IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH SESSION, 1995

**FILED**

**May 24, 1996**

**Cecil W. Crowson**
**Appellate Court Clerk**

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| STATE OF TENNESSEE, | ) | |
| | ) | |
| Appellee, | ) | No. 01C01-9411-CR-00397 |
| | ) | |
| | ) | Davidson County |
| v. | ) | |
| | ) | Hon. Seth Norman, Judge |
| | ) | |
| HENRY LEE MARTIN, | ) | (Especially aggravated robbery) |
| | ) | |
| Appellant. | ) | |

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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

**O P I N I O N**

The defendant, Henry Lee Martin, appeals as of right from his conviction by a jury in the Davidson County Criminal Court for especially aggravated robbery, a Class A felony. He was sentenced as a Range I, standard offender to twenty-two years in the custody of the Tennessee Department of Correction and fined five thousand dollars. The defendant contends that:

> (1) the trial court erred by denying his motion to suppress the identification testimony of the eyewitnesses due to unnecessarily suggestive pretrial identification procedures;
>
> (2) the evidence is insufficient to support his especially aggravated robbery conviction;
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> (3) the trial court erred by allowing the state to present testimony in rebuttal concerning a defense witness' prior inconsistent statements because the defense witness was not afforded an opportunity to explain or deny the alleged statements;
>
> (4) the trial court imposed an excessive sentence.

We hold that the evidence is sufficient and that reversible error does not exist.

This case relates to a robbery of the One Price Clothing store in Nashville. At trial, the store's manager, Jo Ann Hollingsworth, testified that she met the defendant for the first time on February 24, 1993, when he came into the store and asked for help choosing an outfit for his wife. She said that she spoke to the defendant for about ten minutes and showed him several items. When she got frustrated at the defendant's indecisiveness, she walked away from him and told him to let her know if he needed any more assistance. A short time later the defendant again asked for her assistance. She said that she helped him for another five or ten minutes and went into the store's stockroom to search for an item he requested. While she was in the stockroom, she had a short conversation with another store employee, Angela Blakely, and noticed that the defendant was looking into the stockroom. She left the stockroom and told the defendant that she did not have the item he wanted but to let her know if there was anything else she could show him.

Ms. Hollingsworth recalled that the defendant requested her assistance a third time. This time, he had something in his hand and asked her to go to the corner of the store to help him. She said that she complied and that as she turned to pull something off the rack on the wall, the defendant put his arm around her neck, stabbed her in the back and threw her to the floor. She testified that he then pulled her to her feet and stood behind her holding a knife to her throat. She said that he ordered her and Angela Blakely to go back into the stockroom and then used duct tape to tie her hands behind her back and to tie Ms. Blakely's hands and feet together. She said that the defendant forced her to walk to the cash register and that she told him how to open it. He then walked with her back to the stockroom for Ms. Blakely to confirm the procedure for opening the register without setting off an alarm.

Ms. Hollingsworth testified that the defendant made her walk to the register again. She said that he opened the register and placed the money from the register into a bag. She recalled that he then forced her to lie on the floor next to Ms. Blakely and placed boxes and chairs on top of them. She explained that she was able to crawl out of the stockroom to get help from a customer who had entered the store. She said that she suffered a collapsed lung from the attack and that she spent thirty-six hours in the intensive care unit and another three days in a different room in the hospital before being released.

Ms. Hollingsworth also recalled the description of her assailant that she gave to police. She said that he was five feet and seven inches tall and weighed one-hundred and forty-five pounds and was wearing a baseball cap, jeans, a denim jacket, and gloves. She told police that her assailant had “salt and pepper” hair at his temple and that he had blue eyes. She said that Officer Klotzback came to her home with six photographs several days after the robbery and that she identified the defendant from

one of the photographs as the man who robbed the store and stabbed her in the back. She testified that she has no doubt about her identification of the defendant.

Angela Blakely corroborated Ms. Hollingsworth's testimony. She said that she was working at the One Price Clothing store on February 24, 1993, and that she arrived at the store at around 6:00 p.m. that night. She then left the store for approximately five minutes, and when she returned she saw the defendant talking to Ms. Hollingsworth. She said that she got a good look at the defendant that night and recalled telling the police that the man who robbed the store had blondish brown hair and a light mustache. She also recalled estimating the robber's height at five feet seven inches and his weight at one-hundred and forty pounds. She testified that the defendant is undoubtedly the man who robbed the store.

