IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1999 SESSION

STATE OF TENNESSEE,	)	C.C.A. NO. 03C01-9805-CC-00186
	)	
Appellee	)	BRADLEY COUNTY
	)	
v.	)	HON. CARROLL L. ROSS,
	)	JUDGE
ALFRED “CHUCKIE” FRANCIS,	)	
	)	(Sale of Crack Cocaine)
Defendant/Appellant	)	

FOR THE APPELLANT

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OPINION FILED _____

AFFIRMED

JOHN K. BYERS
SENIOR JUDGE

O P I N I O N

On September 4, 1997, the defendant was found guilty in a jury trial of the sale of crack cocaine over .5 grams. The trial court found the defendant to be a Range II, multiple offender and sentenced him to eighteen years in the Tennessee Department of Corrections. This sentence was to be served consecutive to any time the defendant had to serve for crimes committed in Oklahoma. The jury fined the defendant $25,000.

The defendant raises the following issues on appeal:

I. Whether the trial court failed to grant appellant's request for a mistrial after the confidential informant testified that she first met appellant after appellant's release from prison.

II. Whether the trial court erred in not allowing trial counsel to withdraw as attorney of record after trial counsel and appellant indicated the need for withdrawal.

III. Whether the evidence produced at trial was sufficient to support the verdict.

IV. Whether the trial court erred in allowing two convictions to be used as impeachment against the appellant.

The judgment of the trial court is affirmed.

BACKGROUND

The evidence presented by the State at trial consisted of the testimony of Gary M. Hicks, a detective with the Cleveland Police Department; Nettie Herron, a confidential informant; James Richardson, an agent with the Tennessee Alcoholic Beverage Commission; John Lea, an officer with the Cleveland Police Department; David Brown, a forensic chemist with the Tennessee Bureau of Investigations (TBI); and another man by the name of David Brown, an acquaintance of the defendant.

Gary M. Hicks testified that he is in charge of the special investigations unit at the Cleveland Police Department. Detective Hicks explained that he has received special training in drug investigation and that he has been involved in several undercover drug operations. As a result of this work, he was introduced to Nettie Herron, who acted as the confidential informant in this case. Detective Hicks

testified that Ms. Herron was not acting as a confidential informant because she had charges of her own pending, as is sometimes the case with confidential informants. On cross examination, he admitted that Ms. Herron had been convicted of shoplifting and that she had never had a steady job.

Detective Hicks testified that on February 21, 1996 he met with Ms. Herron and other agents, including James Richardson, to discuss the drug operation that they planned to conduct that night. He described how he wired Ms. Herron with a radio transmitter and how he searched her prior to the wiring. He stated that he tested the equipment before she left and that it was working properly. Detective Hicks explained that Agent Richardson drove Ms. Herron to the target location on Wildwood Avenue and that he monitored and recorded the transaction as it was aired over the radio transmitter.

Detective Hicks stated that parts of the audio tape that recorded the drug transaction of February 21, 1996 are difficult to hear and understand. He testified that he is able to recognize several voices on the tape but that he did not recognize the voice of the defendant. He recognized the voice of David Brown because he had bought crack cocaine from him on three prior occasions; the voices of Portia and Cissie Francis, the defendant's two sisters, because he knew them as individuals; and the voices of Nettie Herron and Agent Richardson. Detective Hicks further stated that neither he nor any other agents involved in the case accompanied Ms. Herron into the apartment or witnessed the defendant enter or leave the apartment on Wildwood Avenue.

Nettie Herron testified that she worked as a confidential informant for the Cleveland Police Department. She became involved in this work after she became aware of the drug problem in her neighborhood. She explained that she decided to clean up her neighborhood after a man tried to sell drugs to her sixteen year old daughter. Ms. Herron admitted that she had a theft charge and a suspended license, but she stated that these were not the reasons why she worked as a confidential informant.

Ms. Herron testified that she knew most of the people that she made undercover buys from, either from growing up around them or living next to them. In this case, Ms. Herron explained that she became acquainted with the defendant through his sister Portia Francis with whom she used to associate. She further stated that she met the defendant once after he was released from jail.

