

IN THE COURT OF CRIMINAL APPEALS OF  
TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1999

**FILED**

December 3, 1999

Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE,	)	C.C.A. NO. 03C01-9901-CR-00043
	)	
Appellee,	)	
	)	
VS.	)	HAMILTON COUNTY
	)	
MICHAEL E. DEAN,	)	HON. DOUGLAS A. MEYER,
	)	JUDGE
	)	
Appellant.	)	(Robbery)

ON APPEAL FROM THE JUDGMENT OF THE  
CRIMINAL COURT OF HAMILTON COUNTY

FOR THE APPELLANT:

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Assistant Public Defender

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OPINION FILED \_\_\_\_\_

AFFIRMED

DAVID H. WELLES, JUDGE

# OPINION

The Defendant, Michael E. Dean, was indicted for the robbery of Margaret Jackson and the assault of Eric Carter, arising out of events occurring on December 6, 1996. A Hamilton County jury found the Defendant guilty of the robbery but acquitted him of the assault. He now appeals his robbery conviction alleging insufficiency of the evidence and prosecutorial misconduct. We affirm the judgment of the trial court.

Ms. Margaret Jackson, a seventy-five year old woman, testified at trial that she was leaving the Electric Power Board Credit Union in downtown Chattanooga when she heard someone “jogging” behind her. The person “got up even” with her and said, “Give me that pocketbook.” Ms. Jackson was holding her pocketbook under her left arm with the straps over her shoulder. The person grabbed the purse and pushed her down, so she let go of the purse and fell into the street. She hurt her knee and skinned her finger but did not suffer any serious injuries in the fall.

Ms. Jackson said that the person started running through some nearby buildings, and she started running after him on the sidewalk. She ran after him until she lost sight of him. Within the next hour, the police brought the Defendant out of a house, and Ms. Jackson identified him as the person who had robbed her. She said that she recognized him based on his appearance and his voice, but she could not remember what he was wearing when he robbed her. During trial, she again identified the Defendant as the person who had robbed her.

Counsel for the Defendant played the tape from the preliminary hearing during his cross-examination of Ms. Jackson. In her preliminary hearing testimony, Ms. Jackson stated that she did not get a good look at the robber’s

face when he grabbed her purse, but that she recognized the Defendant's voice when he spoke. She testified, "Well, there was one man brought out, I said, 'That's not him.' He [the Defendant] spoke. I said, 'That's the man.'"

After the preliminary hearing tape was played, Ms. Jackson testified that the police brought two men out of the house, and she identified the Defendant, not the other man, as the person who had robbed her. She testified that the other man came out first and that he did not look or sound anything like the Defendant.

Eric Carter, a ten year old boy, testified that he was raking leaves behind his house when the Defendant, whom he referred to as "Mike," came running through the alley between his house and the Defendant's house carrying a pocketbook. He said that the Defendant ran into him and knocked him down, dropping the pocketbook. The Defendant then picked up the pocketbook and ran into his house. Carter testified that he knew the Defendant because the Defendant is the father of one of his friends. When the police arrived, he directed them to the Defendant's house. At trial, he positively identified the Defendant as the person who ran into him.

Lieutenant Clyde L. Willhoit of the Chattanooga Police Department responded to a robbery call and was informed that the suspect was in a house located at 1405 Chamberlain. He approached the house and noticed that the door was ajar. He was going to open the door when a voice inside said, "Hold it." A person later identified as David Parks opened the door and let Lieutenant Willhoit inside. Lieutenant Willhoit made contact with the Defendant as the Defendant was getting out of the shower, and then he found Ms. Jackson's purse in one of the bedrooms. It was underneath some clothes inside a laundry basket on the bed. He testified that the only two people in the house were the

Defendant and David Parks and that Mr. Parks and the Defendant do not look or sound anything alike.

