IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
March 4, 2014 Session

STATE OF TENNESSEE v. RANDY SHERRILL

Direct Appeal from the Circuit Court for Lake County
No. 12-CR-9745 Russell Lee Moore, Jr., Judge

No. W2013-01306-CCA-R3-CD - Filed July 7, 2014

A Lake County jury convicted the Defendant, Randy Sherrill, of sale of a Schedule II controlled substance in a drug-free zone. The trial court sentenced the Defendant to serve eight years as a multiple offender. On appeal, the Defendant contends that: (1) "Markham Park" is not listed as a "park" by the State of Tennessee, the City of Tiptonville, or the Federal Government; (2) the State committed a *Brady* violation by not informing defense counsel of its confidential informant's drug use during the time period of his transactions with the Defendant; (3) the State failed to prove chain of custody; and (4) the trial court, Tiptonville Police Chief England, and the State, engaged in improper conversations with the jury after jury deliberations had begun. After a thorough review of the record and the applicable authorities, we affirm the trial court's judgment.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Charles S. Kelly, Sr., Dyersburg, Tennessee, for the Appellant, Randy Sherrill.

Robert E. Cooper, Jr., Attorney General and Reporter; Jeffrey D. Zentner, Assistant Attorney General; C. Phillip Bivens, District Attorney General; Lance E. Webb, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

This case arises from a drug transaction between the Defendant and a confidential informant working with the police. A Lake County grand jury indicted the Defendant for sale of a Schedule II drug in a drug-free zone. At the Defendant's trial on these charges, the

parties presented the following evidence: Joe England, the City of Tiptonville Chief of Police, testified that, in the latter part of 2011, he was involved in a controlled buy involving a confidential informant ("CI"). He stated that he had been involved in "three hundred or more" controlled buys during his law enforcement career, and, in his experience, drug sellers and users had their own terminology associated with drug transactions. As an example, Chief England said that a buyer or seller might never state the name of the drug to be purchased, only referencing the amount, such as "I need fifty."

Chief England testified that the CI contacted him and stated that the Defendant had four "Adderall" pills to sell for $5.00 a pill. Chief England acknowledged that the CI had "some charges" in Crockett County and "a drug problem in the past." He clarified that the CI did not have any pending charges at the time of the controlled buy. A controlled buy was arranged for January 13, 2012. Police officers met with the CI first and searched his person and vehicle to ensure that there were not any illegal drugs or money accessible to the CI during the controlled buy. Chief England explained that this procedure helped to ensure the identity of the drug seller during controlled buys. After the search, a police officer provided the CI with $20.00 of "buy money" with which to purchase the drugs from the Defendant. The CI was also fitted with a microphone transmitter to allow law enforcement to listen to the transaction while it was ongoing and a video recorder to record the transaction.

Chief England testified that, after the CI was prepared for the controlled buy, the CI went to the Defendant's residence. He followed the CI as closely as possible without being "conspicuous." Chief England parked in an "open space between two buildings" where he "had a direct line of sight," from a distance of approximately 150 yards, to the front of the Defendant's residence. The video recording of the controlled buy was played for the jury, and Chief England indicated on the screen where he and Deputy Glidewell were located during the controlled buy. Chief England also identified what appeared to be a clear plastic bag that can be seen during the drug transaction on the recording. He confirmed that the bag seen in the video recording was similar to the bag containing the pills that the CI returned to him after the controlled buy.

Chief England testified that, from his position of observation during the controlled buy, he observed the Defendant standing in his doorway. He confirmed that he was familiar with the sound of the Defendant's voice and recognized the Defendant's voice as he was listening to the transaction through the transmitter. He said that, through the transmitter, he heard the CI say, "Twenty bucks I got four of them." Chief England said that, with the use of binoculars, he was able to observe the interaction but did not clearly see the Defendant hand the CI "four orange pills."

Chief England testified that, following the transaction, the CI gave the police officers

the pills he purchased, which he described as four orange pills in a "cellophane wrapper." Chief England said that he again searched the CI and his vehicle. The CI was paid $60.00 for his participation in the controlled buy. Chief England agreed that, since the time of the controlled buy, the CI has been charged for offenses in Crockett County.

Chief England testified that he returned to the scene of the controlled buy and measured the distance between the Defendant's residence and Markham Park. He explained the method he used to determine the distance and stated that the distance between the Defendant's residence and Markham Park was 952 ½ feet. Chief England stated that there was a wrought iron sign on the park property indicating it is "Markham Park." He said that the city owned and maintained the park.

