IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1999 SESSION

FILED

June 30, 1999

Cecil Crowson, Jr.
Appellate Court
Clerk

STATE OF TENNESSEE,	
Appellee,	No. 02C01-9711-CR-00444
v.	Shelby County
LINA COOK and GLEN COOK,	Honorable Carolyn Wade Blackett, Judge
Kidnapping-three counts, robbery-two counts,	(Especially aggravated kidnapping-three counts, aggravated
Appellants.	attempted aggravated robbery, possession of a handgun in an occupied place)

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OPINION FILED: .....

AFFIRMED

Joseph M. Tipton
Judge

OPINION

The defendants, Lisa Cook and Glenn Cook, appeal as of right from their convictions by a jury in the Shelby County Criminal Court for three counts of especially aggravated kidnapping, a Class A felony, two counts of aggravated robbery, a Class B felony, and one count each of attempted aggravated robbery and possession of a handgun in an occupied place, a Class C felony and Class A misdemeanor, respectively. Each defendant was sentenced as a Range I, standard offender to twenty years confinement in the Department of Correction for each especially aggravated kidnapping conviction, ten years for each aggravated robbery conviction, five years for the attempted aggravated robbery conviction, and eleven months and twenty-nine days for the possession of a handgun

convictions. The sentences were ordered to be served concurrently.

Both defendants raise the following issues on appeal:

> (1) whether the evidence is sufficient to support the especially aggravated kidnapping convictions;
>
> (2) whether the evidence is sufficient to support the attempted aggravated robbery convictions; and
>
> (3) whether the trial court erred by allowing the state to introduce testimony of police officers that they were responding to a "shots-fired" call when they arrested the defendants.

Defendant Lina Cook raises the following issue on appeal:

> (4) whether the failure of any witness to identify the defendants individually deprived Lina Cook of a fair trial.

Defendant Glenn Cook raises the following issues on appeal:

> (5) whether the trial court's failure to instruct the jury on facilitation deprived him of a fair trial; and
>
> (6) whether the cumulative effect of the combined errors deprived him of a fair trial.

We affirm the judgments of conviction.

The record reflects that the defendants are identical twins. Christopher Fouches testified that on April 14, 1998, he went to a party at Lake Point Apartments with his sister, Marti Fouches, and Marti's fiancé, Tony Garrett. He said that as they left the party at about 2:30 a.m. and were walking down the steps, the defendants approached

them. He said Mr. Garrett was in front of him and Ms. Forches, and one of the defendants struck Mr. Garrett in the face. He said Ms. Forches began screaming, and he tried to calm her down. He said that one defendant had a revolver, and the other had a rifle or a shotgun.[1]

Mr. Forches testified that Defendant Two approached Mr. Garrett and threatened him. He said that Defendant One robbed Mr. Garrett and told him to get into Mr. Garrett's car. He stated that the defendants took Ms. Forches's jewelry, and they reached into Mr. Garrett's pockets and might have taken something. He testified that the defendants did not attempt to rob him but asked him if he had a pistol, which he did not. He said the defendants did not pat him down or search him. He said the defendants then forced the three of them into Mr. Garrett's car by pointing a pistol at them. He stated that he and Ms. Forches were in the backseat, Mr. Garrett was in the driver's seat, and Defendant One was in the front passenger seat. He said that Defendant Two followed them in another car. He said that in Mr. Garrett's car, Defendant One threatened to shoot Mr. Garrett. He said that he pleaded with Defendant One not to shoot Mr. Garrett because he and Ms. Forches were engaged. He testified that Defendant One

[1] Although the victims were unable to identify the defendants individually by name, most of their testimony distinguishes between the two based upon which weapon the defendants were carrying. For purposes of this opinion, the defendant carrying the revolver will be referred to as Defendant One, and the defendant carrying the rifle, shotgun or pipe will be referred to as Defendant Two.

said that if they told anyone about the incident, Ms. Fowlkes would be a victim.

Mr. Fowlkes testified that Defendant One forced Mr. Garrett to drive to the apartment Mr. Garrett and Ms. Fowlkes shared at Perkins Woods. He said that when they arrived, Defendant One forced Mr. Garrett out of the car and into the apartment at gunpoint. He said that Defendant Two, who had a rifle, stayed with him and Ms. Fowlkes at the car. He said that about ten to fifteen minutes later, Defendant One and Mr. Garrett came outside. He said that one of the defendants reached into Mr. Garrett's pocket and took some money. He said the defendants demanded money from Ms. Fowlkes, but she did not have any. He said the defendants then got in their car and left. Mr. Fowlkes testified that he feared for his life during the incident.

