IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JULY 1996 SESSION

FILED

March 14, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. No. 02C01-9601-CC-00023**
	)	
Appellee,	)	**DYER COUNTY**
	)	
VS.	)	**Hon. Joe G. Riley, Judge**
	)	
STEVEN D. BOLDEN,	)	**No. C94-263 BELOW**
	)	
Appellant.	)	**(Second Degree Murder)**

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OPINION FILED:_____

AFFIRMED

CORNELIA A. CLARK,
Special Judge

OPINION

Defendant was convicted by a jury of second-degree murder and sentenced by the trial court to serve twenty-one (21) years as a Range I standard offender. Defendant appeals as of right and raises nine issues:

1. Whether the plea agreement between Kabrian Hayes, the defendant's co-defendant, and the State denied the defendant his right to a fair trial.

2. Whether the testimony of Brandon Edward Shaw was newly discovered evidence entitling him to a new trial.

3. Whether the trial judge erred in charging the jury with the lesser included offense of second-degree murder.

4. Whether there was sufficient evidence to support the defendant's conviction.

5. Whether defendant's trial attorney rendered ineffective assistance of counsel.

6. Whether defendant's contention that members or potential members of the jury panel saw him wearing prison restraints gives rise to a due process violation.

7. Whether the sentence imposed by the trial court was excessive.

8. Whether the trial court erred in denying his motion to dismiss the indictment.

9. Whether the trial court erred in denying defendant's motion to suppress his statement to law enforcement officers.

We affirm the judgment of the trial court in all respects.

We begin with a brief statement of the facts. On March 16, 1994, defendant and his co-defendant, Kabrian Hayes, a juvenile, were living with Harold Pierce. Both regularly sold drugs. On that morning defendant borrowed Pierce's 1988 blue four-door Cavalier. He used it to drive around Tiptonville looking for the victim, Sammy Davidson, who owed him money for the previous purchase of two rocks of cocaine. During his travels defendant stopped by Thelma Jones' house, where he encountered Hayes.

Hayes joined defendant in the car and they continued to ride around the city. They were drinking. Hayes testified that defendant was carrying a 9-mm. pistol, which he later asked Hayes to hold. Harold Pierce testified that defendant did own some kind of automatic weapon.

Terrance Montgomery, a friend of defendant's, testified that later that night he saw defendant driving down Lake Street in the blue Cavalier. Hayes was with him. Defendant saw Terrance, stopped, and stated that the victim "had messed him out of forty dollars" and that he was looking for the victim in order to recover the money. Defendant said that he intended to kill the victim. Defendant said he would take the victim, place him in water, ride around with the windows open, and then place the victim back in the water. According to Montgomery, the defendant was saying "all kinds of crazy things". Montgomery also noticed that Hayes was carrying a 9-mm. gun.

Defendant, Hayes, and Montgomery drove to Decker's Quik Mart, then to a local cafe. Defendant left for a time with someone named Madge, while Hayes and

Montgomery remained at the cafe. Later defendant returned to pick up Hayes and Montgomery, but Montgomery decided not to go with them. Instead, he borrowed someone else's car to look for the victim and warn him of the defendant's threats. Montgomery was unable to locate the victim.

The defendant and Hayes ultimately saw the victim walking down an alley. Defendant ordered the victim into the back seat of the Cavalier. According to Hayes, the victim, the defendant and Hayes rode around in town "for a minute". During this time, defendant asked the victim for the forty dollars. The victim indicated he did not have the money. Defendant then drove to a dirt road and again asked the victim about the money. At this point, defendant ordered Hayes to shoot the victim. Hayes obeyed and shot the victim twice. The defendant and Hayes then rolled the victim's body toward the river. The defendant took the gun from Hayes and both individuals kicked the body toward the river. They returned to a liquor store, purchased more liquor, and continued to drink.

Sheriff Joe Jones found the victim's body near the Mississippi River, three and a half miles north of Tiptonville. At the time the body was recovered there was cocaine in the victim's system. Investigator Roger Leon Hughes found a 9-mm. slug in the trunk of the Cavalier. The parties stipulated that the victim was killed by two gunshot wounds from a 9-mm. weapon, and that the shots were fired by Kabrian Hayes while the victim was in the back seat of the automobile driven by defendant.

