

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST SESSION, 1996

FILED
December 30, 1996
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

MONOLETO DELSHONE
GREEN,

Appellant.

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C.C.A. NO. 010019910CC0054

RUTHERFORD COUNTY

HON. JAMES H. CLAYTON, JR.
JUDGE

(Aggravated Robbery)

ON APPEAL FROM THE JUDGMENT OF THE
CIRCUIT COURT OF RUTHERFORD COUNTY

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant, Monoletto Delshone Green, appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. He was convicted on a Rutherford County jury verdict of Aggravated Robbery. He appeals his conviction presenting eight issues for review: (1) That the trial court erred by failing to suppress the Defendant's confession; (2) that the trial court erred by failing to suppress an identification made of the Defendant at the pretrial hearing; (3) that it was prejudicial error to admit evidence that the Defendant possessed a handgun; (4) that the judicial process was prejudiced when a witness was detained in order to secure his presence at the Defendant's trial; (5) that it was error to admit a photographic lineup at trial which was not provided by the State pursuant to a discovery request; (6) that the trial court erred in admitting hearsay testimony; (7) that the trial court erred by admitting evidence of flight and instructing the jury on flight; (8) that the Assistant District Attorney made prejudicial and improper remarks at trial. We have examined the Defendant's issues on appeal and conclude that there is no reversible error. Therefore, we affirm the judgment of the trial court.

We begin with a brief summary of the facts. On March 1, 1994, at approximately 11:28 p.m., the victim was at work, alone, at the Kountry Korner convenience store and gas station in Murfreesboro, Tennessee. There were no customers in the store. The victim was standing by the cash register when a light-skinned black male entered the store. The victim did not see a vehicle

parked in the available spaces in front of the store. The individual who entered the store wore a black jacket that had the word "Sox" on the back. The victim described him as wearing blue jeans, a black belt, white underwear, black and white athletic shoes, with a white envelope hanging from the back pocket. The man was wearing a bandana that covered his face over the bridge of his nose, so that only his eyes were visible. He had the hood of the jacket pulled over his head.

The man had a shiny silver or black automatic handgun, like a 9mm, with a long barrel. He announced that "This is a robbery." At first, the victim believed it was only a joke by one of his customers and told him to get out. His assailant walked to within three or four feet of the victim. The victim was on a platform slightly higher than the subject, but described him as approximately five feet, eight inches tall and weighing approximately one hundred forty pounds. The robber pointed the gun at the victim's head and demanded the money from the cash register. The victim told the robber that what he was doing was stupid because he had less than one hundred dollars. He removed the cash drawer and put it on the counter and asked whether the robber also wanted the change. The victim then handed the paper money to the assailant. In the exchange, a dollar bill was left on the counter.

The man exited the store and the victim called 911. As the robber walked past the window, he removed the bandana and his face was visible. The victim did not see how or where the robber left the store, nor were there any witnesses to the robbery. However, shortly before the robbery, a neighbor had noticed a car parked at the side of the Kountry Korner Market. He noted this as unusual

because all of the parking spaces in front of the store were vacant. The witness described the vehicle as an early nineteen-seventies model Nova with "moon" style hubcaps.

In the early morning hours on April 6, 1994, an officer from the Smyrna Police Department was conducting a routine patrol of the David Youree School in Smyrna. He noticed a car parked behind the school and approached it in his cruiser. Another officer driving a second vehicle was also present. The first officer directed his spotlight on the car, and the Defendant "popped" up in the front seat, as if he had been lying down on the passenger side. The subject slid to the driver's side and began to drive the vehicle away from the officers. He rammed a police cruiser in his attempt to maneuver around them. The officers called for backup units and pursued the Defendant on a high-speed chase through the Smyrna area and on the interstate highway. The officers were joined by units from the Rutherford County Sheriff's Department and the Tennessee Highway Patrol. They chased the Defendant for several miles, as the Defendant weaved through other traffic and drove on the wrong side of the roadway in order to elude the officers. He rammed a civilian car as well as a police vehicle before he ran off the roadway. Several officers extracted the Defendant from the car by breaking a window. One officer's service revolver discharged through the driver's side window and the front windshield.

