

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

NOVEMBER 1996 SESSION

FILED
March 18, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

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| STATE OF TENNESSEE, | * | C.C.A. # 02C01-9512-CC-00379 |
| Appellee, | * | MADISON COUNTY |
| VS. | * | Hon. Whit Lafon, Judge |
| ALBERTO BARETTA ESTES, | * | (Aggravated Robbery) |
| Appellant. | * | |

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OPINION FILED: _____

AFFIRMED IN PART AND REMANDED IN PART

GARY R. WADE, JUDGE

OPINION

The defendant, Alberto Baretta Estes, was found guilty of aggravated robbery and possession of a firearm with the intent to employ it in the commission of a robbery. See Tenn. Code Ann. §§ 39-13-402 & 39-17-1307(c). The trial court imposed a Range I, nine-year sentence on the robbery conviction but, by the time of this appeal, had not entered judgment on the guilty verdict for the possession of a firearm count.

The defendant presents the following issues for our review:

- (1) whether conduct by the trial judge unfairly prejudiced the defendant;
- (2) whether the convictions for both aggravated robbery and possession of a firearm would violate double jeopardy principles; and
- (3) whether the trial court erred by imposing a sentence greater than the statutory minimum.

Although the defendant has not contested the sufficiency of the evidence, a factual background will be useful in assessing the issues. On January 20, 1994, the victim, Kathy Buchanan, was assisting a customer, Jeffrey Lane, at Buchanan's Grocery Store in Jackson. A second person, whom she identified at trial as the defendant, entered the store, browsed for a while, left, and then returned to ask for cigarettes. The victim looked away momentarily and when she turned back around with the cigarettes, the defendant displayed a handgun and demanded the cash from the register. The victim estimated that around \$300 was taken during the robbery. She acknowledged, on cross-examination, that she had misidentified another

suspect before determining that the defendant was the robber.

Irene Bond, the defendant's ex-girlfriend, testified that on the day of the robbery the defendant had a gun, claiming he was "going to get him some money." A couple of hours later, the defendant informed her that he had robbed Buchanan's Grocery Store and intended to use the money to buy a car. Ms. Bond testified that the defendant provided her with accurate details of the robbery.

Ms. Bond's brother, Robert Bond, testified that he saw the defendant with \$200 and a gun on the day of the robbery; he accompanied the defendant who was shopping for a car. Bond, who denied having any other details of the robbery, told investigators that Rochelle Triplett was with him at the time of the crime.

Officer Patrick Williams testified that both Lane and Ms. Buchanan made tentative identifications of Triplett from a photographic lineup.

Jeffrey Lane, a defense witness, testified that he had returned to his residence from the grocery store shortly before the robbery. About five to ten minutes later, an investigator came to the residence and asked if he knew the person who was in the store when he left. While Lane also admitted he had initially identified Triplett, he testified at trial that the defendant was the person in the store at the time of his departure.

Triplett, also a witness for the defense, testified that he was arrested for the crime but soon released. He denied any knowledge of the robbery.

At trial, the defendant denied any involvement in the crime. He claimed the money in his possession was a birthday gift from his mother. The defendant's mother, Lucille Estes, corroborated the defendant's claim that the money was a birthday gift.

I

The defendant has devoted a substantial portion of his brief to the argument that certain aspects of the trial judge's conduct caused unfair prejudice. He specifically complains about the following:

- (a) the trial judge's questioning of two of the defense witnesses;
- (b) the trial judge's interrupting the cross-examination of witnesses and advising counsel to avoid repetitive cross-examination;
- (c) the trial judge's admonishment of counsel for asking questions based on facts not in the evidence;
- (d) the trial judge's requiring defense counsel to let a witness finish his answer;
- (e) the trial judge's requiring defense counsel to avoid compound questions;
- (f) the trial judge's sua sponte ruling declaring hearsay evidence inadmissible;
- (g) the trial judge's refusal to hear argument on objections; and
- (h) the trial judge's reference to defense counsel's duty to have witnesses present to testify.

At one point, the defense counsel informed the trial judge that he sensed

some animosity and was concerned about the possible effect on the jury. The trial judge provided some curative instructions: "my opinion in this matter is not supposed to be considered as far as the jury is concerned." The defendant argues that all of the acts by the judge amounted to an impermissible comment on the evidence and that the jury was swayed by his apparent bias against the defendant.

The Tennessee Constitution prohibits judges from any comment "with regard to matters of fact." Tenn. Const. art. VI, § 9; State v. Suttles, 767 S.W.2d 403, 406 (Tenn. 1989). The aim of this rule is to avoid giving "the jury any impression as to his feelings or to make any statement which might reflect upon the weight or credibility of evidence or which might sway the jury." Suttles, 767 S.W.2d at 407; State v. Brown, 823 S.W.2d 576 (Tenn. Crim. App. 1991). "It is natural that jurors should be anxious to know the mind of the court, and follow it. Therefore, a court cannot be too cautious in his inquiries." McDonald v. State, 14 S.W. 487, 488 (Tenn. 1890).

