

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY 1996 SESSION

<p>FILED</p> <p>May 16, 1997</p> <p>Cecil W. Crowson Appellate Court Clerk</p>
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STATE OF TENNESSEE)
)
 Appellee)
)
 V.)
)
 THOMAS BOOKER, JR.)
)
 and)
)
 THOMAS WAYNE MCDANIELS)
)
 Appellants)

NO. 01C01-9508-CR-00264
 DAVIDSON COUNTY
 HON. J. RANDALL WYATT, JR.,
 JUDGE
 (Possession of Controlled Substance
 with Intent to Sell, Possession with
 Intent to Use Drug Paraphernalia, and
 Sentencing)

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OPINION FILED:_____

AFFIRMED

William M. Barker, Judge

Opinion

The Appellants, Thomas Booker, Jr. and Thomas Wayne McDaniels, appeal as of right their convictions and sentences entered in the Davidson County Criminal Court. Booker was found guilty of possession with intent to deliver or sell 300 grams, or more, of a substance containing cocaine, possession with intent to deliver or sell not less than one-half ounce nor more than ten pounds of marijuana, and possession with intent to use drug paraphernalia and was sentenced to twenty years imprisonment. McDaniels was found guilty of possession with intent to deliver or sell 300 grams, or more, of a substance containing cocaine and sentenced to twenty years imprisonment.

Booker argues on appeal that:

- (1) The trial court's failure to grant his motion for severance denied him due process of law.
- (2) The trial court erred when it failed to sua sponte order a mistrial when suppressed evidence was mentioned in closing argument.
- (3) The State's evidence was obtained under the authority of a defective search warrant and was, therefore, inadmissible in court.
- (4) The evidence presented at trial was insufficient to support the jury's guilty verdicts.
- (5) The trial court erroneously applied the "leader in the commission of an offense" sentencing enhancement factor.
- (6) The jury failed to adhere to the trial court's instructions to not discuss the case before deliberations.

McDaniels argues on appeal that:

- (1) The evidence introduced at trial was insufficient to establish possession with intent to deliver or sell three hundred grams, or more, of a substance containing cocaine.
- (2) Officer Chitty's testimony was irrelevant and incompetent and the trial court erred by allowing its admission in evidence.
- (3) The trial court erroneously qualified Mr. Randal Nelson as an expert witness.
- (4) The sentence imposed by the trial court was excessive.

Following a careful review of the record on appeal, we find no reversible error with respect to the Appellants' convictions and sentences and, therefore, affirm the trial court's judgments.

Summary of the Facts

On July 14, 1992, Metropolitan Nashville police officers executed a search warrant on Thomas Booker, Jr. and his Davidson County residence. When the officers entered Booker's residence, four people, including Booker and McDaniels, were in the kitchen. When the occupants realized that the police were there, they started running towards the living room in an attempt to escape from the house through another door. The police, however, had the house surrounded and detained Booker, McDaniels, the other two men from the kitchen, and two men sitting on the front porch. The officers searched the house with the assistance of the drug dog Barney and found in the kitchen 505.6 grams of cocaine packaged in eighteen small plastic bags and rolled up in a coat, 59.1 grams of cocaine packaged in four plastic bags inside a glove, one set of scales, and one open box of plastic bags. The police officers also found 22.9 grams of cocaine in Booker's bedroom, 977.4 grams of marijuana in the basement, and 4.1 grams of cocaine and one set of electronic scales in the garage. On McDaniels' person they found one bag of cocaine weighing 6.3 grams. At trial, one of the six persons present at Booker's house testified that when he was sitting on the porch earlier that night, McDaniels had arrived with something that looked like a rolled up coat or shirt under his arm.

A. Booker's Arguments on Appeal

I.

Booker argues that the trial court's failure to grant his motion for severance denied him due process of law. This issue is without merit.

The trial court overruled a motion Booker filed to sever his trial from that of McDaniels. If the severance had been granted, Booker planned to introduce evidence

of a gun that police officers found in a car belonging to McDaniels. The trial court ruled that the police search of McDaniels' car was invalid and the discovered gun was suppressed for the purposes of McDaniels' trial. Booker now claims that if the jury had been allowed to learn that McDaniels had a gun in his car, it could have drawn the inference that McDaniels brought the gun to protect his drugs and that Booker was innocent.