On cross-examination, Chief England said that, before this controlled buy, the CI had worked with Deputy Glidewell. Based upon his experience and work with the CI, Deputy Glidewell "vouched for [the CI's] credibility and his faithfulness to do the operation [involving the Defendant]." Chief England reiterated that the CI did not have any pending charges at the time. Chief England agreed that he was unaware of any of the correspondence that ensued between the CI and the Defendant before the CI met with him for the controlled buy. He said that, originally, the CI was to arrange a sale with a known "crack dealer" in the community, but when he met with the CI, the CI informed him that he could buy four "Adderall" from the Defendant for $20.00.

The CI testified that in the first few months of 2012 he worked as a CI, making controlled buys for Chief England and Deputy Glidewell. The CI recalled buying pills from the Defendant on January 13, 2012. He said that he communicated with the Defendant about buying "Adderall" through text messages on their cellular telephones. Through these messages, the Defendant conveyed that he had four pills that he would sell for $5.00 each. The CI told the police officers, and they instructed him to buy all four of the pills and provided him with $20.00 to do so. The police officers also searched his person and vehicle and placed recording devices on him.

The CI testified that he drove to the Defendant's house located on Main Street. When he arrived, he saw the Defendant standing in the doorway. He approached the Defendant, the two men exchanged greetings, and then the CI handed the Defendant the "buy money" with his right hand, and the Defendant handed the CI the pills with his left hand into the CI's left hand. The CI described the pills as "dirty orange capsule[s]." He said he had seen these type of pills before "many times" and recognized the pills as Adderall.

The CI testified that, after the transaction as he drove back to the "meeting place," he saw Randy Carter at "Maverick's." He explained that Randy Carter was the person he had

planned to conduct the controlled buy with that day. He said that Mr. Carter did not sell pills, only crack cocaine. Upon seeing Mr. Carter, the CI pulled into Maverick's to obtain Mr. Carter's cellular telephone number in order to "set something up for the next move that day." The CI said that he then proceeded to the meeting place where the police officers retrieved the pills and recording equipment and searched his vehicle and person again. The CI stated that he was paid for his work that day, but that he was not to receive any further compensation for his testimony. He confirmed that he did not have any pending criminal charges against him at the time of these events. He explained that he worked as a CI for law enforcement "for the money." He agreed that he had a "drug problem at the time." He further agreed that, since the controlled buy involving the Defendant, he had been charged with aggravated robbery in Crockett County.

On cross-examination, the CI agreed that he used "some" of the money he received for his work assisting police during controlled buys to buy illegal drugs for his own use. He said that he had bought drugs for his own use from the Defendant a "bunch of times." The CI agreed that the Defendant was not initially a "target" for that day but that he suggested it to the deputies after the Defendant sent the CI a text message indicating he had Adderall for sale.

The CI testified that he did not tell either Chief England or Officer Glidewell about his drug use while working as an informant. He denied that he did not do so because of a fear that the police officers would terminate his work with them, causing him to lose the money he used to buy drugs. Defense counsel questioned the CI about the facts surrounding his criminal charges in Crockett County. The CI denied involvement in the aggravated robbery of a gas station. When asked about his confession to the police, he explained that he falsely admitted to the crime in exchange for the police dropping criminal charges against his fiancé.

Corey Glidewell, a Lake County Sheriff's Office deputy, testified that he participated in the January 13, 2012, controlled buy involving the Defendant. His testimony recounting the controlled buy was consistent with Chief England's testimony. Deputy Glidewell recalled that, after the controlled buy, as the CI drove away from the Defendant's residence, the CI pulled into a gas station to ask Randy Carter, a potential target, for his telephone number to arrange for another controlled buy. Deputy Glidewell explained that Mr. Carter was a person known to the police to sell crack cocaine.

Deputy Glidewell testified that he collected four orange "Adderall" pills from the CI after the controlled buy involving the Defendant. He said the pills were contained in the cellophane wrapper found on packages of cigarettes. Deputy Glidewell bagged the pills in an evidence bag, labeled the bag, and then stored the pills in the evidence locker. He later

delivered the pills to the Tennessee Bureau of Investigation ("TBI") crime lab in Memphis for analysis. Later, when the analysis of the evidence was finished, Deputy Glidewell retrieved the evidence from the Memphis laboratory. He stated that he confirmed that the agency, case number, item number, offense, suspect, date of recovery, and his initials were on the evidence bag that he retrieved from the Memphis laboratory.