Defendant was arrested without a warrant and taken to the Lake County Jail about 8:15 p.m. on March 21, 1994. On the afternoon of March 22, 1994, defendant was interviewed from 4:35 p.m. until approximately 5:55 p.m. Defendant signed a written waiver of his rights and ultimately gave two different statements to the investigator. During his first statement he denied he was present at the time the victim was killed. In his second statement he admitted he was in the car when Hayes shot the victim.

I.

Defendant first contends that the plea agreement between Kabrian Hayes, his co-defendant, and the State denied him his right to due process of law and prevented him from having a fair trial. He contends that Hayes lied in order to secure a better deal for himself.

The United States Supreme Court has held that an agreement entered into between the state and a witness, which could potentially influence the witness' testimony, should be disclosed to the defense and the jury because the information is directly related to the witness' credibility. Giglio v. United States, 405 U.S. 150, 31 L.Ed.2d 104, 92 S.Ct. 763 (1972). Moreover, a defendant has the right to explore on cross-examination any promises of leniency or other favorable treatment offered to a witness. See State v. Spurlock, 874 S.W.2d 602, 617 (Tenn. Crim. App. 1993); State v. Norris, 684 S.W.2d 650, 654 (Tenn. Crim. App. 1984). When a witness answers questions on direct or cross-examination falsely, the prosecution has an affirmative duty to correct the false testimony. Giglio, 405 U.S. at 153; Spurlock, 874 S.W.2d at 617. The state's knowing use of false testimony to convict an accused violates a defendant's right to a fair and impartial trial as embodied in the due process clause of the Fourteen Amendment of the United States Constitution and Article I, Sections 8 and 9 of the Tennessee Constitution. Pyle v. Kansas, 317 U.S. 213, 216, 63 S.Ct. 177, 87 L.Ed. 214 (1942); State v. Spurlock, 874 S.W.2d at 617.

The trial court found that no constitutional violation had occurred. To prevail on this claim, defendant must prove that the testimony was false, that the state knew that it was false when it was presented, and that the testimony was material. The burden is on the defendant to prove these elements by a preponderance of the evidence. Id. at 610. The defendant must demonstrate that the evidence in the record preponderates against the trial court's findings that he failed to establish those requirements. Id.

In this case Kabrian Hayes was also charged with first degree murder. He agreed to plead guilty to second degree murder in exchange for his truthful testimony against defendant. The original agreement included a sentence recommendation of twenty-five years. During the course of his direct testimony at trial the state requested a recess. The state contends this is because Hayes was not being truthful in his testimony on the stand, and they had an obligation to correct the problem. Defendant contends that Hayes began his testimony truthfully, and that the recess was taken so the state could improperly "encourage" Hayes to testify as the state desired. During the recess Hayes' attorney and the prosecutor did negotiate a new written agreement whereby Hayes would plead guilty to second degree murder and receive judicial sentencing in exchange for his testifying "truthfully as to (appellant's) involvement in the murder of Sammy Davidson and as he stated in his statement to Roger Hughes on March 21, 1994, . . . and as to threats made to him by Steve Bolden . . ." During the recess Hayes' mother also spoke to him and urged him to tell the truth. After this recess Hayes retook the stand and testified about defendant's involvement in the crime. The written agreement was made an exhibit.

Hayes was cross-examined extensively about inconsistencies in his trial testimony, and between his trial testimony and earlier statements he made to various people. He testified that he shot the victim because he was scared of the defendant. He would do anything the defendant asked of him, including shooting himself. Hayes stated that initially he wanted to protect the defendant. He did not want to implicate him in the shooting because they were good friends and because he was scared of the defendant. While Hayes was in jail awaiting trial he received ten letters from defendant. In these letters the defendant asked Hayes to commit perjury.

After review of the record, this court cannot find that Hayes testified untruthfully or that an agreement prohibiting him from altering his testimony from prior statements denied defendant the right to a fair trial. It is clear Hayes feared the defendant. He stated numerous times that the defendant had threatened to harm him if he testified truthfully. Defendant wrote Hayes letters asking him to lie on the witness stand. He also talked to Hayes about prison gangs and what could happen to people who snitch in prison.

