IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER SESSION, 1999

STATE OF TENNESSEE,	)	**C.C.A. NO. W1999-01691-CCA-R3-CD**
	)	
Appellee,	)	
	)	**HENRY COUNTY**
V.	)	
	)	
	)	**HON. C. CREED McGINLEY,**
EMMA JEAN DUNLAP HILLIARD,	)	
	)	
Appellant.	)	**(SALE OF CONTROLLED SUBSTANCE)**

FOR THE APPELLANT:

SAM WALLACE, SR.
227 Second Avenue, North
Nashville, TN 37201

FOR THE APPELLEE:

PAUL G. SUMMERS
Attorney General & Reporter

PATRICIA C. KUSSMANN
Assistant Attorney General
2nd Floor, Cordell Hull Building
425 Fifth Avenue North
Nashville, TN 37243

ROBERT RADFORD
District Attorney General

BETH C. BOSWELL
Assistant District Attorney General
111 Church Street
P.O. Box 686
Huntingdon, TN 38344

OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

Defendant Emma Jean Dunlap Hilliard appeals as of right from her conviction by a Henry County jury of sale of a schedule II controlled substance. Defendant received a sentence of 9 (nine) years and a fine of $100,000. On appeal, Defendant now argues:

1. The evidence is insufficient to support her conviction of sale of a controlled substance.
2. The verdict is "contrary to law" because of alleged prosecutorial misconduct involving a witness' testimony.
3. The evidence preponderates against the jury verdict.
4. The trial court erred when it did not grant her motion for judgment of acquittal.
5. The trial court erred when it proceeded with the trial even though a defense witness, who had been subpoenaed, was not present due to incarceration in Kentucky.

After a thorough review of the record we find no error, and affirm Defendant's conviction.

I. Facts

On January 8, 1998, Michael Gurnitz was stopped by Patrolman Andy Bass of the Paris, Tennessee, Police Department. The tags on Gurnitz' vehicle were expired, and Gurnitz was driving without a valid driver's license. After the stop Gurnitz was arrested, and he became concerned because he had a shotgun in the trunk, and he believed the gun to be illegal because of it's length. As a result, Gurnitz offered to make an undercover cocaine buy at a location that he knew to have crack cocaine.

Gurnitz was taken by Patrolman Bass to the Paris Police headquarters, where they met with Sergeant Donnie Blackwell. The three discussed Gurnitz' offer. It was agreed that Gurnitz would act as an informant, and in exchange he would receive a written citation for his charges instead of being booked and held. Blackwell had

Officer Bass strip-search Gurnitz to ensure that Gurnitz was not in the possession of any money or drugs, and then outfitted Gurnitz with a concealed microphone, wireless transmitter, and a back-up cassette recorder. Blackwell gave Gurnitz $50 in marked bills with which to make a purchase. The three then departed to make a purchase at the Defendant's house. Gurnitz traveled with Bass in Bass' personal vehicle, and Blackwell traveled in a separate vehicle. The plan was for Bass to drop Gurnitz off close to the house, and Blackwell would monitor the transaction from another location using a radio receiver to listen to the transmission from Gurnitz' wireless transmitter.

Bass dropped Gurnitz off as planned. Gurnitz proceeded to Defendant's residence, knocked on the door, and purchased a rock of crack cocaine for $50. Gurnitz was met by Bass, and they proceeded to police headquarters, where Bass strip-searched Gurnitz again. Sergeant Blackwell used the information and evidence gathered by Gurnitz as the basis for a search warrant of Defendant's home, which was duly issued by a judge. The warrant was executed approximately one and a half hours after Gurnitz made the purchase–but the search produced no drugs and no marked money. At the time the warrant was executed there was no one home. Olivia, a trained drug dog, participated in the search, and made four "hits" on different areas in the house.

Defendant was subsequently indicted on one count of sale of a schedule II controlled substance, and one count of delivery of a schedule II controlled substance. The jury convicted her of the count addressing the sale, but acquitted her on the delivery count. The jury assessed a fine of $100,000. The judge sentenced Defendant to a nine year prison term, to be served consecutively with a sentence for which Defendant was on parole.

