IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1995 SESSION

STATE OF TENNESSEE,)
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APPELLEE,)
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)
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v.)
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)
BRUCE C. RELIFORD,)
)
APPELLANT.)

No. 02-C-01-9504-CR-00111

Shelby County

W. Fred Axley, Judge

(Aggravated Robbery)

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OPINION FILED:_____

AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED FOR RESENTENCING

Joe B. Jones, Judge

O P I N I O N

The appellant, Bruce C. Reliford, was convicted of three (3) counts of aggravated robbery, a Class B felony, by a jury of his peers. The trial court found that the appellant was a standard offender and imposed the following Range I sentences:

a) Indictment number 93-06435, a fine of $5,000 and confinement for twelve (12) years in the Department of Correction;

b) Indictment number 93-06436, a fine of $4,000 and confinement for twelve (12) years in the Department of Correction; and

c) Indictment number 94-02500, a fine of $4,000 and confinement for twelve (12) years in the Department of Correction.

The sentences are to be served consecutively. Thus, the effective sentence imposed was fines totaling $13,000 and confinement for thirty-six (36) years.

Several issues are presented for review. The appellant contends that the evidence contained in the record is insufficient, as a matter of law, to support a finding by a rational trier of fact that he was guilty of three counts of aggravated robbery beyond a reasonable doubt. He also contends that the trial court committed error of prejudicial dimensions by (a) denying his motion to suppress identification evidence, (b) forcibly bringing him into the courtroom during the course of the trial, (c) ruling that his convictions for carjacking and robbery could be used to impeach him if he testified in support of his defense, and (d) imposing sentences that are excessive. He further contends this his constitutional rights to due process and equal protection were violated because the state failed to preserve the photographs that were included in an array of photographs presented to the witnesses.

The judgment of the trial court is affirmed in part, modified in part, and remanded to the trial court for resentencing. The conviction in indictment 93-06435 is affirmed. The conviction for aggravated robbery in indictment 93-06436 is modified by reducing the conviction to robbery. The conviction for aggravated robbery in indictment 94-02500 is modified by reducing the conviction to theft over $10,000.

The victims in these cases were employees of two separate Circle K convenience stores located at 4673 Millbranch Road and 2006 Shelby Drive, both in Memphis,

Tennessee. The robberies occurred when the employees went to a nearby bank to make a deposit. On both occasions the bank was closed. The deposit was to be placed in the "night deposit" slot at the bank.

Barbara Randolph from the Millbranch Road store attempted to make a deposit[1] on the afternoon of January 12, 1992. As she approached the bank, the appellant opened his jacket, showed Randolph that he had a pistol, and stated: "Give me your bag and give me your [car] keys." Randolph complied with this command. The appellant then told Randolph to get into her car. Since she was fearful that the appellant would hurt her, she complied with this command as well. The appellant drove Randolph to a residential neighborhood, told her to exit the vehicle, and drove away.[2] Her motor vehicle was subsequently recovered by the Memphis Police Department.

Mary Adams of the Shelby Drive store attempted to make a deposit[3] on the afternoon of April 12, 1992. Randolph followed Adams to the bank in a separate vehicle for safety reasons. The appellant arrived at the bank moments after Adams and Randolph. When he exited his vehicle, he started walking towards Adams. As he passed Randolph, he said: "Hi." Randolph immediately recognized the appellant as the person who had robbed her in January. She told the appellant: "Don't touch me. Don't do anything to me."

The appellant told Adams to "[g]ive me the money." Adams told the appellant that she did not have any money. He then told Adams: "If you don't give me the money, I will blow your damn head off." Adams took the deposit from under her shirt and threw it. The deposit bag landed in Randolph's vehicle. The appellant entered the vehicle and drove away.

Both Randolph and Adams identified the appellant from an array of photographs on two separate occasions. Randolph also made a courtroom identification of the appellant during her testimony. The appellant, who had opted to remain outside the courtroom, was not inside the courtroom when Adams testified. Although the state requested that the court require the appellant to come into the courtroom so that Adams could view him, the court

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[1]The bank deposit totaled approximately $4,700.