Furthermore, the substance of the plea agreement was disclosed to the defendant and the jury. Defense counsel cross-examined Hayes extensively about the newly-revised plea agreement. He emphasized the timing of the ultimate agreement, its variation from the earlier agreement, and certain inconsistencies in Hayes' prior testimony. The jury was fully aware of the circumstances under which he testified. A jury verdict resolves all questions of credibility. The defendant has not presented any facts demonstrating that Hayes' ultimate trial testimony was false. The evidence does not preponderate against the findings of the trial court. This argument is without merit.

II.

Defendant next contends that he is entitled to a new trial based on the newly-discovered testimony of Brandon Edward Shaw. Shaw testified during the hearing on the motion for new trial in August 1995. He was Kabrian Hayes' cell-mate in the Lake County Jail for a period of time. During that incarceration Shaw says that Hayes told him that the victim owed Hayes, not defendant, some money for drugs. He testified that Hayes further told him that he suddenly shot the victim and that defendant had no prior knowledge it was going to happen. Later Shaw was transferred to Fort Pillow and met defendant Bolden. About June 13, 1995, defendant was identified to him and he told defendant his story.

On cross-examination, Shaw acknowledged that he shared a cell with Hayes at the time Hayes gave testimony at the original trial in November 1994. He was aware at that time about the testimony Hayes gave in court, but did not disclose any discrepancies to anyone. He waited many months after the trial before telling Mr. Bolden.

A decision whether to grant a motion for new trial based on newly-discovered evidence lies within the sound discretion of the trial court. State v. Singleton, 853 S.W.2d 490 (Tenn. 1993). Before a new trial may be granted on this ground, three requirements must be established: (1) the defendant used reasonable diligence to discover the evidence; (2) the evidence is clearly material; and (3) the evidence would likely change the result if accepted by the jury. State v. Goswick, 656 S.W.2d 355, 358-59 (Tenn. 1983). If evidence merely discredits a witness, or contradicts or impeaches the witness' statements during trial, it does not constitute grounds for new trial. State v. Singleton, 853 S.W.2d at 496; State v. Arnold, 719 S.W.2d 543, 550 (Tenn. Crim. App. 1986). The new evidence must be so crucial to the defendant's guilt or innocence that its admission would probably result in an acquittal. Singleton, 853 S.W.2d at 496.

The trial court found that the evidence presented was merely impeachable in nature. The pertinent parts of Shaw's testimony were that the victim owed Hayes money instead of the defendant and that the defendant did not tell Hayes to shoot the victim. While this testimony contradicts part of Hayes' testimony at trial, he was subjected to a full cross examination about similar inconsistencies in his other prior statements. There was other evidence supporting defendant's conviction in addition to Hayes' testimony. Thus there is no guarantee that if the jury believed Shaw's account, the results of the trial would have been different. We find no clear abuse of discretion. See State v. O'Guin, 641 S.W.2d 894, 898 (Tenn. Crim. App. 1982). This issue is without merit.

III.

Defendant next contends that the trial court erred in charging the jury about the possible lesser included offense of second degree murder. T.C.A. §40-18-110(a) provides that trial judges must charge juries with all lesser grades or classes of an offense supported by the evidence, without any request on the part of the defendant to do so. See also State v. Trusty, 919 S.W.2d 305, 311 (Tenn. 1996); State v. Harbison, 704 S.W.2d 314, 319 (Tenn.) cert. denied, 476 U.S. 1153, 90 L.Ed.2d 705, 106 S.Ct. 2261 (1986). Failure to charge such lesser offense(s) denies a defendant his constitutional right to trial by a jury if there are any facts "susceptible of inferring guilt on any lesser included offense or offenses". State v. Wright, 618 S.W.2d 310, 315 (Tenn. Crim. App. 1981). This requirement is avoided only when the record is devoid of evidence to support an inference of guilt of the lesser offense. State v. Stephenson, 878 S.W.2d 530 (Tenn. 1994).

A first degree murder occurs when an individual acts intentionally with premeditation and deliberation in executing a killing. Tenn. Code Ann. §39-13-202(a)(1). Second degree murder is the knowing killing of another. Tenn. Code Ann. §39-13-210(a)(1). Defendant's guilt in this case was further predicated on his criminal responsibility for the conduct of Hayes. A person is criminally responsible for the conduct of another when the person "acting with the intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, . . . solicits, directs, aids or attempts to aid another person to commit the offense". Tenn. Code Ann. §39-11-402(2).