On cross-examination, Mr. Fowlkes testified that light came from streetlights not far from the bottom of the steps at Lake Point Apartments and from lights in the stairwell. He said that he had seen the defendants before and that Mr. Garrett knew the defendants. He said that when Defendant One first approached Mr. Garrett, Defendant One said, "Where yourself at." He said he could not hear whether Mr. Garrett said anything to Defendant One. He said the defendants took Ms. Fowlkes's necklace at Lake Point Apartments. He stated that the

defendants asked him "if he had anything, if he had a gun." He said he thought the defendants were asking him if he had any money and if he had a gun. He said that although he was never directly threatened, he felt his life was threatened because if they would kill Mr. Garrett, they would also kill him.

Mr. Fowlkes testified that at Perkins Woods Apartments, Defendant Two stayed in the car with him and Ms. Fowlkes, and he did not remember if Defendant Two had a gun. He said Defendant Two did not threaten them with a gun. He said that after Defendant One and Mr. Garrett came back outside, Defendant One went to the passenger side of the car and said, "Give me your money." He said that after they got money from Ms. Fowlkes, they left. He said that Defendant Two never raised or pointed his gun.

Mr. Fowlkes testified that they did not call the police that night because Ms. Fowlkes was afraid. He said Ms. Fowlkes was scared because the defendants knew where she and Mr. Garrett lived, and they had threatened to kill Mr. Garrett. He said that after the incident, Mr. Garrett told him that he knew the defendants as security guards. He said that Ms. Fowlkes did not know the defendants.

On redirect examination, Mr. Fourches testified that at Lake Point Apartments, the defendants asked him "if [he] had anything" and if he had a gun. He said he thought they were asking him if he had any money or a gun. He said he thought the defendants still had their guns at Perkins Woods Apartments.

Tony Garrett testified that he had a felony conviction for possession of cocaine. He stated that on April 14, he, his fiancee Marti Fourches, and her brother Christopher Fourches attended a party at Lake Point Apartments. He said that they left the party at about 2:00 a.m. and that as they went down the stairs, he noticed the defendants exiting a gray Chevrolet Cavalier. He said the defendants approached him and told him to "drop it off." He said Defendant One had a .38 caliber pistol and Defendant Two had a 12-gauge gun. He said he told the defendants that he did not have any money, and one of the defendants hit him in the eye. He said the defendants then searched his pockets and took eight hundred dollars from him. He testified that the money was part of Ms. Fourches's income tax refund check that they had cashed earlier that day.

Mr. Garrett testified that Ms. Fourches panicked, and the defendants took about thirty dollars and a herringbone necklace from her. He said that the defendants asked Mr. Fourches what he had on

him but that Mr. Forches did not have anything. Mr. Garrett stated that the defendants forced everyone into his car. He said that he was forced into the driver's side of the car, and one of the defendants got into the passenger's side and forced Mr. Garrett to drive to his and Ms. Forches's apartment complex. He said that Defendant Two followed them in the defendants' car. He stated that the defendants made threats and told Mr. Garrett that he was going to die and that Ms. Forches was going to be a victim.

Mr. Garrett testified that he was forced into his apartment complex by Defendant One while Mr. and Ms. Forches remained in the car with Defendant Two. He said Defendant One searched his apartment but did not find any money. He said Defendant One forced him back outside, and the defendants patted him down again. He said the defendants left after they realized that he did not have any more money, but they threatened to kill him if anyone called the police. He stated that because of these threats, Ms. Forches did not want to the call the police that night but that the next day he convinced her that they should notify the police.

On cross-examination, Mr. Garrett testified that he recognized the defendants' car from the neighborhood. He said the defendants approached him together, and they were both armed. He

said that when one of the defendants told him to "drop it off," he thought they were demanding money from him. He said he did not recall if the defendants said anything about him having a gun that belonged to them. He said the defendants also told Ms. Forches to "drop it off." He said they searched Ms. Forches and took the money that was in her purse, and he said they asked Mr. Forches what he had, but he did not have anything.

Mr. Barrett testified that at Perkins Woods Apartments, Defendant Two threatened to shoot Mr. and Ms. Forches if they moved. He said that Defendant One did not ask him about a gun. He said he was not an acquaintance of the defendants, but he had known them for about four months and knew they worked as security guards. He stated that he might have given the defendants his pager number and that he had seen them the week before the incident at El Paso Pawnshop. He said he did not know what they were looking at, and he did not know if the defendants brought guns at the pawnshop. He stated that he had not seen the defendants armed until the robbery. He testified that he did not own any guns until after the incident. Mr. Barrett stated that the defendants had paged him once, but they did not page him on the day of the incident, and he did not borrow a gun from them.