[2]Randolph testified that her motor vehicle was worth between $12,000 and $13,000.

[3]The deposit consisted of cash, checks, and food stamps totaling approximately $2,600.

denied the request.

I.

The appellant contends that the evidence contained in the record is insufficient to sustain his convictions. He argues that the evidence of his identity as the person who committed these crimes was insufficient. He also contends that the state failed to establish that he possessed a pistol or other dangerous weapon when he committed the April 12, 1992 robberies. The state argues that the identification evidence was sufficient to support the convictions. However, the state concedes that the evidence is insufficient, as a matter of law, to support two of the appellant's convictions for aggravated robbery and states these two convictions should be reduced to robbery.

A.

When an accused challenges the sufficiency of the convicting evidence, this Court must review the record to determine if the evidence adduced at trial is sufficient "to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App.), per. app. denied (Tenn. 1990).

In determining the sufficiency of the convicting evidence, this Court does not reweigh or reevaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App.), per. app. denied (Tenn. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859, cert. denied, 352 U.S. 845, 77 S.Ct. 39, 1 L.Ed.2d 49 (1956). To the contrary, this Court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of the witnesses, the weight and value to be given to the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d at 835. In State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973), our Supreme Court said: "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State."

Since a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused, as the appellant, has the burden in this Court of illustrating why the evidence is insufficient to support the verdicts returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court will not disturb a verdict of guilt due to the sufficiency of the 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 accused is guilty beyond a reasonable doubt. Tuggle, 639 S.W.2d at 914.

B.

The offense of "robbery" is defined as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401(a). The offense of robbery is a Class C felony.

The offense of "aggravated robbery" is defined as a robbery "(1) [a]ccomplished 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; or (2) [w]here the victim suffers serious bodily injury." Tenn. Code Ann. § 39-13-402(a). Since neither Randolph nor Adams suffered "serious injury" within the meaning of this statute, the state's case must rise or fall on whether the offense was accomplished by the use of a deadly weapon, the display of an article that could be used as a deadly weapon, or the display of an article fashioned to lead the victim to believe it was a deadly weapon. Aggravated robbery is a Class B felony.

A person commits the offense of "theft" "if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the

owner's effective consent." Tenn. Code Ann. § 39-14-103. In other words, a person commits theft if he (a) knowingly obtains the property of another, (b) intends to deprive the owner of the property, and (c) the property is obtained without the permission of the owner. A person also commits the offense of theft if he (a) knowingly exercises control over the property of another, (b) intends to deprive the owner of the property, and (c) obtains the property without the permission of the owner.

(1)

In this case, the evidence of the appellant's guilt of the January 12, 1992 offense is overwhelming. The appellant approached Randolph, opened his coat so she could see that he was armed with a pistol, and took the bank deposit bag and her motor vehicle. On three separate occasions, Randolph identified the appellant as the person who robbed her. In other words, the evidence is clearly sufficient to support the finding of the jury that the appellant was guilty of aggravated robbery beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979).

(2)

The state has correctly conceded that the appellant should not have been convicted of two counts of aggravated robbery for the offenses committed on April 12, 1992. This Court agrees that the offense committed against Adams should be reduced to simple robbery. However, this Court is of the opinion that the offense committed against Randolph on this date constituted theft not robbery.

Neither Randolph nor Adams testified that the appellant used or exhibited a dangerous weapon. The appellant simply said "Hi" to Randolph as he walked past her. He told Adams to "give me the money." When she stated that she did not have any money, the appellant told Adams: "If you don't give me the money, I will blow your damn head off." However, the record is devoid of evidence that the appellant had the capability

of harming Adams with a dangerous weapon. The appellant "scuffled" with Adams before Adams threw the deposit bag into Randolph's motor vehicle. Furthermore, Adams positively identified the appellant as the person who robbed her on April 12th. In short, these facts would support a finding by a rational trier of fact that the appellant was guilty of robbery beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, supra.

