IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER SESSION, l993

FILED

November 16, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE	)	
	)	
APPELLEE	)	NO. 0lC0l-9309-CC-00292
	)	
	)	WILLIAMSON COUNTY
	)	
V.	)	HON. DONALD P. HARRIS, JUDGE
	)	
	)	(Promoting Prostitution)
	)	
RONALD EDWARD PARRISH	)	
	)	
APPELLANT	)	

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AFFIRMED

OPINION FILED:_____

JERRY SCOTT, PRESIDING JUDGE

O P I N I O N

The appellant was convicted of promoting prostitution, a Class E felony, in violation of Tenn. Code Ann. § 39-l3-5l5, for which he received a sentence of eighteen months in the Tennessee Department of Correction and a fine of $3,000.00. On appeal, the appellant has presented eleven issues. The first three issues deal with whether the search of his car was reasonable. The fourth deals with the relevance of various items of evidence. The next two issues deal with whether the state's conduct toward its material witness violated the appellant's due process rights. The seventh issue alleges error occurred when the exhibits were sent to the jury room for their use during deliberations. The next two issues concern the expert testimony of Sergeant Joe Blakely. The tenth issue deals with the trial court's denial of the appellant's motion for judgment of acquittal, and the final issue deals with improper statements allegedly made by the state during its closing argument. Finding that none of these issues have any merit, the judgment of the trial court is affirmed.

A brief review of the facts is helpful in clarifying the issues. On October 4, l99l, as part of an undercover prostitution sting operation called "Dear John," Jeff Hughes and Melissa Gobbell Angel, officers employed by the Brentwood Police Department, placed a phone call to an escort service known as Charlie's Angels II. They requested the services of a male prostitute in their Brentwood hotel room. Approximately a half hour later, the appellant drove up to the hotel in his Lincoln Continental and dropped off Mark Counessee, who went to the undercover officers' room and identified himself as the prostitute they had requested. Meanwhile, the appellant had driven away, but other undercover officers followed his car. Mr. Hughes and Ms. Angel arrested Mr. Counessee after he accepted money and disrobed. Shortly thereafter, the officers following the appellant arrested him and took both him and his car to the police station.

At the station, the officers conducted a warrantless search of the

appellant's automobile. They seized literally thousands of pieces of paper in their search for evidence that he was promoting prostitution. The papers were taken inside the station and sorted through over an extended period of time. This documentary evidence played a major role in the prosecution's case, as did the testimony of Mr. Counessee, the prostitute who had visited the two undercover officers.

In his first issue the appellant argues that the trial court erred by not suppressing the evidence gathered in the warrantless search of his automobile, claiming that the search violated Article I § 7 of the Tennessee Constitution and the Fourth Amendment to the United States Constitution.

The state suggests in its brief that the trial judge erred by overruling the appellant's motion to suppress, but that the error was harmless because the appellant did not challenge the sufficiency of the evidence against him.

Contrary to that assertion, the appellant challenged the sufficiency of the evidence and, as the appellant correctly asserts in his reply brief, constitutional rights should not be waved aside so lightly. Thus, we address the issue on the merits.

Although it is well-recognized that a warrantless search is presumptively unreasonable, Fuqua v. Armour, 543 S.W.2d 64, 66 (Tenn. l976), there are exceptions to this rule. One is the search of an automobile when probable cause exists and the car is "halted while moving along the public street or highway." Id. Another is a search made after an arrest, but for which there was probable cause at the time and place of the arrest. Chambers v. Maroney, 399 U.S. 42, 52, 90 S.Ct. l975, l98l, 26 L.Ed.2d 4l9 (l970). In such a case, if a warrantless search at the scene would be permissible, then the police may instead seize the car and search it at the station. Michigan v. Thomas, 458 U.S.

259, 26l, l02 S.Ct. 3079, 3080-8l, 73 L.Ed.2d 750 (l982); See also: Florida v. Meyers, 466 U.S. 380, 382, l04 S.Ct. l852, l853, 80 L.Ed.2d 38l (l984) (validating a search carried out in a secure area eight hours after the arrest).