Mr. Garrett testified that he assumed Defendant Turner was carrying a 12-gauge gun because half of the gun was sticking out, and he knew what a 12-gauge gun looked like. He said that nothing was taken at Perkins Woods Apartments because the defendants had already taken everything. He said the defendants asked Mr. Forches if he had any money, but Mr. Forches told them that he did not. He testified that he and Ms. Forches stayed in a hotel after the incident.

Mr. Garrett was shown a photograph of the defendants, and he described the defendant in photograph number 0000000000-35 as the calm one. He stated that the defendant in the photograph appeared to be Lino Cook, but he was not positive because they were identical twins. He testified that he saw one of the defendants at Circle K after charges had been filed, and that defendant begged him to drop the charges. He said he later saw the calm one, and he denied telling that defendant that he pressed charges because he was embarrassed about being hit in front of his fiancee.

Marti Forches testified that she, Mr. Garrett, and her brother left the party at Lake Point Apartments at about 2:00 a.m. on April 14. She said that as they walked down the steps, the defendants jumped out of their car and approached them. She said that one of the defendants had his hand down by his side. She said that Mr. Garrett

knew the defendants and that he stated, "What's up Dance Man." She said Defendant One pulled out a large silver .38 caliber gun, and she said it looked like Defendant Two had a stick or a pipe. She testified that the bottom of the stairs was well lit and she panicked.

Ms. Fowlkes testified that Defendant One told Mr. Garrett to "drop that shit" off" and then struck Mr. Garrett. She said Defendant Two said "what you got" and took her necklace. She stated that Defendant Two told her and Mr. Fowlkes not to move. She stated that Defendant One forced Mr. Garrett into the driver's side of his car and forced her and Mr. Fowlkes into the backseat. She testified that Defendant One told her that she was going to be a victim, and she said she thought she was going to die.

Ms. Fowlkes testified that Defendant One forced Mr. Garrett to drive to the apartment she shared with him, then Defendant One forced Mr. Garrett into the apartment at gunpoint while Defendant Two stayed with her and Mr. Fowlkes. She said Defendant One and Mr. Garrett were in the apartment for about four or five minutes, and when they came out, the defendants forced Mr. Garrett into his car, then they got into their car and left. She said the defendants stated that they would come back for them if they called the police. She said she and Mr. Garrett dropped off Mr. Fowlkes at their mother's house, then

she and Mr. Garrett spent the night at Mr. Garrett's mother's house. She said she did not want to call the police because she was scared, but Mr. Garrett convinced her the next day that they should notify the police.

On cross-examination, Ms. Fowlkes testified that she recognized the defendants. She said she had been in the area a couple of times after Mr. Garrett had seen the defendants walking on the street and had given them a ride. She said Mr. Garrett told her that the defendants were security guards. She stated that she did not keep guns in the apartment that she shared with Mr. Garrett. She said that on the night of the incident, she did not hear either defendant ask Mr. Garrett if he had a gun he was holding for them. She stated that the eight hundred dollars the defendants took from Mr. Garrett was part of the money from her income tax refund.

Ms. Fowlkes testified that Defendant Tran pointed an object at Mr. Fowlkes that looked like a pipe or a stick. She said Defendant Doe asked Mr. Fowlkes if he had a gun, but the defendants did not search or pat down Mr. Fowlkes. She testified that Defendant Tran ripped off her necklace, and she gave them about thirty or thirty-five dollars. Initially, she said she gave them her money at Lake Point Apartments, but she later stated that she gave them her money at

Perkins Woods Apartments. She said that she and Mr. Garrett stayed with Mr. Garrett's mother after the incident because all the hotels were booked. She said she was not aware of any guns kept in her apartment after the incident.

Officer Rodney Adair of the Memphis Police Department testified that he received a dispatch at about 3:01 p.m. on April 14 reporting shots fired at Lake Point Apartments. He said he spoke with security officers at the apartments who informed him that the suspects had left and might be headed toward Getwell Gardens. He said the suspects were described as two black males, possibly twins, driving a gray, four-door Chevrolet Cavalier.

