IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1997 SESSION

FILED

December 23, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9704-CR-00123**
Appellee,	)	
	)	**COCKE COUNTY**
VS.	)	
	)	**HON. WILLIAM R. HOLT, JR., JUDGE**
WANDA STANLEY and JEFF LILLARD,	)	
	)	
Appellants.	)	(Harboring a Fugitive and
	)	Providing Aid to a Fugitive)

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OPINION FILED:_____

AFFIRMED IN PART; REVERSED IN PART; REMANDED FOR RESENTENCING

JOHN H. PEAY,
Judge

O P I N I O N

In the spring of 1995, the defendants were indicted by presentment on charges relating to assisting two escaped felons. Wanda Stanley was indicted on two counts of harboring a fugitive and two counts of providing aid to a fugitive. Her boyfriend, Jeff Lillard, was also indicted on two counts of providing aid to a fugitive.[1] A jury found both defendants guilty of each charge. After a hearing, both defendants received two year sentences on each conviction. The trial court ordered the defendants to eighteen months incarceration in the Tennessee Department of Correction and six months of supervised probation for each conviction. The sentences were ordered to run concurrently.[2] In this appeal of right, the defendants raise the following issues:

> I. Whether the trial court erred in hearing the State's motion to consolidate despite the fact that the motion was not filed in compliance with the Tennessee Rules of Criminal Procedure.
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> II. Whether the trial court erred in granting the State's motion to consolidate.
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> III. Whether the trial court erred in its failure to swear the jury prior to questioning during voir dire.
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> IV. Whether the trial court erred in failing to select potential alternate jurors in compliance with the Tennessee Rules of Criminal Procedure.
>
> V. Whether the trial court erred by failing to dismiss certain jurors for cause.
>
> VI. Whether the State should have been allowed to make references to the death of one deputy and the wounding of another.
>
> VII. Whether the State made improper references to the defendants' failure to testify.
>
> VIII. Whether the evidence was sufficient to support a

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[1]The defendants were convicted under T.C.A. § 39-11-411.

[2]Lee Ester Crumbley was tried along with the defendants. The jury convicted her of the offenses with which she was charged: one count of harboring a fugitive and one count of providing aid to a fugitive. She is not a part of the appeal before this Court.

finding of guilt beyond a reasonable doubt.

IX. Whether the defendants' sentences are excessive.

After a review of the record and applicable law, we reverse and dismiss defendant Stanley's convictions for harboring a fugitive. However, we affirm her remaining convictions as well as the convictions of defendant Lillard. This cause is to be remanded to the trial court for resentencing of both defendants on all convictions.

BACKGROUND FACTS

Convicted felons Curtis Eugene "Pickle" Jones and Donald L. Nolan escaped from Turney Center on October 5, 1994. Prison officials did not discover that the pair had escaped until the next day when an emergency count was performed. The proper authorities were notified and a search ensued. On October 11, 1994, an anonymous caller told TBI officers that the fugitives could likely be found at one of two particular residences in Cocke County. The homes were identified as belonging to Lee Ester Crumbley and defendant Wanda Stanley. "Pickle" Jones was Crumbley's nephew and Stanley's cousin. Stanley is Crumbley's niece.

TBI Special Agent Steve Richardson testified that he had driven by the two homes on the morning of October 11. Stanley's home, located at 544 Jones Circle, and Crumbley's home, located at 569 Woodlawn Avenue, had adjoining back lots. After driving by the homes, Richardson decided to place an agent in the field near the two homes for surveillance purposes. When driving back by Stanley's house, Richardson testified that he had seen Stanley's Jeep Cherokee parked in her driveway. Richardson decided to set up further surveillance and a short time later observed Crumbley arrive in a white Toyota at the Stanley home. Richardson testified that when Stanley left the house, he and other agents followed her. When Stanley arrived at the Newport Print Shop, Richardson testified that he and other agents questioned Stanley and Lillard, who

was also at the Print Shop.

Richardson testified that Stanley had agreed to return to her house and let TBI agents search the home. While at her home, agents discovered a crawl space that led from an upstairs bathroom to the attic. They also discovered fresh insulation on the bathroom floor near the entrance to the crawl space. In the attic, agents found a piece of cardboard lying across the attic beams and two beer bottles. Agents also located a duffle bag containing canned foods and a flashlight in one of the upstairs bedrooms. No identifiable fingerprints were found on the beer bottles.

Richardson testified that when the search had been completed, he asked Stanley about the house directly behind her, meaning Crumbley's house. Stanley said she thought no one was home and that a woman named Shirley lived there.[3] Richardson then asked Stanley about the elderly woman he had seen enter her home earlier that day. Stanley told him that the woman was Crumbley and that her car had broken down and someone had picked her up from Stanley's house. However, Richardson testified that during the time he had been watching the house, he had not seen Crumbley leave. Richardson testified that at this point he then left Stanley's home in order to pursue another tip about the fugitives' whereabouts. He did not return to the area until he heard calls for assistance on his radio.