The appellant claims that State v. Leveye, 796 S.W.2d 948 (Tenn. l990), sets out a three-prong test for invoking the vehicle exception to the warrant requirement. The elements of the test are: (l) that the vehicle be mobile; (2) that there is a lesser expectation of privacy in a vehicle; and (3) that the search be such as a magistrate would authorize. Appellant has erred in reading the application of such a test into Leveye. What the case does is interpret California v. Carney, 47l U.S. 386, l05 S.Ct. 2066, 85 L.Ed.2d 406 (l985), into Tennessee law. The Court holds that vehicles are inherently mobile, which creates a conclusive presumption of exigency, and concludes that the only real requirement is that there be probable cause to believe the vehicle contains contraband. Leveye, 796 S.W.2d at 952. Although Carney dealt specifically with a search for contraband, the rule is not limited to such searches, for the scope of a warrantless search is the same as that which could be authorized by warrant. United States v. Ross, 456 U.S. 798, 825, l02 S.Ct. 2l57, 2l72, 72 L.Ed.2d 572 (l982). A search warrant may, of course, be issued for items other than contraband.

In this case, the police also searched a briefcase that they found in the trunk of the appellant's car. This did not make the search unreasonable. If there is probable cause to search the vehicle, then there is also probable cause to later search containers in the car. In United States v. Johns, 469 U.S. 478, l05 S.Ct. 88l, 887, 83 L.Ed.2d 890 (l985), the Supreme Court, relying on, inter alia, Meyers and Thomas, found that police may later search packages removed from a vehicle without a warrant if they could have searched them earlier.

Tennessee courts have "consistently followed the decisions of the United

States Supreme Court in deciding cases involving the vehicle exception" to the warrant requirement. State v. Leveye, supra, 796 S.W.2d at 953. Thus, the warrantless search of the appellant's car is valid if probable cause can be shown.

Whether there is probable cause for a search depends on the particular facts of each case. Fowler v. United States, 229 F.2d 2l5, 2l5-l6 (6th Cir. l955). In this case, the trial court found that because of the nature of the call-in prostitution business, whereby prostitutes are delivered by car to their destination, a car used in such a delivery is likely to contain business records relating to prostitution. The police officers observed the appellant leaving Mr. Counessee at the motel. They then followed the appellant's car until they were informed of Mr. Counessee's arrest for prostitution, at which time they pulled the appellant over and placed him under arrest. At that point, the police certainly had probable cause to believe that the car contained evidence of the appellant's prostitution activities, since, for search and seizure purposes, probable cause means reasonable grounds for suspicion for cautious men to believe that the accused person is guilty of the offense upon which the search is founded. United States v. O'Leary, 20l F.Supp. 926, 928 (E.D. Tenn. l962). Therefore, the search was not unreasonable and the appellant's issue is without merit.

In his second issue, the appellant argues that Article XI, § l6 of the Tennessee Constitution prohibits any exceptions to the warrant requirement of Article I, § 7 of the Tennessee Constitution.[1] Although the issue is well-argued,

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[1]Article XI, § l6 provides:

> The declaration of rights hereto prefixed is declared to be a part of the Constitution of this State, and shall never be violated on any pretence whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the bill of rights contained, is excepted out of the General powers of government, and shall forever remain inviolate.

Article I, § 7 provides:

the appellant cites no cases which have ever suggested such a holding. Indeed cases from the Tennessee Supreme Court have held absolutely to the contrary. State v. Leveye, supra, 796 S.W.2d at 953 (citing cases). We obviously have no authority to overrule the Tennessee Supreme Court on this or any other issue. Article VI, § 1 of the Tennessee Constitution vests judicial power in "one Supreme Court" and such other "inferior courts" as the Legislature shall from time to time, ordain and establish. The Court of Criminal Appeals is clearly an "inferior court," subject to the actions of the supreme judicial tribunal of this State, whose "adjudications are final and conclusive on all questions determined by it." Barger v. Brock, 535 S.W.2d 337, 340 (Tenn. l976). This issue is without merit.

In his third issue, relying on Lo-Ji Sales, Inc. v. New York, 442 U.S. 3l9, 99 S.Ct. 23l9, 60 L.Ed.2d 920 (l979), the appellant argues that the search of his car was a general search in violation of Article I, § 7 of the Tennessee Constitution and the Fourth Amendment to the United States Constitution. He claims that a search warrant like the one here could not have been issued for a search for documentary evidence. However, in State v. Bell, another promoting prostitution case, 832 S.W.2d 583, 584 (Tenn.Crim.App. l99l), this Court upheld the search of a mobile home where the warrant specified that the police hoped to find "certain items such as written records, tally sheets, job assignments, work schedules, cash receipts, telephone numbers, client lists and a large sum of unreported cash." See also: State v. Meadows, 745 S.W.2d 886, 89l (Tenn.Crim.App. l987) (finding that a warrant authorizing the seizure of "any letters, papers, records, materials, or other property which pertain to drug sales" was not "unconstitutionally general.") In this case, the officer in charge of the

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> That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offenses are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.

search testified that they were looking for "business records pertaining to prostitution." The items they found were similar to those listed on the warrant in Bell. Thus, we find that since a valid warrant could have been issued for this search, and the search did not violate the "general search" provisions of either constitution.