Randolph was standing outside of her motor vehicle while Adams and the appellant scuffled. She apparently left her car keys in the ignition. When Adams threw the deposit bag into Randolph's vehicle, the appellant got inside the vehicle and drove away. The appellant did not approach Randolph or make any statement to her other than the initial "Hi." In short, the record is devoid of evidence that the appellant stole the vehicle "by violence or putting [Randolph] in fear," an essential element of robbery. Tenn. Code Ann. § 39-13-401. However, the evidence contained in the record would support a conviction of theft over the value of $10,000, a Class C felony.[4] The appellant knowingly obtained possession of Randolph's vehicle, he intended to deprive Randolph of her vehicle, and he took the vehicle without her permission. Tenn. Code Ann. § 39-14-103. Tenn. R. App. P. 13(e); Jackson v. Virginia, supra.

C.

In summary, the appellant's conviction for aggravated robbery in indictment number 93-06435 is affirmed. The evidence is clearly sufficient to support his conviction of this offense.

The appellant's conviction for aggravated robbery in indictment number 93-06436 is not supported by the evidence for the reasons hereinabove stated. However, the evidence is sufficient to support a conviction for the lesser included offense of robbery. Therefore, the judgment of the trial court in this case is modified to show a conviction for robbery.

The appellant's conviction for aggravated robbery in indictment number 94-02500

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[4]Tenn. Code Ann. § 39-14-105(4) provides that the theft of property is "[a] Class C felony if the value of the property or services obtained is ten thousand dollars ($10,000) or more but less than sixty thousand dollars ($60,000)."

also is not supported by the evidence for the reasons hereinabove stated. However, the evidence is sufficient to support a conviction for the lesser included offense of theft. Therefore, the judgment of the trial court in this case is modified to show a conviction for theft over the value of $10,000.

II.

The appellant raises two contentions concerning the identification evidence introduced through Randolph and Adams. First, he contends that the trial court should have granted his motion to suppress this evidence. He argues that the initial photographs viewed by Randolph and Adams were not introduced into evidence. Thus, he argues, it must be presumed that if these photographs had been introduced, they would have been unfavorable to the state because they "would have indicated suggestiveness." He cites the case of Ford v. State, 184 Tenn. 443, 201 S.W.2d 539 (1945) in support of his argument. Second, the appellant contends that his right to due process of law and his equal protection rights were violated because the last photographic array, which was introduced into evidence, has not been included in the record transmitted to this Court. He argues that the exhibit was lost by the state between the trial and the preparation of the record.

A.

In the appellant's amended motion for a new trial it is alleged:

> The Court erred by not suppressing the in-court and out-of-court identifications of the defendant, Bruce Reliford. The only recorded identification of the defendant came some nine to eleven months after the incidents. Because of the length [of] time between the incidents and the identification, the defendant is subject to prejudice because of the high possibility of taint during the identification process.

This Court cannot determine what the word "taint" means in the context of this allegation. Does it mean that the officers suggested who the victims should select from the photographic array? Does it mean that the taint results from the passage of time between

the robberies in question and the date the identifications were made from the photographic array? Or does it mean that the photographic array itself was suggestive?

When an issue contained in the motion for a new trial lacks specificity, this Court will not consider the issue. See State v. Gauldin, 737 S.W.2d 795, 797-98 (Tenn. Crim. App.), per. app. denied (Tenn. 1987); State v. Frazier, 683 S.W.2d 346, 351 (Tenn. Crim. App.), per. app. denied (Tenn. 1984); State v. King, 622 S.W.2d 77, 79 (Tenn. Crim. App.), per. app. denied (Tenn. 1981); State v. McKinney, 603 S.W.2d 755, 759-60 (Tenn. Crim. App. 1980). This issue has been waived. Gauldin, 737 S.W.2d at 798.