TBI Assistant Special Agent Rick Morrell testified that he had been the agent in the field doing surveillance on the two homes. He further testified that when agents made the decision to approach Crumbley's home, he knocked on the door and attempted to look in windows. He also stated that several telephone calls were made to the house, but no one answered. Morrell further stated that he had asked defendant

[3]Evidence did show that another small house was located near Stanley's and Crumbley's house.

Stanley whether she could provide the agents with consent to search the Crumbley house and she said that she could.

After some time had passed and no movement had been detected inside the house, Morrell and other agents decided to forcibly enter the home. Morrell was able to gain entry through the door to the kitchen and he then opened the back door to allow other officers to enter the home. As the officers were making their way through the house, shots erupted and the officers began to retreat. Morrell testified that Officer Scott Miller had been fatally wounded by at least one of the shots.

TBI Special Agent David Davenport testified that officers continued to try to make contact with the fugitives. He and Officer Richard Caldwell had attempted to enter the home through the front door when the door started to open and more shots were fired. Caldwell was injured by one of the shots. Davenport further testified that defendant Stanley had used a bullhorn to try and coax the fugitives from the home but that the fugitives made no response. Ultimately, tear gas was pumped into the house causing the house to catch fire. Shortly before the house caught fire, Crumbley crawled out of the house by way of the front door. At that time, other officers were able to retrieve the slain body of Officer Miller. The escaped felons died in the fire.

At the investigation following the fire, TBI Agent Steve Scott discovered the bodies of the fugitives. He testified that Nolan had been found just inside the front door on the floor and that Jones had been found in one of the home's bedrooms. Scott, who is an expert in firearms identification, also discovered three handguns in the home. One was found at the foot of Nolan's body. This gun matched the serial number of the backup pistol carried by Officer Miller. A second gun was found in the bedroom underneath Jones's body. This gun was a Taurus manufactured 357 Magnum revolver. The third

gun was also retrieved from the bedroom. This gun was identified as Officer Miller's duty weapon.

Agent Scott further testified that he had searched Stanley's Jeep Cherokee and had discovered a spent cartridge on a shelf underneath the glove compartment. He determined that the cartridge had been fired by the 357 Magnum found near Jones' body. Scott further determined that the bullet that killed Officer Miller had been fired from the same weapon. The pathology report revealed that the bullet had hit Miller just under his eye.

Leslie Johnson, an employee at a pawn shop in Greeneville, South Carolina, testified that she had sold a Taurus 357 with the same serial number as that found at the crime scene to Tracy Eugene Clark. Clark then testified that he had in fact bought the gun but that he sold it to his uncle, Tommy Clark, in either late 1992 or early 1993. Tommy Clark then testified that he had pawned the gun to defendant Lillard for one hundred dollars ($100). However, TBI Agent David Davenport testified that in December 1994 he had questioned defendant Lillard about the gun and Lillard had said he did not buy a gun in June of 1994 and that he did not give a gun to "Pickle" Jones.

Amy Stanley, daughter of defendant Stanley, was the only witness to testify on the behalf of the defendants. She testified that she had lived with her mother off and on during the time of this incident. She further testified that she had been in the process of moving back to her mother's house when the police searched the home. Amy Stanley also claimed ownership of the duffle bag and canned food that had been found in one of the bedrooms. She explained that the bag had been left over from some camping trips she had taken earlier in the year. Additionally, Amy Stanley offered an explanation for the beer bottles found in defendant Stanley's attic. Amy Stanley testified that she had

thrown the beer bottles in the attic a couple of years ago so that her mother would not catch her drinking.

Following this testimony, the defendants rested and the jury began its deliberations. The defendants were ultimately found guilty on all charges.

I. SUFFICIENCY

The defendants contend that the evidence was insufficient to support a finding of guilt beyond a reasonable doubt. Though this is not the defendants' first listed issue, we have chosen to address it first as we have just above recited the facts of the case. Furthermore, should this issue be decided in favor of the defendants, there is little need to discuss the remaining issues in depth.

A defendant challenging the sufficiency of the proof has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "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, 61 L.Ed.2d 560 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well

as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

The defendants contend that the evidence was insufficient to sustain their convictions. Defendant Stanley was convicted of providing aid to the fugitives as well as harboring the fugitives. Defendant Lillard was convicted of providing aid only. The statute under which they were convicted provides:

> A person is an accessory after the fact who, after the commission of a felony, with knowledge or reasonable ground to believe that the offender has committed the felony, and with the intent to hinder the arrest, trial, conviction or punishment of the offender:
>
> (1) Harbors or conceals the offender;
>
> (2) Provides or aids in providing the offender with any means of avoiding arrest, trial, conviction or punishment; or
>
> (3) Warns the offender of impending apprehension or discovery.

T.C.A. § 39-11-411.