Some of the seized materials had no relation to prostitution but were nonetheless admitted into evidence. These included the cards from Sam's Wholesale Club, business cards from car dealers, receipts for the purchase of auto parts, and other similar items. Those items, which had no relation to the crime, were irrelevant and should not have been admitted as evidence, since only "relevant evidence" is admissible. Rule 402, Tenn.R.Evid. However, this evidence had no prejudicial effect upon the appellant. Unless the error affected the outcome of the trial, there is no basis for reversal. Rule 52(a), Tenn.R.Crim.P. ; State v. Horne, 652 S.W.2d 9l6, 9l9 (Tenn. Crim.App. l983). Thus, the trial court's error in allowing the admission of those items into evidence was harmless beyond any doubt. The third issue has no merit.

In his next issue, the appellant argues that the trial court erred by admitting numerous items of documentary evidence, including $2,500.00 in currency, telephone records and various checks, into evidence over his objection. He claims that the evidence was irrelevant, as it is not properly connected to the crime with which he is charged.

The relevance of evidence is a determination within the trial court's discretion, and that determination will not be overturned absent an abuse of discretion. State v. Leath, 744 S.W.2d 59l, 593 (Tenn.Crim.App. l987). In this case, the trial judge determined that the evidence in question was relevant to prove or disprove the appellant's role in promoting prostitution. Although, standing alone, some of the evidence was of questionable relevance, it is still

admissible if it becomes relevant when taken in connection with other evidence. Ivey v. State, 2l0 Tenn. 422, 360 S.W.2d l, 4 (l962). Here, the testimony of Sergeant Joseph Blakely of the Metropolitan Nashville Police Department on how organized prostitution was conducted in Nashville made the documentary evidence relevant.

The appellant further argues that the documentary evidence constitutes evidence of "other crimes," making it inadmissible under Rule 404(b), Tenn.R.Evid. As discussed in the preceding paragraph, the trial judge found this evidence relevant to proving the crime of promoting prostitution. Further, the appellant is unclear as to exactly what "other crimes" this evidence shows. The evidence appears to show his involvement in promoting prostitution, the crime with which he was charged. Thus, this issue has no merit.

In the fifth issue, appellant argues that he was denied his right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution because the state allowed its chief material witness to commit perjury.

Appellant points out the similarities between this case and the case of United States v. Wallach, 935 F.2d 445, 457 (2d Cir. l99l). The witness in that case committed perjury, just as the state's key witness, Mr. Counessee, did here. In Wallach, the perjuring witness was also the keystone of the government's case. However, the court in Wallach made much of the fact that the government attempted to rehabilitate the witness on redirect. In this case, however, it was the prosecutor who brought the perjury to the trial court's attention. Thus, this case does not fall under the situation where a reversal is "virtually automatic" when the government knowingly allows false testimony to be introduced. United States v. Stofsky, 527 F.2d 237, 243 (2d Cir. l975). Here, the state apprised the court of the false testimony.

In the absence of this knowing introduction, perjured testimony will reach the level of a due process violation only if it is of "an extraordinary nature.... It must leave the court with a firm belief that but for the perjured testimony, the defendant would likely not have been convicted." Sanders v. Sullivan, 863 F.2d 2l8, 226 (2d Cir. l988). The perjured testimony here was not material, as Counessee merely lied about not being employed.[2] At most, the perjury on that minor point goes to the credibility of the witness. Such evidence is certainly not grounds for a new trial. See: Clarke v. State, 2l8 Tenn. 259, 402 S.W.2d 863, 872 (l966). Further, there is no reason to believe that, in the absence of the perjured testimony or the presence of truthful testimony about the witness' employment status, the jury would have reached a different verdict. Thus, this issue is without merit.

