

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
July 11, 2017 Session

FILED

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. TREVIAL MOSS

Appeal from the Criminal Court for Shelby County
No. 14-06090 W. Mark Ward, Judge

No. W2016-01973-CCA-R3-CD

The Defendant, Treval Moss, was convicted by a Shelby County jury of aggravated robbery and sentenced to twelve years' confinement. In this direct appeal, the Defendant argues that (1) the evidence is insufficient to support his conviction; (2) the verdict is contrary to the law and weight of the evidence; (3) the State withheld discovery material in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963); and (4) the trial court erred in imposing the maximum sentence. Upon our review, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JJ., joined.

Terita Hewlett, Memphis, Tennessee, for the appellant, Treval Moss.

Herbert H. Slatery III, Attorney General and Reporter; Jeffrey D. Zentner, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Gavin Smith and Tyler Parks, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The Defendant's trial began on February 29, 2016, and continued through March 2, 2016. Phillip Finney, the victim, testified that on August 7, 2014, he was "assaulted and pistol whipped and robbed by two individuals." The victim was walking down the street and encountered a woman named "Latonya" or "Tonya" whom he had previously seen arguing with two men. He asked the woman where he could purchase marijuana and crack cocaine. The woman walked away, spoke with two men, and returned. She told the victim one of the men's brother had some, so they began walking down the street together. The victim leaned over to tie his shoe and was struck in the left eye with a

handgun. He fell to the ground and “the biggest” or “tallest” man put a gun to the back of his head and told him not to move. The other man “tossed [the victim] from [his] left to [his] right going inside [his] pockets and removed \$175” from his pocket. The men ran away, and the victim was able to gather his belongings and go home and call the police. The victim identified the Defendant at trial as the man who put the gun to the back of his head.

The victim spoke with the police that night and the following morning. He provided the police with a statement as to the robbery and identified the Defendant from a photographic line-up. The victim wrote underneath the Defendant’s photograph that the Defendant was the person who went through his pockets and kicked him in the face. He explained at trial that this was not correct because at that point the victim was “still kind of scared and shaky and . . . had like a concussion.” He confirmed to the jury that he was “100 percent” sure that the Defendant was the person who put the gun to the back of his head. With a gun pointed at his head, the victim was scared and thought he was going to die.

On cross-examination, the victim agreed that he had already consumed a half of a half a pint of “Paul Masson” brown liquor at the time he was robbed. He also stated that he had a conversation with Tonya’s cousin, who “referred” the victim to the Defendant and his co-defendant. The victim also agreed that he had a prior conviction for aggravated robbery, for which he was released in 2009.

Officer Culver with the Memphis Police Department responded to the robbery call in this case. Upon arrival, he spoke to the victim, who described the perpetrators as two black males, one dressed in black and the other in a black and white shirt. The victim explained that “Tonya” was also involved in the offense. Officer Culver observed blood on the lower part of the victim’s eye and called paramedics to provide the victim with medical treatment. Finally, Officer Culver opined that the victim appeared “dizzy” as a result of being struck in the head, rather than being intoxicated.

Latonya Wright’s cousin lived in the same “rooming house” as the victim. Wright testified that she knew the victim through her cousin and described her relationship with the victim as “close.” On the night of the offense, Wright was “watching” her cousin’s room while he was at work. She said “a little incident” occurred between her and another woman at the house. As she walked away to “calm herself down,” the Defendant joined her. She testified that the victim later called her and asked if she knew where to buy drugs. She told him that she would set something up, and she and the Defendant and two other men waited for the victim to arrive. When the victim arrived, the Defendant told Wright that his brother was going to “serve” the victim, meaning get drugs for him. Wright asked the Defendant’s brother to get “10 hard and 10 soft,” meaning crack and

powder cocaine, for the victim. Wright testified that as time passed, she observed the Defendant holding a gun to the head of the victim. She did not call the police because she was “high as Cooter Brown and didn’t know what to do.” The next morning Wright’s mother took her to the police department, and she provided a statement detailing the events. At that time, Wright identified a photograph of the Defendant, admitted as an exhibit at trial, as the individual who “pull[ed] a gun out on [the victim].” Although Wright was arrested at the time of the offense, she denied any involvement in the offense at trial.