Having acknowledged that the appearance of an impartial jurist is critical to a fair trial, we will examine each of the defendant's complaints. Initially, our Rules of Evidence specifically permit the interrogation of witnesses by the trial judge:

(b) Interrogation by Court. The Court may interrogate witnesses.

(c) Objections. Objections ... to interrogation by [the court] may be made at the time or at the next available opportunity when the jury is not present.

Tenn. R. Evid. 614(b), (c). So long as the inquiry is impartial, trial courts may

ask questions to either clarify a point or to supply any omission. See Collins v. State, 416 S.W.2d 766 (Tenn. 1967); Parker v. State, 178 S.W. 438 (Tenn. 1915).

Here, the trial judge questioned Lane, a defense witness, about how he knew the defendant had committed the robbery if he did not actually witness the event. At one point, the trial court inquired, "You're merely telling something Ms. Buchanan said, aren't you?" In our view, this qualified as a legitimate question aimed at determining the witness's basis of knowledge and whether his identification testimony was hearsay. A fundamental rule is that one "may not testify to a matter unless ... the witness has personal knowledge of the matter." Tenn. R. Evid. 602. Had defense counsel established this foundation, the trial judge's questions might not have been either necessary or appropriate.

The trial judge also questioned the defendant's mother, Ms. Estes, about whether she had a job and how she got the money to give to the defendant for his birthday. Ms. Estes responded that the money came from the defendant's monthly S.S.I. check. The record, in our assessment, does not suggest this question was biased for either the state or the defense.

We have also reviewed the instances the trial judge limited cross-examination of the witnesses. On each occasion, the trial judge found the questions had already been asked and answered and admonished counsel to move on to another subject. The Sixth Amendment provides that the accused

shall have the right to be "confronted with the witnesses against him." U.S. Const. amend. VI. "Confrontation means more than being allowed to confront the witness physically." Davis v. Alaska, 415 U.S. 308, 315 (1974). It includes the right to an "effective cross-examination." Delaware v. Fensterer, 474 U.S. 15, 20 (1985). Our view is that the trial judge allowed an effective cross-examination of each witness; he did not limit the inquiry other than to avoid repetitive questions. See Cole v. State, 512 S.W.2d 598, 602 (Tenn. Crim. App. 1974). In Cole, this court held that "[s]uch matters are largely within the discretion of the trial judge ... and ... will not be disturbed on review except when an abuse is clearly demonstrated." Id. We have found no abuse of that discretion in this case.

Each of the other complaints by the defendant again fall within a limited scope of appellate review. Rule 611(a), Tenn. R. Evid., provides, "[t]he court shall exercise appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel." Under this standard, it was not an abuse of discretion for the trial court to require that counsel avoid compound questions, base his questions on facts in proof, limit hearsay testimony to allowable exceptions, and permit the witness to finish an answer without interruption.

Rule 103(a)(1), Tenn. R. Evid., provides that where counsel objects to a ruling, counsel should "stat[e] the specific ground of objection if the specific ground was not apparent from the context." The rule requires trial courts to consider the basis of the objection; it implies that some limited

argument, outside of the hearing of the jury, might be appropriate in some instances. We cannot conclude from this record, however, that the few instances the trial judge refused to hear argument on his ruling had any effect on the outcome of the trial. Finally, we have also reviewed the exchange between the trial judge and defense counsel about the need for having the witnesses present to testify. Counsel does have that ultimate responsibility. We have found nothing to indicate that the directive exceeded the bounds of propriety.

We acknowledge that the trial judge maintained an active presence at the trial. In our assessment, his treatment of counsel for the defense and that of the state was equal, even if not ideal from the perspective of either side. For example, the trial judge admonished counsel for the state to avoid leading questions and repetitive cross-examination. At one point, the trial judge asked the assistant district attorney if he understood the meaning of the word "overruled." He "cross-examined" Robert Bond, a witness for the state. The record includes no comments by the trial judge as to the credibility of the witnesses or on the weight of the evidence. In State v. Harris, 839 S.W.2d 54, 66-67 (Tenn. 1992), a case involving a similar claim, our supreme court observed that the trial judge had interjected on behalf of the defense as often as on behalf of the state and thus found no evidence of bias against the defendant. In summary, we reject each of the defendant's claims of misconduct on the part of the trial judge.

