IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY SESSION, 1996

FILED

July 26, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. 02C01-9504-CR-00100**
	)	
Appellee,	)	
	)	
	)	**SHELBY COUNTY**
VS.	)	
	)	**HON. JON K. BLACKWOOD**
PRESTON CARTER,	)	**PRESIDING SPECIAL JUDGE**
	)	
Appellant.	)	**(Direct Appeal)**

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OPINION FILED ________________________

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

Appellant Preston Carter was convicted of aggravated robbery by a jury in the Shelby County Criminal Court and sentenced to eight years in the Department of Correction. In this direct appeal, Appellant presents the following issues:

> I. Whether the evidence was sufficient to show that Appellant was guilty of aggravated robbery;
>
> II. Whether the trial court erred in allowing an amendment to the indictment on the morning that the trial began;
>
> III. Whether the trial court erred in not charging the jury with the lesser included offense of theft; and,
>
> IV. Whether the trial court erred in refusing to grant a mistrial based on a police officer's reference to the fact that homicide officers were involved in Appellant's investigation.

After a review of each of these issues, we find no reversible error and affirm the decision of the trial court.

This case involves a March 9, 1993 robbery of a Mapco Express in Memphis, Tennessee. Alice Wilkins, the Mapco employee who was working as a cashier at the time of the robbery, testified that she had just relieved another employee around 5:00 a.m. when two males came into the store. One of the men approached Ms. Wilkins and laid a double-barrel shotgun on the counter facing her. After the man told Ms. Wilkins not to be afraid because he just wanted the money, he told her to get on her knees on the floor. During this encounter, the other man went to the back of the store to remove the video tapes from the surveillance camera.

Though Ms. Wilkins could describe her assailant as a black male in a dark blue jogging suit, she did not recognize Appellant as the robber. However, she was able to recognize with certainty Appellant's double-barrel gun as the same gun used by the Mapco robber to threaten her.

Mary Richard, who was the Mapco cashier on shift before Ms. Wilkins, also testified on behalf of the State. As she was warming up her car to leave the Mapco parking lot, she saw two men inside the store, one of whom pulled out what looked like a double-barrel shotgun and laid it on the counter. Ms. Richard testified that Appellant's gun appeared to be the same gun that she had seen that morning.

Appellant gave a statement to a police officer who interviewed him in May, 1993. Confessing to the robbery, he stated that he, along with another male Cedric Parker, had robbed the Mapco Express on March 9, 1993 around 5:26 a.m. They waited until after the employees had changed shifts before entering the store. Appellant had a sawed-off double-barrel 12-gauge shotgun which he laid on the counter. According to Appellant, while the cashier gave his accomplice the money, Appellant removed the surveillance tapes from the video recorder. Appellant testified that he had on jeans and a t-shirt and that the other male had on black jeans and a black t-shirt. Appellant owned the shotgun used in the robbery which had been sold to him by a cousin.

I.

Appellant first contends that the evidence was insufficient to show that he was the person who robbed the Mapco Express on the morning of March 9, 1993. This court must review the record to determine if the evidence adduced at trial was sufficient "to support the finding of the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Furthermore, the credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in that testimony are matters entrusted exclusively to the jury as the trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); Byrge v. State, 575 S.W.2d 292, 295

(Tenn. Crim. App. 1978). The relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have determined that the essential elements of the crime were established beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 314-24 (1979).

Appellant's claim is based upon the fact that there were no eyewitnesses who positively identified him and that this conviction is based upon circumstantial evidence. However, what Appellant omits from his recitation of the evidence is that he gave a statement to the police admitting his guilt to this crime. A conviction resting primarily on a defendant's inculpatory statements must be affirmed where the record contains "substantial independent evidence tending to establish the trustworthiness of the defendant's statements." State v. Ervin, 731 S.W.2d 70, 72 (Tenn. Crim. App. 1986) (citing Opper v. United States, 348 U.S. 84, 93 (1954)); see also State v. Buck, 670 S.W.2d 600, 609-10 (Tenn. 1984). Although Ms. Wilkins and Ms. Richard could not specifically identify Appellant, their account of the robbery was consistent with Appellant's account as detailed in his confession. Furthermore, both witnesses recognized Appellant's somewhat unusual gun as the one used in the Mapco robbery. In light of the fact that Appellant's confession was corroborated by the testimony of these other witnesses, a rational trier of fact could certainly have found Appellant guilty of this robbery beyond a reasonable doubt.

II.

In his second issue, Appellant argues that he was prejudiced by the trial court's decision allowing the State to amend the indictment on the day of the trial. It is true that on September 12, 1994, prior to trial, the court granted the State's motion to amend the indictment by correcting the name of the victim to read "Alice Wilkins" whereas it previously had read "Alice C. Watkins." In so doing, the court reasoned that amending

the indictment "does not create a new crime so as to prejudice the defendant and so pursuant to Rule 7(b) of the Tennessee Rules of Criminal Procedure, the amendment should be allowed." We agree.