Ms. Herron testified that on February 21, 1996 she was wired, searched, given money, and driven to the apartment on Wildwood Avenue. She explained that she and Agent Richardson discussed that she should make the buy from the defendant rather than David Brown.[1] Ms. Herron testified that she entered the apartment alone and purchased six rocks of cocaine from the defendant. She then testified that she left the apartment, returned to the vehicle, and gave Agent Richardson the six rocks of cocaine. Finally, Ms. Herron testified that she reviewed the audio tape of the drug transaction for accuracy and that she could identify the voices of the defendant, Portia Francis, Cissie Francis, David Brown, and Agent Richardson.

James Richardson, an agent with the Tennessee Alcoholic Beverage Commission, testified that on February 21, 1996 he drove Ms. Herron to the apartment on Wildwood, gave her $120.00 to buy drugs, and told her to make the buy from the defendant because he was the target of the investigation. Agent Richardson testified that he watched Ms. Herron enter the apartment, saw her exit the apartment, witnessed her enter his vehicle, received the rock cocaine from her, and then delivered the rock cocaine to Detective Hicks. Agent Richardson stated that he did not see the defendant that night.

John Lea, a property and evidence officer with the Cleveland Police Department, testified that he received a substance that was marked as evidence against the defendant and delivered it to the crime lab in Chattanooga. After testing

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[1] The transcript of the audio tape of the alleged drug transaction with the defendant does not reflect this. The transcript reveals that Ms. Herron asked Agent Richardson: "So, what do you want me to do here? David's in here. Do you want me to deal with David? Or...." Then, Agent Richardson replied by saying, "Yeah, that'd be fine."

was concluded, Officer Lea picked up the evidence and returned it to the Cleveland Police Department.

David Brown, an agent with the TBI, testified that he works as a forensic chemist in the Chattanooga Regional Laboratory. Agent Brown explained that he received a package marked as evidence against the defendant from Officer Lea of the Cleveland Police Department. Agent Brown tested the contents of the package and found a rock-like substance, which he determined to be a cocaine base, Schedule II, with a weight of .6 grams.

The State also called another man named David Brown, who is an acquaintance of the defendant. Mr. Brown stated that he knew Nettie Herron from selling drugs to her in the past. He testified that he does not recall the events of February 21, 1996 and that he does not remember being with the defendant that night. Mr. Brown further testified that he did not know the defendant to sell drugs.

The defendant presented an alibi defense to the jury. The defendant's proof at trial consisted of the testimony of Audrey Moore, his friend; David Brown, his acquaintance; and Antoinette "Cissie" Francis, his sister; as well as his own testimony.

Audrey Moore testified that she spent the entire evening of February 21, 1996 with the defendant. She explained that she picked the defendant up at Moseby Park in Cleveland at 5:00 p.m. Then, Ms. Moore and the defendant went to Chattanooga where they had dinner and stopped at a liquor store. When they returned to Cleveland at 10:00 p.m., Ms. Moore and the defendant checked into a Red Carpet Inn. Ms. Moore testified that the next morning around 11:15 a.m. she took the defendant to his wife's house so that he and his wife could leave town to celebrate his mother-in-law's birthday.

The defense recalled David Brown. Mr. Brown testified that he had been convicted of selling rock cocaine either at the home of Cissie Francis or just outside her home in February 1996. Mr. Brown again testified that he did not remember seeing the defendant at the apartment on the night of February 21, 1996.

Antoinette “Cissie” Francis, the defendant’s sister, testified that she lived in an apartment on Wildwood Avenue in February 1996. Ms. Francis testified that Ms. Herron, the confidential informant, has a reputation for dishonesty in the community and that she is not honest in her own opinion. She stated that her brother has never sold drugs out of her apartment. She also stated that her brother’s voice was not on the audio tape of the alleged drug transaction. Ms. Francis testified that she has been evicted from her apartment but that there is no proof that drugs were being sold there.

When the defendant testified at trial, he stated that he spent the entire night of February 21, 1996 with Audrey Moore in a hotel. The defendant stated that he has never sold crack cocaine and that he did not sell crack cocaine on the night of February 21, 1996. The defendant further stated that he has never used crack cocaine and that he has never been in a crack house. The defendant admitted that he had previously pled guilty to grand larceny and two counts of aggravated robbery because he was responsible for committing those crimes.

In rebuttal, the State recalled Detective Hicks to the stand. Detective Hicks testified that in his capacity as a police officer he had seen the defendant in a crack house once before.