The Defendant had light-toned skin, was wearing a black "Sox" jacket and had an envelope in his back pocket. Several marijuana cigarettes and rolling papers were found in the car. The officers ran a driver's license check on him, which listed him as five feet seven inches in height and weighing one hundred

thirty-five pounds. Because his description was similar to that of the robber of the Kountry Korner Market, he became a suspect for that crime. The Defendant was also charged with drug possession, reckless endangerment and evading arrest.

The police took a photograph of him and assembled a photo array of six subjects. The victim did not identify the Defendant, nor did he make a positive identification of another subject. The victim later testified that the Defendant's skin tone appeared much darker in the photograph.

While the Defendant was being held in the county jail, a detective from the Rutherford County Sheriff's Department interviewed him on several occasions. At 8:05 a.m. on April 7, 1994, the Defendant was Mirandized and made a taped statement, denying involvement in the robbery. The detective made two additional attempts on April 7, and one attempt on April 8 to elicit a statement from the Defendant, but the Defendant refused. The detective was off work on the weekend of April 9 and 10, 1994, but upon returning to work on April 11, he received a note from the Defendant, requesting to speak with him. The Defendant submitted a letter for the District Attorney that included a confession to the robbery. After seeing the letter, the detective presented the Defendant with a waiver form, but the Defendant refused to make a statement and wanted the letter back. The detective retained the original letter and made a copy for the Defendant.

At the hearing to suppress the confession, the victim positively identified the Defendant as the robber. He noted that the complexion of the Defendant was a distinctively light skin tone like the robber's. The Defendant's father

testified at trial that he had seen him prior to the robbery with a shiny, automatic .38 caliber pistol. His father also stated he took the weapon and gave it to the Defendant's grandfather. The Defendant's uncle testified at trial that he had loaned the Defendant his car, a blue, 1970's Nova with "moon" hubcaps, about the time of the robbery.

The Defendant was convicted on a jury verdict of aggravated robbery and he now brings this appeal.

I.

First, the Defendant contends that the trial court erred by failing to suppress his confession. He asserts that his confession was involuntarily induced by the investigating detective's interrogation technique and that the evidence preponderates against the trial court's finding that the confession was voluntary and admissible at trial.

The Fifth Amendment to the United States Constitution as applied to the States through the Fourteenth Amendment insures that the accused may not be compelled to be a witness against himself. The Tennessee Constitution also provides that a defendant cannot be compelled to give evidence against himself. Tenn. Const. art. I, § 9. The accused may waive these rights, but the waiver must be made "voluntarily, knowingly, and intelligently" and "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." Miranda v. Arizona, 384, U.S. 436, 444, 467, 86 S.Ct. 1602, 1612, 1624 16 L.Ed.2d 694,706, 719 (1966). "In determining whether

a confession is voluntary, courts must look to the totality of the circumstances to determine whether the conduct of the law enforcement officers was such as to undermine the accused's will and bring about an involuntary confession." State v. Burtis, 664 S.W.2d 305, 309 (Tenn. Crim. App. 1983). See also State v. Benton, 759 S.W.2d 427, 431-32 (Tenn. Crim. App.1988).

The Defendant does not contest that he made a knowing, intelligent and voluntary waiver of his Miranda rights. The investigating officer advised the Defendant of his rights before the initial taped interview on April 7, 1994. The officer spoke with the Defendant on three other occasions without obtaining any further statement from him. The Defendant also signed a written waiver of his rights before the fourth conversation on April 8, 1994. There is no evidence that the Defendant invoked his Miranda rights, nor did he request representation from counsel before he submitted his written confession. Only after the officer received the Defendant's confession did he refuse to make a statement and request counsel. No interrogation took place after that.

The Defendant contests the voluntariness of his confession. The relevant portion of the confession reads as follows:

I give you my deepest regrets on the Kountry Korner incident, it wasn't a violent act. My father is Richard Green. He feels the same way I do about this. I feel there is no want for a lawyer, maybe a public defender. I will pay the \$136 back and Mr. Dotson you give me probation again.

He asserts that the investigating officer threatened him with the "maximum sentence" if he did not confess, that the officer suggested that he would ask the

District Attorney for probation if he confessed, and that the officer misstated the nature of the State's evidence against him.

Regarding the misstatement of the evidence, the investigator told the Defendant that a dollar bill was left at the scene on which his fingerprints were found. Yet the dollar bill was still undergoing a fingerprint test. The detective also stated that the car license had been recorded and that the victim identified the Defendant in a photo array, when in fact, there was only a description of the vehicle and the victim did not make a positive identification of the Defendant.