We conclude that there is sufficient evidence for a rational trier of fact to find this defendant guilty of second degree murder. The jury decided from the evidence presented that the defendant "acted with intent to promote or assist the commission of the offense", and aided the co-defendant in committing the act. See State v. Lewis, 919 S.W.2d 62, 65-66 (Tenn. Crim. App. 1995). Defendant, in the presence of others, made threats against the victim. He gave the murder weapon to Hayes.

He drove the victim and Hayes, who could not drive, around town and out to a deserted dirt road along the Mississippi River. He repeatedly asked the victim for his money. He ordered Hayes to shoot the victim. He was aware that this conduct was reasonably certain to cause the death of the victim, especially since the shooting occurred at close range in a closed automobile. He helped dump and kick the body into the river.

There was evidence that the defendant acted "knowingly" and with the requisite intent to be held criminally responsible for the shooting. The trial judge was under a statutory duty to instruct the jury on the offense of second degree murder. The defendant's argument on this issue is without merit.

IV.

Defendant next contends that the evidence was insufficient to support a conviction. When an accused challenges the sufficiency of the convicting evidence, the standard is whether, 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, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). Nor may this court reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

In support of his contention defendant relies primarily on his earlier argument that the testimony of co-defendant and accomplice Kabrian Hayes was not credible and not supported by other evidence. The issue of Hayes' credibility already has been addressed. A jury's finding resolves all issues of credibility in favor of the theory of the state. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Defense

counsel thoroughly cross-examined Hayes concerning his agreement with the state, his various statements, and his use of marijuana on the evening of the murder. The jury apparently accepted his testimony as true.

However, it is also well established in Tennessee that a conviction may not be based upon the uncorroborated testimony of an accomplice. State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994). Whether a witness's testimony has been sufficiently corroborated is a matter entrusted to the jury as the trier of fact. Id. To corroborate the testimony of an accomplice, there must be some other evidence fairly tending to connect the defendant with the commission of the crime. State v. Santiago, 914 S.W.2d 116, 123 (Tenn. Crim. App. 1995). The testimony of Terrance Montgomery, if believed, corroborated defendant's intention to kill the victim and his assertion that the defendant owed him the money for the drugs. The testimony of Harold Pierce corroborated the defendant's possession of some kind of automatic weapon. The parties stipulated that the victim was killed by gunshot wounds from a 9-mm. weapon, and the shots were fired by Hayes while defendant was also in the car. We conclude that the evidence of corroboration, when viewed in a light most favorable to the state, is sufficient to sustain the appellant's conviction. This contention is without merit.

V.

Defendant next contends that his trial counsel, Mark Hayes, did not render effective assistance during his trial. We begin by noting that while ineffective assistance of counsel claims may be raised on direct appeal merely on the record, such a practice is "fraught with peril". State v. Beard, No. 03C01-9502-CR-00044 (Tenn. Crim. App., Knoxville, September 26, 1996), quoting Wallace v. State, No. 01C01-9308-CC-00275 (Tenn. Crim. App., Nashville, September 15, 1994). This is because without an evidentiary hearing it is virtually impossible to demonstrate prejudice as required in ineffective assistance claims. Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In this

case, however, an evidentiary hearing was conducted in conjunction with the motion for new trial after new counsel had been appointed. Trial counsel, defendant, and other witnesses testified. We therefore consider this question on the merits.

In order to establish ineffective representation, defendant must show that counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that, but for his counsel's deficient performance, the result of his trial would likely have been different. Id. In Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), our Supreme Court decided that the range of competence should be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), and United States v. DeCoster, 159 U.S. App. D.C. 326, 487 F.2d 1997, 1202-04 (D.C. Cir. 1973), cert. denied, 444 U.S. 944, 62 L.Ed.2d 311, 100 S.Ct. 302 (1979). In reviewing counsel's conduct, "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time". Strickland v. Washington, 466 U.S. at 689; see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not alone establish a claim of ineffective assistance. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. See Hellard v. State, 629 S.W.2d at 9.