Lennie Covington, an officer with the Metropolitan Police Department, testified that the apartment where the defendant was living in February 1993 was on a hill overlooking the shopping center where the One Price Clothing store is located. He drew a rough map of the area and identified photographs of a path leading from the apartment complex where the defendant lived to the shopping center. Officer Covington also recalled putting together a photograph array that he showed to Angela Blakely. He said that he chose photographs for the array based upon the descriptions of the assailant he received from police reports and from the One Price Clothing store's loss prevention manager who had received information from Ms. Hollingsworth and Ms. Blakely. He said that all the reports he used to construct the array listed the robber's height as five feet and seven inches and his weight as one-hundred and forty pounds, and he admitted that the description on the defendant's photograph listed the defendant as being five feet and eleven inches tall and weighing one hundred and eighty pounds. He said that he used the description from the photograph in the arrest warrant and estimated that the defendant was five feet ten inches tall and weighed one hundred and

forty pounds at the time of his arrest. He explained that he reported the defendant's weight as one-hundred and sixty-five pounds in his arrest report because that was what the defendant said he weighed. Officer Covington also explained that when he showed Ms. Blakely the photographs, he told Ms. Blakely that there was a possibility that one of the men depicted in the photographs robbed the store.

Wilford Klotzback of the Metropolitan Police Department testified that he showed Ms. Hollingsworth a photograph array containing the defendant's picture. He recalled telling her that he believed one of the photographs belonged to the person who committed the robbery. He said that Ms. Hollingsworth had some difficulty picking the defendant out of the array at first, because he wore a hat during the robbery. He said that he suggested that Ms. Hollingsworth place her thumb over the head of each individual in the array in order that she could focus on the part of the face that was visible during the robbery. He said that when she placed her thumb over the top of the photograph of the defendant, she identified him as the man who robbed her.

Patricia Berry, the defendant's girlfriend, testified that the defendant was living with her in February of 1993. She said that she remembered February 24, 1993, because she and the defendant had fought the previous night and the defendant had stayed at a motel. She testified that on February 24, 1993, the defendant was at her apartment when she arrived home from work at around 3:00 p.m. She said that she and the defendant used cocaine that afternoon. She recalled that they went shoplifting, bought more cocaine, and then returned to the apartment between five-thirty and six that evening. She said that her apartment was hot that night and that she and the defendant went out on the balcony to get some air. She remembered seeing an ambulance and police cars along side the One Price Clothing store while she was standing on the balcony. She said that the defendant was with her from five-thirty until the time she saw the ambulance and police cars and that he did not commit the

robbery. She admitted that she and the defendant made their living stealing and also said that at the time of her arrest she did not tell Officer Covington that the defendant could not have committed the robbery because he was with her.

The defendant testified that he has never been in the One Price Clothing store. He said that he had a job at Shoney's for a couple of months at the end of 1992 but that on and off for the past six years and in February 1993, he made a living by shoplifting. He said that he stayed in a motel on the night of February 23, 1993, because he and Ms. Berry had been fighting. He testified that on February 24, 1993, he checked out of the motel, shoplifted, returned the merchandise, bought cocaine and then went to Ms. Berry's apartment where he used the cocaine. He recalled that Ms. Berry arrived at the apartment approximately an hour and a half later than he did. He said that he noticed fire trucks and ambulances in the parking lot in front of the One Price Clothing store and that he did not leave the apartment until around seven or eight o'clock that night when he ran out of cocaine and went shoplifting to buy some more. He said that he has used the path leading from the apartment complex to the shopping center before but denied robbing the One Price Clothing store. He said that he is five feet and eleven inches tall and weighed approximately one-hundred and eighty pounds in February 1993, fifty-six pounds less than he weighed at trial.

Jackie Brandon testified that he and his wife entered the One Price Clothing store at dusk on February 24, 1993. On his way into the store, a man leaving the store quickly brushed by him. He said that the man was about five feet and eight inches tall, had a light mustache, and was wearing a dark leather jacket and jeans. He admitted that he was guessing at the man's height because the man had his head down as he was leaving the store and said that the man was wearing a knit cap, not a baseball hat. He testified that he was certain that the defendant was not the man he saw leaving the One Price Clothing store.