Officer Adair testified that as he pulled into Getwell Gardens, the defendants were pulling out in a gray Cavalier. He said he turned on his blue lights, stopped the car, and ordered the defendants out of the car. He said he drew his weapon because he had information that the suspects were armed and had fired shots. He said that the passenger got out of the car, raised his hands, and dropped to the ground as ordered. He said the driver got out of the car and raised his hands, and he noticed that the driver was wearing a shoulder holster but did not have a weapon. He said the driver was being difficult and would not get on the ground as ordered. He said

another officer arrived about ten seconds later, and the driver finally complied.

Officer Adair testified that he patted down the passenger and found six rounds of .38 caliber ammunition in his hands. He said neither defendant had weapons on them, but a search of the car produced two handguns and a shotgun. He said the weapons were in the front part of the car, and the shotgun and a handgun were loaded. He testified that ammunition was found in the trunk of the car.

On cross-examination, Officer Adair admitted that according to the arrest ticket, both defendants lay flat on the ground before other officers arrived. He testified that the barrel of the shotgun they recovered was hot, but he did not know if it was hot from lying in the sun. He said he had no knowledge of any spent shotgun shells or bullets found in the car.

Officer Paul Bishop of the Memphis Police Department testified that he was called to Eastwood Hospital at about 8:30 p.m. on April 14 to take a robbery report from the victims. He said that Mr. Garrett's left eye was swollen. He said he heard a call over the radio regarding shots fired, and he put out a broadcast regarding the robbery

and kidnapping because he thought the descriptions of the suspects were similar.

Officer Hardy Quinn of the Memphis Police Department testified that he received a call to go to Getwell Gardens on the report of shots fired. He said that when he arrived, the defendants were out of their car, and Officer Kelly had his gun drawn and was ordering them to get on the ground. He said the passenger complied, but the driver did not. He said he asked the driver his name, and the driver said he was Glenn Cook. He said the driver was wearing a shoulder holster. He stated that in the front of the car, he found a loaded, sawed-off shotgun containing six rounds of ammunition and two loaded .38 caliber handguns. He said he also found ammunition. On cross-examination, he stated that he did not see any spent shells in the car.

B.F. Hathaway, Jr., an investigator with the Tennessee Department of Commerce and Insurance Regulatory Boards, testified that the Boards regulate security companies and that one must go through a certain procedure to become a commissioned security officer in Tennessee. He said that one must file a lengthy application and undergo FBI and TBI background checks. He said that a person cannot work as an armed security guard in Tennessee until they have

been certified by the state. The affidavit of Donna Hancock, Administrative Director of Tennessee Private Protective Security Guard Services, was admitted into evidence. In her affidavit, Ms. Hancock stated that a complete record search revealed that the defendants did not hold armed guard registration, nor was there any record of an application filed by the defendants. The defendants were convicted upon the foregoing evidence.

I. SUFFICIENCY OF THE EVIDENCE--ESPECIALLY AGGRAVATED KIDNAPPING

The defendants contend that the evidence is insufficient to support their convictions for especially aggravated kidnapping. They argue that neither Mr. nor Ms. Fowlkes were threatened in the area on the way to Perkins Woods. They also argue that the victims could not articulate the specific involvement of each defendant, and no evidence indicates that Defendant Two threatened or displayed a weapon. The state responds that both Mr. and Ms. Fowlkes testified that Defendant One pointed a gun at them and forced them into the backseat of Mr. Garrett's car. The state further argues that at Perkins Woods, Defendant Two guarded Mr. and Ms. Fowlkes with a shotgun and threatened to shoot them if they moved. The state argues that the victims' inability to specifically identify each defendant by name is immaterial because both defendants were held criminally responsible for the conduct of the other. We agree.

The standard of review when the sufficiency of the evidence is questioned on appeal 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 beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Especially aggravated kidnapping is defined as false imprisonment "[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. § 39-13-305(a)(1). A person commits the offense of false imprisonment when he or she "knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty." Tenn. Code Ann. § 39-13-302(a).

The evidence is sufficient to establish the especially aggravated kidnapping of all three victims. Mr. Fowlkes testified at trial that the defendants forced the three of them into his vehicle at gunpoint and forced Mr. Barnett into his apartment at gunpoint. He

testified that Defendant Two stayed with him and Ms. Fowlkes at the car and that that defendant had a rifle. Mr. Garrett testified that the armed defendants forced them into his car and forced him to drive to his apartment. He testified that at Perkins Woods Apartments, Defendant Two threatened to shoot Mr. and Ms. Fowlkes if they moved. Ms. Fowlkes testified that Defendant One, who was armed, forced her and Mr. Fowlkes into the backseat of Mr. Garrett's car and forced Mr. Garrett into the driver's seat. She testified that Defendant Two pointed an object at Mr. Fowlkes that looked like a pipe or a stick. Viewed in the light most favorable to the state, the evidence is sufficient to support the especially aggravated kidnapping convictions.