Also, we note that the approach to the issue of ineffective assistance of counsel does not have to start with an analysis of an attorney's conduct. If prejudice is not shown, we need not seek to determine the validity of the allegations about deficient performance. Strickland v. Washington, 466 U.S. at 697, 104 S.Ct. at 2069. Moreover, on appeal, we are bound by the trial judge's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). In this

respect the defendant has the burden of illustrating how the evidence preponderates against the judgment entered. Id.

Defendant contends primarily that his rights were impaired by counsel's failure to call Kenny Clay to testify at trial. Defendant requested that his attorney subpoena Mr. Clay. A factual dispute exists as to whether his trial attorney actually interviewed Clay. Clay testified at the motion for new trial that defendant's attorney never contacted him. Defendant's trial counsel testified that he did interview Clay, but felt that his testimony would not be helpful and would be easy to impeach. Defendant contends that if counsel did not interview Clay he was ineffective for failing to investigate the case; if he did, then his failure to subpoena Clay to testify also deprived him of effective assistance of counsel.

Kenny Clay testified that after the shooting, while Clay was in jail on an unrelated matter, he spoke to the defendant and Kabrian Hayes on the telephone. Defendant told Clay there had "been an accident". Hayes told Clay that he shot the victim during an argument about money owed to him. Hayes said the gun went off accidentally when the victim grabbed for it and then he shot the victim again. Clay testified that Hayes said that defendant told him to put away the gun. Clay testified that at some point later, all three of them were incarcerated together in Lake County. During that incarceration Hayes passed Clay a note saying that he was going to go ahead and "take the charge and everything".

Clay acknowledged that he had enough prior convictions to be classified as a Range III offender, including convictions for being a drug dealer. He testified that defendant and Hayes were also drug dealers. He confirmed that he had made a single telephone call and spoken to both defendant and Hayes. Defendant continued to be present while Hayes spoke to Clay. He testified that he and defendant had been running buddies, and that defendant had previously sent him money when he was in jail.

Trial counsel testified that defendant did speak to him about Kenny Clay, and that he interviewed Clay in the Lake County Jail. Although counsel did not specifically remember the purpose of Clay's testimony, he did determine that Clay was not going to be helpful. He also testified that he determined that impeachment was going to be "so easy and so destructive" that there was not any point in calling him.

The trial court held that trial counsel was not ineffective for failing to call Clay to testify. The court found that he would have been thoroughly impeached because of his prior convictions. The trial court also found that his testimony would not have added anything and would not have made any difference in the jury's verdict. This court agrees. Hayes himself was cross-examined at length about inconsistencies in his own testimony, including statements similar to those about which Clay would have testified. The issue of his credibility was squarely before the jury. This issue is without merit.

VI.

Defendant next contends that he was denied a fair trial because he was observed by potential jurors while wearing handcuffs. The rule applicable to restraint of an accused during trial has been extensively reviewed in the case of Willocks v. State, 546 S.W.2d 819 (Tenn. Crim. App. 1976), which quotes from and adopts as the rule the holdings in other cases cited there. Willocks established the rule that a defendant should never be shackled during trial before a jury except in extraordinary circumstances and after a clear showing of the necessity to do so, including a showing that less drastic measures are not sufficient adequately to control the defendant.

However, if a challenged practice is not inherently prejudicial and the defendant fails to show actual prejudice, then his complaint must fail. Carroll v.

State, 532 S.W.2d 934, 936 (Tenn. Crim. App. 1975) (observation in prison attire). The only testimony presented on this issue came from the defendant during the hearing on the motion for new trial. He testified that he was brought to the courthouse on the day of trial wearing handcuffs. The officer who was driving him let him out of the car, and he attempted to walk to the courthouse. He stated that some of the potential jurors were standing nearby. When the officer realized that, he tried to get between the potential jurors and the defendant, and stated that seeing him would be "a big mistake". Defendant believes that at least some of the jurors could see him. To his knowledge, the only potential juror in that group who ultimately ended up on the jury was a heavy-set white woman who was an alternate. Defendant further testified that he did not relate this event to his trial counsel because he didn't "even think it was nothing". The issue was raised for the first time in an amended motion for new trial filed by subsequently-appointed counsel.