During the state's rebuttal, Officer Covington testified that when he arrested the defendant, the defendant asked him the date of the alleged offense. Officer Covington said that he told the defendant that the robbery took place on February 24, 1993, and that the defendant then turned to Ms. Berry and asked her where she was on that date or whether she knew where they were that night. Officer Covington explained that Ms. Berry responded to the defendant's questions by saying that she did not know where he was but that she was at the motel. Officer Covington also recalled that a week before trial Ms. Berry told him that she and the defendant were in the bedroom doing drugs between six and seven o'clock on February 24th. He said that he asked Ms. Berry her whereabouts between six and seven o'clock on February 24th at least six times and that she never said anything about being on the balcony that day or anything about seeing an ambulance or police cars.

Jo Ann Hollingsworth and Angela Blakely also testified during the state's rebuttal. Both said that they heard the defendant testify and that his voice sounded like the voice of the man who robbed the One Price Clothing store. In addition, Ms. Hollingsworth testified that the weather in Nashville was cold on the day of the robbery.

**I**

The defendant contends that the trial court should have suppressed evidence of Jo Ann Hollingsworth's and Angela Blakely's identifications of him. He asserts that the photograph array was impermissibly suggestive so as to violate due process and to render the identification testimony unreliable and inadmissible. See Sloan v. State, 584 S.W.2d 461 (Tenn. Crim. App. 1978); Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967(1968). We disagree.

At the suppression hearing, Ms. Hollingsworth testified that she spent about thirty minutes trying to help the defendant before he stabbed her in the back. She said that the store was well-lit and that she was sure that the defendant was the man who robbed her. She recalled picking the defendant out of a photograph array between five and seven days after the robbery and said that she recognized his picture immediately. She admitted that the photograph of the defendant that was used in the photograph array was not as centered as the other photographs but said that it did not factor into her identification of him. She also acknowledged that the photograph beneath the defendant's in the array had a yellow tint to it but said that the defendant's photograph did not look any brighter than others in the array.

Ms. Blakely testified that the store was well-lit and that she got a good look at the defendant on the day of the robbery. She recalled that it took her approximately ten minutes to pick the defendant out of the photograph array. She admitted that the photograph of the defendant was off-center and that it had more color in it than the other photographs but said that neither the brightness nor the fact that the photograph was off-center affected her identification of the defendant.

Officers Covington and Klotzback also testified at the suppression hearing. Officer Covington said that when he presented Ms. Blakely with the photographs he said, "Now, I have a person here who I think may be the person who did this." Likewise, Officer Klotzback testified that when he gave Ms. Hollingsworth the photographs he told her that police believed that the array contained a photograph of the man who robbed the store.

In Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967 (1968), the Supreme Court discussed potential hazards of an identification procedure involving photographs as opposed to a lineup. However, the court also recognized the use of

photographs as an effective procedure "from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs." 390 U.S. at 384, 88 S. Ct. at 971. It concluded that "convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Id; see, e.g., Sloan v. State, 584 S.W.2d 461 (Tenn. Crim. App. 1978).

The Supreme Court in Simmons noted that the potential for misidentification is increased when one photograph is "in some way emphasized" or "if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime." Simmons, 390 U.S. at 383, 88 S. Ct. at 970. In this case, the defendant argues that his photograph is emphasized in the array because it is off-center and does not have a yellow tint to it. We note that the defendant's photograph is remarkably similar to others in the array. It is only slightly off-center and a couple of the other photographs in the array have only a slight tint to them. Nevertheless, we recognize that the photograph identification procedure may have been suggestive given the officers' improper suggestions that one of the men pictured was the robber.

Due process requires exclusion of identifications resulting from suggestive identification procedures when there is a "likelihood of misidentification". Neil v. Biggers, 409 U.S. 188, 198, 93 S. Ct. 375, 381-82 (1972); State v. Philpott, 882 S.W.2d 394, 400 (Tenn. Crim. App.) app. denied (Tenn. 1994). In Neil, the Supreme Court identified the following factors to be considered when determining whether an identification is reliable and thus admissible:

> (1) the opportunity of the witness to view the criminal at the time of the crime,

(2) the witness' degree of attention,

(3) the accuracy of the witness' prior description of the criminal,

(4) the level of certainty demonstrated by the witness at the confrontation, and

(5) the length of time between the crime and the confrontation.

409 U.S. at 199, 93 S. Ct. at 382. In the present case, our consideration of these factors leads us to conclude that both Ms. Hollingsworth's and Ms. Blakely's identifications of the defendant are reliable.

