IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1996 SESSION

FILED

November 27, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	No. 01-C-01-9509-CC-00285
	)	
Appellee	)	MONTGOMERY COUNTY
V.	)	
	)	HON. JOHN H. GASAWAY,
ROBERT ANTHONY DEVITO,	)	JUDGE
	)	
Appellant.	)	(Felony Murder)
	)	
	)	

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

This is a direct appeal by appellant, Robert Anthony Devito, from a conviction in the Montgomery County Circuit Court of first degree felony murder. He received a sentence of life imprisonment. Appellant raises the following issues on appeal:

(1) the unavailability of Jencks material and co-defendant David Howington's testimony deprived appellant of his Sixth Amendment constitutional rights;

(2) the trial court erred in failing to honor an informal agreement between the State and co-defendant Howington;

(3) the trial court erred in not ordering a mistrial when co-defendant Howington stated that he had been threatened by the district attorney; and

(4) the trial court erred in admitting the preliminary hearing testimony of co-defendant Howington because it was hearsay.

Finding the trial court committed no error, we affirm the conviction.

Michael Trobaugh was medically discharged from the Army on January 12, 1991 and received a large lump sum payment. The check was for approximately $23,000 and bank records reflect that Trobaugh withdrew roughly $8,000 of this amount in cash. He intended to use the money to purchase marijuana. Trobaugh lived in Clarksville and owned "foosball" tables at two bars there. He also worked as a bouncer at the "Cat West" club in Clarksville. By virtue of these affiliations, he knew that obtaining marijuana would not be difficult. He began to inquire about purchasing ten pounds of the substance.

Trobaugh talked to his roommate about the drug purchase and the roommate referred Trobaugh to Eric Farley, who was known to distribute drugs. Farley spoke with Trobaugh on the phone and confirmed that he likely could get that amount of marijuana. He quoted Trobaugh a price of $1400-$1600 per pound. Trobaugh then asked where Farley could get that much marijuana. He informed Trobaugh that appellant was his regular supplier. Testimony reflected that Farley worked for appellant distributing drugs and usually received a commission from his sales. Upon

learning this, Trobaugh replied that he knew appellant and would get the drugs himself. They argued about the matter because such an arrangement would "cut [Farley] out of the deal." In fact, Farley stood to lose about $1,000 if eliminated from the transaction. Ultimately, however, Farley agreed to give Trobaugh's phone number to appellant for further dealing.

Appellant contacted Trobaugh and made arrangements for the delivery of the marijuana. It is unclear from the record when the delivery was scheduled to take place. On January 21, 1991, appellant and a friend, David Howington, visited Farley's house. Farley noticed that appellant was carrying a .357 Dan Wesson in a holster on his side. The three men discussed the planned drug deal. Appellant informed Farley that he and Howington were going to "roll Trobaugh," meaning they were going to rob and/or kill him. Farley told appellant to "do what you have to do." Appellant elaborated by stating that he and Howington were not going to actually deliver the marijuana, but were going to take Trobaugh's money. That way they would have both the money and the marijuana. Farley cautioned them that Trobaugh might retaliate and was rumored to be an accomplished kickboxer. Appellant then stated "well, I'll just shoot him." Appellant also stated that when he robbed Trobaugh, he would "leave no witnesses behind." The men did not discuss when this would take place.

Later that evening, appellant and Howington went to numerous bars in Clarksville where they were well-known. Appellant was armed with the .357 that night. The record reflects that they had been drinking, as well as smoking marijuana and taking Valium. They met Trobaugh at a bar and then followed him to his trailer. This was in the early morning hours of January 22. Upon arrival, the three entered the living room of the trailer and Howington sat down on the couch. Apparently thinking the exchange was going to take place, Trobaugh went into the back bedroom and emerged with his hands full of money. He put it on the coffee table and sat down in a recliner. Appellant was standing on the left side of the recliner. Without speaking, he

pulled out his gun, placed it behind Trobaugh's left ear and fired. He and Howington then collected the money and they left the trailer.