In addition, the appellant did not include in the motion for new trial the issue that the first photographic array must be presumed to have been unfavorable to the state because "it would have indicated suggestiveness." Thus, this issue has also been waived. Tenn. R. App. P. 3(e); State v. Ray, 880 S.W.2d 700, 705 (Tenn. Crim. App.), per. app. denied (Tenn. 1993); State v. Gilmore, 823 S.W.2d 566, 570 (Tenn. Crim. App.), per. app. denied (Tenn. 1991).

This Court parenthetically notes that both witnesses separately made positive identifications of the appellant from the photographic array. Randolph had ample time to see the appellant on two separate occasions. On the first occasion he placed her in the car and drove several blocks before releasing her. Randolph also made a positive courtroom identification. There is nothing to suggest in the record that there was any taint whatsoever in the photographic array identifications.

B.

It appears that the photographic array shown to Randolph and Adams following the second robbery was introduced as an exhibit. When the record was being prepared for transmission to this Court, the exhibit could not be found. Three deputy clerks and the assistant district attorney who prosecuted the appellant executed a document that states:

> This is to certify that after a diligent and thorough search and inquiry, the Property and Exhibits Section of the Criminal Court Clerks Office has never been in receipt of the above described exhibits, after having been entered into evidence by the State of Tennessee. This is to further certify that after a diligent

> search of the records in the office of the Criminal Court Clerk and the records in the office of the District Attorney General, the above described exhibits were not found in regards to this matter.

The record does not indicate that counsel for the appellant made this fact known to the trial court. Furthermore, the record does not indicate that counsel for the appellant made an effort to have the state and the law enforcement officers reconstruct the photographic array. As a general rule, officers usually note the names of the individuals whose photographs were included in a photographic array. An officer testified at the suppression hearing that he could examine his file, determine the booking numbers of those present in the lineup, and make sure that this was the photographic array that was presented to the victims. Obviously, the officer could retrieve identical photographs from the "mug books" or the Bureau of Identification, which maintains the records, fingerprints and photographs taken of each person that is arrested. Although a reconstructed array would not be identical in every minute particular to the originals, it would permit this Court to perform its function of determining whether the photographs were suggestive as the appellant claims.

It is the duty of the appellant to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues which form the basis of the appeal to enable this Court to determine the issues presented for review. Tenn. R. App. P. 24(b); State v. Bane, 874 S.W.2d 73, 82 (Tenn. Crim. App. 1993), per. app. denied (Tenn. 1994); State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App.), per. app. denied (Tenn. 1988). If the appellant cannot prepare or have prepared a complete transcript of the evidence, including exhibits, the appellant must establish his or her inability to prepare the transcript or include the exhibits, the reason that the transcript or the exhibits cannot be included in the record, and that this deficiency in the record was caused by circumstances beyond his or her control. State v. Rhoden, 739 S.W.2d at 6, 14 (Tenn. Crim. App.), per. app. denied (Tenn. 1987). In this case, the record establishes why the exhibits have not been included in the record. However, this does not equate to relief.

First, this Court has held that this issue pertaining to the photographic array has been waived. Thus, this issue is rendered moot. Second, the record does not establish

that counsel for the appellant took steps to reconstruct the photographic array. It appears that the officers had the precise booking numbers and names of the individuals who were included in the photographic lineup.

This issue is without merit.

III.

After the jury had been selected, the appellant complained to the trial court that the proceedings were unfair. He also complained that his court-appointed counsel had just given him certain court-related documents. One document was the indictment and another was the Tennessee Pattern Jury Instruction on aggravated robbery. The trial court declared a recess so that the appellant could review the documents. He was taken to the area where prisoners are kept when court is not in session.

When the trial court returned to the bench, the court learned that the appellant might refuse to return to the courtroom. The court told a deputy to open the door and permit the accused to enter the courtroom. The deputy stated: "He doesn't want to come out, Judge." The state proceeded without the defendant.

During the direct examination of Randolph, the assistant district attorney general asked the court to inquire if the appellant would voluntarily reenter the courtroom so that Randolph could view him and make a courtroom identification. If he would not come into the courtroom voluntarily, the assistant district attorney general asked the trial court to require the appellant to come into the courtroom. The appellant came into the courtroom voluntarily. The trial court asked the appellant if he would like to remain in the courtroom. The appellant replied that the trial was unfair. When asked again if he wanted to stay in the courtroom, the appellant stated: "I'd like to have me an attorney." The appellant then left the courtroom. Randolph positively identified the appellant as the perpetrator of all the crimes in question.