Detective Maranda Jones of the Memphis Police Department investigated the case and created photographic lineups containing the Defendant’s photograph. They were shown to Wright and the victim, both of whom identified the Defendant as the perpetrator in the offense. Detective Jones also explained that Wright was initially arrested and charged with facilitation of aggravated robbery because the victim said Wright brought the men to him. Detective Jones further agreed that Wright provided inconsistent statements regarding how she and the other men arrived at the offense location. After the Defendant was developed as a suspect, he was eventually arrested by Officer Charles Wren of the Memphis Police Department.

Upon hearing the above proof, the jury convicted the Defendant as charged of aggravated robbery. At the April 21, 2016 sentencing hearing, the presentence report was admitted into evidence, without objection. The State did not offer any witnesses. The Defendant testified and “truly apologiz[ed] [to the victim] for whatever went on that day.” On cross-examination, the Defendant insisted that he was not present during the offense. Following arguments of counsel, the trial court classified the Defendant as a Range I, standard offender and imposed the maximum sentence of twelve years’ incarceration. The Defendant filed a motion for new trial, which was denied by the trial court on September 12, 2016. A timely notice of appeal was filed, and this case is now properly before this court.

ANALYSIS

I. Sufficiency of Evidence. The Defendant challenges the evidence supporting his aggravated robbery conviction as insufficient. He does not dispute any specific element of the offense but contends rather that his conviction was based on inconsistent testimony. The State maintains, and we agree, that the evidence was sufficient to support the Defendant’s conviction of aggravated robbery.

When a defendant challenges the sufficiency of the convicting evidence, the standard of review is “whether, after viewing 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 (1979); see also Tenn. R. App. P. 13(e) (“Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt.”). This standard applies to convictions based upon direct, circumstantial, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

The State, on appeal, is entitled to the strongest legitimate view of the evidence and all legitimate or reasonable inferences which may be drawn from that evidence. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact, and this court will not reweigh or reevaluate the evidence. State v. Sutton, 166 S.W.3d 686, 689-90 (Tenn. 2005). This court has stated that “[a] guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution’s theory.” Bland, 958 S.W.2d at 659 (citation omitted). A guilty verdict also “removes the presumption of innocence and replaces it with a presumption of guilt, and the defendant has the burden of illustrating why the evidence is insufficient to support the jury’s verdict.” Id. (citation omitted).

In order to sustain a conviction of aggravated robbery, the State was required to prove beyond a reasonable doubt that the Defendant robbed the victim “with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon[.]” T.C.A. § 39-13-402(a)(1). “Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear.” T.C.A. § 39-13-401(a).

Viewed in the light most favorable to the State, the proof fully supports the Defendant’s conviction for aggravated robbery. The victim candidly testified that he was attempting to buy drugs on the day of the offense and enlisted Latonya Wright to help him. Wright ultimately led the victim to the Defendant and his co-defendant. As the victim leaned over to tie his shoe, he was struck in the left eye with a handgun. He then fell to the ground, and the Defendant put a gun to the back of his head and told him not to move. The other man “tossed [the victim] from [his] left to [his] right going inside [his] pockets and removed \$175” from his pocket. The next day, Wright confirmed through a photographic line-up that the Defendant was the individual who held a gun to the victim’s head. The jury resolved any inconsistency with the testimony of the victim and/or Wright against the Defendant as was their prerogative. The Defendant is not entitled to relief.

II. Thirteenth Juror. The Defendant similarly argues that the trial court failed to properly weigh the evidence in its role as the thirteenth juror. The State disagrees.