Tennessee Rules of Criminal Procedure 14(c)(2)(i) and (ii) provides that the trial court shall grant a severance of defendants if deemed appropriate to promote or achieve a fair determination of a defendant's guilt or innocence. The decision whether to grant a motion for severance is within the trial judge's sound discretion and will not be disturbed on appeal unless the defendant is unfairly or unduly prejudiced. Hunter v. State, 440 S.W.2d 1, 6 (Tenn. 1969); State v. Wiseman, 643 S.W.2d 354, 362 (Tenn. Crim. App. 1982); see also State v. Burton, 751 S.W.2d 440, 447 (Tenn. Crim. App. 1988). The trial court, however, must not only protect the rights of the accused, it must also protect the rights of the state prosecution, and "when several persons are charged jointly with a single crime . . . the state is entitled to have the fact of guilt determined and punishment assessed in a single trial, unless to do so would unfairly prejudice the rights of the defendants." Tennessee v. Wiseman, 643 S.W.2d 354, 362 (Tenn. Crim. App. 1982) (quoting Woodruff v. State, 51 S.W.2d 843, 845 (Tenn. 1932)).

We do not find Booker was unfairly prejudiced or that the trial court abused its discretion by denying the motion for a severance. Booker's argument that McDaniels' gun would have helped establish his innocence is tenuous at most. Booker also presented exculpatory evidence from two independent witnesses who testified that the eighteen bags of cocaine belonged to McDaniels and that McDaniels had brought them into the house. That evidence should have been much more probative of Booker's innocence than the suppressed gun, yet the jury still convicted Booker for possession of 300 grams, or more, of cocaine.

II.

Booker next argues that the trial court erred when it failed to sua sponte order a mistrial when suppressed evidence was mentioned in closing argument. This issue is without merit.

An order for mistrial is appropriate to correct some event which precludes an impartial jury verdict. Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App.1977). The decision whether to grant a mistrial is within the trial court's sound discretion and will not be overturned on appeal absent a clear showing of abuse of discretion. State v. Jones, 733 S.W.2d 517, 522 (Tenn. Crim. App. 1987).

Booker contends that the trial judge should have sua sponte ordered a mistrial when McDaniels' counsel allegedly mentioned McDaniels' suppressed weapon in closing argument. Booker did not object to this argument during trial and has, therefore, waived this issue. Tenn. R. Crim. P. 12(f). Moreover, we do not think that the trial court abused its discretion by refusing to order a mistrial. The complained about portion of McDaniels' counsel's argument was: "[D]oes a man take a large bag of contraband . . . and doesn't bring a pistol to protect it? Well, no weapon was found on Mr. McDaniels." This was a correct statement of the evidence presented during trial and there was no mention that a weapon had been found in McDaniels' car.

III.

Booker argues that the State's evidence was obtained under the authority of a defective search warrant and was, therefore, inadmissible in court. This issue is without merit.

The core of Booker's argument is that the affidavit in support of the search warrant was inadequate in two respects. First, the affidavit did not set out whether the informant was a "citizen informant" or a "confidential informant." Second, the affidavit did not indicate that any information given by the informant had resulted in previous convictions and was, therefore, unreliable.

The adequacy of an affidavit is tested by determining (1) if it "set[s] out a basis for the informant's knowledge," and (2) if "there [is] a factual allegation showing that the source is credible or his information reliable." State v. Smith, 867 S.W.2d 343, 345-46 (Tenn. Crim. App. 1993), see State v. Jacumin, 778 S.W.2d 430 (Tenn. 1989). If the affidavit states that the informant is a citizen informant rather than a confidential informant, then there is a presumption of informant reliability. State v. Melson, 638 S.W.2d 342 (Tenn. 1982). There is no requirement that the affidavit has to state whether the informant is a citizen informant or a confidential informant, and if no distinction is made, the magistrate judge simply has to apply the more stringent two prong test. Smith, 867 S.W.2d at 348. The fact that the affidavit used to support the search warrant in this case did not provide the informant's status does not, by itself, invalidate its adequacy.