With respect to the first factor, both victims had ample opportunity to view the man who robbed them. Ms. Hollingsworth testified that the man was in the store for thirty minutes and requested her assistance three times before he stabbed her. Although Ms. Blakely was in the stockroom part of the time, she testified that she noticed the robber when he kept asking Ms. Hollingsworth for help. She said that the store was well-lit and that she got a good look at the defendant from a distance of five feet.

The second factor, the witness' degree of attention at the time of the crime, also weighs in favor of admitting the identifications. The robber drew attention to himself by his repeated requests for assistance. Both women also testified that they focused their attention on the robber after he stabbed Ms. Hollingsworth in the back.

Regarding the third factor, we recognize that neither of the witnesses gave police a perfect description of the defendant immediately after the crime. They both estimated that the robber was five feet and seven inches tall, while the evidence at trial established that the defendant is between five feet ten inches and five feet eleven inches tall. Ms. Hollingsworth's description of the robber immediately after the crime also varied from the description given by Ms. Blakely. Although Ms. Hollingsworth told police that the robber wore a denim jacket and a baseball cap, Ms. Blakely described

the hat as a motorcycle hat with snaps on the side and a small bill and said that the jacket was black. Despite these apparent inconsistencies, we conclude that the witness' descriptions of the robber are "accurate enough to be consistent with the proposition that the man [they] saw and described at the time of the crime was the defendant." See Proctor v. State, 565 S.W.2d 909, 913 (Tenn. Crim. App. 1978). Ms. Hollingsworth told police that the robber had blue eyes and "salt and pepper" hair around his temples. Ms. Blakely told police that the robber had blondish-brown hair. The photograph of the defendant that was used shows that the defendant has blondish-brown hair and blue eyes. Both women estimated that the robber's weight was around one-hundred and forty pounds, and at trial, Officer Covington testified that the defendant weighed approximately one-hundred and forty pounds at the time of his arrest. Although imperfect, the descriptions the witnesses gave police are sufficiently consistent with the defendant.

The fourth factor, the certainty of the witnesses at the confrontation, also weighs in favor of admission of the identifications. Ms. Hollingsworth took less than a minute to pick the defendant's photograph out of the array, and she testified that when she chose the defendant's photograph, she had no question whatsoever that the defendant was the person who robbed her.

Ms. Blakely testified that she studied the array for around ten minutes before she chose the defendant's photograph. She noted that she chose the defendant's photograph because he had the same face and the same eyes as the robber. She testified at trial that she was certain that the defendant was the person who robbed the One Price Clothing store. The defendant argues that Ms. Blakely only chose his photograph because she felt obligated to pick someone out of the array after Officer Covington suggested that the array contained a photograph of the person he thought robbed the store. He contends that the amount of time that it took for Ms.

Blakely to pick him out of the photograph array indicates uncertainty in her identification. Conversely, the state argues that the fact that it took Ms. Blakely ten minutes to identify the defendant demonstrates that she carefully examined the photographs and only identified him when she was absolutely certain. We refuse to speculate about why Ms. Blakely took ten minutes to identify the defendant's photograph. Nothing in the record indicates that Ms. Blakely had any doubts about her identification of the defendant from the array of photographs.

With respect to the fifth factor, we note that both witnesses viewed the photograph arrays within only five to seven days after the robbery. After examining the totality of circumstances surrounding both Ms. Hollingsworth's and Ms. Blakely's pretrial identifications of the defendant, we conclude that both identifications are reliable and admissible.

**II**

In his second issue, the defendant challenges the sufficiency of the convicting evidence. He asserts that the state failed to prove beyond a reasonable doubt that he was the person who robbed the One Price Clothing store and also failed to present sufficient evidence of serious bodily injury.

Our standard of review when the sufficiency of the evidence is questioned on appeal 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, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield,

676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

First, the defendant argues that the evidence is insufficient to prove that he was the person who committed the robbery. In support, he asserts that the trial court should have excluded Angela Blakely's and Jo Ann Hollingsworth's identification of him and that the testimony of Patricia Berry and Jackie Brandon proved that he was not the man who robbed the One Price Clothing store. As previously noted, the trial court properly admitted the identification testimony of Angela Blakely and Jo Ann Hollingsworth. Questions of credibility are for the jury to decide. Sheffield, 676 S.W.2d at 547 (Tenn. 1984); Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). The jury obviously chose to believe Ms. Blakely and Ms. Hollingsworth, and this court's function is not to reweigh the evidence.