Tennessee Rule of Criminal Procedure 33(d) states that “the trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence.” See State v. Carter, 896 S.W.2d 119, 122 (Tenn. 1995) (holding that the trial court has a duty to serve as the thirteenth juror). Only if the record contains statements by the trial judge indicating disagreement with the jury’s verdict or evidencing the trial judge’s refusal to act as the thirteenth juror may an appellate court reverse the trial court’s judgment. Id. Otherwise, appellate review is limited to sufficiency of the evidence pursuant to Rule 13(e) of the Tennessee Rules of Appellate Procedure. State v. Burlison, 868 S.W.2d 713, 718-19 (Tenn. Crim. App. 1993). If the reviewing court finds that the trial judge has failed to fulfill his or her role as thirteenth juror, the reviewing court must grant a new trial. State v. Moats, 906 S.W.2d 431, 435 (Tenn. 1995).

Here, the Defendant argues that the trial court “never made an independent determination as to whether the weight of the evidence was sufficient to support the verdict.” To the contrary, the record clearly shows that the trial court agreed with the jury’s verdict as the thirteenth juror. As acknowledged in the Defendant’s brief, the trial court explicitly stated, “I approve of the verdict as the 13th juror.” Therefore, this issue is not subject to appellate review.

III. Brady Issue. The Defendant next argues that the State “withheld discovery material in the State’s possession . . . in violation of [his] right to due process, Brady v. Maryland, and State v. Sellers.” Specifically, the Defendant insists that the 911 tape was material and exculpatory because the victim claimed that there were four men involved in the robbery, rather than two. In response, the State contends in a footnote that this issue is waived because the record does not contain the 911 recording. Additionally, the State argues that the trial court properly determined that the State did not suppress the 911 recording and that its content was immaterial to the Defendant’s case. Finally, interpreting the issue under Rule 16, the State insists that the 911 tape was not used in the State’s case-in-chief and therefore is not subject to disclosure. For the following reasons, we conclude that the Defendant is not entitled to relief on this issue.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and the “Law of the Land” Clause of Article I, section 8 of the Tennessee Constitution afford all criminal defendants the right to a fair trial. The United States Supreme Court in Brady v. Maryland, 373 U.S. 83, 87 (1963), held that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of good faith or bad faith of the prosecution.” Evidence that is “favorable to an accused” includes both

“evidence deemed to be exculpatory in nature and evidence that could be used to impeach the state’s witnesses.” Johnson v. State, 38 S.W.3d 52, 55-56 (Tenn. 2001). Favorable evidence has also been defined as the following:

[E]vidence which provides some significant aid to the defendant’s case, whether it furnishes corroboration of the defendant’s story, calls into question a material, although not indispensable, element of the prosecution’s version of the events, or challenges the credibility of a key prosecution witness.

Id. at 56-57 (quoting Commonwealth v. Ellison, 376 Mass. 1, 379 N.E.2d 560, 571 (1978)). “The duty to disclose exculpatory evidence extends to all ‘favorable information’ irrespective of whether the evidence is admissible at trial.” State v. Robinson, 146 S.W.3d 469, 512 (Tenn. 2004) (citing Johnson, 38 S.W.3d at 56).

Evidence is considered material under this standard only “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Kyles v. Whitley, 514 U.S. 419, 433 (1995) (citation omitted); State v. Edgin, 902 S.W.2d 387, 390 (Tenn. 1995). The United States Supreme Court held:

[The] touchstone of materiality is a “reasonable probability” of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A “reasonable probability” of a different result is accordingly shown when the government’s evidentiary suppression “undermines confidence in the outcome of the trial.”

Kyles, 514 U.S. at 434 (quoting United States v. Bagley, 473 U.S. 667, 678 (1985)). Both impeachment evidence and exculpatory evidence fall within the Brady rule. Bagley, 473 U.S. at 676. The burden of proving a Brady violation rests with the defendant, and the violation must be proved by a preponderance of the evidence. Edgin, 902 S.W.2d at 389 (citing State v. Spurlock, 874 S.W.2d 602, 610 (Tenn. Crim. App. 1993)).

In order to establish a Brady violation, the defendant must show the existence of four elements: (1) that the defendant requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not); (2) that the State withheld the information; (3) that the

withheld information was favorable; and (4) that the withheld information was material. Edgin, 902 S.W.2d at 389 (citations omitted).