Defendant has presented no proof that any juror who actually decided the case ever saw him in handcuffs. The only juror he could identify was an alternate. The record does not reflect that any alternate participated in the actual deliberations leading toward the verdict. The defendant did not make timely objection, when inquiry could have been made of each juror and curative instructions could have been given if necessary. The defendant also has not shown any prejudice. See Seelbach v. State, 572 S.W.2d 267, 271 (Tenn. Crim. App. 1978). This issue is without merit.

VII.

The defendant next contends that the twenty-one year sentence imposed by the trial court was excessive. When an accused challenges the length, range, or manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption the determinations made by the trial court are correct. Tenn. Code Ann. §40-35-401(d). If our review reflects that the trial court

followed the statutory sentencing procedure, imposed a lawful sentence after giving due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered sentencing principles and all relevant facts and circumstances". State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

> the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. §§40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

Under Tenn. Code Ann. §40-35-210 a court at sentencing is required to consider all the following: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments of sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors; (f) any statement the defendant wishes to make in his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Anno. §§40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987). The burden is on the defendant to show that the sentence was improper. Sentencing Commission Comments, Tenn. Code Ann. §40-35-401(d).

The court can use evidence or information offered by either party at any phase of the proceeding in determining what enhancement and mitigating factors apply. The court can also receive information as to these factors from the presentence report, even though the information was not asserted by the parties. T.C.A. §40-35-207(a)(5). Neither party is even required to file a statement of proposed enhancement or mitigating factors unless required to do so by the court. Tenn. Code Ann. §40-35-202(b). However, a court is always required to consider the existence of these factors in making its sentencing determinations. Finally, in conducting our de novo review, this court is authorized to consider any enhancement or mitigating factors supported by the record, even if not relied upon by the trial court. State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993).

The trial court found the existence of three enhancement factors as set forth at Tenn. Code Ann. §40-35-114:

> (1) Previous history of criminal convictions or criminal behavior.
>
> (11) The felony resulted in death or bodily injury or involved a threat of death or bodily injury to another person and the defendant has previously been convicted of a felony that resulted in death or bodily injury.
>
> (13) The felony was committed while the defendant was on bail for aggravated assault, of which he has now been convicted.

The defendant does not challenge the application of enhancement factors (1) or

(13).[1] However, defendant challenges the application of factor (11) based on State v. Makoka, 885 S.W.2d 366 (Tenn. Crim. App. 1994). Defendant concedes that the Makoka court did not state specifically why factor (11) was misapplied. We find that Makoka is not applicable here.

Defendant also contends that factor (11) is inapplicable because it includes an element of the underlying offense. See State v. Bingham, 910 S.W.2d 448, 452 (Tenn. Crim. App. 1995). However, this is not the case. Since the definition of this enhancement factor includes an additional provision, i.e., that the defendant has a previous conviction of a felony resulting in death or bodily injury, it is not an element of second degree murder. State v. Pewitt, No. 01C01-9411-CC-00375 (Tenn. Crim. App., Nashville, August 22, 1996), quoting State v. Bunn, No. 01C01-9311-CC-00401, Tenn. Crim. App., Nashville, November 22, 1994).

The trial court also apparently found the existence of one mitigating factor as set forth in Tenn. Code Ann. §40-35-113(13) (any other factor consistent with the purposes of this chapter). The court held that the defendant only had one prior conviction and that his "criminal problems do not appear to have begun until very recently". The trial court stated that it placed great weight on both enhancement factor (11) and mitigating factor (13).

The sentencing range for the defendant for this Class A felony is from fifteen (15) to twenty-five (25) years. The presumptive sentence for the defendant is the minimum sentence in the range before enhancement or mitigating factors are considered.[2] The weight to be assigned any enhancement or mitigating factor is within the discretion of the trial judge. State v. Marshall, 870 S.W.2d 532, 541

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[1]In his brief defendant refers to this factor with the number (16). However, it is clear from the context that he is conceding the application of factor (13).

[2]Tenn. Code Ann. §40-35-210(c). This offense occurred on March 16, 1994. The defendant was sentenced January 6, 1995. Effective July 1, 1995, for crimes committed after that date, the presumptive sentence for a Class A felony is the mid-point of the range if there are no enhancement or mitigating factors.