Second, the defendant argues that the evidence is insufficient to support a conviction for especially aggravated robbery because the state failed to prove that Ms. Hollingsworth sustained serious bodily injury as required by T.C.A. § 39-13-403. We disagree. Under T.C.A. § 39-11-106, "serious bodily injury" is bodily injury involving:

> (A) A substantial risk of death;
>
> (B) Protracted unconsciousness;
>
> (C) Extreme physical pain;
>
> (D) Protracted or obvious disfigurement; or
>
> (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty.

Ms. Hollingsworth testified that she suffered a collapsed lung as a result of the defendant's attack. She said that after the defendant stabbed her and took the money from the cash register, he threw her down on the ground and put cardboard boxes and chairs on top of her. She said that she had problems breathing and that she felt a lot of

pain in her back. She recalled spending thirty-six hours in the intensive care unit and having a tube inserted to remove fluid from her collapsed lung. This undisputed testimony is sufficient to establish that the defendant created a substantial risk of death and that the victim suffered extreme pain and substantial impairment of her lung. The evidence is sufficient to establish serious bodily injury.

**III**

Next, the defendant complains about Officer Covington's rebuttal testimony about Patricia Berry's prior statements. He contends that the trial court erred by allowing Officer Covington to testify that : (1) he heard Ms. Berry tell the defendant that she did not know where he was on the day of the robbery, but that she was at a motel, and (2) when he questioned Ms. Berry, she did not tell him about seeing an ambulance and police cars from her balcony on the day of the robbery. Primarily, the defendant claims that this testimony was inadmissible extrinsic impeachment evidence because Ms. Berry was not afforded the opportunity during her testimony to explain or deny the statements, which the defendant asserts is required under Rule 613(b), Tenn. R. Evid.

As previously shown, Ms. Berry's testimony at the trial provided an alibi for the defendant. She testified that he was with her on the night of the robbery, establishing it to be that night because she saw police cars and an ambulance near the One Price Clothing store. In the state's rebuttal evidence, Officer Covington testified that he heard Ms. Berry tell the defendant that she did not know where he was on the night of the robbery and that she was at a motel. Thus, he directly contradicted her trial testimony on this point. Also, Officer Covington testified that in the face of repeated questioning in a pretrial interview about how she remembered the particular night, Ms. Berry made no mention about being on the balcony or seeing any emergency vehicles at the One Price Clothing store. In this sense, the state was seeking to prove a prior

statement that was inconsistent by its omission of material facts. See Johnson v. State, 596 S.W.2d 97, 103-04 (Tenn. Crim. App. 1979), app. denied (Tenn. 1980).[1]

The defendant objected to Officer Covington testifying in rebuttal, asserting that the state had not afforded Ms. Berry an opportunity to explain or deny the statements during her cross-examination. The trial court overruled the objection upon its recollection that the state had, in fact, sufficiently questioned Ms. Berry about her previous statements. Unfortunately, the record does not support the trial court's recollection. The state did not confront Ms. Berry during her cross-examination with her previous statements.

The defendant argues that this failure should have barred Officer Covington's rebuttal testimony under Rule 613(b), Tenn. R. Evid., which states:

> **Extrinsic Evidence of Prior Inconsistent Statement of Witness.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 803(1.2).

The state responds that Rule 613(b) does not require the proponent of the inconsistent statement to afford the impeached witness an opportunity to explain or deny the statement before it is introduced. It relies upon federal cases interpreting the similarly worded federal Rule 613(b). See, e.g., United States v. Hudson, 970 F.2d 948, 955-56 (1st Cir. 1992). Thus, we must determine whether Rule 613(b), Tenn. R. Evid., requires that a witness be confronted with a prior inconsistent statement before extrinsic evidence of that statement is admissible for impeachment purposes.

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[1]We note that the defendant also argues that Officer Covington's testimony was improper rebuttal evidence in that it did not tend "to explain or controvert evidence produced by an adverse party." Cozzolino v. State, 584 S.W.2d 765, 768 (Tenn. 1979). However, to the extent that Officer Covington testified about a defense witness' prior inconsistent statements material to the defendant's claimed alibi, he was a proper rebuttal witness in controverting the defendant's defense proof.