Rule 7(b) provides that an indictment may be amended without the defendant's consent if it is done before jeopardy attaches and "[i]f no additional or different offense is thereby charged and no substantial rights of the defendant are thereby prejudiced." In this case, the amendment was allowed before the jury was sworn and, therefore, jeopardy had not attached. State v. Knight, 616 S.W.2d 593 (Tenn.), cert. denied, 454 U.S. 1097 (1981). No "additional or different offense" was charged in the amended indictment. But for the victim's name, both the pre-amendment and the post-amendment indictment were identical charging, with the same language, the offense of aggravated robbery.

Furthermore, no substantial rights of Appellant were prejudiced by this amendment. Our Court has stated that the general rule is that amendments to correct errors in the victims' names are permissible. State v. Hensley, 656 S.W.2d 410, 413 (Tenn. Crim. App. 1983) (citing Wharton's Criminal Procedure § 364 (12th Ed. 1975)); see also State v. McClennon, 669 S.W.2d 705, 706 (Tenn. Crim. App. 1984). Here, it is indisputable that Appellant was on notice of the offense and the particular misconduct for which he was charged. See State v. Burkley, 804 S.W.2d 458, 460 (Tenn. Crim. App. 1990). We therefore find that the trial court's decision to allow the amendment to Appellant's indictment was proper.

III.

Next, Appellant contends that the trial court erred in its failure to charge the jury with the lesser included offense of theft. It is true that theft is a lesser included offense

of aggravated robbery. State v. King, 905 S.W.2d 207, 214 (Tenn. Crim. App. 1995). Appellant's aggravated robbery conviction required a finding by the jury that the elements of theft were present and, in addition, the following elements: (1) that the property was taken from the person of another by violence or by putting the person in fear, Tenn. Code Ann. § 39-13-401(a) (1991); and (2) that this act was accomplished 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. Id. § 39-13-402(1).

A trial judge must charge the jury with a lesser included offense "where 'any facts . . . are susceptible of inferring guilt.'" State v. Trusty, 919 S.W.2d 305, 310 (Tenn. 1996) (quoting State v. Wright, 618 S.W.2d 310 (Tenn. Crim. App. 1981)); see also Tenn. Code Ann. § 40-18-110 (1990) (requiring judges to include lesser grades of offenses in jury instructions). However, "[w]here the evidence in a record clearly shows that the defendant was guilty of the greater offense and is devoid of any evidence permitting an inference of guilt of the lesser offense, the trial court's failure to charge on a lesser offense is not error." State v. Stephenson, 878 S.W.2d 530, 550 (Tenn. 1994) (citing State v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990)). This court has held that no instruction is required where the evidence shows that the crime was committed and the only issue is whether this particular defendant was the one who committed the crime. Price v. State, 589 S.W.2d 929, 932 (Tenn. Crim. App. 1979); see also State v. Barker, 642 S.W.2d 735, 738 (Tenn. Crim. App. 1982) ("Where the State's evidence establishes that the crime specified in the indictment was committed and the defendant seeks only to establish an alibi, leaving the State's evidence as to the degree of crime uncontradicted, no instructions on lesser included offenses are required.")

Here, the uncontroverted proof showed that the Mapco Express was robbed by a man with a gun who forced the cashier down on her knees--the only question at issue was the identity of this perpetrator. We therefore hold that the record is devoid of any

evidence that a mere theft occurred, and, under these circumstances, the trial court did not err in failing to charge the jury with the lesser included offense.

IV.

In his final issue, Appellant claims that the trial court erred in denying him a mistrial based upon a reference by one of the State's witnesses to the presence of homicide officers at Appellant's apartment. When asked by the defense attorney on cross-examination how many people were present at Appellant's apartment on the night of May 29th when Appellant was first investigated, the record reflects that the police officer witness responded as follows:

> There were four homici. . . officers went out there, two uniform officers going out there; and three investigators went inside and two uniform guys went inside.

Though no objection was made at this time, the defense attorney later in a bench trial requested a mistrial "based on the fact that this jury has to wonder why Homicide officers came to the scene." The trial court denied the motion for a mistrial and we affirm that decision.

The decision to grant or deny a mistrial is reviewed for an abuse of discretion. State v. Compton, 642 S.W.2d 745, 746 (Tenn. Crim. App. 1982). Generally, the trial court should use this discretion "with the greatest caution and only in the most urgent circumstances." State v. Witt, 572 S.W.2d 913, 917 (Tenn. 1978). Initially, we note that Appellant failed to make a contemporaneous objection which is alone a ground for waiver of this issue. See Tenn. R. App. P. 36(a); State v. Smith, 893 S.W.2d 908, 922 (Tenn. 1994), cert. denied, 116 S. Ct. 99 (1995). However, it is apparent that, in this case, the trial judge did not abuse his discretion. It is difficult to believe that jurors hearing only the officer's partial reference to the presence of homicide officers would

infer that Appellant was under investigation for a homicide. See State v. Jones, 733 S.W.2d 517, 522 (Tenn. Crim. App. 1987) (detective witness' statement that he had taken photographs of defendant "on a different case" did not necessarily imply a previous record). Furthermore, it appears that this was an entirely inadvertent statement and that the State had even taken precautions to prevent any such reference.

For the reasons stated herein, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE

CONCUR:

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JOSEPH B. JONES, PRESIDING JUDGE

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GARY R. WADE, JUDGE