On cross-examination, Deputy Glidewell agreed that he was unaware that the CI used illegal drugs during the time they worked together. He stated that he never had any reason to doubt who the CI targeted during the time they worked together.

Laura Cole, a TBI forensic scientist, testified as an expert witness in the field of drug identification. Agent Cole stated that she tested the pills related to this case. She noted that each of the four capsules contained the markings, "Adderall XR20mg." After testing the capsules, she concluded that the substance was amphetamine, the controlled substance found in Adderall.

Agent Cole explained that items submitted to a TBI laboratory receive a unique laboratory identification number and then the evidence is stored in a vault. She confirmed that on January 18, 2012, the Memphis TBI lab received an evidence bag from the Tiptonville Police Department relating to the Defendant. Due to a back log in the Memphis laboratory, Eric Warren, a Memphis TBI laboratory forensic scientist, brought the evidence to Nashville to be analyzed. After verifying the evidence laboratory number, submittal form, agency case number, and subject's name, Agent Cole opened the evidence bag and analyzed the orange capsules associated with this case. Agent Cole stated that after she finished her analysis, she returned the evidence to the receiving section where the evidence was stored in the vault until Jack VanHeuser, a TBI regional crime laboratory supervisor, returned the evidence to Memphis.

Brad Hopper, the Defendant's cousin, testified on the Defendant's behalf. He stated that, on January 13, 2012, he lived with the Defendant. He recalled that the Defendant sent a text message to the CI on this date to "get some drugs" but that the CI brought them "some fake stuff." Mr. Hopper explained that the Defendant and he were trying to buy methamphetamine from the CI. He described the item the CI brought as "white" and contained "in a corner of a baggie." When the Defendant and he attempted to smoke the substance, "it just turned black." The Defendant sent a text message to the CI asking for the $50.00 they had paid the CI for the drugs to be returned and, later, the CI brought "some money" to the Defendant's residence. When asked whether he had ever seen the Defendant with Adderall, Mr. Hopper responded, "I don't know. . . . I've never known him to mess with Adderall." He stated that he had seen the CI with Adderall "[q]uite a few times."

On cross-examination, Mr. Hopper agreed that the Defendant texted the CI and that he did not see any of the text messages exchanged between the Defendant and the CI.

The Defendant testified that he worked for Mississippi Limestone, a concrete company. He said he had known the CI for a long time and "done drugs" with him, but he had never sold drugs to the CI. The Defendant said that he sent a text message to the CI on January 13, 2012, asking for a half of a gram of "meth." The CI responded that he was on the way to the Defendant's residence. He delivered the drugs and after the Defendant "tried it out," and determined "it wasn't real," he sent a text message to the CI requesting a return of his money. The CI responded with a message stating, "I got part of it." The Defendant said that he instructed the CI to bring by whatever amount of money he had. The Defendant described his next encounter with the CI, saying, "He come by the house with twenty dollars and said he had four of them and I told him to hurry up." The Defendant denied taking or selling Adderall.

On cross-examination, the Defendant denied that he was prescribed Adderall and denied that he knew anyone who was prescribed Adderall. The Defendant agreed that his communication with the CI was through text message. He agreed that he did not bring any of the text messages with the CI to court. When asked what the CI was referencing when he said "four of them" during the transaction, the Defendant said, "All I heard was is [sic] when he said he'd be right back."

Chief England testified that he did not know that the CI was an addict at the time of the controlled buy. He said that had he known of the CI's addiction, it would have affected his decision to use the CI in the controlled buy.

On cross-examination, Chief England confirmed that he thoroughly searched the CI and his vehicle before the controlled buy and that he did not find any Adderall in his possession. Chief England said that, in his experience, methamphetamine was sold in quarter ounces.

Based upon this evidence, the jury convicted the Defendant of sale of a Schedule II controlled substance in a drug-free zone. For this conviction, the trial court sentenced the Defendant to serve an eight-year sentence as a multiple offender. It is from this judgment that the Defendant appeals.

II. Analysis

On appeal, the Defendant contends that: (1) "Markham Park" is not listed as a "park" by the State of Tennessee, the City of Tiptonville or the Federal Government; (2) the State

committed a *Brady* violation by not informing defense counsel of its confidential informant's drug use during the time period of his transactions with the Defendant; (3) the State failed to prove chain of custody; and (4) the trial court, Chief England, and the State engaged in improper conversations with the jury after jury deliberations had begun.