At Defendant's trial the State relied primarily upon the testimony of Bass, Blackwell, and Gurnitz, as well as on an audio recording of the transaction that was made via the concealed microphone on Gurnitz' person. Gurntiz' testimony,

however, proved problematic. In the morning, Gurnitz testified for the prosecution. He related his personal involvement as the police informant, describing how he was stopped by Officer Bass, how he offered to help the police, and his role in the undercover purchase. In so doing he identified Defendant as the person who sold him the crack cocaine. In the afternoon, however, he returned to the stand as a defense witness, and recanted portions of his earlier testimony. Specifically, Gurnitz stated that he did not think that Defendant was the person from whom he had purchased the cocaine. Gurnitz testified that he had identified Defendant only because he was threatened by the prosecutor and Blackwell prior to trial.

II. Analysis

Defendant raises five issues: (1) the evidence is insufficient to support her conviction of sale of a controlled substance; (2) the verdict is "contrary to law" because of alleged prosecutorial misconduct involving Michael Gurnitz' testimony; (3) the evidence preponderates against the jury verdict; (4) the trial court erred when it did not grant her motion for a judgment of acquittal; and (5) the trial court erred when it proceeded with the trial even though a defense witness, who had been subpoenaed, was not present due to incarceration in Kentucky.

We first note that Defendant has not cited any authority in her argument on issues (3), (4), and (5). As a result these issues are waived. Tenn. Crim. App. R. 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988). We also note that Defendant's issue (3) is simply a reformulation of Defendant's sufficiency of the evidence argument. Thus even if Defendant had not waived this issue Defendant would not be entitled to relief for the reasons stated in Part IIA of this opinion. As to issue (4), we observe that the Tennessee Rules of Criminal Procedure require a trial judge to order a judgment of acquittal when the evidence presented is insufficient to sustain a conviction. Tenn.R.Crim.P. 29(a). This is essentially the same standard that is applied when assessing the sufficiency of the evidence after a conviction. State v. Anderson, 880 S.W.2d 720, 726 (Tenn. Crim.

App. 1994). As a result, even if Defendant had not waived issue (4), Defendant would not be entitled to relief on this issue for the reasons set forth in Part IIA of this opinion.

Finally, although Defendant has technically waived issue (5), we elect to address this claim on the merits because it raises constitutional issues.

A.

Defendant argues that the evidence is insufficient to support her conviction. We disagree.

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. State v. Shepherd, 902 S.W.2d 895, 903 (Tenn. 1995) (citing Jackson v. Virginia, 443 U.S. 307, 322-25 (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).

A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences therefrom. Cabbage, 571 S.W.2d at 835. Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this Court of illustrating why the evidence is insufficient to support the jury verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Here, Defendant's sufficiency argument focuses upon the identification of Defendant as the person who sold Gurnitz the cocaine. Defendant argues that under the cancellation rule, Gurnitz' conflicting testimony regarding Defendant's identity may not be used to convict Defendant, and thus there is insufficient evidence to prove that Defendant was the seller of the cocaine.

In Tennessee, contradictory statements by a witness in connection with the same fact cancel each other. State v. Matthews, 888 S.W.2d 446, 449 (Tenn. Crim. App. 1993); Taylor v. Nashville Banner Pub. Co., 573 S.W.2d 476, 482 (Tenn. Ct. App. 1978). The rule only applies when the inconsistency in the witness' testimony is unexplained and when neither version of the testimony is corroborated by other evidence. Matthews, 888 S.W.2d at 450 (citing Taylor, 573 S.W.2d at 483).