The detective's misrepresentation of the evidence is relevant when considering the totality of the circumstances, but will not necessarily invalidate a confession. See Frazier v. Cupp, 394 U.S. 731, 739, 89 S.Ct. 1420, 1424-25, 22 L.Ed.2d 684 (1969); McGee v. State, 2 Tenn. Crim. App. 100, 106, 451 S.W.2d 709 (Tenn. Crim. App. 1969), cert. denied, id. (Tenn. 1970). The Defendant admitted he was aware that these were misrepresentations and that the detective was trying to "run a game" on him. Although he claims he wrote the letter because he was scared, he stated that "I know he can't use that evidence he so-called had to convict me." The Defendant's testimony suggests that he did not rely on the misstatements of evidence and that he voluntarily submitted his confession.

The Defendant also claims that the detective threatened him with the maximum sentence and misstated the law when he referred to probation, which is not available for aggravated robbery. He contends that his fear of the possible sentence induced him to involuntarily confess to the crime. However, the

Defendant cites no Tennessee authority for the proposition that a misstatement of the law invalidates a confession. The Defendant testified at the suppression hearing that he was threatened by the alleged misstatements regarding the sentence and probation. There is testimony from the investigating officer who made no acknowledgment that he made any reference to the sentence, probation or that he threatened the Defendant. The State correctly notes that the determination of the Defendant's ability to voluntarily and understandingly confess as an effect of the statements made by the investigating officer was a contested issue of fact at the suppression hearing.

Deference is given to the trial court to assess the credibility of the witnesses, weigh and value the evidence, resolve conflicts in the evidence, and determine issues of fact. At an evidentiary hearing on a motion to suppress evidence, the factual findings of the trial judge will not be disturbed on appeal unless the evidence in the record preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996).

In the case sub judice, the evidence does not preponderate against the findings of the trial court. There is substantial evidence that the waiver was made voluntarily, knowingly and intelligently. There was a three-day time period between the last contact made by the detective and the Defendant's request to see him and his proffer of the letter for the District Attorney. Although the Defendant asked for the letter back after he had tendered it to the detective and refused to sign another waiver form, this suggests that he was aware of the consequences of his action. The wisdom of the defendant deciding to make a statement and his or her failure to foresee the effects of that statement are not

relevant to the determination of a valid waiver. See Harris v. Riddle, 551 F.2d 936, 939 (4th Cir.1977), cert. denied, 434 U.S. 849, 98 S.Ct. 160, 54 L.Ed.2d 118 (1977). Because we find that the evidence does not preponderate against the trial court's ruling that the confession was voluntary, the trial court properly overruled the Defendant's motion to suppress.

This issue is without merit.

II.

The Defendant asserts that the identification made of him by the victim at the pretrial hearing was akin to a showup that was unduly suggestive, and therefore the in-court identification should have been suppressed as violative of his due process rights.

An identification procedure that is so impermissibly suggestive “as to give rise to a very substantial likelihood of irreparable misidentification” violates due process. Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968). A showup is a form of identification of a defendant that is inherently suggestive. Yet, the identification at a preliminary hearing differs from a showup arranged by the police because the identification is not induced by an inherently suggestive confrontation arranged by the police. State v. Dixon, 656 S.W.2d 49, 51 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1983). This, however, does not eliminate the possibility that the pretrial confrontation was suggestive. Although it may be suggestive, an identification may satisfy due process as reliable and admissible when considering the totality of the circumstances. See State v. Brown, 795 S.W.2d 689, 694 (Tenn. Crim. App. 1990); Dixon, 656 S.W.2d at 51. Five factors are to be considered when evaluating the propriety of the identification process. Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972); Bennett v. State, 530 S.W.2d 511, 514 (Tenn.), reh’g. denied, id. (Tenn. 1975). These are the opportunity the witness had to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty of the witness at the confrontation (pretrial hearing)

and the time between the crime and the confrontation. Brown, 795 S.W.2d at 694; Dixon, 656 S.W.2d at 51.