First, defendant Stanley was charged with and convicted of two counts of T.C.A. § 39-11-411(a)(1). The State offered proof that Stanley was a cousin to escaped felon "Pickle" Jones and that when police searched her home, they discovered a crawl space leading to the attic, two Coors Light beer bottles in the attic, and a piece of

cardboard lying across the attic rafters. Police also discovered a duffle bag containing canned goods and a flashlight. Stanley had given the police consent to search her home. TBI agents had gotten a tip from an anonymous informer that Stanley had been hiding the two fugitives.

Although the evidence of the defendant's guilt is circumstantial in nature, it is a well established principle of law in this state that circumstantial evidence alone may be sufficient to support a conviction. State v. Buttrey, 756 S.W.2d 718, 721 (Tenn. Crim. App. 1988). However, in order for this to occur, the circumstantial evidence "must be not only consistent with the guilt of the accused but it must also be inconsistent with his [or her] innocence and must exclude every other reasonable theory or hypothesis except that of guilt." State v. Tharpe, 726 S.W.2d 896, 900 (Tenn. 1987). In addition, "it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that [the defendant] is the one who committed the crime." Tharpe, 726 S.W.2d at 896. Moral certainty as to each element of the offense is required, but absolute certainty is not. Tharpe, 726 S.W.2d at 896.

While following the above guidelines, this Court must remember that the jury decides the weight to be given to circumstantial evidence and that "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence are questions primarily for the jury." Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958); State v. Coury, 697 S.W.2d 373, 377 (Tenn. Crim. App. 1985); Pruitt v. State, 460 S.W.2d 385, 391 (Tenn. Crim. App. 1970).

Here, we are unable to conclude that the circumstantial evidence presented by the State "exclude[s] every other reasonable theory or hypothesis except that of guilt."

State v. Tharpe, 726 S.W.2d 896, 900 (Tenn. 1987). Evidence that Stanley had a crawl space in her house, two beer bottles in the attic, and a duffle bag of canned food in an upstairs bedroom is simply not enough to sustain a conviction for harboring fugitives. Giving the State the strongest legitimate view of proof and even disregarding the proof offered by the defendants, we cannot uphold this conviction. We recognize that drawing inferences from the offered proof is the providence of the jury, but in this case, such an inference is not adequately supported by the proof. Thus, we reverse and dismiss Stanley's convictions for harboring the two fugitives.

Stanley was also charged with and convicted of two counts of T.C.A. § 39-11-411(a)(2). As to these charges, the State offered proof that when police asked Stanley if anyone were at home at the Crumbley house, she responded that no one was home but that a lady named Shirley lived there. It was not until much later at Crumbley's house that Stanley told officers her aunt was probably in the house. She even called to the fugitives with a bullhorn that police had provided. Following the whole incident, TBI Agent Richardson confronted Stanley and told her that had she told the truth in the first place, the entire incident could have been avoided. Richardson testified that Stanley had not responded but had merely dropped her head.

From this proof, a rational trier of fact could conclude that Stanley knew the escaped fugitives were hiding at the Crumbley home and that Stanley aided them by not telling police that they were in fact there. Thus, as to Stanley's convictions for aiding the fugitives, we find the evidence sufficient to support her convictions beyond a reasonable doubt. Here, Stanley failed to carry her burden of illustrating to this Court why the evidence is insufficient to support the verdict.

We turn now to defendant Lillard who was charged with and convicted of

two counts of aiding fugitives. T.C.A. § 39-11-411(a)(2). Here, the State offered proof that Lillard had purchased a Taurus manufactured 357 revolver from a man named Tommy Clark. The State then showed that this same gun was the one used to shoot and kill Officer Miller and that it was the gun found underneath the body of "Pickle" Jones. From these facts, it is completely permissible for the jury to draw the inference that Lillard had aided the fugitives by providing the weapon which they used in their attack against the police. Thus, we conclude that this evidence was sufficient beyond a reasonable doubt to convict Lillard of these two offenses.

II. MOTION TO CONSOLIDATE

Turning now to the first listed issue in the defendants' brief, the defendants contend that the motion to consolidate their case with that of Lee Ester Crumbley was not filed in compliance with the Tennessee Rules of Criminal Procedure. Specifically, they contend that the motion was improperly served because it was faxed to the defendants' attorney rather than being actually delivered or mailed. They further contend that the motion was not timely filed and should have been decided prior to trial as is required by Rule 12 of the Tennessee Rules of Criminal Procedure.

A. Merits of the Motion

Since the defendants also attack the merits of the motion to consolidate, we choose to address this issue before addressing the technical aspects of the motion. Under Tenn. R. Crim. P. 13(a), the trial court may order consolidation of two or more indictments for trial if the offenses and all defendants could have been joined in a single indictment pursuant to Tenn. R. Crim. P. 8. This latter rule provides that two or more defendants may be joined

> [e]ven if conspiracy is not charged and all of the defendants are not charged in each count, if the several offenses charged:

> (i) Were part of a common scheme or plan; or
>
> (ii) Were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

Tenn. R. Crim. P. 8(c)(3). The decision to consolidate defendants is left to the sound discretion of the trial judge. Absent a showing of prejudice, this Court may not overturn the trial court's determination. State v. Gaylor, 862 S.W.2d 546, 555 (Tenn. Crim. App. 1992).