Initially, we note that there are no published Tennessee cases interpreting Rule 613(b). Although this court has twice disclosed a view that Rule 613(b) requires that the impeached witness be confronted with the prior inconsistent statements or otherwise given the opportunity to explain or deny them before extrinsic evidence will be allowed, our supreme court has concurred in results only in both cases. See State v. Ronald D. Moore, No. 02C01-9412-CR-00296, Shelby Co. (Tenn. Crim. App. Sept. 20, 1995), app. denied (Tenn. Mar. 4, 1996) (concurring in results only); State v. Donald Wayne Holt, No. 01C01-9503-CC-00053, Rutherford Co. (Tenn. Crim. App. Sept. 27, 1995), app. denied (Tenn. Mar. 4, 1996) (concurring in results only). On the other hand, one member of the court of appeals has interpreted Rule 613(b) as not requiring the impeached witness to be confronted before extrinsic evidence is admissible, so long as the opportunity remains for the opposing party to interrogate the impeached witness. See Billie Jean Belew, et al. v. Ronald K. Gilmer, et al., No. 01A01-9010-CV-00365, Davidson Co. (Tenn. Ct. App. 1991) (Koch, concurring). In any event, unpublished opinions are not to be taken as general, precedential authority. See Fisher v. State, 197 Tenn. 594, 277 S.W.2d 340-41 (1955); Cook v. State, 506 S.W.2d 955, 958 (Tenn. Crim. App. 1973).

At common law, Tennessee courts followed the Rule in the Queen's Case[2] under which impeachment of a witness by extrinsic evidence of a prior inconsistent statement was not permitted unless the witness was first confronted with and questioned about the inconsistent statement. See Moore v. Bettis, 30 Tenn. (11 Hum.) 67, 69-70 (1850); Nelson v. State, 32 Tenn. (2 Swan) 237, 258-59 (1852); Hardin v. State, 210 Tenn. 116, 135, 355 S.W.2d 105, 113, (1962); State v. McDougle, 681

[2]Queen Caroline's Case, 2 Br. & B. 284, 313, 129 Eng. Rep. 976 (1820): "If it be intended to bring the credit of a witness into question by proof of anything he may have said or declared touching the cause, the witness is first asked, upon cross-examination, whether or not he has said or declared that which is intended to be proved."

S.W.2d 578, 583 (Tenn. Crim. App. 1984).[3] The purposes of these foundation requirements have been stated to be "(1) to avoid unfair surprise to the adversary, (2) to save time, as an admission by the witness may make extrinsic proof unnecessary, and (3) to give the witness in fairness a chance to explain the discrepancy." 1 John W. Strong, McCormick on Evidence § 37, at 120 (4th ed.1992).

Also, it is important to recognize that traditionally, a prior inconsistent statement proffered solely for the purpose of impeachment of a nonparty witness has not been admissible in Tennessee as substantive evidence. See King v. State, 187 Tenn. 431, 215 S.W.2d 813, 815 (1948). Instead, its relevance is directed solely toward affecting the credibility of the witness proven to have given conflicting statements. In this respect, requiring the impeached witness to be confronted with the inconsistency tends to focus the jury's attention on the issue of the witness' credibility. Conversely, allowing extrinsic evidence of the inconsistent statement when the witness has not been confronted with it increases the likelihood that the extrinsic evidence will be considered substantively. McCormick at 123. At some point, the risk of prejudice resulting from a jury considering "impeaching" statement contents substantively might outweigh the statement's probative value so as to bar admission into evidence. See, e.g., Mays v. State, 495 S.W.2d 833, 836-37 (Tenn. Crim. App. 1972).

It is significant that the similar federal Rule 613(b) was contemplated to do away with the traditional foundation requirement of confronting the impeached witness during cross-examination with the prior inconsistent statement.

> The traditional insistence that the attendance of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine on the statement, with no specification of any particular time or

[3]This does not mean that the witness actually had to be shown the statement, if it were written, see Titus v. State, 66 Tenn. 132, 137 (1874), but the contents of this statement had to be disclosed along with the "time, place and person, involved in the supposed contradiction." Moore, 30 Tenn. at 70.

> sequence. Under this procedure, several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement. Also, dangers of oversight are reduced.

Notes of Advisory Committee on Proposed Rules, Fed. R. Evid. 613 (citations omitted); see also United States v. Barrett, 539 F.2d 244, 255 (1st Cir. 1976) (recounting legislative history reflecting that the Advisory Committee believed that the goals of impeachment through prior inconsistent statements "could better be achieved by allowing the opportunity to deny or explain to occur at any time during the trial, rather than limiting it to cross--examination").