II. SUFFICIENCY OF THE EVIDENCE -- ATTEMPTED AGGRAVATED ROBBERY

The defendants contend that the evidence is insufficient to support their convictions for the attempted aggravated robbery of Mr. Fowlkes. Specifically, they argue that Mr. Fowlkes testified that he was not robbed. The state contends that the evidence is sufficient. We agree.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, <u>any</u> 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, 99 S. Ct. 2781, 2789 (1979). This means that we do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

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). 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). Criminal attempt is defined as follows:

> A person commits criminal attempt when, acting with the kind of culpability otherwise required for the offense:
>
> (1) Intentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;
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> (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
>
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

At trial, Mr. Fowlkes initially testified that the defendants did not rob him but only asked him if he had a gun. Later, he testified that Defendant Doe, brandishing a weapon, came to the passenger side of the car at Perkins Woods Apartments and said, "Give me your money." He also testified that the defendants asked him if he had anything, and he thought they were asking him if he had any money. Mr. Garrett testified that the armed defendants asked Mr. Fowlkes what he had on him. He stated that the defendants asked Mr. Fowlkes if he had any money, but Mr. Fowlkes told them that he did not. He testified that the defendants did not take anything from Mr. Fowlkes because Mr. Fowlkes did not have anything.

Viewed in the light most favorable to the state, the evidence supports the attempted aggravated robbery conviction. Although Mr. Fowlkes's testimony was somewhat contradictory, both he and Mr. Garrett testified that the defendants were armed and that they asked Mr. Fowlkes for his money. The jury obviously accredited this testimony, as is their prerogative, despite Mr. Fowlkes's assertion that he did not believe he was robbed. See State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983) (holding that "[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"). This issue has no merit.

III. ADMISSIBILITY OF "SHOTS FIRED" TESTIMONY

The defendants contend that the trial court erred by allowing police officers to testify that they were responding to a "shots-fired" call when they arrested the defendants and by allowing the prosecutor to refer to this during opening statement and closing argument. They argue that this evidence is irrelevant and prejudicial. See Tenn. R. Evid. 401, 403. The state contends that the issue is waived because the defendants did not object to the testimony at trial and that the evidence is nevertheless relevant and probative to prove the identity of the defendants and to explain why the officers arrested them.

The record reveals that the defendants filed a motion in limine to prohibit the state from referring to the "shots-fired" call during opening statement. At the motion hearing, one of the defense attorneys stated, "I would like to ask that [the prosecutor] not refer to the shots-fired call in his opening statement. He's free, of course, to prove any relationship it may have to the defendants during the course of the trial." The trial court denied the motion.

At trial, Officer Adair testified that he received a "shots-fired" call at Lake Point Apartments at about 3:00 p.m. on April 14, 1994. He said he investigated the call, learned that the suspects were two black males in a gray Corvalier, and headed toward Getwell Gardens. He said that as he was pulling into Getwell Gardens, the defendants, who matched the description of the suspects in the "shots-fired" call, were pulling out. Officer Bishop testified that as he was taking the description of the defendants from the victim at the hospital on April 14, he heard a report of shots being fired and a description of the suspects. He said that when he realized the description was similar to the description the victim had just given him, he put out a broadcast regarding the robbery and kidnapping. Officer Quinn testified that he responded to a "shots-fired" call at Getwell Gardens and that when he arrived, Officer Adair had stopped the defendants.

First, we question the propriety of the trial court allowing the state to refer to the "shots-fired" call during opening statement. Ordinarily, there is little relevance but potential prejudice in allowing a police officer to explain the nature of the call to which he or she was responding. See, e.g., State v. Brown, 915 S.W.2d 8, 6 (Tenn. Crim. App. 1995). However, in the context of the whole trial, we fail to see the harm to the defendants.