We are of the opinion that the cancellation rule does not apply to this case for two reasons. First, Gurnitz' indecision regarding the identity of Defendant was explained at trial. When Gurnitz was recalled to the stand by Defendant, Gurnitz admitted on cross examination that his life and the lives of his wife and child had been threatened by associates of Defendant's because of Gurnitz' role as an informant. Gurnitz also testified that he was assaulted in jail by two persons because of his role as an informant, and that he had to be transferred to another facility for his own protection. Finally, although Gurnitz testified in the afternoon that he identified the Defendant because he was threatened by the prosecutor and Sergeant Blackwell, he admitted on cross examination that he was only threatened with a perjury prosecution if he lied on the stand.

When Gurnitz' testimony regarding the presence of external pressures was juxtaposed with his decision to re-take the stand and recant his original testimony, the jury had an explanation for Gurnitz' conflicting testimony. The cancellation rule does not apply because the jury was not presented with two irreconcilable versions of events. It was for the jury to decide which version to believe.

Second, Gurnitz' identification of Defendant was corroborated by the testimony of Sergeant Blackwell. Blackwell testified that he monitored the entire transaction via a radio that received a signal from the wireless transmitter hidden on Gurnitz' person. The State introduced two different tape recordings of the transaction, one of which was played for the jury, and Blackwell testified that tapes contained a recording of the Defendant's comments during the transaction. Blackwell testified that he recognized Defendant's voice because "I've known her 18, 19 years and have talked to her numerous times and know her voice well."

In summary, Gurnitz' conflicting testimony was explained, and his identification of Defendant was corroborated by Sergeant Blackwell. As a result, the cancellation rule does not apply. There is sufficient evidence such that a rational trier of fact could find, beyond a reasonable doubt, that Defendant was the person who sold Gurnitz cocaine.

B.

Defendant next argues that the verdict is "contrary to law." Although the exact nature of Defendant's argument is difficult to ascertain, in essence Defendant argues that the prosecutor knowingly relied upon false evidence presented by Michael Gurnitz in order to obtain Defendant's conviction, thus depriving Defendant of due process of law. We disagree.

Defendant's argument rests on established constitutional law that prohibits a prosecutor from knowingly using false evidence to obtain a conviction. See Napue v. Illinois, 360 U.S. 264, 269 (1959); Mooney v. Holohan, 294 U.S. 103, 112 (1935); State v. Spurlock, 874 S.W.2d 602, 610-11 (Tenn. Crim. App. 1993). On this record, however, there is no conclusive evidence that Gurnitz' testimony during the State's case-in-chief was false. Without more, Defendant's conclusory allegations of wrongdoing on the part of the prosecution will not suffice. Defendant is not entitled to relief on this issue.

C.

Finally, Defendant argues that the trial court erred when it refused to continue Defendant's trial upon discovery of an absent defense witness. On the morning of trial, after the jury had been sworn, Defense counsel became aware that a defense witness was not present, and addressed the court:

Defense Counsel #1: Judge, before we bring the jury back in, we've got an issue about a material witness who was subpoenaed who was present at the time the allegation of the crime (sic) took place. He's in jail in Murray, Kentucky and has not been brought in.

The Court: I didn't get any Order of Transport or anything. Are you aware that the witness was incarcerated?

Defense Counsel #1: Yes, I put it on the subpoena.

The Court: Do you know what that person would testify to?

Defense Counsel #1: I think so.

The Court: What type of arrangement do you have with Murray County? Can this person be arranged to be brought in?

Court Officer: Yes, sir. We'd have to go get him.

The Court: You should have done this prior to today.

Defense Counsel #1: Judge, we didn't realize that . . .

The Court: Do you have a standard order for the State?

General: I don't have one, Judge, but I may be able to get one if I can have a minute. I can run see (sic) if [ ] has one downstairs or something. I don't have one with me.

The Court: Well, get me one cranked up and–

Defense Counsel #1: I'm sorry Judge. Ms. Hilliard says he's been moved to Lexington anyway.

The Court: Lexington what?

Defense Counsel #1: Kentucky.