A. Proof Regarding Markham Park

The Defendant contests Markham Park's status as a "park" for purposes of his conviction for selling drugs within 1,000 feet of a drug-free zone. At the motion for new trial hearing, the Defendant submitted an exhibit showing that Markham Park was not listed as a City of Tiptonville park, a State of Tennessee park, or a federal park. Based upon this, the Defendant contends that he can not be convicted of selling drugs within 1,000 feet of a park. The State asks this Court to treat this issue as waived because the Defendant failed to support this issue in his brief with citation to legal authority.

The Rules of Appellate Procedure require that citations to authority and references to the record be included in the argument portion of the brief. Tenn. R. App. P. 27(a)(7). The rules of this Court also contemplate waiver of issues not supported by citation to authorities or appropriate references to the record. *See* Tenn. R. Ct. Crim. App. 10(b)("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."). We deem this issue waived due to the Defendant's failure to cite to any legal authorities. Notwithstanding the waiver, we further note that the Defendant failed to object at trial to the State's introduction of Markham Park as a park, raising this challenge for the first time at the motion for new trial hearing. His failure to raise a contemporaneous objection at trial would also result in waiver. Tenn. R. Crim. P. 33 and 36(a).

B. Brady Violation

The Defendant argues that the State committed a *Brady* violation when it failed to inform him that the CI was "running drugs" during his work with the police department as a confidential informant. The State again asks this Court to treat this issue as waived due to the Defendant's failure to support his issue with citation to legal authority or citation to the record. Because the Defendant failed to cite to any legal authority or the record in support of his argument, we deem this issue waived. *See* Tenn. R. Crim. App. 10(b). Moreover, our review of the trial transcript shows that the State raised the issue of the CI's drug use at trial and that the Defendant fully cross-examined the CI as to his drug use, and he also cross-examined both of the law enforcement officers about their knowledge of the CI's drug use during the time of the controlled buy. Therefore, even if we were to address the issue on its merits, the Defendant would not be entitled to relief.

C. Chain of Custody

The Defendant argues that the State failed to establish the chain of custody for the Adderall pills. We review challenges to the chain of custody of evidence under the abuse of discretion standard. *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Beech*, 744 S.W.2d 585, 587 (Tenn. Crim. App. 1987). Under this standard, we will not reverse unless the trial court "'applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999) (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)).

Tennessee Rule of Evidence 901(a) provides: "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims." As we have previously recognized, it is "'well-established that as a condition precedent to the introduction of tangible evidence, a witness must be able to identify the evidence or establish an unbroken chain of custody.'" *Scott*, 33 S.W.3d at 760 (quoting State v. *Holbrooks*, 983 S.W.2d 697, 700 (Tenn. Crim. App. 1998)). This evidentiary rule is designed to ensure "that there has been no tampering, loss, substitution, or mistake with respect to the evidence." *Id*. (quoting *State v. Braden*, 867 S.W.2d 750, 759 (Tenn. Crim. App. 1993)).

Even though each link in the chain of custody should be sufficiently established, this rule does not require that the identity of tangible evidence be proven beyond all possibility of doubt; nor should the State be required to establish facts which exclude every possibility of tampering. *Scott*, 33 S.W.3d at 760. An item is not necessarily precluded from admission as evidence if the State fails to call all of the witnesses who handled the item. *See State v. Johnson*, 673 S.W.2d 877, 881 (Tenn. Crim. App. 1984). Accordingly, when the facts and circumstances that surround tangible evidence reasonably establish the identity and integrity of the evidence, the trial court should admit the item into evidence.

The State presented the following evidence with regard to the chain of custody. Officer Glidewell collected the pills from the CI after the controlled buy. He placed the pills in an evidence bag and stored them in the evidence locker until he transported the pills to the Memphis TBI laboratory for analysis. To more expediently analyze the evidence, Eric Warren, a Memphis TBI laboratory forensic scientist, transported the evidence to the TBI Nashville laboratory. After verifying the evidence laboratory number, submittal form, agency case number, and subject's name, Agent Cole opened the evidence bag and analyzed the orange capsules associated with this case. After analysis of the pills, Jack VanHeuser, a TBI regional crime laboratory supervisor, returned the evidence to the Memphis laboratory where Officer Glidewell retrieved the pills.