DENIAL OF REQUEST FOR A MISTRIAL

The defendant argues that it was error for the trial court to deny a request for a mistrial after Ms. Herron, the confidential informant, testified that she met the defendant after he was released from jail. The defendant says that prior to this statement he had decided not to testify but that after the statement he felt forced to tell the jury why he had been in jail.

After the statement by Ms. Herron, counsel for the defendant objected and requested a mistrial. The trial judge immediately conducted a jury out hearing and denied the request for a mistrial. The trial judge based this ruling on the following reasoning:

> And I’m going to hold that it was not grounds for a mistrial because it was responsive as to why she did not know this particular defendant. He had been somewhere and that’s where he had been. Again, I can’t -- it’s not brought in by her to show necessarily any prior conviction and that’s the

> reason I'm going to let it in. For identity purposes, she was testifying she just had met him recently and she didn't know him before then because he'd just gotten out of jail, as I understand her testimony. So for the record, that's why I overruled your objection on the mistrial.

Later, the trial judge issued the following curative instruction to the jury:

> Ladies and gentleman, I want to advise you at this time that during the, during the testimony of the last witness, mention was made of the fact that she had just met the defendant because he had just been released from jail. You are to consider this evidence only for the purpose of knowing why she may not have known him previously. This information may not be used by you in any way in determining his guilt or innocence of this particular charge.

The general rule is that a mistrial should be declared if there is manifest necessity warranting such action by the trial judge. *Arnold v. State,* 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). The decision of whether to grant a mistrial will not be overturned on appeal unless there was an abuse of discretion. *State v. Seay,* 945 S.W.2d 755, 764 (Tenn. Crim. App.) (citation omitted), *app. denied* (Tenn. 1996).

In this case, Ms. Herron's statement was the only reference in the State's proof to the defendant's previous incarceration. Further, it does not appear from the record that the State surreptitiously elicited testimony from Ms. Herron about his previous incarceration. We find that Ms. Herron's statement did not amount to manifest necessity and that the trial judge did not abuse his discretion in failing to grant a mistrial.

Moreover, the trial judge cured any potential error by instructing the jury not to consider the unsolicited statement. *See State v. West,* 767 S.W.2d 387, 397 (Tenn. 1989), *cert. denied* 497 U.S. 1010 (1990). A jury is presumed to follow a trial court's curative instruction. *State v. Johnson,* 762 S.W.2d 110, 116 (Tenn. 1988) (citation omitted), *cert. denied* 489 U.S. 1091 (1989).

DENIAL OF MOTION TO WITHDRAW

The defendant contends that the trial court erred in not allowing trial counsel to withdraw as attorney of record after trial counsel and the defendant indicated the need for withdrawal. Trial counsel requested to withdraw as attorney of record on two occasions, once before trial and once at trial. The trial court denied both

motions. The defendant also made several requests for a different lawyer, but the trial court denied his requests.

The trial court may, upon good cause shown, permit the withdrawal of an attorney appointed to represent an indigent defendant in a criminal case. Tenn. Code Ann. § 40-14-205(a). Further, the trial court has wide discretion in matters regarding the appointment and relief of counsel, and its action will not be set aside on appeal unless a plain abuse of that discretion is shown. *State v. Rubio,* 746 S.W.2d 732, 737 (Tenn. Crim. App. 1987).

We find nothing in the record that would have required the withdrawal of counsel in this case. *See* Supreme Court Rule 8, DR 2-110. Further, the trial judge did not abuse his discretion in failing to grant the requests for withdrawal by trial counsel or the defendant.

The defendant also infers that the trial court's denial of the requests for withdrawal amounted to ineffective assistance of counsel. However, the defendant fails to explain how trial counsel's performance was deficient or how he was prejudiced by the purported deficient performance. *See Strickland v. Washington,* 466 U.S. 668, 686 (1984). Moreover, we find that trial counsel's performance was within the range of competence required of attorneys in criminal cases. *See Baxter v. Rose,* 523 S.W.2d 930, 936 (Tenn. 1975). In fact, we note that the trial judge made the following comments to trial counsel: "[You are] doing a good job" and "I can't imagine anything that could have been done that hasn't been done."

SUFFICIENCY OF THE EVIDENCE

The defendant challenges the sufficiency of the evidence to support the conviction for the sale of crack cocaine over .5 grams. He specifically contends that there was no proof, other than the biased testimony of the confidential informant, to support the conviction.