The appellant contends that the trial court violated his due process and equal protection rights "by forcibly bringing him into the courtroom during the trial." He asserts that this was "akin to trying the defendant in shackles or handcuffs, or informing the jury

that the defendant was unable to make bond." The state argues that the appellant's "assertion is not accurate, and is no more than fanciful hyperbole."

As previously stated, the appellant was asked to come into the courtroom, and he entered the courtroom freely and voluntarily. No one forced the appellant. When he refused to come into the courtroom a second time for identification by another witness, the trial court did not have the appellant forcibly brought into the courtroom. The appellant was never shackled or handcuffed while in the presence of the jury. Nor did the trial court advise or insinuate that the appellant was unable to make bond. Moreover, the appellant was the victim of his own circumstances. He advised the bailiffs that he would not sit in the courtroom during the course of the trial.

The precise issue in question has not arisen in this state. However, other appellate courts have addressed similar issues.

The privilege against self-incrimination protects an accused from being a "witness" against himself. The scope of the privilege is limited to "testimony" or "communications."[5] In Schmerber v. California,[6] the United States Supreme Court said:

> It is clear that the protection of the privilege [against self-incrimination] reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a

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[5]Several cases have dealt with compelling a suspect or an accused to give an exemplar or sample during the investigative process: United States v. Mara, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed.2d 774 (1973) (handwriting exemplar); United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973) (voice exemplar); Biggers v. Tennessee, 390 U.S. 404, 88 S.Ct. 979, 19 L.Ed.2d 1267 (1968) (voice exemplar); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (appearance in a lineup and voice exemplar); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (blood sample); Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 102 (1910) (required to wear clothing); Lucero v. Gunter, 17 F.3d 1347 (10th Cir. 1994) (urine sample); State v. Jackson, 889 S.W.2d 219, 222 (Tenn. Crim. App. 1993), per. app. denied (Tenn. 1994) (hair sample); State v. Meeks, 867 S.W.2d 361, 376 (Tenn. Crim. App. 1993), cert. denied, ___ U.S. __, 114 S.Ct. 1200, 127 L.Ed.2d 548 (1994) (voice exemplar); State v. Gilbert, 751 S.W.2d 454, 458-59 (Tenn. Crim. App.), per. app. denied (Tenn. 1988) (performance of field sobriety tests); State v. McAlister, 751 S.W.2d 436, 440 (Tenn. Crim. App. 1987), per. app. denied (Tenn. 1988) (samples of hair and body fluids); State v. Mabon, 648 S.W.2d 271, 275 (Tenn. Crim. App. 1982), per. app. denied (Tenn. 1983) (submit to x-ray); Trail v. State, 526 S.W.2d 127, 129 (Tenn. Crim. App.), cert. denied, (Tenn. 1975) (performance of field sobriety tests); Powell v. State, 489 S.W.2d 538, 540-41 (Tenn. Crim. App. 1972), cert. denied, (Tenn. 1973) (appearance in a lineup); Barrett v. State, 190 Tenn. 366, 229 S.W.2d 516 (1950) (required to wear hat); and State v. Stanley Richard Walker, Benton County No. 02-C-01-9411-CC-00258 (Tenn. Crim. App., Jackson, May 10, 1995) (performance of field sobriety tests).