Some context is necessary to fully understand the chronology of events in this case. The record shows that on December 16, 2014, the Defendant filed a general motion for discovery, which did not specifically request a copy of the 911 recording in this case. On February 3, 2016, the State filed its response, which provided instructions for defense counsel to inspect or review any tangible objects the State intended to use as evidence in its case in chief.¹ On May 12, 2016, defense counsel filed a motion for new trial alleging, among other things, that the day after trial, March 3, the State notified defense counsel regarding a “disc” containing additional discovery.² Defense counsel’s motion claimed that the disc contained a 911 call during which the victim told police that “there were four males present plus a female,” which was material because during trial the victim said there were only two males involved in the offense. Defense counsel further argued that this was exculpatory evidence because it contradicted the victim’s identity of the Defendant and showed that the victim was under the influence of alcohol and other mind altering drugs.

In its May 31, 2016 response to the Defendant’s above motion, the State explained that the Defense Bar and the District Attorney’s Office have an agreed “common practice,” in which the Defense Bar reimburses the District Attorney’s Office when information provided to a defendant requires storage on a compact disc. To facilitate this practice, an investigator will place the audio or video files on the disc and give it to an administrative assistant, who will in turn contact defense counsel to make payment and pick up the disc. In this case, a disc was prepared for the Defendant on February 22, 2016, a week before trial. However, an invoice for the disc was not created until March 3, 2016, the day defense counsel was notified and a day after trial concluded. The State did not provide an explanation for the delay in contacting defense counsel, and the disc was obtained by defense counsel on March 7, 2016.

After hearing the motion for new trial, the trial court issued a written order denying relief. The trial court engaged in an exhaustive analysis of this issue and reasoned as follows:

After this alleged Brady violation was raised at the Motion for New Trial, this Court ordered that a transcript of the trial be prepared in order to

¹ Defense counsel’s motion for new trial states that the State initially complied with discovery on January 21, 2015; however, the appellate record contains no such response.

² The motion for new trial provides that the disc containing the 911 tape is attached to said motion; however, no disc is contained in the record on appeal.

assist the Court in evaluating the “materiality” of the 911 recording. After reviewing the transcript, this Court concludes and so finds that the evidence does not meet the “materiality” standard of Brady. i.e. there is no reasonable probability of a different result in this case. Stated differently, the absence of this evidence does not undermine confidence in the outcome of the trial.

The undisclosed evidence relates solely to the “number” of men who participated in the robbery, it has nothing to do with whether or not the defendant was a participant in the robbery. Further, in the context of this case, the number of “men” is a fluid concept subject to various interpretations, depending on (1) whether you count the number of men on the front porch when the victim first encountered Ms. Wright; (2) whether you count “Peanut” as in on the actual assault, even though he was over 100 feet away walking away with Ms. Wright at the time of the assault; or (3) whether you count only the two men who actually assaulted and robbed the victim. No doubt at the time the 911 call was made, the victim had no idea whether Ms. Wright and Peanut were in on the robbery or not. In addition, he had just been hit in the head and had a concussion. Furthermore, by the time the first officer arrived on the scene, he was told by the victim that he had been robbed by two men, and a broadcast was put out to that effect. Simply, put, this discrepancy as to the “number” of men participating was rather insignificant in the context of this case.

Defendant contends that the 911 recording “raises questions about the victim’s ability to identify the defendant, the victim’s ability to recall and victim’s state of mind under the influence of alcohol and drugs.” Later the motion declares that the defense “position continues to be that the victim’s ability to recall was in question because he had consumed alcohol and illegal, mind altering substances the date of the incident and any identification of the defendant was erroneous.” Let me be clear, there was no evidence presented in this case that the victim was intoxicated at the time of the incident. In fact, the first officer who arrived on the scene testified that the victim did not appear intoxicated.

Furthermore, the identification of the defendant in this case by the victim is corroborated by the testimony of Ms. Wright, who actually knew the defendant. At trial, both Ms. Wright and the victim were thoroughly cross-examined regarding every inconsistency in their version of the events and impeached with their prior convictions. However no inconsistency existed as to the participation of the defendant in the robbery. Against this

combined testimony of the victim and Ms. Wright, the defense offered no evidence whatsoever. The jury heard the testimony of Ms. Wright and the victim, heard all the alleged inconsistencies, and assessed the credibility of Ms. Wright and the victim, and found the evidence supported a finding of guilt beyond a reasonable doubt. In the context of this case, the fact that the 911 recording showed the victim initially reported being robbed by 4 persons was insignificant.