When the sufficiency of the evidence is challenged, the standard of review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could find the accused guilty of the crime beyond a reasonable doubt. *State v. Duncan,* 698 S.W.2d 63, 67 (Tenn. 1985), *cert. denied,* 475 U.S.

1031 (1986). Furthermore, "a jury verdict approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory." *State v. Williams,* 657 S.W.2d 405, 410 (Tenn. 1983), *cert. denied,* 465 U.S. 1073 (1984); *State v. Grace,* 493 S.W.2d 474, 476 (Tenn. 1973).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom. *State v. Cabbage,* 571 S.W.2d 832, 835 (Tenn. 1978). Moreover, this Court may not reweigh or reevaluate the evidence. *Id.*

A finding of guilt against the defendant removes the presumption of innocence and raises a presumption of guilt on appeal. *Grace,* 493 S.W.2d at 476. It is the defendant who must overcome this presumption of guilt and carry the burden of demonstrating that the evidence is insufficient. *Williams,* 657 S.W.2d at 410.

The jury found the defendant guilty of the sale of cocaine over .5 grams pursuant to Tenn. Code Ann. §§ 39-17-417(a)(3), (c)(1). The evidence presented at trial, which included direct, scientific, and circumstantial evidence, showed that the defendant sold .6 grams of crack cocaine to Ms. Herron for $120.00. We find this evidence supports the verdict of the jury finding the defendant guilty beyond a reasonable doubt. Further, the defendant did not carry the burden of proving that this evidence was insufficient.

ADMISSIBILITY OF IMPEACHMENT EVIDENCE

Finally, the defendant contends that the trial court erred in allowing the State to use two previous convictions for aggravated robbery as impeachment evidence against him. Essentially, the defendant says that aggravated robbery is a crime of violence and therefore has "little or no direct bearing on honesty or veracity." *See State v. Barnard,* 899 S.W.2d 617, 622 (Tenn. Crim. App.) (citation omitted), *app. denied* (Tenn. 1994).

This issue is governed by Rule 609 of the Tennessee Rules of Evidence. According to Rule 609, the State may use a prior conviction to impeach the testimony of the accused in a criminal prosecution if:

> (a) the conviction was for a crime that is punishable by death or imprisonment in excess of one (1) year or a misdemeanor involving dishonesty or a false statement, Tenn.R.Evid. 609(a)(2), (b) less than ten (10) years have elapsed between the date the accused was released from confinement and the commencement of the prosecution, Tenn.R.Evid. 609(b), (c) the State gives reasonable written notice of the particular conviction or convictions it intends to use to impeach the accused prior to trial, Tenn.R.Evid. 609(a)(3), and (d) the trial court finds that the probative value of the felony or misdemeanor on the issue of credibility outweighs its unfair prejudicial effect on the substantive issues. Tenn.R.Evid. 609(a)(3).

See State v. Farmer, 841 S.W.2d 837, 839 (Tenn. Crim. App.), *app. dismissed* (Tenn. 1992).

In this case, the trial court found that all four requirements were satisfied. Regarding the fourth requirement, which raises the most significant question of admissibility, the trial court held that the aggravated robbery convictions were highly probative of the defendant's credibility because they are crimes that involve dishonesty. *See State v. Tune,* 872 S.W.2d 922, 927 (Tenn. Crim. App.), *app. denied* (Tenn. 1993) (burglary); *State v. Crank,* 721 S.W.2d 264, 266 (Tenn. Crim. App. 1986) (burglary).

It is well established that questions concerning the admissibility of evidence rest within the sound discretion of the trial court and that an appellate court will not interfere with the exercise of this discretion absent a clear abuse appearing on the face of the record. *See State v. Lavender,* No. 02C01-9506-CR-00202, Davidson County, n. 8 (Tenn. Crim. App. 1996) (citations omitted), *aff'd on other grounds,* 967 S.W.2d 803 (Tenn. 1998). We find that the trial court did not abuse its discretion in ruling that the defendant's two previous convictions for aggravated robbery were admissible as impeachment evidence against him.

CONCLUSION

We find that there are no reversible errors and affirm the defendant's conviction. It appearing that the defendant is indigent, the costs of the appeal are taxed to the State.

John K. Byers, Senior Judge

CONCUR:

James Curwood Witt, Jr., Judge

Norma McGee Ogle, Judge