The Defendant argues that the pills cannot be placed into evidence because the State did not produce the TBI employee who transported the evidence to the Nashville TBI laboratory. As noted above, it is not necessary to present every person who handled a piece of evidence. The State presented sufficient facts to "establish a reasonable assurance of the identity of the evidence." *State v. Woods*, 806 S.W.2d 205, 212 (Tenn. Crim. App. 1990). For this reason, we hold that the trial court did not abuse its discretion in allowing the drugs into evidence. The Defendant is not entitled to relief.

D. Improper Contact With the Jury

The Defendant asserts that the trial court, the State, and Chief England engaged in improper conversations with the jury in violation of Tennessee Rule of Evidence 606(b). Specifically he contends that these parties were "overly accommodating" to a jury request to see a portion of the video recording of the controlled buy. The State responds that, because the complained-of conversation with the jury occurred on the record and in the presence of defense counsel, who made no objection, the Defendant can not prove improper influence.

At the motion for new trial hearing, the trial court stated that the conversations with the jury were about finding the proper portion of the video recording that the jury had requested to see and found that there were no comments made about the evidence that influenced the jury. The trial court noted that the cases upon which the Defendant relied in his argument were cases involving conversations with jurors outside the presence of the court, unlike this case where the conversations were on the record.

Article I, § 9 of the Tennessee Constitution provides that an accused has the right to be tried by "an impartial jury." It is the law in Tennessee that an unexplained juror conversation with a third party is good cause for a new trial. *State v. Blackwell*, 664 S.W.2d 686, 689 (Tenn. 1984). When there is extraneous prejudicial information or any outside influence is brought to bear on a juror, the validity of the verdict is questionable. *Id*.

During jury deliberation, the jury notified the trial judge that the jury would like to see the video recording of the controlled buy again. With all parties present, the trial court addressed the jury about this request:

Trial court:	Okay. Now do I understand correctly you want to see the video again? Is there any particular part of it, like, do you want to see all the travel back and forth or just - - -
Juror:	The transaction.

Trial Court: Okay.

Chief England: Do they want it in slow motion, Judge, regular motion?

Juror: Probably slow and we want - - -

Chief England: As slow as I can get it maybe?

Juror: Yeah.

Trial Court: Start it - - -

Juror: Can you do it slow - -

Chief England: I can play it both ways. However y'all want to do it.

The State: And where do you want to start? You don't want to start at the - - -

Juror: Where he's getting out of the car - - -

The State: Just as he's getting out of the car. Joe, that's 13:41: Right at 31.

Chief England: Right as he's getting out of the car, right?

The State: 31, 32, right in that neighborhood.

Juror: We don't care about the - - -

Trial Court: You don't care about what?

Juror: The outside - -

Trial Court: Okay. All right.

The State: You want to see him go to the door?

Juror: Yes.

The State:	Okay. Just move it forward.
Trial Court:	Wants to see him at the door. Can you see that right now? Is that close enough?
The State:	We've got some wires down here and we're afraid to unplug the whole thing.
Trial Court:	You can come around here and stand.
The State:	Yeah, why not let - - Any objection to her moving down here and seeing it? Here, I tell you what, Judge, she can have my chair.
Chief England:	She can have this one.
Trial Court:	Any of you that need to be up close now we'll put you in a chair down here. Any of you that are willing to admit that you can't see. Can you see? Come on if you can't. Now can everybody else see okay? It's good to be young, isn't it?
Juror:	Thank you.

In our view, this conversation is neither extraneous or prejudicial. The jury requested to see a portion of the video recording of the controlled buy. This conversation was a response to the request. The video recording was admitted into evidence, without objection, at trial and thus the jury was entitled to review a portion of it. The trial court's accommodation of this request does not rise to the level of extraneous or prejudicial. Furthermore, we note that thoroughout the dialogue regarding the video recording, the Defendant made no objection. *See* Tenn. R. App. P. 36(a) (providing waiver of an issue where the party failed to take "whatever action was reasonably available to prevent or nullify the harmful effect of an error.")

Accordingly, we conclude that the Defendant has failed to prove improper influence where the trial court, on the record, responded to the jury's request to view a portion of the video recording of the controlled buy. The Defendant is not entitled to relief.

III. Conclusion

In accordance with the aforementioned reasoning and authorities, we affirm the trial court's judgments.

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ROBERT W. WEDEMEYER, JUDGE