We find that the affidavit supporting the search warrant satisfied the reliability prong of the confidential informant test. The affidavit stated that the confidential informant had been inside Booker's residence within the last seventy-two hours before the search and seen Booker offer cocaine for sale. It also stated that the confidential informant had given information in the past that had proven to be true and correct and had resulted in numerous narcotics related arrests and the recovery of large quantities of illegal drugs. See State v. Brown, 638 S.W.2d 436, 437 (Tenn. Crim. App. 1982) (A lack of previous arrests or convictions does not contradict or negate informant reliability, which can be established if the "narcotics unit has on several previous occasions received reliable and accurate information from the informant."); State v. Boyd, C.C.A. No. 01C01-9303-CR-00085 (Tenn. Crim. App., Nashville, Sept. 16,

1993) (Informant found reliable when the affidavit stated that previous arrests had resulted from information supplied by that informant.).

IV.

Booker argues that the evidence presented at trial was insufficient to support the jury's guilty verdicts. This issue is likewise without merit.

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "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). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

A defendant challenging the sufficiency of the proof has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

In order to convict Booker of possession of 300 grams of cocaine with intent to deliver or sell, the State was required to show that Booker knowingly possessed 300 grams, or more, of a substance containing cocaine and that he intended to deliver or sell that substance. See Tenn. Code Ann. § 39-17-417(a), (j)(5) (Supp. 1995). To convict Booker of possession of marijuana with intent to deliver or sell, the State had

to prove that Booker knowingly possessed not less than one-half ounce nor more than ten pounds of marijuana and that he intended to deliver or sell such substance. See Tenn. Code Ann. § 39-17-417(a), (g)(1) (Supp. 1995). To convict Booker of unlawful drug paraphernalia uses and activities, the State had to prove that Booker knowingly possessed “with intent to use . . . drug paraphernalia to . . . pack, repack, store, contain, conceal . . . inhale, or otherwise introduce into the human body a controlled substance” and acted either intentionally, knowingly, or recklessly. See Tenn. Code Ann. § 39-17-425 (1991).

We find that the evidence introduced at trial was more than sufficient for a rational trier of fact to find Booker guilty beyond a reasonable doubt. That evidence showed that the police searched a residence occupied by Booker, that the police found cocaine, marijuana, and drug paraphernalia in several different locations at the house, including the kitchen, bedroom, basement and garage, and that Booker was involved in repackaging some of the drugs for distribution. The jury chose to credit the State’s witnesses and the circumstantial evidence presented. That was its prerogative.

V.

Booker claims that the evidence introduced at trial was insufficient to establish the “leader in the commission of an offense” sentencing enhancement factor. This issue is also without merit.

When an Appellant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d) (1991). The burden of showing that the sentence is improper is upon the appealing party. Id., (sentencing commission comments). This presumption, however, is conditioned upon an 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).

The minimum sentence within the range is the presumptive sentence. If there are enhancing and mitigating factors, the court must start at the minimum sentence in the range and enhance the sentence as appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors. If there are no mitigating factors, the court may set the sentence above the minimum in that range but still within the range. Tenn. Code Ann. § 40-35-210 (1990). The trial judge has full discretion to determine the weight given to each factor, as long as it does not violate the principles of the Sentencing Reform Act. *Id.* (Sentencing Commission Comments).

Booker has failed to show that his sentences were improperly enhanced. The trial judge found that Booker was a “leader in the commission of an offense” because he was in possession of the house into which McDaniels delivered drugs; other drugs were stored in the house; and there was evidence that the drugs in the house were being repackaged for distribution. We agree with the trial court that this enhancement factor was applicable.

VI.

Booker argues that the jury failed to adhere to the trial court’s instructions to not discuss the case before deliberations. This issue is without merit.

An unidentified juror made pre-deliberation statements about Booker’s counsel to the effect that he had very nice clothes and that anybody who could afford such representation must have a lot of money. Booker contends that somehow the implication from the statement was that Booker must be a drug dealer and guilty of the crimes for which he was charged. Booker wants to support this argument by introducing the testimony of one juror and one alternate juror.

