpatory impeachment information. Although the prosecuting attorney referred to a "probation violation warrant," she did not address whether there was, in fact, a pending probation violation. Nor did she address whether it had been previously heard and re-set for May 31.

In spite of the above, the defendant is not entitled to relief for a number of reasons. Firstly, although the trial transcript shows that a copy of the probation violation warrant was made an exhibit, it has not been included in the record in this Court. It is the defendant's obligation to provide an adequate record for appellate review. State v. Ballard, 855 S.w.2d 557, 560 (Tenn. 1993).

Secondly, defense counsel stated he discovered this information during trial, although it was after the close of the proof and prior to final argument. The record does not reflect any effort by counsel to recall Gooch and bring this information

before the jury. *See* Tenn. R. App. P. 36(a). This may, or may not, have been practical at that juncture in the trial; however, we are unable to make this determination from the record. We also note there was no effort to introduce certified copies of these documents for the jury's consideration. Counsel simply moved to strike Gooch's testimony.

Finally, the defendant has not shown that this evidence meets the Bagley "materiality" test. Constitutional error is established only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. at 682, 105 S.Ct. 3375. The "touchstone" of materiality is a "reasonable probability" of a different result which is shown when the government's suppression "undermines confidence in the outcome of the trial." Kyles v. Whitley, 514 U.S. at ___, 115 S.Ct. at 1566 (citing United States v. Bagley, 473 U.S. at 678, 105 S.Ct. at 3375). The testimony of Gooch was primarily cumulative to the testimony of Binkley and Tyson. Considering the testimony of Binkley and Tyson, along with defendant's damning admission of being beside the driver's door at the time of the shooting, defendant has failed to establish a reasonable probability that the result would have been different had the jury known of a pending probation violation against Gooch. The failure to reveal such information, under the facts of this case, would not undermine the confidence in the outcome of the trial.[1]

This issue is without merit.

MOTION TO SUPPRESS

Defendant contends his pretrial statements given during police interrogation should be suppressed since he was not properly advised of his constitutional rights.

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[1]We have concluded, based upon an examination of the entire record, that defendant is entitled to no relief. Nevertheless, we in no way approve of a prosecutor's failure to disclose the pending probation violation of a government witness prior to trial, or at the very least prior to the witness's testimony. We acknowledge there may be a rational explanation for the failure to do so in this case, although it does not appear in the record.

Although the defendant was 17 years of age at the time of the commission of these offenses, he was arrested several months later after he had attained the age of 18. At the suppression hearing the defendant testified he was not advised of his Miranda rights. The interviewing officer testified that he read the defendant his Miranda rights before asking any questions. At the conclusion of the proof, the total ruling of the trial court was "Motion's overruled."

Findings of fact made by the trial court at the hearing on a motion to suppress are binding upon this Court unless the evidence contained in the record preponderates against those findings. State v. Smith, 933 S.W.2d 450, 455 (Tenn. 1996); State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). However, the trial court in this case failed to make any findings of fact. Where factual issues are involved in determining a motion to suppress, the trial court has an obligation to state its findings on the record. Tenn. R. Crim. P. 12(e). It is essential for the trial court to set out findings in order for the correctness of the decision to be assessed on appellate review. State v. Raspberry, 640 S.W.2d 227, 229 (Tenn. Crim. App. 1982). Ordinarily, this failure might preclude our review. However, in this instance the failure is not fatal. *See* State v. Claybrook, 736 S.W.2d 95, 104 (Tenn. 1987). The trial judge implicitly accredited the testimony of the interrogating officer and discredited the testimony of the defendant as to whether or not the Miranda rights were given. The evidence does not preponderate otherwise.

This issue is without merit.

CHAIN OF CUSTODY

Defendant contends the state failed to establish the proper chain of custody for the introduction of bullet fragments. We disagree.

The medical examiner testified that the bullet fragments came from the victim's body. An officer testified that he secured the bullet fragments from the medical examiner's office and delivered them to the TBI crime laboratory. The TBI forensic scientist testified that he examined these same bullet fragments.