The medical examiner testified that the entry wound was just behind the left ear. The bullet severed the brain stem causing the bodily functions to cease and then exited the body through the right cheek. He also testified that the gun was fired anywhere from zero to six inches from the head. Neither the bullet nor the gun were ever recovered.

Initially, much of the evidence incriminating appellant was revealed in a statement Howington made to police and his testimony at the preliminary hearing. The testimony was the result of an agreement with the State. If Howington would testify truthfully at the preliminary hearing, the State agreed to recommend that the magistrate bind Howington over to the grand jury on a charge of second degree murder. However, the bargain was later abandoned. The State believed that Howington did not testify truthfully at the hearing and declined to honor its part of the bargain. Both appellant and Howington were indicted for premeditated and felony murder of Michael Trobaugh.

The trials were severed and Howington was tried first. A jury convicted him of felony murder and he was sentenced to life imprisonment.[1] Appellant was then tried. The State called Howington to testify at appellant's trial. However, he refused to do so. First, he invoked his Fifth Amendment right against self-incrimination. The trial court ruled that he could not invoke this privilege as he had already been convicted of the offense. Howington then contended that he was in fear for his life in the penitentiary and would not testify against appellant. He persisted in this refusal even after being ordered to testify by the trial court. He was held in contempt and ordered

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[1]On appeal to the supreme court, Howington's conviction of first degree murder was reversed. The court held that the State was obligated to honor the bargain, as Howington's testimony was not a material breach of the agreement. In upholding the bargain, the court summarily entered a conviction of second degree murder for Howington and remanded his case for resentencing. State v. Howington, 907 S.W.2d 403 (Tenn. 1995).

to serve ten days. The trial court ruled Howington an unavailable witness under the Tennessee Rules of Evidence. As a result, the State was permitted to introduce Howington's former testimony from the preliminary hearing. This testimony incriminated appellant in Trobaugh's murder and fingered him as the trigger man. Others involved with appellant testified at trial,[2] including Eric Farley. All incriminated appellant in the crime. The jury found him guilty of felony murder and he received a sentence of life imprisonment.

Appellant first contends that the unavailability of Jencks material and Howington's testimony violated his right to confrontation. The issue is twofold. First, appellant contends that the State failed to provide him with a copy of a statement Howington made to police officers after being arrested. Appellant alleges this is a violation of the Tennessee equivalent of the Jencks Act. See Tenn. R. Crim. P. 26.2 Advisory Commission Comments. Second, appellant argues that the trial court erred in ruling Howington an unavailable witness. The thrust of his argument is that the State somehow procured the unavailability through the dishonored bargain with Howington. These issues are without merit.

There was no violation of the duty to provide Jencks material. Under Tennessee Rules of Criminal Procedure 26.2, opposing counsel must be provided any prior statements of a testifying witness to permit an effective cross-examination of that witness and to thereby test his credibility. The rule provides that the information is to be provided *only* after the witness has given testimony on direct examination. Tenn. R. Crim. P. 26.2(a). See also State v. Caughron, 855 S.W.2d 526, 534 (Tenn.), cert. denied, ___ U.S. ___, 114 S.Ct. 475, 126 L.Ed.2d 426 (1993) and State v. Taylor, 771 S.W.2d 387, 394 (Tenn. 1989), cert. denied, 497 U.S. 1031, 110 S.Ct. 3291, 111 L.Ed.2d 799 (1990) (emphasis added). As such, this rule was not applicable to

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[2]Many of the witnesses at appellant's trial were implicated criminally in drug possession/sale or as accessories to Trobaugh's murder. However, the State granted full immunity to each of them in exchange for their testimony against appellant.

Howington's testimony at appellant's trial. Howington was an unavailable witness and never proffered any testimony on direct examination. Thus, under the language of the rule, the duty to provide Jencks material never arose.

Moreover, the record belies appellant's claim that he was denied Jencks material on Howington. After Howington's preliminary hearing testimony was read into the record, appellant's counsel indicated that he had Howington's statement to police. He stated during a bench conference that he had not "read his [Howington] statement to the police officers in about a week and a half." Later in the same bench conference, appellant's counsel stated that he received "about a hundred and fifty pages of Jencks yesterday." Therefore, the State did provide the Jencks material in advance of Howington's expected testimony, although under no duty to do so. These admissions by appellant's counsel clearly demonstrate that he was not deprived of any Jencks material. Appellant is unable to show that his right to confrontation was hindered in this respect.