Tennessee Rule of Criminal Procedure 24(f) states, inter alia, that jurors shall not communicate with each other regarding any subject connected with the trial before

the case is finally submitted to the jury. Tenn. R. Crim. P. 24(f)(1) (1995). However, “[u]pon an inquiry into the validity of a verdict . . . a juror may [only] testify on the question of whether extraneous prejudicial information was improperly brought to the jury’s attention [or] whether any outside influence was improperly brought to bear upon any juror” Tenn. R. Evid. 606(b); see State v. Frazier, 683 S.W.2d 346 (Tenn. Crim. App. 1984) (holding that even if the jury disregards the trial judge’s instructions to not talk about the case until deliberations, such testimony is inadmissible unless it constitutes extraneous prejudicial information or improper outside influence).

We do not find that the alleged comments by the unidentified juror constitute extraneous prejudicial information or improper outside influence. Therefore, the testimony of the juror and the alternate juror was inadmissible.

B. McDaniels’ Arguments on Appeal

I.

McDaniels argues that the evidence presented at trial was insufficient to support his conviction of possession with intent to deliver or sell 300 grams, or more, of a substance containing cocaine. This issue is without merit.

It is a well established principle of law in this state that circumstantial evidence alone may be sufficient to support a conviction. State v. Buttrey, 756 S.W.2d 718, 721 (Tenn. Crim. App. 1988). The circumstantial evidence, however, “must be not only inconsistent with the guilt of the accused but it must also be inconsistent with his [or her] innocence and must exclude every other reasonable theory or hypothesis except that of guilt.” State v. Tharpe, 726 S.W.2d 896, 900 (Tenn. 1987). In addition, “it must establish such a certainty of guilt of the accused as to convince the mind beyond

a reasonable doubt that [the defendant] is the one who committed the crime.” Tharpe, 726 S.W.2d at 896. Moral certainty as to each element of the offense is required, but

absolute certainty is not. Id. This Court must also remember that the jury decides the weight to be given to circumstantial evidence, moreover, “[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence are questions primarily for the jury.” Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958); State v. Coury, 697 S.W.2d 373, 377 (Tenn. Crim. App. 1985).

We find that the evidence introduced at trial was more than sufficient for a rational trier of fact to find McDaniels guilty beyond a reasonable doubt. During the search of Booker’s residence the police officers found the eighteen bags containing cocaine rolled up in a coat. One of the people who was sitting on the porch when the police searched the house, testified that when McDaniels had arrived earlier that night he had carried something under his arm that looked like a rolled up coat or shirt. The evidence also indicated that McDaniels, Booker, and the other two men in the house were involved in repackaging drugs for distribution.

McDaniels also specifically contends the evidence was insufficient to establish possession of 300 grams, or more, of cocaine because the eighteen bags that made up the 505.6 grams of cocaine were only randomly sampled. During the trial, Tennessee Bureau of Investigation forensic scientist, Mr. Randal Nelson, testified that he received the eighteen small plastic bags containing a white powdery substance and that he first conducted a cobalt thiocyanate test on all eighteen bags. The cobalt thiocyanate test is a presumptive test, because not only cocaine will react positively, but also substances such as lidocaine and procaine. Since all eighteen bags tested positive in the cobalt thiocyanate test, Mr. Nelson randomly selected five bags for further testing. These five bags tested positive for cocaine when analyzed in the gas chromatograph and the infrared spectrometer.

Random sampling of large quantities of drugs can survive sufficiency of the evidence challenges. See State v. Selph, 625 S.W.2d 285, 286 (Tenn. Crim. App. 1981) (stating that a five tablet random sample containing methaqualone was sufficient to establish that 5000 similar looking tablets also contained methaqualone); State v. Moore, C.C.A. No. 03C01-9403-CR-00098 (Tenn. Crim. App., Knoxville, Sept. 18, 1995) (holding that a random sample of twenty-four “rocks” containing crack cocaine was sufficient to establish that 2400 similar looking rocks also contained crack cocaine). In this case, the State first introduced evidence showing that all eighteen bags tested positive in the cobalt thiocyanate test, and then, that five of the eighteen bags affirmatively contained cocaine. The jury was justified in making the inference, circumstantially, that all eighteen bags contained cocaine.