We have evaluated the pretrial confrontation in light of the preceding factors. We note that there was a six-month period between the crime and the confrontation, which increases the suggestive nature of an identification that is remote from the crime. Also, the victim was not able to identify the Defendant from a photo array. Yet, the victim was within a few feet of the Defendant at the time of the crime and had a clear view of his eyes and skin color. He noted that the Defendant's light skin tone was a distinguishing feature. The victim also stated that the skin color in the photograph of the Defendant was much darker and not representative of his actual appearance. He also saw the Defendant's face after he removed the bandana while outside the market. The description of the robber and the Defendant were strikingly similar, and the victim identified the Defendant at the pretrial hearing with certainty. In considering the totality of the circumstances, we find that the trial court properly admitted evidence of the pretrial identification and the in-court identification of the Defendant.

III.

The Defendant argues that he was deprived of a fair trial because the District Attorney referred to irrelevant evidence that the Defendant possessed a gun before the robbery and that this was unduly prejudicial. The Defendant argues that it was improper for the State to refer to this gun in its opening and closing statements. The Defendant's father testified that he had seen him with a handgun prior to the robbery. He described a shiny, automatic pistol, like a .38

caliber and stated that he had taken the weapon away from the Defendant. The victim also described the gun used by the Defendant in the armed robbery as a shiny, automatic pistol, like a 9mm similar to the weapon the Defendant possessed prior to the crime.

The Defendant asserts that testimony regarding the gun in his possession was irrelevant because the prosecutor admitted in his closing argument that the gun the Defendant had in his possession was not the one used in the robbery. He claims the prosecutor used this evidence to impugn his character by a prior bad act. See Tenn. R. Evid 404(b). However, evidence of prior bad acts may be used for a purpose other than to show a defendant's propensity to commit the crime for which he is charged, such as to demonstrate intent, motive or a common scheme or plan, or opportunity. Tenn. R. Evid. 404(b); see State v. Goad, 707 S.W.2d 846, 850 (Tenn. 1986).

We are not convinced that the fact the Defendant once possessed a gun necessarily constitutes a prior bad "act". Because the gun in his possession was similar to the one used in the robbery, evidence of his possession is probative of his access to and use of automatic weapons. This does not indicate a propensity to act from previous behavior, but rather the Defendant's knowledge of and opportunity to use such a gun to commit the robbery.

Moreover, the Defendant did not object to his father's testimony regarding the gun. Pursuant to Rule 404(b) of the Tennessee Rules of Evidence, if defense counsel was suspicious of the purpose for which the State was admitting the evidence, she was entitled to request a jury-out hearing. In a 404(b) hearing, a

trial court is required to determine and state on the record whether a material issue exists other than conduct conforming with a character trait. Id. If a material issue exists, the trial court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice. Id.; see State v. Parton, 694 S.W.2d 299 (Tenn. 1985). However, failure to make a contemporaneous objection waives consideration by this court of the issue on appeal. See T.R.A.P. 36(a); Teague v. State, 772 S.W.2d 915, 926 (Tenn. Crim. App. 1988), perm. to appeal denied, id. (Tenn. 1989); State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App.), perm to appeal denied, id. (Tenn. 1988). Because the Defendant made no objection, this issue is waived.

IV.

Next, the Defendant contends that the judicial process was prejudiced because a witness was unlawfully detained to testify at trial. He has constructed an extensive argument to illustrate the injustice of the procedure by which one of the State's witnesses, Dwight Gregory, was illegally arrested to secure his testimony at trial. He cites Rule 36(b) of the Tennessee Rules of Appellate Procedure which provides that a judgment may be set aside if an error "would result in prejudice to the judicial process." Examples noted in the Comment to Rule 36(b) include ineffective assistance of counsel, an obviously biased decision maker or improper discrimination in jury selection.

The Defendant's argument is misplaced. First, if the witness' presence was secured by an illegal arrest, it is the witness' right to pursue any available remedies. The Defendant does not have standing to assert the claims of another

person. Second, the Defendant has not submitted any evidence of how the alleged illegal procedure has prejudiced the outcome of his trial. In fact, the witness in question testified at the Defendant's hearing on his Motion for New Trial and stated that he told the truth at trial and that his arrest did not affect the content of his testimony. This issue has no merit.

V.