Neither can appellant demonstrate that Howington's unavailability violated his right of confrontation. Howington was called as a witness by the State. After answering some preliminary questions, Howington refused to testify. He stated that he had been threatened in the penitentiary and was in fear of his life. Howington persisted in his refusal after the court ordered him to testify. The trial court held him in contempt and ruled him unavailable as a witness under Rule 804(a)(2) of the Tennessee Rules of Evidence.

The trial court's determination of unavailability was based upon certain definitions provided in the Tennessee Rules of Evidence. See Tenn. R. Evid. 804. The rule permits certain forms of hearsay to be introduced when a declarant is determined to be unavailable. Tenn. R. Evid. 804(b). The rule also delineates the circumstances that justify a such a ruling. Tenn. R. Evid. 804(a). For example, a witness is unavailable when he "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so." Tenn. R.

Evid. 804(a)(2). Howington's actions clearly fit within this set of circumstances. The trial court ordered Howington to testify and he repeatedly refused in the face of being held in contempt. The ruling was proper.

The logical corollary to the trial court's ruling was the admission of Howington's prior testimony. When a declarant is unavailable, one form of admissible hearsay is former testimony. Tenn. R. Evid. 804(b)(1). This was the exception proffered by the State to admit Howington's preliminary hearing testimony. This did not infringe appellant's right to confront witnesses. Our supreme court has explicitly held that the admission of hearsay evidence under this exception to the hearsay rule satisfies the dictates of both the United States and Tennessee Constitutions in the right to confront witnesses. State v. Causby, 706 S.W.2d 628, 631 (Tenn. 1986) (former testimony is one of the hearsay exceptions resting upon such solid foundations that its admission comports with the right of confrontation). See also State v. Howell, 868 S.W.2d 238, 251 (Tenn. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1339, 127 L.Ed.2d 687 (1994) (finding that admission of preliminary hearing testimony under the former testimony exception does not violate the right to confront witnesses). The protections inherent in Howington's former testimony were sufficient to protect appellant's constitutional right to confront witnesses.

Appellant's second issue was not raised in his motion for new trial and generally this constitutes waiver. Tenn. R. App. P. 3(e). However, even addressing the issue on its merits, we find no error. Appellant contends that he suffered prejudice when the trial court in Howington's trial refused to honor the informal agreement he had made with the State. Appellant argues that the supreme court's ruling requiring the State to honor its bargain with Howington would affect Howington's willingness to testify at appellant's trial. His argument is premised on the assumption that Howington's refusal was solely on Fifth Amendment grounds. The record, however, discloses the deficiency of such a claim.

After the trial court instructed Howington that he was not entitled to exercise his Fifth Amendment privilege, his attorney stated on the record that Howington genuinely feared appellant and feared for his life if he offered testimony against appellant. He further stated that this was a factor in Howington's decision not to testify. In questioning Howington about this refusal to testify, Howington replied that "I am not putting my life in danger . . ." Contrary to appellant's contention, Howington's refusal to testify was based on a fear for his life, not fear of self-incrimination. Howington further stated he would testify only if he was exonerated of all charges and released from the penitentiary. It is clear that the State's dishonored bargain is completely irrelevant to appellant's case. It had absolutely no bearing on whether appellant would testify and appellant was not prejudiced by the wrong Howington suffered. The issue is without merit.

Appellant next contends that the trial court should have ordered a mistrial when Howington referred to a threat made by the district attorney. Again, appellant failed to raise this error in his motion for new trial and it is considered waived. See Tenn. R. App. P. 3(e). However, our examination of the issue on the merits reveals no error.