(Tenn. Crim. App. 1993). Having found the existence of three enhancement factors and only one mitigating factor, we believe the sentence imposed of twenty-one years is reasonable and appropriate.

VIII.

Defendant next contends that the trial judge improperly denied his motion to dismiss the indictment because the general sessions judge who presided over his preliminary hearing was actually present in his capacity as juvenile judge when co-defendant Kabrian Hayes gave a statement to police alleging that defendant had told him to kill the victim. The state concedes that the general sessions judge should have informed defense counsel that he had heard the co-defendant's confession, and should have evaluated, under applicable canons, the possible necessity of withdrawing from the case. Although a judge having personal knowledge of disputed evidentiary facts should disqualify himself, see Rule 10, Rules of the Supreme Court, Canon 3C(1)(a)[3] the actual determination as to recusal is within his sound discretion. State v. Hawk, 688 S.W.2d 467 (Tenn. Crim. App. 1985). When the judge believes he can preside fairly, that decision will be upheld absent an abuse of discretion. State ex rel. Phillips v. Henderson, 220 Tenn. 110, 423 S.W.2d 489, 492 (1968).

As important as this right is, the courts have consistently held that litigants will not be permitted to manipulate the issue to gain some procedural advantage. Litigants cannot refrain from asserting known grounds for disqualification in order "to experiment with the court . . . and raise the objection later when the result of the trial proved to be unfavorable". Holmes v. Eason, 76 Tenn. (8 Lea) 754, 757 (1882); See also Gotwald v. Gotwald, 768 S.W.2d 689, 694 (Tenn. Ct. App. 1988). Thus, motions to recuse must be filed promptly after the facts forming the basis for disqualification become known. Collier v. Griffith, No. 01-A-01-9109-CV-00339

[3]At the time of the preliminary hearing and when the briefs were written, this canon applied to the facts in this case. Effective January 27, 1997, Rule 10 was revised in its entirety. The identical requirement is now found in Canon 3E(1)(a).

(Tenn. App., Nashville, March 11, 1992), citing United States v. Baker, 441 F.Supp. 612, 616 (M.D. Tenn. 1977); Hunnicutt v. Hunnicutt, 283 S.E.2d 891, 893 (Ga. 1981). When the grounds for disqualification are known, a litigant's failure to assert them is a timely manner constitutes a waiver of the litigant's right to question the judge's impartiality. Id., citing In re Cameron, 126 Tenn. 614, 663, 151 S.W. 64, 78 (1912); Rodford Trust Co. v. East Tennessee Lumber Co., 92 Tenn. 126, 136-37, 21 S.W. 329, 331 (1893); Holmes v. Eason, 76 Tenn. at 761.

For the reasons set forth below, this argument is without merit.

First, no motion to recuse was ever filed in general sessions court. The judge was given no opportunity to consider the argument now being made by counsel and to determine an appropriate course of action. The issue was first raised in a motion to dismiss the indictment filed in circuit court. In that motion filed November 4, 1994, defendant asserted in writing that he learned of the conflict on March 24, 1994, and that the hearing was conducted on March 25. Defendant's failure to raise this issue prior to the proceeding in question amounts to a waiver of disqualification and an implied consent for the judge to preside. Woodson v. State, 608 S.W.2d 591 (Tenn. Crim. App. 1980).

We do note that at the hearing on the motion to dismiss, conducted in circuit court November 7, 1994, counsel stated that he first learned of the problem during an October 24 hearing. He acknowledged, however, that he had had in his possession the Hayes confession but "very frankly, did not look to check as to who witnessed the confession and who was present . . . "

Second, in Wiseman v. Spaulding, 573 S.W.2d 490 (Tenn. App. 1978), the Tennessee Court of Appeals held that the issue before an appellate court on a challenge to the bias of the trial judge is not the propriety of the judicial conduct of the judge, but whether he committed reversible error which resulted in an unjust disposition of the case. The transcript of the preliminary hearing has been

preserved in the record on appeal. No reversible error is shown as to the bindover decision.