The Defendant asserts that the trial court erred when it permitted the State to introduce a photographic lineup that the State had not provided to defense counsel pursuant to a request for discovery under Rule 16(a)(1)(C) of the Tennessee Rules of Criminal Procedure. On August 22, 1994, defense counsel filed a motion for discovery. Defense counsel also requested the photo array presented to the victim for identification. The investigating detective informed defense counsel that the State did not intend to use the photo array in its case in chief and did not produce the photographs. Defense counsel did not further pursue acquiring or inspecting the photo array. At trial in her opening statement, defense counsel raised the issue that the victim misidentified another person when viewing the photo array. The state introduced the photo array during direct examination of the victim, and defense counsel objected and moved that the photos be excluded. The trial court denied this motion, but allowed defense counsel to view the photo array. The Defendant asserts that it was prejudicial error to admit the photo array.

Rule 16(a)(1)(C) provides that upon the defendant's request, the State shall allow inspection and copying of photographs "which are material to the

preparation of the defendant's defense or are intended for use by the State as evidence in chief at the trial." Tenn. R. Crim. P. 16(a)(1)(C). Clearly, the State had not intended to use the photo array in its case in chief when defense counsel made the request. Because the State did not intend to use the photo array, it was not compelled under Rule 16(a)(1)(C) to provide it to the Defendant unless it was "material to the preparation of the defendant's defense." Although we note defense counsel's failure to pursue obtaining the photo array from the District Attorney after the detective denied inspection, we conclude that the use of the photos was material to the Defendant's defense. The photo array included a picture of the Defendant that the victim did not identify as the robber. Certainly, this has potential to support the Defendant's assertion that he was not the robber of the Kountry Korner Market. Therefore, we find that the failure to produce the photo array was a Rule 16 violation.

The Defendant asserts that exclusion of the evidence was the proper remedy for failure to comply with a discovery request as per Rule 16(d)(2). However, prohibiting the introduction of evidence is not the exclusive means to remedy failure to comply with the rule. Considering that the refusal to produce the photo array was a violation of Rule 16, the trial court had the discretion to permit inspection of the photos or provide whatever remedy that was just under the circumstances. Tenn. R. Crim. P 16(d)(2). The Defendant has asserted that the State's failure to provide the photos was prejudicial to his case, but has not presented this court with any reason for which the photo array was to be used. In order to support exclusion of the photographs, the Defendant must demonstrate actual prejudice from the failure to provide them. State v. Wayne Hymes Richards, No. 03C01-9503-CR-00102, Cumberland County, slip. op. at

8, (Tenn. Crim. App., Knoxville, July 8, 1996); State v. Garland, 617 S.W.2d 176, 185 (Tenn. Crim App.), perm. to appeal denied, id. (Tenn. 1981); State v. Briley, 619 S.W.2d 149, 152 (Tenn. Crim. App. 1981). The Defendant has failed to show how he was prejudiced because he did not have access to a photo array in which he was not identified. Also, the victim did not positively identify another subject in the photo array that could exculpate the Defendant. The trial court provided defense counsel an opportunity to inspect the photo array during the trial and to cross-examine the victim regarding his failure to identify the Defendant. Because no prejudice has been shown, we conclude that the trial court did not abuse its discretion in ordering that remedy.

VI.

The Defendant alleges that the trial court erred in admitting the testimony of the investigating detective of the description of the robber he received from the victim. The officer testified as to the description the victim provided and referred to the report of his investigation.

The rules of evidence provide that "[h]earsay is not admissible except as provided by these rules or otherwise by law." Tenn.R.Evid. 802. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn.R.Evid. 801(c). There are, of course, numerous exceptions to the general rule of exclusion of hearsay. See Tenn.R.Evid. 803(1.1) through (25), 804, and 805.

The prosecutor elicited testimony from the investigating officer about the description of the robber he received from the victim at the scene of the crime. The purpose of this testimony was to compare the victim's description of the robber to the characteristics of the Defendant, such as weight and height, that were obtained when he was apprehended after the car chase. Defense counsel objected to the testimony as hearsay, stating that the proper means to elicit the description was directly from the victim. The victim had already testified and described the robber. The officer testified to the description of the robber while reading from the report.

The Advisory Commission Comments to Rule 612 suggest guidelines by which a witness may refresh her memory: "The direct examiner should lay a foundation for necessity, show the witness the writing, take back the writing, and ask the witness to testify from refreshed memory." Tenn. R. Evid. 612.

The witness' reading the description may have been an error because it was not used to refresh recollection but rather approaches admitting a police report. However, the victim had previously testified to the description of the robber. Assuming the statement was hearsay, any error in admitting the robber's description as reported to the police officer was merely cumulative and clearly harmless. T.R.A.P. 36(b); Tenn. R. Crim. P. 52(a).