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In order to establish a Brady violation, the defendant must show that the favorable evidence was suppressed by the State. As already indicated the State is not required to disclose information that the accused is able to obtain by his own investigation. The State argues that the 911 recording could have been obtained by the defense as a part of a diligent investigation and could have been the subject of a subpoena. As such, the State contends that the defense has failed to show “suppression” of the evidence by the State.

This court agrees with the State’s contention. When the defense has access to 911 recordings with the exercise of reasonable due diligence, there is no suppression of the evidence by the State. Cf. People v. Gozalez, 2016 WL 2855385 (III. App. 2016); Burkett v. Quarterman, 2008 WL 219511 (USDC SD Texas).

As an initial matter, we are inclined to agree with the State and conclude that this issue is waived because the appellate record does not contain the 911 recording. The Defendant has a duty to prepare a record that conveys “a fair, accurate and complete account of what transpired with respect to those issues that are the bases of the appeal.” Tenn. R. App. P. 24(b). We acknowledge that the Defendant’s motion for new trial references the 911 audio disc recording and a transcript thereof as attachments; however, the attachments were not included in the technical record. Even more troubling to this court is the fact that this issue was raised in the State’s brief and at oral argument, and there was no motion to supplement the record or attempt to rectify the problem. To the extent that the Defendant relies on the portion of the transcript that the trial court references in its order, we are compelled to agree with the trial court’s reasoning and analysis in denying relief.³ See State v. Bibbs, 806 S.W.2d 786, 790 (Tenn. Crim. App.

³ The trial court’s order denying relief contains the following reference to the transcript of the 911 call:

Q: How many was it?
A: Four and a female

1991) (“In the absence of an adequate record on appeal, we must presume that the trial court’s ruling was supported by the evidence.”) (citing Smith v. State, 584 S.W.2d 811, 812 (Tenn. Crim. App. 1979); Vermilye v. State, 584 S.W.2d 226, 230 (Tenn. Crim. App. 1979)). Because of the deficient record, this issue is waived and not subject to review on the merits.

IV. Sentencing. In his final issue, the Defendant argues that the trial court imposed an excessive sentence. The State argues, and we agree, that the trial court properly imposed sentence in this case.

This court reviews a trial court’s sentencing determinations under “an abuse of discretion standard of review, granting a presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act.” State v. Bise, 380 S.W.3d 682, 707 (Tenn. 2012). Moreover, “a trial court’s misapplication of an enhancement or mitigating factor does not invalidate the sentence imposed unless the trial court wholly departed from the 1989 Act, as amended in 2005.” Id. “So long as there are other reasons consistent with the purposes and principles of sentencing, as provided by statute, a sentence imposed by the trial court within the appropriate range should be upheld.” Id.

A trial court must consider the following when determining a defendant’s specific sentence and the appropriate combination of sentencing alternatives:

- (1) The evidence, if any, received at the trial and the sentencing hearing;
- (2) The presentence report;
- (3) The principles of sentencing and arguments as to sentencing alternatives;
- (4) The nature and characteristics of the criminal conduct involved;
- (5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114;
- (6) Any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and
- (7) Any statement the defendant wishes to make in the defendant’s own behalf about sentencing.

Q: Four male blacks and one female
A: Pardon me?
Q: It was four male blacks and one female
A. Yes, all were black

T.C.A. § 40-35-210(b). The defendant has the burden of showing the impropriety of the sentence on appeal. Id. § 40-35-401(d), Sentencing Comm'n Cmts. In determining the proper sentence, the trial court must consider the defendant's potential for rehabilitation or treatment. Id. §§ 40-35-102(3)(C), -103(5). In addition, the court must impose a sentence "no greater than that deserved for the offense committed" and "the least severe measure necessary to achieve the purposes for which the sentence is imposed." Id. § 40-35-103(2), (4).