Consolidation should not be granted where separate trials are "necessary to achieve a fair determination" of guilt or innocence. Tenn. R. Crim. P. 14(d). However, we note that the Supreme Court has stated:

> It may have been to the interest of each that he be tried alone, but the orders of the court are molded to protect rights, and not merely the interests, of persons accused of crime. The state, as well as the persons accused, is entitled to have its rights protected, and, when several persons are charged jointly with a single crime, we think the state is entitled to have the fact of guilt determined and punishment assessed in a single trial, unless to do so would unfairly prejudice the rights of the defendants.

Woodruff v. State, 51 S.W.2d 843, 845 (1932).

Turning now to the case before this Court, the defendants claim that consolidation was improper because it caused evidence to be introduced against certain defendants that would not have been admissible in separate trials, because neither a common scheme nor a close connection in respect to time, place and occasion existed, and because defendant Lillard was prejudiced in that Crumbley did not testify in his behalf, which she allegedly would have done had the two been tried separately.

The defendants claim that evidence of the ultimate location of the fugitives and of subsequent events at Crumbley's house had no relevance on the alleged crimes

of the defendants. In a proper case, the disparity of evidence between co-defendants may be grounds for severance. However, "'a strong showing of prejudice' is required before a severance will be granted on this ground. The prejudice requirement is not established 'simply because much of the evidence presented at trial is applicable only to his co-defendants.'" Black v. State, 794 S.W.2d 752, 758 (Tenn. Crim. App. 1990)(citations omitted).

As to defendant Lillard, he argues that the evidence regarding Crumbley's part in aiding the fugitives and the subsequent events at her house would have been inadmissible in a separate trial. We disagree. Lillard was charged with two counts of aiding a fugitive because he supplied the gun used by the fugitives. Thus, the State had to show that the gun was in the possession of the fugitives and that they had used it in an effort to avoid being apprehended. Thus, the State needed to show that the gun was ultimately found under the body of fugitive Jones. Further, the State offered evidence of the shooting death of Officer Miller to show that the fugitives had actually used the gun supplied by the defendant. We find no clear showing of prejudice that Lillard should have been tried separately because evidence relating to the later events at Crumbley's house was admitted.

As to defendant Stanley, the later events at Crumbley's house are less relevant, but relevant nonetheless to her conviction for aiding the fugitives. Stanley provided aid to the fugitives by telling officers she thought no one was in the Crumbley house. Again, we do not find a clear showing of prejudice simply because evidence of events at Crumbley's house was introduced. As we noted above, the fact that some of the evidence presented at trial was applicable only to her co-defendants is not a sufficient ground for severance absent a clear showing of prejudice. See Black v. State, 794 S.W.2d 752 (Tenn. Crim. App. 1990). Furthermore, we note that the trial judge instructed

the jury to "consider any proof in evidence only as to any defendant it relates to. If it does --- if it relates to one defendant, you consider it to that defendant; if it relates to all, you relate it to all. You make that determination. . . . [D]on't penalize a defendant who [the evidence] does not relate to as we proceed through this trial. And I will instruct you from time to time about that." The jury is presumed to have followed these instructions. State v. Newsome, 744 S.W.2d 911, 915 (Tenn. Crim. App. 1987).

The defendants next contend that the consolidation was improper because there was no evidence of a common scheme nor a close connection in respect to time, place, and occasion. From the evidence offered at trial, it is clear that the offense with which the defendants were charged had a close connection. Stanley aided the fugitives by not telling the police that the two were in Crumbley's house. Meanwhile, Crumbley was inside her house with the two fugitives. A short time thereafter, the shoot-out began in which the fugitives used the gun supplied by Lillard. All the events occurred at the Crumbley house, which is adjacent to the lot on which Stanley's house sits. Furthermore, the incident happened in a continuous manner, all during a few hours on October 11, 1994. Thus, we conclude that consolidation was proper because adequate proof demonstrated a close connection with respect to time, place, and occasion.

Defendant Lillard makes a final contention that he was prejudiced by the consolidation because without it, Crumbley would have testified in his behalf. In fact, at Lillard's sentencing hearing, Crumbley told the court that in August of 1994, she had had some disturbances near her house and was afraid because she lived alone. She said one night in August she had become afraid and had asked the defendants to come over. She said that when Lillard had arrived, he gave a gun to her for protection. She then testified that she had put the gun in a dresser drawer and never saw it again. On cross-examination, however, Crumbley admitted that she had never told the police this story.