When Howington refused to testify, he stated that he had been threatened by the district attorney on Sunday. No further inquiry was made into this assertion. The reference to such a statement does not warrant a mistrial and is harmless error. The granting of a mistrial is a decision that is within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of abuse. State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991) (citations omitted). In addition, a mistrial will only be granted in a criminal case if there is a manifest necessity requiring the action by the trial court. Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1978). See also State v. Jones, 733 S.W.2d 517, 522 (Tenn. Crim. App. 1987) (citations omitted). There has been no showing of manifest necessity and we find no abuse of discretion by the trial court. The statement, reiterated by a declarant of

questionable veracity, was made outside the presence of the jury. As such, it could not be deemed to have affected the outcome of the trial.

Furthermore, appellant's counsel did not request a mistrial on this basis. The record indicates that appellant asked the court to declare a mistrial and continue appellant's case until Howington's appeal was complete. This was in the hopes that he would be exonerated of all charges and be willing to testify. The alleged threat made by the district attorney was irrelevant to this request for a mistrial. Appellant's reliance on this error is misplaced. The issue is without merit.

Appellant's final issue attacks the admission of Howington's preliminary hearing testimony. He contends that the testimony does not meet the "former testimony" exception found in Rule 804(b)(1) of the Rules of Evidence. Although somewhat unclear, it appears that appellant attacks the "opportunity to cross-examine" element of this exception. We find the trial court committed no error in admitting the testimony.

Under the former testimony exception, testimony that was given at another hearing of the same proceeding is admissible "if the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross or redirect examination." Tenn. R. Evid. 804(b)(1). Howington's former testimony satisfies the explicit requirements of this rule. In addition, the Advisory Commission Comments to the Rule specifically contemplate preliminary hearing testimony. The evidence was properly admitted by the trial court.

The testimony being offered was sworn testimony that had been given at a joint preliminary hearing for Howington and appellant. The party against whom it is now being used, appellant, had the opportunity to cross-examine the declarant, Howington. The record reflects that appellant's attorney had the opportunity and exercised it fully at the preliminary hearing. He was given ample opportunity to test Howington's veracity and this was not limited by the court. In addition, the motive to develop the testimony was exactly the same. The preliminary hearing testimony incriminated appellant as the trigger man in the murder. Appellant's motive on cross-examination

at the preliminary hearing was to discredit Howington's veracity and therefore make appellant's culpability less likely. The same motive was present at appellant's trial. Appellant's brief states that the cornerstone of his defense is to discredit Howington's testimony. At trial, appellant obviously intended to attack Howington's credibility thereby making appellant's culpability less likely. Although the requirement is merely that the motives be similar, State v. Howell, 868 S.W.2d 238, 251 (Tenn. 1993), the motives here were identical. We find that the preliminary hearing testimony satisfies the parameters of the evidentiary rules and it was not error to admit the evidence.

Notwithstanding the admitted evidence, we note that appellant had numerous opportunities to discredit Howington's testimony at his trial as well. Appellant was permitted to introduce statements that were inconsistent with the former testimony. Portions of Howington's statement to police, as well as portions of Howington's testimony offered at his own trial were read into the record. These all demonstrated inconsistencies. This is an outstanding example of the measures taken by the trial court to protect appellant's right to confront witnesses.

Appellant also contends that the preliminary hearing testimony contained certain inadmissible hearsay statements. However, we decline to review the issue due to appellant's failure to make references to the record. Tenn. Ct. Crim. App. R. 10(b) and Tenn. R. App. P. 27(g). Appellant lodged an objection to hearsay which the court ruled was admissible. There are eighteen pages of testimony following this ruling. Appellant's brief is entirely devoid of references to the record or the specific statements that were inadmissible hearsay. He merely argues that admission of the testimony, *in toto*, was improper. Without appropriate references to the record, the issue is waived. See id and State v. Killebrew, 760 S.W.2d 228, 233 (Tenn. Crim. App. 1988) (it is not the responsibility of this Court to search the record for the purpose of locating pleadings, evidentiary hearings, and factual allegations which are not supported by citations to the record; such issues are waived).

A thorough review of the record indicates no reversible error. The judgment of the trial court is affirmed.

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William M. Barker, Judge

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John H. Peay, Judge

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David G. Hayes, Judge