Third, in Farr v. State, 506 S.W.2d 811 (Tenn. Crim. App. 1974) and Mullins v. State, 214 Tenn. 366, 380 S.W.2d 201 (1964), courts have held that a lack of jurisdiction of the general sessions judge in conducting a preliminary hearing does not invalidate an indictment based on facts subsequently presented to the grand jury.

This issue is without merit.

IX.

Defendant finally contends that his motion to suppress the statement he gave to law enforcement officers should have been granted for lack of voluntariness, because he was not fed from the time he was placed in custody on March 21, 1994, until he gave his statement in the afternoon of March 22, 1994. The trial court heard all the proof presented on this issue and determined that the statement was voluntarily given.

Mere deprivation of food for twenty to twenty-two hours does not in and of itself render a confession involuntary. A confession is suppressed "only when an accused's faculties are so impaired that the confession cannot be considered the product of a free mind and rational intellect". State v. Robinson, 622 S.W.2d 62, 67 (Tenn. Crim. App. 1981).

In State v. Readus, 764 S.W.2d. 770 (Tenn. Crim. App. 1988), the Tennessee Supreme Court cited with approval People v. Cipriano, 431 Mich. 315, 429 N.W.2d 781, 790 (Mich. 1988), and adopted several non-exclusive factors courts must consider in determining the voluntariness of a statement made before an accused is taken before a magistrate. These include: (1) the age of the

accused, (2) his lack of education or intelligence level, (3) the extent of his previous experience with police, (4) the repeated and prolonged nature of the questioning, (5) the length of the detention of the accused before he gave the statement in question, (6) the lack of any advice to the accused of his constitutional rights, (7) whether there was unnecessary delay in bringing him before a magistrate before he gave the confession, (8) whether he was injured, intoxicated, drugged, or in ill health, (9) whether the accused was deprived of food, sleep or medical attention, (10) whether the accused was physically abused, and (11) whether the accused was threatened with abuse. A review of this record convinces us that the statements of the defendant are voluntary and admissible under the factors cited here.

Defendant was twenty-three years old at the time he gave his statement. He had graduated from high school. The length of the questioning was not excessive - under two hours. Although defendant had been detained for twenty to twenty-two hours before giving the statement in question, there is no issue raised as to unnecessary delay in bringing him before a magistrate. He was not injured, intoxicated, drugged, or ill. He was not threatened or abused in any way. The TBI agent who questioned him advised him of all his rights and testified that defendant never asked for an attorney. Defendant signed proper waiver forms. The only viable concern is whether he was not fed. The testimony is unclear about what defendant ate during the twenty-hour period. Jail personnel testified that they regularly feed all prisoners at least two meals a day, and that there is no reason defendant would not have been fed. Agent Hughes testified that he believed he offered the defendant a Coke or something to drink during the interrogation, and the defendant testified that the agent offered him a portion of the brownie he was eating. Under the totality of the circumstances in this case, the statement of the defendant was voluntary and admissible. State v. Huddleston, 924 S.W.2d 666 (Tenn. 1996). This issue is without merit.

For the reasons stated above, the judgment of the trial court is affirmed in all respects.

_____
CORNELIA A. CLARK
SPECIAL JUDGE

CONCUR:

_____
JOHN H. PEAY
JUDGE

_____
DAVID H. WELLES
JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JULY 1996 SESSION

STATE OF TENNESSEE,	)	**C.C.A. No. 02C01-9601-CC-00023**
	)	
Appellee,	)	**DYER COUNTY**
	)	
VS.	)	**Hon. Joe G. Riley, Judge**
	)	
STEVEN D. BOLDEN,	)	**No. C94-263 BELOW**
	)	
Appellant.	)	**(Second Degree Murder)**

J U D G M E N T

Came the appellant, Steven D. Bolden, by counsel, and also came the Attorney General on behalf of the State, and this case was heard on the record on appeal from the Circuit Court of Dyer County; and upon consideration thereof, this Court is of the opinion that there is no reversible error in the judgment of the trial court.

It is, therefore, ordered and adjudged by this court that the judgment of the trial court is affirmed, and the case is remanded to the Criminal Court of Dyer County for execution of the judgment of that court and for collection of costs accrued below.

Costs of the appeal will be paid into this Court by the appellant, Steven D. Bolden, for which let execution issue.

Per Curiam
Peay, Welles, Clark