We cannot conclude that Crumbley's testimony at the sentencing hearing is proof that she would have testified at Lillard's trial had the cases been severed. Lillard has failed to prove that had the cases been severed Crumbley, whose case would have also been pending, would have testified rather than electing to exercise her right to remain silent under the Fifth Amendment to the United States Constitution. See State v. Hicks, 835 S.W.2d 32, 37-38 (Tenn. Crim. App. 1992). Thus, we conclude that the defendants have failed to show that the trial court abused its discretion in consolidating the defendants' case with Crumbley's case.

B. Method of Service

Having addressed the motion on its merits, we now turn to the procedural aspects of the motion. The defendants argue that the motion was improperly served because it was faxed to the defendants' attorney rather than being actually delivered or mailed. They further contend that the motion was not timely filed and should have been decided prior to trial as is required by Rule 12 of the Tennessee Rules of Criminal Procedure.

First, the defendants argue that faxing the motion to the defense attorney was not in compliance with Tenn. R. Crim. P. 49. That rule provides that when serving an attorney with a written motion, the service "shall be made by delivering to that person a copy of the document to be served, or by mailing it to that person at his or her last known address, or if no address is known, by leaving the copy with the clerk of the court." The defendants contend that a facsimile does not fall within the parameters of the rule.

The Supreme Court has twice addressed the issue of filing by facsimile. Both times, the cases were civil cases where the notice of appeal had been filed by facsimile. In Cruse v. City of Columbia, 922 S.W.2d 492 (Tenn. 1996), the Court held

that the notice was sufficient to allow the appeal to proceed. However, in a footnote the Court stated, "[c]ounsel should be specifically aware that facsimile service is not allowed for the service of pleadings and other documents on parties to a lawsuit." Cruse, 922 S.W.2d at 493. The Court further pointed out that Tenn. R. Civ. P. 5.02 specifically defines the service methods for pleadings. Additionally, the Advisory Commission Comments provide that the rule does not permit service by facsimile transmission. Because the language of Tenn. R. Crim. P. 49 is virtually identical to that in Tenn. R. Civ. P. 5.02, we can only conclude that service by facsimile is not permitted under Rule 49 either.

Thus, having concluded that it was error for the State to have sent the defendants the motion by facsimile, we must assess the effect of that error. First, the defendants do not contend that they did not have notice of the State's motion. In fact, the defendants' attorney filed a response to the motion two days later on the day the trial was set to begin. Second, the defendants have failed to demonstrate how they were prejudiced by the fact that the motion was served by facsimile rather than mail. As such, we cannot conclude that the State's error in faxing the motion warrants a new trial. We do, however, recommend that the district attorney's office review the rules of procedure and comply accordingly.

C. Timing of Motion

The defendants' final contention with regard to the motion to consolidate is that the motion was not filed in a timely fashion. The record shows that the motion was filed on the afternoon of Tuesday, September 24, 1996. The trial was set to begin Thursday, September 26, 1996. A hearing was held on the motion the morning before the trial began. The defendants claim that in filing the motion so close to the date of trial, the State violated Tenn. R. Crim. P. 12(c) which provides in part: "A motion made before

trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected." The defendants further contend that the State also failed to comply with Tenn. R. Crim. P. 45(e) which, in part, states that "[a] written motion, other than one which may be heard 'ex parte,' and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing unless a different period is fixed by rule or order of the court." Here, the defendants received the motion only two days prior to the trial.

Clearly, the State failed to comply with Rule 45 when it filed its motion only two days prior to trial. This delay then caused the trial court to be unable to hear the motion "before trial" as is required by Rule 12(e). This Court has before stated that "the phrase 'before trial,' as used in [Rule 12], means sometime earlier than the day the trial is to commence." State v. Aucoin, 756 S.W.2d 705, 709 (Tenn. Crim. App. 1988). In that case, the defendant filed a motion to suppress but did not request a hearing on the motion until the day of trial. The trial court selected the jury, conducted a hearing on the motion, and then denied the motion. On appeal, this Court stated that the defendant's failure to bring the motion to the attention of the trial judge and have the trial judge rule upon the motion prior to trial, resulted in a waiver of the issues raised in the motion. Aucoin, 756 S.W.2d at 709. However, the Court then addressed the merits of the motion and affirmed the trial court's denial of the motion.

Generally, the reason such motions are to be determined prior to trial is to prevent the disruption of juries and to ensure the right of the State to appeal an adverse ruling by the trial judge without placing the defendant twice in jeopardy. See State v. Randolph, 692 S.W.2d 37 (Tenn. Crim. App. 1985); State v. Davidson, 606 S.W.2d 293 (Tenn. Crim. App. 1980). In the case now before this Court, neither of the above cited

concerns are present. The motion to consolidate was heard prior to the jury being selected, thus, not causing any disruption to the jury's hearing of the case. Also, had the State's motion been denied, the State's right to appeal would not have been adversely affected as it is with motions to suppress decided after the jury is sworn. Therefore, we find that the State's failure to file the motion on time, while certainly an error, does not arbitrarily result in a reversal.

