IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9507-CR-00220**
	)	
Appellee,	)	
	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**HON. ANN LACY JOHNS**
ROBERT LEE BAILEY, JR.,	)	**JUDGE**
	)	
Appellant.	)	(Sale of Cocaine and Evading Arrest)

ON APPEAL FROM THE JUDGMENT OF THE CRIMINAL COURT OF DAVIDSON COUNTY

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Defendant was convicted on a jury verdict of the crimes of selling less than one-half gram of cocaine and evading arrest. For the drug offense, he was sentenced to a term of eight years to be served as a Range II multiple offender, and for evading arrest he was sentenced to a concurrent term of eleven months and twenty-nine days. He appeals his convictions and his Range II sentence. We affirm the judgment of the trial court.

It is not necessary that we address the facts in any detail. Members of the Nashville Metropolitan Police Department were conducting an undercover street level drug enforcement operation. During this operation, the Defendant sold cocaine to undercover police officers. Immediately thereafter, when other police officers attempted to arrest the Defendant, he fled and the officers had to chase him down to arrest him. After hearing proof of these facts, the jury returned a verdict of guilty of selling cocaine and evading arrest. We conclude that the evidence is sufficient to support the jury's verdict, and the Defendant does not argue otherwise.

The Defendant argues two issues on this appeal: (1) That reversible error was committed when a police officer testified that the police had received numerous complaints of street drug dealing near a certain elementary school; and (2) that the trial court erred in sentencing him as a Range II multiple offender.

Near the beginning of the State's proof, the assistant district attorney asked a police officer witness if there was any particular area of town that the undercover drug operation was focused on that evening. The officer responded, "we have then, and, of course, we still do, numerous complaints of street drug dealing near Kirkpatrick Elementary School, near the James Cayce public housing." The Defendant objected to the "numerous complaints from unnamed sources," as being hearsay. The trial court stated, "Okay. I don't know that it is asserted for the truth of the matter, but rather for why the officer did what he did, if we make that clarification." The assistant district attorney then resumed questioning of the officer. The Defendant insists that this exchange entitles him to a new trial.

The Defendant argues that the testimony was inadmissable hearsay and that it was not relevant. He argues that if it was remotely relevant to explain why the officers were conducting an undercover drug operation at that location, the testimony is unfairly prejudicial because the jury could view the testimony as "an invitation to remove a drug dealer who may be selling drugs to school children from the street by convicting whoever happens to be on trial." The police officer's testimony was unresponsive to the question asked. The testimony in question consists of just three typed lines on page four of one hundred and thirty-five pages of the transcript of the trial. Later in the officer's testimony, the district attorney mentioned Kirkpatrick Elementary School in a question to the officer. No objection was made. Assuming the testimony was inadmissable as hearsay, was irrelevant, or if relevant, that its probative value was outweighed by the danger of unfair prejudice, we conclude that any such error in allowing the testimony was

harmless and does not entitle the Defendant to a new trial. This issue has no merit.

The Defendant next argues that the trial court erred in sentencing him as a Range II multiple offender. In sentencing the Defendant in Range II, the trial court relied upon the Defendant's two prior convictions for attempted aggravated robbery. The Defendant argues that these two prior felonies were committed as part of a single course of conduct within twenty-four hours and, therefore, constitute only one conviction for the purpose of prior convictions in determining multiple offender status. Tenn. Code Ann. § 40-35-106(b)(4). The State argues that the two attempted aggravated robbery convictions were acts resulting in threatened bodily injury to the victims and, therefore, are not to be construed as a single course of conduct. Id.

It is apparent from this record that the two prior attempted aggravated robbery convictions were committed as part of a single course of conduct within twenty-four hours of each other. In fact, it is apparent that the two crimes were committed at the same time when the Defendant attempted to rob two separate victims at gunpoint simultaneously on or near the Legislative Plaza across from the Performing Arts Center in downtown Nashville. However, it is also clear from this record that these two prior crimes threatened bodily injury to the victims. The Defendant was attempting to rob the two victims at gunpoint. Before the victims could turn over their valuables, a Tennessee State Capitol Police Officer drove by and the Defendant fled. The police officer was able to apprehend the Defendant.

Included in the Sentencing Commission Comments concerning the code section in question is the following statement: "As another example, if the Defendant was convicted of robbing several people in the same store, such would constitute separate convictions for enhancement purposes for a new violation of the law. This is in accord with the policy of giving greater 'weight' to crimes of violence." We cannot conclude that the trial court erred in determining that the two attempted aggravated robbery convictions qualified as separate prior convictions for the purpose of sentencing this Defendant as a multiple offender. This issue has no merit.

The judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

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JOSEPH M. TIPTON, JUDGE