In his sixth issue, the appellant argues that he was denied his due process rights when the state failed to disclose a grant of leniency to the key witness, Mr. Counessee. The appellant says he first learned of this failure some five months after the trial in a statement from Jan Hassler, who had lived with Counessee for some time. Because Ms. Hassler's affidavit, if believed, would constitute newly discovered evidence, we apply the analysis set forth in State v. Goswick, 656 S.W.2d 355, 358-59 (Tenn. l983), where the Tennessee Supreme Court set forth the test to determine whether a new trial should be granted based on newly discovered evidence. A court may order a new trial if: (l) the defendant used reasonable diligence to discover the evidence; (2) the evidence is clearly material; and (3) the evidence would likely change the result if accepted by the jury. Even if these criteria are met, the trial court still has the discretion to grant or deny a new trial. Id., at 358. If the evidence would merely discredit a witness, contradict the witness' statements or impeach the witness, it does not justify the granting of a new trial. State v. Arnold, 7l9 S.W.2d 543, 550

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[2]Although the appellant claims there were several other instances of perjury in Mr. Counessee's testimony, the employment lie is apparently the only one of which he claims the state had knowledge.

(Tenn.Crim.App. l986).

The evidence here does not meet that standard. Not only has the appellant failed to show he used reasonable diligence to discover the evidence, the evidence is not sufficient to justify a new trial, since it would simply serve to impeach the witness.

The appellant cites Giglio v. United States, 405 U.S. l50, l55, 92 S.Ct. 763, 3l L.Ed.2d l04 (l972), for the proposition that the jury is entitled to know about a deal between the prosecutor and a witness. However, in that case it was clear that there had indeed been such a deal, as the Assistant U.S. Attorney admitted the deal. Here, there is only the affidavit of Jan Hassler, the witness' live-in girlfriend, which is, at its very best, only impeaching evidence. Thus, Giglio does not control here, since "[w]ithout some proof that deals were made, it cannot be said that due process was denied." State v. Teague, 645 S.W.2d 392, 398 (Tenn. l983). This issue is without merit.

In his next issue, the appellant claims that the trial court erred by allowing trial exhibits to be sent into the jury room for the jurors' use during deliberations.

The rule in Tennessee at that time was that trial exhibits should not be carried into the jury room during deliberations in a criminal case absent the consent of the parties.[3] State v. Flatt, 727 S.W.2d 252, 254 (Tenn.Crim.App. l986) (citing a long line of cases). Here, the trial judge allowed the documentary evidence to be sent to the jury room over the objections of the appellant. Therefore, the trial judge clearly erred.

However, such an error warrants a reversal only if it affirmatively appears

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[3]The law has now been changed to provide that exhibits will be taken to the jury room in criminal cases, absent good cause for withholding them. Rule 30.l, Tenn.R.Crim.P.

to have affected the result of the trial on the merits. Rule 52(a), Tenn.R.Crim.P. In this case, the exhibits sent to the jury were documentary, not demonstrative as in Flatt.[4] In State v. Wright, 6l8 S.W.2d 3l0, 3l9 (Tenn.Crim.App. l98l), this Court found harmless error in a trial judge's sending certain exhibits into the jury room. Under the circumstances of this case, we find that absolutely no prejudice resulted to appellant.[5] Thus, the error was harmless and the issue is without merit.

In the eighth issue, the appellant claims the trial court erred in allowing Sgt. Blakely to testify as an expert witness and give opinion testimony. Rule 702, Tenn.R.Evid., provides that if "specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." Whether the knowledge will "substantially assist" the jury is a question for the trial judge. Rule l04(a), Tenn.R.Evid. Here, the trial judge found that Sgt. Blakely could explain how a prostitution organization is organized and operated. Such information would certainly assist the jury. As to his qualifications, it is left to the sound discretion of the trial court to determine who may testify as an expert witness. State v. Taylor, 645 S.W.2d 759, 762 (Tenn.Crim.App. l982). Sgt. Blakely clearly possessed superior training, education and knowledge of organized prostitution in Davidson County. Thus, there was no abuse of discretion in the trial court's allowing him to testify as an expert witness. The issue is without merit.

In his next issue, the appellant argues that the trial court erred by allowing

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[4]In Flatt, the exhibits were photographs and a styrofoam coffee cup. The cup was more problematical for this Court, since it could be used by the jury for an unsupervised experiment. State v. Flatt, 727 S.W.2d at 255.

[5]In this case, the trial judge sent all the exhibits. In Wright only selected exhibits were sent -- a far more dangerous practice, but one which still did not mandate reversal.

Sgt. Blakely to be referred to as a member of the organized crime unit of the Metropolitan Police Department. Under Rule 702, Tenn.R.Evid., the state and the accused are permitted to qualify their own witnesses. N. Cohen, D. Paine, and S. Sheppeard, Tennessee Law of Evidence § 702.4 (2d ed.). Here, the prosecutor simply informed the jury of the witness' qualifications. Further, since Sgt. Blakely was a member of the organized crime unit, there is no reason why that information could not be brought to the jury's attention, since it did not prejudice the appellant in any way.[6] The issue is, therefore, without merit.