Thus, having concluded that it was error for the State to have filed the motion only two days before trial, we must assess the effect of that error. At the hearing on the motion, the trial court judge expressed surprise that such a motion was necessary. He stated that it had been his understanding that the cases were already consolidated and that the cases had been previously set together on the docket. The court further noted that previous motions had been filed and jointly heard. Additionally, the court noted that when one of the original defense attorneys involved in the case was called to active duty with the military, all the cases were continued, not just the one involving that particular attorney. The State pointed out to the court that the attorney for the defendants at the criminal trial was also serving as Crumbley's attorney in a civil suit involving the same facts. Thus, the defendants' attorney can hardly complain that he was uninformed about the entire circumstances of the incident involving Crumbley and the defendants. From the above we conclude, as did the trial court, that the defendants were not prejudiced by the State's late filing of the motion. The defendants have failed to show that their course of action would have been different had the cases not been consolidated.

In conclusion, the defendants suffered no prejudice by the faxed motion or the late filing. Furthermore, as we determined in the discussion of the merits of the motion, consolidation was properly granted. Thus, we find that the errors by the State

are harmless. However, we by no means condone the State's failure to follow the rules. We simply have determined that in this case alone that failure to do so was harmless.

IV. FAILURE TO SWEAR JURY PANEL

In this issue, the defendants contend that the trial court erred prior to voir dire when it failed to have the prospective jurors swear to answer all questions truthfully. Apparently, the trial court had determined that individual voir dire was necessary due to the amount of pre-trial publicity. The court then began questioning the jurors individually without swearing them to tell the truth. Once the jury selection was complete and the trial was about to begin, the jury was sworn in and the trial judge then realized that during voir dire he had not asked the jurors to swear that they were answering truthfully. He then asked the jury, "Also, members of the jury, do you and each of you solemnly swear that the answers you have given to the questions that have been asked of you by the Court and by the attorneys earlier, is that the truth, the whole truth and nothing but the truth?" The jurors all answered in the affirmative.

The defendants contend that they should be granted a new trial because Tenn. R. Crim. P. 24(a) mandates that "[t]he court shall cause the prospective jurors to be sworn or affirmed to answer truthfully the questions they will be asked during the selection process . . . ." (emphasis added). Clearly, the trial court did err by failing to swear the prospective jurors to tell the truth prior to their being questioned. However, in considering the entire record in this cause, we are satisfied that this error was harmless beyond a reasonable doubt. T.R.A.P. 36(b); Tenn. R. Crim. P. 52(a). The defendants make no allegation that the jury that heard their case was not fair and impartial.

V. SELECTION OF ALTERNATE JURORS

The defendants next argue that the trial court erred by not selecting

alternate jurors in a manner that complied with Tenn. R. Crim. P. 24. Alternates are to be selected for service in the same manner as regular jurors which is provided for in T.C.A. § 40-18-104.[4] Furthermore, if the required number of jurors cannot be obtained from the original venire, T.C.A. § 22-2-308(a)(2) provides the method for selecting more prospective jurors. This statute provides that if the venire is exhausted,

> the clerk of the court shall produce in open court the jury box, and the box shall be opened by the court and there shall be drawn therefrom, as directed by the court, the number of names deemed by the judge sufficient to complete the juries. This process shall, if necessary, continue until the grand and petit juries are completed; but the judge of the court instead of following the last mentioned procedure may, if the judge shall deem proper, furnish a sufficient number of names of persons to be summoned to the sheriff, or the judge may, if the judge thinks proper, direct the sheriff to summon a sufficient number to complete the juries.

In this case, when the original venire was exhausted, the court instructed the court clerk to have twenty potential jurors at the courthouse the next morning. The clerk informed the court that the sheriff's office was already closed for the day. The court responded, "Do what we can do. I'm afraid to go without any alternates."

The following day, the new potential jurors arrived. Prior to the voir dire of the jurors, the defendants objected to the way the potential alternates were chosen. Evidently, the jurors were selected through telephone calls made by the sheriff's office. The trial court noted the objection and continued with the selection of the alternates. At the conclusion of the trial, a hearing on the issue of selecting the jurors was held. Sheriff Tunney Moore told the court that he was simply told by the clerk to have twenty more jurors at the courthouse the next day. He was provided with no further instruction. He said he simply started calling people by running his finger through the phone book. He

[4] "The names of the jurors are written on separate scrolls, and placed in a box or other receptacle, and drawn out by a child under ten (10) years of age, by the judge, or some person agreed upon by the district attorney general and the defendant." T.C.A. § 40-18-104.

said he also instructed some of his officers to make some phone calls. Moore further stated that some of the calls he made were to people that he knew, specifically to people he knew that were retired and might have time to serve.

The defendants argued that the selection of potential alternates failed to comply with the statutory requirements. They also objected because some of the officers in the sheriff's department had been named as defendants in a civil case involving the same facts as the present criminal case.