The record reflects that neither defendant objected to the testimony at trial. In fact, the attorney for one of the defendants further questioned the officers on cross-examination about the 'shots-fired' call. During the cross-examination of Officer Adair, one of the defense attorneys asked the officer, '[W]hat information were you given by the dispatcher in the call,' to which Officer Adair responded, 'Two subjects were armed, driving around, firing shots, in the area of the Lake Point Apartments.' During the cross-examination of Officer Quinn, the attorney stated, 'Officer Quinn, you indicated you received a shots-fired call or heard a shots-fired call at Bethwell Gardens and responded; is that correct?' In light of the fact that the motion in limine only contested the admissibility of the 'shots-fired' call in the opening statement, that the defendants did not object to the 'shots fired' testimony at trial, and that one of the attorneys referred to the evidence on cross-examination, the defendants cannot now complain. See T.R.A.P. 36(a). In any event, given the strength of the evidence against the defendants, we do not believe that the testimony had any bearing on the outcome of the trial.

IV. IDENTIFICATION OF DEFENDANTS

Defendant Lina Cook contends that the failure of any witness to identify the defendants individually deprived him of his right to a fair trial. The defendant's brief also indicates that he believes he

was denied uniform verdicts because the failure of any witness to identify the defendants individually prevented the jury from determining which defendant was more culpable. The state contends that each defendant was charged with the same offenses and is criminally responsible for the actions of the other, as well as for their own actions.

Pursuant to Tenn. Code Ann. § 39-11-402(2), a person is criminally responsible for an offense committed by the conduct of another if, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, a person solicits, directs, aids, or attempts to aid another person to commit the offense[.]" A criminal actor and a person aiding the actor pursuant to Tenn. Code Ann. § 39-11-402(2) are equally considered parties to the offense. Tenn. Code Ann. § 39-11-401. The exact role played by each defendant is inconsequential as long as the jury finds that both had the requisite mental state and were involved in the commission of the crime. We conclude that the state was not required to identify each defendant separately because each is held criminally responsible for the actions of the other and because the liability of both for the offenses is the same.

In State v. Williams, 921 S.W.2d 247 (Tenn. Crim. App. 1995), the defendant was convicted of aggravated rape when the victim identified him as one of her assailants, although she was unsure which of her assailants sexually penetrated her. The defendant claimed that he was denied his constitutional right to a unanimous jury verdict because the verdict did not indicate whether the jury found him to be the actual perpetrator of the offense or merely criminally responsible for the conduct of another. This court affirmed the conviction, concluding that Williams' constitutional right to a unanimous jury verdict was not violated. Id. at 251-52.

The facts of the present case show that the armed defendants intentionally took money and other valuables from the victims, forced the victims into a certain group, forced the victims to travel to Mr. Garrett's apartment, forcibly held two of the victims in the car, and forced Mr. Garrett into his apartment. Both defendants were active participants in the entire incident and, as such, each defendant is criminally responsible for the acts of the other. See State v. Hicks, 868 S.W.2d 82, 88 (Tenn. Crim. App. 1992); see also, Maxwell v. State, 441 S.W.2d 503, 504 (Tenn. 1969) (holding that "[t]o be criminally responsible, the accused need not have taken any money from the victim with his own hands, or actually participated in any other act of force or violence; it is sufficient if he was present, aiding and abetting,

ready and willing to aid if necessary") (citation omitted). The defendants were not denied a fair trial nor deprived of any constitutionally required cross-examination rights.

V. FACILITATION INSTRUCTION

Defendant Glenn Cook contends that the trial court erred by not instructing the jury on the lesser included offense of facilitation. He argues that virtually every time one is charged with a felony by way of criminal responsibility, an instruction on facilitation of the felony is warranted. The state contends that the issue is waived because the defendant failed to include it in his motion for a new trial and that an instruction was nevertheless not warranted in this case.

We agree that the issue is waived because the defendant failed to include it in his motion for a new trial. T.R.A.P. 3(e). Further, we do not believe that the failure to instruct constitutes plain error. A trial court's duty to instruct the jury on all lesser included offenses of an indictment is contingent upon proof existing in the record to support the instruction. Tenn. Code Ann. § 40-18-110(a); State v. Trusty, 919 S.W.2d 305, 311 (Tenn. 1996). A facilitation instruction in the present case was not warranted because the proof at trial overwhelmingly showed that both defendants acted with the same culpable intent to promote, assist in, or benefit from the commission of

the offenses. See State v. Illey, 921 S.W.2d 440, 452 (Tenn. Crim. App. 1995).

Defendant Glenn Cook also contends that the effect of the combined errors deprived him of a fair trial. Because we have concluded that no individual error exists, we also conclude that there is no cumulative error.

In consideration of the foregoing and the record as a whole, we affirm the defendants' judgments of conviction.

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Joseph M. Tipton, Judge

CONCUR:

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Gary R. Wade, Presiding Judge

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Thomas T. Woodall, Judge