At sentencing, all parties agreed that the Defendant was a Range I, standard offender, convicted of aggravated robbery, a Class B felony, and subject to a sentencing range of eight to twelve years. See T.C.A. § 40-35-112(a)(2). After hearing the Defendant's apology, insisting that he was not present at the crime, the trial court heard argument of counsel. Defense counsel conceded that the Defendant had a prior criminal record but urged the court to impose the minimum sentence, and the State argued for the maximum based on enhancement factors (1), (2), and (8). T.C.A. § 40-35-114(1), (2), (8). In imposing the sentence, the trial court explicitly stated that it gave minimal weight to factor (1), the Defendant's prior criminal history or criminal behavior, which consisted of drug use, aggravated assault, possession of alcohol, and juvenile related conduct. The trial court further applied enhancement factor (2), that the Defendant was a leader in the commission of the offense, reasoning that the Defendant was "at least one" of two of the perpetrators and because the Defendant held the gun to the victim's head. The trial court also applied enhancement factor (8), that the Defendant failed to comply with the conditions of a sentence involving release into the community, because the Defendant had previously been on probation. Finally, the trial court determined that none of the statutory mitigating factors applied and applied minimal weight to the catch-all factors.

In his brief, the Defendant initially challenges the weight the trial court applied to enhance his sentence based on prior non-violent criminal behavior. He additionally argues that the trial court failed to consider his potential for rehabilitation and relied on erroneous facts contained in the presentence report. Finally, he argues that the trial court erred in determining that he was a leader in the robbery because he was merely "present and participated" in the crime.

We must first note that the 2005 amendments to our sentencing act deleted as grounds for appeal claims that the trial court did not properly weigh the enhancement and/or mitigating factors. See 2005 Tenn. Pub. Acts ch. 353, §§ 8-9; State v. Carter, 254 S.W.3d 335, 345 (Tenn. 2008). Additionally, the record shows that the trial court explicitly applied minimal weight to enhancement factor (1) or the Defendant's prior criminal history and behavior. Next, our review of the record shows that the trial court considered the Defendant's potential for rehabilitation and, based on the victim's trial testimony, properly considered the Defendant as the gunman in the robbery. Finally, we

agree with the Defendant, and conclude that the record does not support the trial court's enhancement of his sentence based on the Defendant's role as a leader in the offense. In doing so, we recognize that enhancement factor (2) does not require the Defendant to be the sole leader but rather that he be a "leader," and that, as a result, two criminal actors may qualify for enhancement under this factor. See State v. Hicks, 868 S.W.2d 729, 731 (Tenn. Crim. App.1993). However, nothing in the record in this case suggests that the Defendant directed the co-defendant or any others involved to rob the victim. See State v. Kenneth Hayes, No. W2010-00309-CCA-R3-CD, 2011 WL 3655130, at *7 (Tenn. Crim. App. Aug. 19, 2011) (citing State v. Freeman, 943 S.W.2d 25 (Tenn. Crim. App.1996); State v. Eddrick Devon Pewitte, W2008-00747-CCA-R3-CD, 2009 WL 29891, at *10 (Tenn. Crim. App. Jan. 5, 2009), no Tenn. R. App. P. 11 application filed.)

Nevertheless, we conclude that the trial court's misapplication of enhancement factor (2) does not impact the Defendant's sentence because, in all other respects, the record supports the trial court's imposition of the twelve-year sentence. Enhancement factors (1) and (8) were properly applied and justify the maximum sentence. Because the trial court considered the purposes and principals of the sentencing act, we conclude that the Defendant's twelve-year sentence was proper. He is not entitled to relief.

CONCLUSION

Upon our review, we conclude that the evidence was sufficient to support the Defendant's aggravated robbery conviction, that the trial court properly exercised its role as the thirteenth juror, that the Defendant waived any issue pertaining to a 911 recording which was not included in the appellate record, and that the Defendant's twelve-year sentence was proper.

CAMILLE R. MCMULLEN, JUDGE