While the method of selecting the alternate jurors may not have complied with the selection statutes, we see no reason to further examine the selection process. The alternate jurors were not needed and were dismissed prior to the jury's deliberation. The defendants argue that the alternates were with the jury during the course of the trial and may have influenced the jury. However, the court instructed the jurors and alternates throughout the trial that they were not to discuss the case until deliberations began. The jury is presumed to have followed these instructions. State v. Newsome, 744 S.W.2d 911, 915 (Tenn. Crim. App. 1987). Thus, we conclude that any errors which may have occurred in selecting the potential alternates were harmless beyond a reasonable doubt.[5]

VI. DISMISSAL OF JURORS

The defendants next complain that the trial court erred when it refused to dismiss certain jurors for cause based on their exposure to pre-trial publicity. The defendants allege that they were forced to use all their peremptory challenges because the trial court refused to dismiss for cause jurors Doyle Dennis, Blanche Holt, Robert Williamson, and Loretta Roberts. Each of these potential jurors said something to the

[5]We note that this case is quite distinguishable from State v. Lynn, 924 S.W.2d 892 (Tenn. 1996). In that case, the actual jury that heard the case was not selected in accordance with the statutory requirements. The case before us now does not rise to the level of error in Lynn. Thus, a harmless error analysis is appropriate.

effect that they had heard about the case but that they had not really formed any opinions. In a confusing line of questions, some of the jurors said that they needed to be shown some proof that the defendants were not guilty. However, they all said they would be able to put aside any opinions that they may have formed and would base their decisions on the proof offered in court. The defendants challenged all four jurors and the trial court refused to dismiss any of them. All four were later dismissed when the defendants exercised their peremptory challenges.

Since none of these people served on the jury, "any error in refusing to excuse [them] for cause in and of itself does not entitle the defendant[s] to a new trial unless the jury that ultimately heard the case was not fair and impartial." State v. Howell, 868 S.W.2d 238, 249 (Tenn. 1993)(citation omitted). The defendants make no argument that any of the subsequent jurors they were "forced" to accept were in any way incompetent. Without such an allegation, we are unable to say that the defendants suffered any prejudice because their peremptory challenges had been exhausted. In order for this Court to find a prejudicial error, the defendants should have offered proof that the actual jury that heard their case was in some way not fair and impartial. Failing to do so, we find no merit to this issue.

VII. EVIDENCE OF DEATH OF OFFICER

The defendants next contend that the State made improper and irrelevant references to the death of one police officer and the wounding of another. The defendants claim that such improperly admitted evidence was highly prejudicial and therefore, constitutes reversible error. This evidence was the subject of a defense pretrial motion which the trial court denied.

The defendants argue that the State's references to Officer Miller's death

and to the shooting of Officer Caldwell were irrelevant to a determination of the defendants' guilt for the crimes with which they were charged. The defendants cite the following references as improper: TBI agent's testimony that he received a report of an officer having been shot at Crumbley's house; reference to Officer Caldwell bleeding; reference to the retrieval of Officer Miller's body before the house became engulfed in flames; a poster depicting Officer Miller's wounds; and other general references to the standoff and its consequences. The defendants contend that this evidence is irrelevant because the crimes with which they were charged had been completed prior to the activities at Crumbley's house.

Tennessee Rules of Evidence 401 provides that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The determination of whether any evidence is relevant is left to the broad discretion of the trial court. This determination will not be disturbed on appeal absent an abuse of discretion. State v. Hill, 885 S.W.2d 357, 361(Tenn. Crim. App. 1994).

As we concluded in the discussion above about the motion to consolidate, evidence of the escaped felons' use of the weapon was relevant to show that defendant Lillard had aided the felons by supplying the weapon that helped the felons stave off officers. The defendants have failed to demonstrate how the admission of such evidence was so prejudicial as to warrant a reversal. We find no abuse of discretion by the trial court.

VIII. CLOSING ARGUMENTS

The defendants next contend that during closing arguments, the State

made impermissible references to the defendants' failure to testify. At trial, the defendants' only witness was Amy Stanley, daughter of defendant Stanley. During closing argument, the State told the jury:

> You don't lie if you're not guilty of anything. You're not afraid of the truth if the truth doesn't hurt you. Why is it that [Jeff Lillard] couldn't have just ---- he wanted to come up with some ---- going to come up here with Amy, going to try to hide behind Amy. Amy doesn't talk about that weapon. She didn't know anything about that weapon.

A defendant's right not to testify is clearly protected under Tennessee law. See Tenn. Constitution, Article I, Section 9; T.C.A. § 40-17-103. It is also clear that any adverse comment by the State upon the failure of the defendant to testify constitutes reversible error, if an objection is made, and if the "trial judge does not promptly require counsel to desist and does not properly instruct the jury accordingly." State v. Hale, 672 S.W.2d 201, 202 (Tenn. 1984).