VII.

The next issue raised by the Defendant is whether the trial court erred by admitting evidence of and instructing the jury on flight. He contends that,

although relevant, proof of the Defendant's flight would be overly prejudicial and outweigh the probative value of the evidence. See Tenn. R. Evid. 403.

Evidence of a defendant's flight is relevant and admissible, when considering the facts and circumstances of the crime, it has probative value in establishing guilt. State v. Zagorski, 701 S.W.2d 808, 813 (Tenn. 1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3309, 92 L.Ed.2d 722 (1986). Relevant evidence includes the circumstances surrounding a defendant's arrest even if they reveal the commission of another crime. Id. The length of time between the crime and the evidence of flight does not negate its probative value. Any ex post facto indication by the accused of a desire to evade prosecution may be shown as one of a series of circumstances from which guilt may be inferred. State v. Braggs, 604 S.W.2d 883, 886 (Tenn. Crim. App.); perm to appeal denied, id. (Tenn. 1980). Shockley v. State, 585 S.W.2d 645 (Tenn. Crim. App.1978); Marable v. State, 203 Tenn. 440, 313 S.W.2d 451 (1958). Evidence of other crimes may be relevant to prove the identity or flight of a defendant and is admissible as long as the probative value outweighs the prejudicial effect. State v. Howell, 868 S.W.2d 238, 254 (Tenn. 1993), cert denied, 114 S.Ct. 1339, 127 L.Ed.2d 687 (1994).

In the case sub judice, the Defendant engaged in a high speed chase to avoid an encounter with police officers. Upon his capture, the police discovered that the Defendant resembled the Kountry Korner Market robber and was wearing the same type jacket. The circumstances of the chase and his arrest are probative of both flight and the identity of the robber. The court did not err by admitting the evidence of flight. Any evidence regarding the possession of

marijuana, a crime not relevant to the robbery, was excluded pursuant to a pretrial order. The Defendant, not the State, chose to introduce the drug evidence on cross-examination, therefore error cannot be assigned to the trial court.

Finally, it was not error for the trial court to instruct the jury on flight when evidence of the Defendant's arrest was properly admitted. There was evidence from which the jury could determine that the appellant fled. Therefore, the instruction concerning flight was proper. Moreover, the trial court instructed the jury in conformity with T.P.I.-- Crim. 37.16 that : "whether there was flight by the Defendant, the reasons for it, and the weight to be given it, are questions for you to determine." This instruction correctly sets forth the jury's responsibility concerning the flight issue. This issue has no merit.

VIII.

In the Defendant's final issue, he asserts that the Assistant District Attorney made unprofessional and improper remarks during his closing argument. The Defendant takes issue with several statements made by the prosecutor. He alluded to the lack of strength of the Defendant's theories that another person had committed the robbery, asserting that the State had proved the elements of the case. Second, the Defendant takes issue with the prosecutor's misstatement of evidence, which was cured by the prosecutor when he corrected the facts. Finally, the Defendant claims that it was improper for the prosecutor to mention that the letter had not been suppressed because this would suggest that the trial court found the confession to be credible. We find that, taken in the context of the entire trial and the length of the closing argument, there was no prosecutorial misconduct.

Assuming that the Assistant District Attorney's statements were improper, they must be such that they prejudice the outcome of the trial. Our review consists of considering five factors to determine whether the prosecutor's statements affected the verdict. Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976); State v. Davis, 872 S.W.2d 950, 953-54 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1993). These are (1) the conduct complained of viewed in the context and in light of the facts and circumstances of the case; (2) any curative measures undertaken by the court and the prosecution; (3) the intent of the prosecutor in making the improper statement; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength and weakness of the case. Judge, 539 S.W.2d at 344.

We have considered the preceding factors in the context of this case. We find that the misstatements made by the prosecutor appear unintentional and had only a harmless effect, if any. In light of the overwhelming evidence in this case, we find that the statements could not have prejudiced the Defendant. Furthermore, the court properly instructed the jury that the arguments of counsel were not to be considered as evidence in the case. This issue is without merit.

After a thorough review of the issues presented for review, we conclude that they are without merit. We affirm the judgment of the trial court.

DAVID H. WELLES, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

JOSEPH M. TIPTON, JUDGE