A witness must be able to identify the evidence or establish an unbroken chain of custody. State v. Baldwin, 867 S.W.2d 358, 361 (Tenn. Crim. App. 1993). This issue addresses itself to the sound discretion of the trial court, and the court's determination will not be disturbed on appeal absent an abuse of that discretion. Id. We find no error with regard to the admission of this evidence.

This issue is without merit.

VARIANCE

Defendant contends there was a fatal variance between the indictment and proof in this case. Specifically, defendant contends the indictment alleged the defendant attempted to take "cash monies of value" from the victim, whereas the proof established the object of the theft was a radio. A variance between the indictment and proof is not fatal if the defendant is sufficiently informed of the charges so that he or she can adequately prepare for trial, and the defendant is protected against a subsequent prosecution on double jeopardy grounds. State v. Mayes, 854 S.W.2d 638, 640 (Tenn. 1993).

The essence of this prosecution was a murder committed during the course of an attempted robbery. The object of the robbery, whether it be cash or a radio, was of little significance. Furthermore, only one witness testified that the radio could have been the object of the attempted robbery. Regardless, the defendant was not prejudiced by the alleged variance and will suffer no double jeopardy problem.

This issue is without merit.

THE "JACK MOVE"

Defendant contends the trial court erred in allowing witnesses to explain the street term "jack move." Specifically, the defendant contends no foundation was laid for a witness to give an opinion as to the definition of the term. *See* Tenn. R. Evid. 701.

It is apparent from the record that "jack move" is a street term. The record established these offenses were committed in a high-crime area where drug dealing and shootings were not uncommon. Regina Tyson testified that she lived in the area. She was obviously familiar with the term and stated that it meant "robbing, taking something from somebody."

If it was an opinion, a sufficient foundation was laid for the witness to testify as to the meaning of the term. The trial court did not abuse its discretion in admitting this testimony.[2]

This issue is without merit.

NEWLY DISCOVERED EVIDENCE

Lastly, the defendant contends the trial court erred in refusing to grant a new trial based upon a witness he discovered after the trial. We respectfully disagree.

Subsequent to the trial the defendant's parents located Calvin Flowers, who was allegedly at the scene on the night of the shooting. Flowers testified during the motion for new trial. Flowers' testimony was unclear. Although he implied that the defendant was at the pay phone at the time of the shooting, his testimony also revealed that he did not actually see the defendant at the time of the shooting. Nor did he even see the vehicle. Based upon this testimony the trial court found that the testimony of Calvin Flowers would not have changed the outcome of the trial.

In seeking a new trial based upon newly discovered evidence, there must be a showing that defendant and his counsel exercised reasonable diligence in attempting to discover the evidence. State v. Nichols, 877 S.W.2d 722, 737 (Tenn. 1994); State v. Singleton, 853 S.W.2d 490, 496 (Tenn. 1993). In addition, there must also be a showing of the materiality of the testimony, and the trial court must determine whether the result of the trial would likely be changed if the evidence

[2]The same definition of this term was given by the witness, Brian Binkley. Although his ability to relate the definition may be more questionable, any possible error was harmless in light of Tyson's testimony.

were produced. Nichols, 877 S.W.2d at 737; Singleton, 853 S.W.2d at 496. The granting or refusal of a new trial on the basis of newly discovered evidence rests within the sound discretion of the trial court. State v. Walker, 910 S.W.2d 381, 395 (Tenn. 1995); State v. Parchman, 973 S.W.2d 607, 610 (Tenn. Crim. App. 1987).

Defendant's contention on this issue fails for two reasons. Firstly, there was no showing that the defendant exercised reasonable diligence in attempting to discover the evidence prior to trial. Secondly, the trial court found that the result of the trial would have been no different if the evidence had been admitted. The trial court was obviously unimpressed with this testimony and was in a much better position to judge the credibility of the witness than this Court. We find no abuse of discretion in the trial court's denying a new trial based upon this evidence.

This issue is without merit.

CONCLUSION

After a careful review of the record, we affirm the judgment of the trial court.

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JOE G. RILEY, JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

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JOSEPH M. TIPTON, JUDGE