[6]384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

> subpoena to produce one's papers (citation omitted). On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.[7]

In 3 Wharton's Criminal Evidence § 585 (14th ed. 1987), the author states what an accused may be compelled to do during the course of a trial:

> At the trial itself, an accused may be required to stand so that he may be observed; to walk; to remove a veil, visor, mask or glasses; to put on a wig and sunglasses; to exhibit his hands; to roll up his sleeve to show a tattoo; to submit to the taking of his fingerprints; to remove his coat and shirt to show scars; to allow inspection of his face for identifying marks; to move his feet into view; or to put on a garment, hat or cap.[8]

In Bass v. State,[9] the accused testified in support of his defense. Later, the trial court ordered the accused to "stand up in order that witnesses might see him."[10] The Supreme Court held that this did not violate the accused's privilege against self-incrimination. The Court observed in dictum that "[c]ourts have held that even though the defendant has not testified, his rights are not violated by being required to stand where witnesses may identify him."[11]

In Black v. State,[12] the trial court ordered the accused to stand in front of the jury during the state's case in chief and present the jury with a front and side view. It appears that the accused had a scarred right neck and disfigured right ear, which were important

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[7]384 U.S. at 763-64, 86 S.Ct. at 1832, 16 L.Ed.2d at 916.

[8]3 Wharton's Criminal Evidence §585, at 426-29 (14th ed. 1987) (An earlier version is cited with approval in State v. Rodriguez, 752 S.W.2d 108, 112 (Tenn. Crim. App. 1988)).

[9]191 Tenn. 259, 231 S.W.2d 707 (1950).

[10]191 Tenn. at 273, 231 S.W.2d at 713.

[11]191 Tenn. at 273-74, 231 S.W.2d at 713.

[12]479 S.W.2d 656, 658 (Tenn. Crim. App.), cert. denied (Tenn. 1972).

in his identification as the perpetrator of the crime. This Court held that the procedure did not violate the accused's privilege against self-incrimination.

In State v. Henderson,[13] the trial court required the accused to "to display to the jury a distinctive tattoo on his arm."[14] This Court held that the procedure did not violate the accused's privilege against self-incrimination.

The accused is afforded a reciprocal right. In State v. Sanders,[15] the identity of the accused as the person who committed the crime was a critical issue. Although the accused did not testify, he sought permission from the trial court to stand in the presence of the jury to show his height. This Court held that "a defendant is entitled to stand up before [the jury] regardless of whether or not he plans to testify. Unless Sanders stood up, the jury would have no way of knowing whether his height was substantially that of the offender described by the [victim]."[16]

In State v. Rodriguez,[17] the accused sought permission to wear the shirt and cap the victim testified was worn by the perpetrator of the crime to demonstrate his appearance. This Court held that a "defendant can introduce, 'demonstrative real or physical evidence' by exhibiting himself to the jury in items of clothing relevant to the inquiry, whether he testifies or not."[18]

This Court concludes that asking the appellant to voluntarily enter the courtroom so that he could be viewed by Randolph did not violate his privilege against self-incrimination, his right to due process of law, or his right to equal protection under the law. The appellant did not have the right to dictate how the state would try its case. Nor was the appellant entitled to deny the state evidence by opting to remain outside the courtroom. In this case, the appellant attempted to destroy the state's identification evidence at every stage of the proceeding. The state was entitled to have Randolph view the appellant to determine if

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[13]623 S.W.2d 638 (Tenn. Crim. App.), per. app. denied (Tenn. 1981).

[14]623 S.W.2d at 641.

[15]691 S.W.2d 566 (Tenn. Crim. App. 1984), per. app. denied (Tenn. 1985).

[16]691 S.W.2d at 569.

[17]752 S.W.2d 108 (Tenn. Crim. App. 1988).

[18]752 S.W.2d at 113.

she could identify him in person as the perpetrator of the three crimes.

This issue is without merit.

IV.

The appellant had been convicted of armed robbery and carjacking in federal court. The appellant filed a motion in limine seeking the entry of an order prohibiting the assistant district attorney general from using these convictions to impeach him as a witness. The trial court denied the motion. The appellant contends that the trial court committed error of prejudicial dimensions in permitting the offenses to be used to impeach him because of the similarities of the offenses to the crimes for which he was being tried. He also argued that the prejudicial effect of using these convictions would far outweigh their probative value.