Most federal cases have held that Rule 613(b) does not require that a witness be confronted with an inconsistent statement before extrinsic evidence of it is admissible. Rather, the continuing availability of the impeached witness to be recalled becomes the important factor in determining the admissibility of extrinsic evidence of an inconsistent statement when a party has failed to confront the witness with the inconsistency. See Barrett, 539 F.2d at 254-56; Hudson, 970 F.2d at 955-56; United States v. Praetorius, 622 F.2d 1054, 1065 (2nd Cir. 1979), cert. denied sub nom. Lebel v. United States, 449 U.S. 860 (1980); United States v. McLaughlin, 663 F.2d 949, 953 (9th Cir. 1981); Wammock v. Celotex Corp., 793 F.2d 1518, 1521-23 (11th Cir. 1986); but cf. United States v. Bonnett, 877 F.2d 1450, 1462 (10th Cir. 1989) (failure to confront impeached witness with inconsistent statement "denies the trier of fact the opportunity to observe his demeanor and the nature of his testimony as he denies or explains his prior testimony").

We note, though, that Rule 613(b) can be read to provide a condition precedent to admissibility of the extrinsic evidence, i.e., the evidence is "not admissible unless" the witness is afforded the opportunity to explain or deny the inconsistent statement and the opposing party is afforded the opportunity to question the impeached witness or the interests of justice so require. In this vein, in United States v. Rice, 550

F.2d 1364, 1374 (5th Cir.), cert. denied, 434 U.S. 954 (1977), the court stated that affording such opportunities to the witness and the opposing party were criteria to be met before the statement is admissible. One treatise suggests that sufficient compliance with the federal rule would occur if the impeaching party "informs the court and opposing counsel at the time the witness testifies that he intends to introduce an impeaching statement and that his opponent may therefore prefer to keep the witness available to be called to explain it if he desires to do so." 3 J. Weinstein, et al., Weinstein's Evidence, 613-33 (1995); accord State v. Emery, 642 P.2d 838, 849 (Ariz. 1982) (en banc).

However, we do not believe that we should impose upon the impeaching party any particular duty to insure that the criteria are met before the statement is deemed admissible. The rule assigns no special obligation to any party and we will not create one. On the other hand, if the impeached witness is not confronted with the statement during his or her testimony before the extrinsic evidence is presented and the impeaching party does not provide sufficient notice to the opposing party of the need to keep the impeached witness available, the risk of exclusion will fall upon the impeaching party if the witness is then unavailable for questioning.

In the present case, the focus of the defendant's objection in the trial court was on the failure of the state to confront Ms. Berry with the inconsistent statements during her cross-examination. Under our analysis of Rule 613(b), we conclude that such a confrontation was not required in advance of the admission of the inconsistent statements. Furthermore, nothing in the record indicates that the defendant was unable to recall Ms. Berry, who claimed to be his girlfriend, in order for her to explain or deny the inconsistent statements. Absent the record reflecting her being unavailable as a witness, the extrinsic evidence was admissible and any failure of the defendant to have her respond to such evidence effectively constitutes a waiver of the opportunity

provided under Rule 613(b). See, e.g., Wilmington Trust Co. v. Manufacturers Life Ins. Co., 749 F.2d 694, 699 (11th Cir. 1985). Thus, there was no evidentiary bar to the state introducing extrinisic evidence of Ms. Berry's prior inconsistent statements for the purpose of impeachment.

**IV**

Finally, the defendant contends that his sentence is excessive because the trial court improperly applied enhancement factor T.C.A. § 40-35-114(5), regarding exceptionally cruel treatment to the victim, and failed to apply any mitigating factors. The defendant does not challenge the trial court's enhancement of his sentence based upon the offense involving more than one victim. See T.C.A § 40-35-114(3).

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d) and -402(d). As the Sentencing Commission Comments to these sections note, the burden is now on the appealing party to show that the sentencing is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

> the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and

> enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. §§ 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

Also, in conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and 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, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103 and -210; see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229 (Tenn. 1986).

The sentence to be imposed by the trial court is presumptively the minimum in the range unless there are enhancement factors present. T.C.A. § 40-35-210(c).[4] Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. T.C.A. § 40-35-210(d) and (e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. T.C.A. § 40-35-210, Sentencing Commission Comments; Moss, 727 S.W.2d at 237; see Ashby, 823 S.W.2d at 169.