The Court:	Well, it looks like you've got an unavailable witness because they are out of state. Have they served the subpoena?
Clerk:	He was served in the Calloway County Jail.
The Court:	How did they do that?
Clerk:	The sheriff's department here sent it to Calloway County.
The Court:	I don't know that I'm in a position to help you. I mean, there's been no Motion for Continuance to show the witness was unavailable. We can issue a capias, but I'm sure there's no way they could get them from Lexington, or whatever.
Defense Counsel #2:	Judge, we just found out this morning. Ms. Hilliard received a letter saying he had been transferred. We were under the impression he was at Murray.
The Court:	I perhaps might have been able to assist you had the person been at Murray. Lexington, I don't see any way that can be accomplished. So the record will show he was served with a subpoena, and I can issue a capias, but there's no way he can be served, and the Court was not made aware of this prior to the swearing of the jury, so at this time we'll continue. Bring the jury back, please.

As noted at the beginning of this opinion, Defendant has technically waived this issue because she has failed to cite to any authority to support this argument. Tenn. Crim. App. R. 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988). We also note that this issue was waived by Defendant at trial: although Defendant drew the trial court's attention to the fact that the witness was absent, Defendant did not object in any form when the trial court chose to proceed with the trial. See T.R.A.P. 36(a); Teague v. State, 772 S.W.2d 915, 926 (Tenn. Crim. App. 1988); Killebrew, 760 S.W.2d at 235.

Notwithstanding waiver, we do not find Defendant's argument to be persuasive. It is well settled that the grant or denial of a continuance rests within the sound discretion of the trial judge. Harris v. State, 947 S.W.2d 156, 173 (Tenn. Crim. App. 1996) (citing State v. Morgan, 825 S.W.2d 113, 117 (Tenn. Crim. App. 1991)). A conviction will only be reversed if (1) the denial was an abuse of

discretion, and (2) the defendant was prejudiced, to be proved by a showing that there is a reasonable probability that, had the continuance been granted, the results of the trial would have been different. Morgan, 825 S.W.2d at 117 (citing State v. Dykes, 803 S.W.2d 250, 257 (Tenn. Crim. App. 1990); Baxter v. State, 503 S.W.2d 226, 230 (Tenn. Crim. App. 1973)).

Defendant correctly draws our attention to the fact that Defendant has a fundamental constitutional right to compulsory process for obtaining witnesses in her favor. See U.S. Const. amend. VI; Tenn. Const. art. I, § 9. When the witness is shown to be material, the trial court has no discretion as to the issuance of such process. Bacon v. State, 385 S.W.2d 107, 109 (1964). Moreover, "in the legitimate exercise of this right to obtain witnesses . . . a reasonable opportunity must be afforded to make the process effective and, if necessary for this purpose, a reasonable adjournment of the trial should be granted." State v. Hughes, C.C.A. No. 02C01-9208-CR-0018-00183, 1993 WL 193712, at * 5 (Shelby County) (Tenn. Crim. App., Jackson, June 9, 1993), no Rule 11 application filed (quoting State v. Rossi, 43 A.2d 323, 326 (R.I. 1945)).

Here, however, Defendant has not placed any evidence before us regarding the substance of the missing witness' testimony. At trial defense counsel told the judge that the witness was present when the crime took place. The judge asked defense counsel if he knew what the witness would say, and defense counsel replied "I think so." This is the extent of the information in the record. Defense counsel did not make an offer of proof. Nor was there any evidence presented at trial regarding the absent witness' knowledge of the events at issue. As a result, there is no indication that the missing witness' testimony was material to Defendant's case. In the absence of any such information in the record we cannot say that the trial judge abused his discretion in requiring the trial to proceed, nor can we say that the results of the trial would have been different had the continuance been granted and the missing witness testified. As a result, Defendant is not entitled to relief on this issue.

III. Conclusion

For the above reasons we affirm Defendant's conviction of sale of a schedule II controlled substance.

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THOMAS T. WOODALL, Judge

CONCUR:

_____
DAVID G. HAYES, Judge

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JOE G. RILEY, JR., Judge