The state may use certain prior convictions to impeach an accused who testifies in support of his or her defense. Tenn. R. Evid. 609 states in part:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime may be admitted if the following procedures and conditions are satisfied:
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> * * * *
>
> (2) The crime must be punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or, if not so punishable, the crime must have involved dishonesty or false statement.
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> (3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conviction before trial, and the court upon request must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

The crimes of robbery with a deadly weapon and carjacking are punishable by imprisonment for more than one year. Furthermore, these crimes involve dishonesty because they are an aggravated form of theft -- taking the property of another at gunpoint.

The trial court stated on the record that it had weighed the probative value and the prejudicial effect of the convictions on the substantive issues before ruling that the state could use the convictions to impeach the appellant if he opted to testify in support of his defense.

The mere fact that a prior conviction of the accused is identical or similar in nature to the offense for which the accused is being tried does not, as a matter of law, bar the use of the convictions for impeachment of the accused.[19] As the rule states, the availability of a conviction for an identical or similar crime depends upon the nature of the conviction and the probative value of the conviction.[20] The appellate courts of this state have recognized

[19]See State v. Miller, 737 S.W.2d 556, 560 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).

[20]See State v. Farmer, 841 S.W.2d 837 (Tenn. Crim. App.), per. app. denied (Tenn. 1992).

that a conviction for a crime involving dishonesty or a false statement has greater probative value than convictions for other crimes. This Court has previously held that a prior conviction for robbery with a deadly weapon can be used to impeach an accused who is being tried for robbery.[21] These cases were decided upon the theory that a conviction for armed robbery is highly probative of an accused's credibility as a witness.

The trial court properly ruled that the convictions for armed robbery and carjacking could be used to impeach the appellant if he testified in support of his defense. This Court finds, as it did in the cases hereinabove set forth, that convictions for armed robbery and carjacking would have been exceptionally probative of the appellant's credibility as a witness. In other words, the probative value of these two convictions far outweighs the prejudicial effect upon the substantive issues.

This issue is without merit.

V.

The appellant raises two issues concerning sentencing. In view of the fact that this Court has reduced two offenses and this cause must be remanded to the trial court for a new sentencing hearing, these issues have been rendered moot.

This Court parenthetically notes that appellant's prior convictions can be used to enhance the sentences within the appropriate range and to support consecutive

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[21] See State v. Goad, 692 S.W.2d 32, 37 (Tenn. Crim. App.), per. app. denied (Tenn. 1985) (prior conviction for armed robbery admissible to impeach the accused in a prosecution for armed robbery); State v. Norris, 684 S.W.2d 650, 654 (Tenn. Crim. App. 1984), per. app. denied (Tenn. 1985) (prior conviction for armed robbery admissible to impeach the accused in a prosecution for murder first degree and armed robbery); State v. Davis, 649 S.W.2d 12, 13-14 (Tenn. Crim. App. 1982), per. app. denied (Tenn. 1983) (prior conviction for bank robbery admissible to impeach the accused in a prosecution for bank robbery); State v. Fluellen, 626 S.W.2d 299, 300 (Tenn. Crim. App.), per. app. denied (Tenn. 1981) (prior conviction for armed robbery admissible to impeach the accused in a prosecution for aggravated rape).

sentencing.[22]

This Court agrees with the appellant that the aggravating circumstance in Tenn. Code Ann. § 40-35-114(9) (possession or use of a firearm during the offense) should not be used in this case. The use of the weapon is an element of aggravated robbery. In addition, this Court has held in several reported and unreported opinions that aggravating factors (10) (lack of hesitation about committing a crime when the risk to human life was high) and (16) ("the crime was committed under circumstances under which the potential for bodily injury to a victim was great") should not be used to enhance the offenses of aggravated robbery and robbery.

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JOE B. JONES, JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

_____
WILLIAM M. BARKER, JUDGE

[22]State v. Smith, 891 S.W.2d 922, 931 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); State v. Meeks, 867 S.W.2d 361, 377 (Tenn. Crim. App. 1993), cert. denied, _____ U.S. _____, 114 S.Ct. 1200, 127 L.Ed.2d 548 (1994).