The trial court enhanced the defendant's sentence from the presumptive fifteen years to twenty-two years based upon the crime involving more than one victim and because it found that the defendant treated the victim with exceptional cruelty. See T.C.A § 40-35-114 (3) and (5). The defendant does not challenge the trial court's

[4]For Class A felonies committed on or after July 1, 1995, the presumptive sentence is the midpoint of the range. See 1995 Tenn. Pub. Acts, ch. 493 (amending T.C.A. § 40-35-210(c)).

application of enhancement factor (3) but contends that the record does not support the application of factor (5).

With respect to the application of enhancement factor (5), the trial court noted:

> I believe the court can take into consideration enhancement factor five. The defendant treated, or allowed a victim to be treated, with exceptional cruelty during the robbery. I understand that the injury is a portion of the -- an element of the crime. But to stab someone in the back, and then have Ms. Hollingsworth lie there for the period of time that she had to, with this injury, to me, I think, qualifies under Section Five.

The trial court's reliance on the amount of time that passed before Ms. Hollingsworth was discovered is not supported by the record. To the contrary, Ms. Hollingsworth testified that after the defendant left the store she crawled out of the stock room, and a couple of minutes had passed before she saw people shopping in the store.

Although the defendant undoubtedly treated Ms. Hollingsworth cruelly by stabbing her once in the back, the facts of this case do not support a finding of exceptional cruelty beyond that present in any especially aggravated robbery. See Manning v. State, 883 S.W.2d 635, 639 (Tenn. Crim. App. 1994) (refusing to apply enhancement factor (5) when "most of the facts relied upon in applying this enhancement factor to the [defendant] are the very facts which made [his] crimes aggravated under the law"). Accordingly, we conclude that enhancement factor (5) should not apply.

However, the trial court properly enhanced the defendant's sentence because the crime involved more than one victim, see T.C.A. § 40-35-114(3), and we conclude that the record also supports two enhancement factors that were not applied by the trial court, the defendant's previous history of criminal convictions and criminal behavior and his previous history of unwillingness to comply with conditions of a

sentence involving release into the community. See T.C.A. § 40-35-114(1) and (8). Application of enhancement factor (1) is supported by the defendant's testimony that for the last six years he has supported himself by shoplifting. In addition, the presentence report shows that the defendant has several misdemeanor convictions, including nine convictions for theft under five-hundred dollars, a conviction for cocaine possession, and an assault conviction. With respect to the application of enhancement factor (8), the presentence report reflects that the defendant was sentenced to six months probation for one of the theft convictions and that his probation was revoked.

Regarding mitigation, the defendant argues that the trial court should have mitigated his sentence based upon his lack of felony convictions and his successful completion of a drug and alcohol rehabilitation program. Although in State v. Keel, 882 S.W.2d 410, 422-23 (Tenn. Crim. App.), app. denied (Tenn. 1994), this court indicated that the lack of a felony record should not be used in mitigation, we note that the Tennessee Supreme Court considered such a circumstance to mitigate the sentence in State v. Moss, 727 S.W.2d 229, 240 (Tenn. 1986). Essentially, what remains significant is the extent of past criminal behavior in terms of both numbers and seriousness.

In Moss, the defendant's criminal record related to "an extremely poor history of irresponsible and reckless driving" that resulted in his license being indefinitely revoked. 727 S.W.2d at 232-33. In Keel, the defendant's record showed a substantial pattern of possessing cocaine for personal use, two convictions for driving under the influence, convictions for harassment and reckless driving, and reflected that he was on probation when he committed the several drug felonies for which he was being sentenced. Obviously, the history of criminal behavior in Keel was substantially more extensive and more serious than that existing in Moss. We view the extensive history of criminal behavior in the present case to be similar to that in Keel and we do

not fault the trial court in refusing to afford mitigating weight to the defendant's lack of prior felony convictions. On the other hand, we conclude that the defendant's successful completion of a drug and alcohol rehabilitation program since his confinement for this offense has some mitigation value in terms of showing some potential for rehabilitation. See T.C.A. §§ 40-35-103(5) and -113(13).

However, even considering the defendant's successful completion of the rehabilitation program, a twenty-two-year sentence remains justified because of the three applicable enhancement factors: the defendant's history of criminal behavior, the crime involving more than one victim, and the defendant's history of unwillingness to comply with conditions of a sentence involving release into the community. See T.C.A. § 40-35-114 (1), (3), and (8). In affirming the defendant's twenty-two-year sentence, we place the most significant weight on his extensive history of criminal behavior, behavior that has now escalated into the violent offense in this case.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

(Not Participating)
Jerry Scott, Judge

_____
David G. Hayes, Judge