#### SUFFICIENCY OF THE EVIDENCE

Tennessee Rule of Appellate Procedure 13(e) prescribes that “[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.” Tenn. R. App. P. 13(e). Evidence is sufficient if, 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 (1979). In addition, because conviction by a trier of fact destroys the presumption of innocence and imposes a presumption of guilt, a convicted criminal defendant bears the burden of showing that the evidence was insufficient. McBee v. State, 372 S.W.2d 173, 176 (Tenn. 1963); see also State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992) (citing State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1976), and State v. Brown, 551 S.W.2d 329, 331 (Tenn. 1977)); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Holt v. State, 357 S.W.2d 57, 61 (Tenn. 1962).

In its review of the evidence, an appellate court must afford the State “the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom.” Tuggle, 639 S.W.2d at 914 (citing State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978)). The court may not “re-weigh or re-evaluate the evidence” in the record below. Evans, 838 S.W.2d at 191 (citing Cabbage, 571 S.W.2d at 836). Likewise, should the reviewing court find particular conflicts in the trial testimony, the court must resolve them in favor of the jury verdict or trial court judgment. Tuggle, 639 S.W.2d at 914.

The Defendant argues that the evidence is insufficient for a rational juror to have found his guilt beyond a reasonable doubt because the evidence

identifying him as the perpetrator was “very tenuous, at best.” The evidence, however, is indeed quite sufficient to support the conviction. While the Defendant points out inconsistencies in Ms. Jackson’s testimony regarding her identification of the Defendant, such inconsistencies go only to the weight of the testimony, which is a matter for the jury. Taking the evidence in the light most favorable to the State, we note Ms. Jackson testified at both the preliminary hearing and at trial that she identified the Defendant by his voice as the person who robbed her. At trial, she again identified the Defendant as the person who robbed her. Eric Carter testified that the Defendant was running through the alley carrying a purse, that he dropped the purse when he ran into Carter, and that he picked up the purse and ran into the house. Eric Carter was certain that it was the Defendant who was carrying the purse because he knew the Defendant. Ms. Carter’s purse was found in the Defendant’s residence. Though two people were in the residence, both Ms. Jackson and Lieutenant Willhoit testified that Mr. Parks and the Defendant do not look or sound alike. This is more than sufficient evidence to identify the Defendant as the perpetrator; thus the evidence is sufficient for a rational juror to have found the Defendant’s guilt beyond a reasonable doubt.

#### PROSECUTORIAL MISCONDUCT

During closing argument, the prosecutor made the following statement: “Mr. Dean, with all due respect to your authority as a jury, as jurors, is about as guilty as anyone I have ever prosecuted, and the State respectfully asks you to so find.” The Defendant argues that this statement was improper and “prejudicial in light of the tenuous evidence” presented at trial and thus it requires a reversal of his conviction.

Though the Defendant argues that this statement was improper and prejudicial, he did not object to the statement during trial or raise it as an issue in his motion for a new trial. Failure to make a contemporaneous objection waives consideration by this Court of the issue on appeal. See Tenn. R. App. P.

36(a); State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988). Similarly, Tennessee Rule of Appellate Procedure 3(e) provides that “in all cases tried by a jury, no issue presented for review shall be predicated upon error in the . . . misconduct of . . . counsel . . . unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.” See also State v. Caughron, 855 S.W.2d 526, 538 (Tenn. 1993). Consequently, the Defendant has waived consideration of this issue; however, we also find that the issue lacks merit.

While we agree with the Defendant that the prosecutor improperly expressed his personal opinion that the Defendant was guilty, see Coker v. State, 911 S.W.2d 357, 368 (Tenn. Crim. App. 1995), the test to be applied in looking at improper comments during closing argument is “whether the improper conduct could have affected the verdict to the prejudice of the defendant.” Harrington v. State, 385 S.W.2d 758, 759 (Tenn. 1965). In light of the overwhelming, as opposed to tenuous, evidence of the Defendant’s guilt, we do not see how the prosecutor’s personal opinion could have affected the jury’s verdict to the prejudice of the Defendant. This issue has no merit.

Accordingly, the judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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GARY R. WADE, PRESIDING JUDGE

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DAVID G. HAYES, JUDGE