With regard to the evidence presented against McDaniels, the jury chose to credit the State's witnesses and the circumstantial evidence presented and found that the evidence was sufficient to support the conviction. McDaniels has failed to overcome the presumption of guilt on appeal.

II.

McDaniels argues that Officer Chitty's testimony was irrelevant and incompetent and that the trial judge erred by allowing its admission in evidence. This issue is without merit.

McDaniels argues that Officer Chitty's testimony was irrelevant and incompetent because Officer Chitty, when he testified in court, relied solely on his memory as to what happened on July 14, 1992, as opposed to on a written report. McDaniels also claims that Officer Chitty's testimony was inconsistent and lacked detail, and that he erroneously testified that McDaniels had 20.5 grams of cocaine on his person, when it was in fact only 6.3 grams.

This issue is waived as McDaniels has failed to cite authority to support his arguments. Rules of the Court of Criminal Appeals of Tennessee 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988). We will, however, address

this issue on its merits. The decision to admit or exclude evidence is left to the trial court's sound discretion and will not be disturbed unless it is arbitrarily exercised. State v. Hawk, 688 S.W.2d 467, 472 (Tenn. Crim. App. 1985); State v. Baker, 785 S.W.2d 132, 134 (Tenn. Crim. App. 1989).

We do not find that the trial court abused its discretion. Officer Chitty was one of the principal officers searching the Booker residence on July 14, 1992, and his testimony regarding the events that took place was certainly relevant evidence. See Tenn. R. Evid. 401, 402. It was for the jury to determine whether Officer Chitty's testimony was inconsistent or lacked detail, and whether Officer Chitty was a credible witness. The issue regarding Officer Chitty's testimony was one of credibility, not admissibility.

It is clear from the record that although Officer Chitty erroneously testified to the amount of cocaine on McDaniels' person, such error, however, was harmless because later testimony established the correct amount. See Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a). Officer Chitty's incorrect testimony did not result in McDaniels experiencing any undue prejudice and the outcome of the trial was not affected thereby.

III.

McDaniels contends that the trial court erroneously qualified Mr. Randal Nelson as an expert witness. This issue is without merit.

McDaniels argues that Mr. Nelson should not have been qualified as a forensic expert because he was unable to relate when the equipment he used to test the cocaine was last calibrated. He also contends that Nelson was unqualified because he could not explain the scientific principles and mathematical formulae upon which the analytical equipment was based.

The record reveals that Mr. Nelson had substantial training and experience as a forensic scientist, qualifying as an expert in over thirty trials. Contrary to McDaniels' claim, Mr. Nelson adequately explained the scientific principles involved in both the

testing procedures and the equipment operations that translated the test results. He acknowledged that he could not recall the specific mathematical formulae upon which the equipment was based, saying that he would need a chemistry book. He also explained that the equipment was calibrated every week, and that the exact date of calibration was kept on file in the laboratory.

A witness who qualifies “as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.” Tenn. R. Evid. 702. Whether an individual qualifies as an expert and whether expert testimony is appropriate are within the trial judge’s discretion. State v. Williams, 657 S.W.2d 405, 411 (Tenn. 1983). The record shows Mr. Nelson to be qualified as a forensic expert able to present the test results in this case. The mere fact that he did not know some mathematic formulae or the exact date of the equipment calibration did not prevent the trial court from allowing him to testify. We see no abuse of discretion.

IV.

Finally, McDaniels contends that the sentence imposed by the trial court was excessive. This issue is without merit.

The trial court is well within its authority to enhance a prison sentence if it finds that a convicted individual has “a previous history of criminal convictions or criminal behavior . . .” Tenn. Code Ann. § 40-35-114 (Supp. 1995). Here, the record reveals that McDaniels has at least thirteen prior convictions and we find that the application of the sentencing enhancement factor was appropriate. The trial court found no mitigating factors.

Accordingly, all the Appellants’ convictions and sentences are affirmed.

WILLIAM M. BARKER, JUDGE

CONCUR BY:

GARY R. WADE, JUDGE

JOSEPH M. TIPTON, JUDGE