In the tenth issue, the appellant argues that the trial court erred by denying his motion for judgment of acquittal under Rule 29(a), Tenn.R.Crim.P., at the conclusion of all the proof. He claims that, because the prosecution failed to independently corroborate the testimony of Mr. Counessee, there was insufficient evidence to sustain a conviction.

When deciding a motion for judgment of acquittal, the standard for judging the adequacy of the evidence is whether it is sufficient or insufficient to convict. State v. Cabbage, 57l S.W.2d 832, 836 (Tenn. l978). The trial judge here determined that there was sufficient evidence for a conviction, as he denied the motion for judgment of acquittal and allowed the case to go to the jury. The jury proceeded to convict the appellant of promoting prostitution. We will set aside a finding based on the sufficiency of the evidence only if the evidence is insufficient to support the jury's finding of guilt beyond a reasonable

doubt. Rule l3(e), Tenn.R.App.P.; Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 278l, 2786-2792, 6l L.Ed.2d 560 (l979). From our examination of the evidence,

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[6]There was no allegation or insinuation that this appellant was involved with organized crime.

it is clear that the evidence was sufficient to support a finding of guilt beyond a reasonable doubt. This issue has no merit.

However, the appellant claims we should not look at the whole of the evidence. Specifically, he argues that the testimony of Mr. Counessee should not have been considered by the jury. Under Tennessee law, unlike most other jurisdictions, if a witness is declared an accomplice as a matter of law, that witness' testimony requires independent corroboration to sustain a conviction. Mathis v. State, 590 S.W.2d 449, 454 (Tenn. l979). The appellant contends that the state failed to provide this corroboration. We disagree.

First, evidence relied upon as corroborating that of an accomplice need not extend to every part of the accomplice's testimony, but need only tend to connect the defendant to the commission of the offense. Stanley v. State, l89 Tenn. ll0, 222 S.W.2d 384, 387 (l949). Further, the corroborating evidence may be circumstantial, and need not be adequate, in and of itself, to support a conviction. State v. Hensley, 656 S.W.2d 4l0, 4l2 (Tenn.Crim.App. l983). It is sufficient if there is evidence entirely independent of the accomplice's testimony that, taken by itself, leads to the inference that a crime has been committed and that the accused is implicated in that crime. Mathis, 590 S.W.2d at 454. Finally, what is sufficient corroboration depends on the particular facts and circumstances of each case. Wallis v. State, 450 S.W.2d 43, 45-6 (Tenn.Crim.App. l969). In this case, there are several sources of corroboration. The papers in the trunk of the car and the fact that the appellant was observed leaving Mr. Counessee at the hotel were clearly sufficient to corroborate the accomplice's testimony.

Thus, the trial judge properly considered the whole of the evidence when

deciding to deny the motion for judgment of acquittal. Therefore, there was sufficient evidence for the case to go to the jury, and the trial judge correctly denied the motion for judgment of acquittal. This issue is without merit.

In his final issue, the appellant argues that various statements made by the prosecutor during closing argument were improper, outside the record, and designed to inflame the jury in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The appellant points to three different occasions where the prosecutor made an allegedly improper comment. On each occasion, the trial judge admonished the prosecutor. Further, on one occasion, the trial judge instructed the jury to disregard the prosecutor's comments which referred to evidence outside the record. These were the "prompt curative instructions" called for by State v. Hunt, 665 S.W.2d 75l, 755 (Tenn.Crim.App. l984), where this Court found that such statements are not prejudicial to the appellant if promptly cured by a proper jury instruction. The other two comments by the prosecutor were clearly harmless under the test of Judge v. State, 539 S.W.2d 340, 344 (Tenn.Crim.App. l976), since this was indeed a very strong case against the appellant.[7] Therefore, this issue has no merit.

Finding no merit to any issue, the judgment is affirmed.

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[7]In Judge, this Court set out five factors to consider in determining whether the improper conduct could have affected the verdict:

1. The conduct complained of viewed in context and in light of the facts and circumstances of the case.
2. The curative measures undertaken by the court and the prosecution.
3. The intent of the prosecutor in making the improper statement.
4. The cumulative effect of the improper conduct and any other errors in the record.
5. The relative strength or weakness of the case.

Id., at 344.

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JERRY SCOTT, PRESIDING JUDGE

CONCUR:

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JOE B. JONES, JUDGE

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JULIAN P. GUINN, SPECIAL JUDGE