II

The defendant next argues that convictions for both aggravated

robbery and possession of a firearm with intent to use it during a robbery violate double jeopardy principles. The jury returned a verdict of guilty on both the robbery and the possession of a firearm. At the sentencing hearing, however, the trial judge did not impose a sentence for the possession offense; no judgment form for that count appears in the record.

The double jeopardy clauses of the United States and Tennessee Constitutions protect against multiple convictions or punishments for the same offense. Our supreme court recently enunciated new standards for determining when a double jeopardy violation occurs. State v. John Michael Denton, _____ S.W.2d _____, No. 01S01-9509-CC-00152 (Tenn., Dec. 2, 1996). In short, the court held that a resolution of double jeopardy issues under the Tennessee Constitution requires the following:

- (1) a Blockburger analysis of whether either of the statutory offenses requires proof of an additional fact the other does not;
- (2) an analysis of whether the same evidence is used to prove each offense;
- (3) consideration of whether there were multiple victims or discrete acts; and
- (4) a comparison of the purposes of the statutes which were the basis for the convictions.

Id. slip op. at 18 (relying in part on the principles established in both Blockburger v. United States, 284 U.S. 299 (1932), and Duchac v. State, 505 S.W.2d 237 (Tenn. 1973)). In Denton, the court held that convictions for possessing a weapon with the intent to use it in the commission of an offense and aggravated assault violated double jeopardy and the possession count was reversed and dismissed. Id. at 20.

Under the standards established in Denton, the defendant appears to at least have a colorable claim that the dual convictions would violate double jeopardy; this court, however, may not review this issue. In every case, we "shall ... consider whether the trial and appellate court have jurisdiction over the subject matter." Tenn. R. App. P. 13(b) (emphasis added). The jurisdiction of the Court of Criminal Appeals is set forth in Tenn. Code Ann. § 16-5-108:

Jurisdiction.--(a) The jurisdiction of the court of criminal appeals shall be appellate only, and shall extend to review of the final judgments of trial courts in ... [c]riminal cases, both felony and misdemeanor.

(emphasis added). By statute, we do not have the jurisdiction to review the action of the trial court unless it is a "final judgment."

Generally no appeal lies from actions of the trial court that are not final judgments. Rule 3(b), Tenn. R. App. P., provides as follows:

(b) Availability of Appeal as of Right by Defendant in Criminal Actions. In criminal actions an appeal as of right by a defendant lies from any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals

(emphasis added). In State v. McCary, 815 S.W.2d 220, 221 (Tenn. Crim. App. 1991), our court emphasized, "[t]his Court has jurisdiction of final judgments of the trial courts" Our court has previously addressed the importance of adhering to jurisdictional limitations; "they go to the very nature of our jurisdiction to hear the case, [and] we raise and address the issues sua sponte in order to preserve the integrity and prevent prejudice to the judicial process." State v. Bowlin, 871 S.W.2d 170, 173 (Tenn. Crim. App. 1993)

(citations omitted).

Because judgment has not been entered on the possession count, we do not have jurisdiction to review this issue. Were we to rule for the defendant, there is technically no conviction to reverse and dismiss. Were we to rule for the state, there is no judgment of conviction to uphold. The cause is remanded to the trial court, which must first consider and rule on the claim of double jeopardy. If the trial court enters an adverse judgment, the defendant may appeal to this court.

III

The defendant's final claim is that the trial court erred by failing to impose the minimum sentence for the robbery conviction. The sentence range was eight to twelve years. See Tenn. Code Ann. § 40-35-112(a)(2). The trial court sentenced the defendant to nine years.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

Here, the trial court made no findings on the record as to which enhancement factors were applicable. The trial court simply ordered a nine-year sentence. Thus, the sentence is not entitled to the presumption of correctness.

No evidence was presented at the sentencing hearing. Our review of the presentence report indicates the defendant, age twenty at the time of this offense, had juvenile adjudications for aggravated burglary, theft over \$1,000, vehicular burglary, three counts of theft under \$500, possession of burglary tools, and two counts of vandalism. The presentence report also indicates the defendant had been released from supervision with the department of youth development for only three months before he committed the current offense.

The defendant argues that because he has a low intelligence

quotient and receives S.S.I., he was suffering from a mental condition that reduced his culpability for the offense. He insists that this qualifies as a mitigating factor. That may be true. See Tenn. Code Ann. § 40-35-113(8). Yet a juvenile record may be used to establish a prior record of criminal behavior. State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993). The defendant does, in fact, have a history of criminal behavior. See Tenn. Code Ann. § 40-35-114(1). That in our view, marginally outweighs the mitigation factor and warrants a nine-year sentence.

The robbery conviction and sentence are affirmed. The case is remanded for a disposition of the possession of a weapon count.

Gary R. Wade, Judge

CONCUR:

David G. Hayes, Judge

William M. Barker, Judge