In this case, the defendant made no objection when the State made its comments about "hiding behind Amy." The failure of defense counsel to make a contemporaneous objection waives consideration by the Court of the issue on appeal. See State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988); T.R.A.P. 36(a). The defendants' attorney, recognizing the effect of his failure to object, now argues that this Court should address the issue under a plain error analysis. In order for the State's comments to amount to plain error, the comments must have affected "the substantial rights of an accused." Tenn. R. Crim. P. 52(b). This Court may take notice of such an error at any time "where necessary to do substantial justice." Tenn. R. Crim. P. 52(b).

The above quoted passage from the State's closing argument is not an improper comment on the defendants' failure to testify. "The prosecutor made no direct allusion to the defendant[s'] failure to testify, nor did he argue to the jury directly or

indirectly that the omission to testify should be taken by them as an inference of guilt. Such an argument, if made, clearly would have been improper." Taylor v. State, 582 S.W.2d 98, 100 (Tenn. Crim. App. 1979). Furthermore, the trial court instructed the jury that the defendants' "failure to testify may not be considered as an admission of guilt[,] as evidence against them, or that the charges could not be answered. For they are presumed innocent and they are not required to prove that they are innocent." Such an instruction "dissipated any prejudicial effect which might have emanated from the comment in question." Taylor, 582 S.W.2d at 100. Thus, we find no merit to this issue.

IX. SENTENCING

As their final issue, the defendants contend that their sentences were excessive. Each defendant received an effective sentence of two years. Each is to serve eighteen months in the Tennessee Department of Correction with the remaining six months of the sentence to be served on supervised probation.

When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "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).

Tennessee Code Annotated § 40-35-210 provides that the minimum sentence within the range is the presumptive sentence. If there are enhancing and mitigating factors, the court must start at the minimum sentence in the range and enhance the sentence as appropriate for the enhancement factors and then reduce the sentence

within the range as appropriate for the mitigating factors. If there are no mitigating factors, the court may set the sentence above the minimum in that range but still within the range. The weight to be given each factor is left to the discretion of the trial judge. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

The Act further provides that "[w]henever the court imposes a sentence, it shall place on the record either orally or in writing, what enhancement or mitigating factors it found, if any, as well as findings of fact as required by § 40-35-209." T.C.A. § 40-35-210(f) (emphasis added). Because of the importance of enhancing and mitigating factors under the sentencing guidelines, even the absence of these factors must be recorded if none are found. T.C.A. § 40-35-210 comment. These findings by the trial judge must be recorded in order to allow an adequate review on appeal.

In this case, the trial court applied enhancement factor 10 to both defendants for each of their convictions. Factor 10 is applied if the "defendant had no hesitation about committing a crime when the risk to human life was high." T.C.A. § 40-35-114(10). The Supreme Court has held that the focus in determining to apply this factor should be whether "the risk to human life was high" and that little, if any, emphasis is to be placed on whether the defendant "hesitated" before committing the crime. State v. Jones, 883 S.W.2d 597, 602 (Tenn. 1994).

Here, Lillard aided escaped fugitives by providing them with a weapon which they ultimately used in an effort to avoid apprehension. Stanley also assisted the fugitives by not telling the police that the fugitives were armed and hiding in Crumbley's home. Under these circumstances, the risk to human life was certainly high. The actions of the defendants placed all officers investigating the fugitives' escape in grave danger. As stated in the facts of the case, one officer was indeed killed while another was wounded.

The defendants created a high risk to the lives of all the officers at Crumbley's house on October 11, 1994. Thus, we conclude the trial court was not in error when it applied factor 10 to both of the defendants.

As to mitigating factors, the trial court failed to state on the record the absence of any mitigators. The defendants now argue that mitigating factor 1 should have been applied. That factor provides that "the defendant's criminal conduct neither caused nor threatened serious bodily injury." T.C.A. § 40-35-113(1). As discussed immediately above, the defendants' conduct did threaten serious bodily injury. The defendants' assistance to the fugitives essentially led unsuspecting police into an extremely dangerous situation in which not only serious bodily harm was threatened but also death. This mitigating factor does not apply.

The sentencing range for the defendants' convictions is one to two years. Starting at the mid-range of the sentence, the trial court then had the discretion to lengthen the sentence according to the application of any enhancement factors. Accordingly, the trial judge here set the defendants' sentences at the top of the range. It was within the trial court's discretion to sentence the defendants to two years on each of their convictions, thus, we find no reason to disturb this aspect of the sentence.

Determining that the trial court was not in error when it sentenced the defendants to the top of the range does not end the inquiry as to the appropriateness of their sentences. The defendants also claim that the trial court erred when it refused their requests for straight probation. We first point out that the defendants were convicted of Class E felonies, thus they are presumed to be eligible for alternative sentencing in absence of evidence to the contrary. It appears that the trial court was attempting to fashion an alternative sentence when it ordered the defendants to some incarceration in

the Tennessee Department of Corrections followed by probation. However, there is no statutory authority for such a sentence. A defendant's sentence cannot include both time in the penitentiary and time spent on probation. A sentence can, however, include incarceration in the local jail followed by probation. In that case, the time of incarceration in the local jail cannot exceed one year. See T.C.A. § 40-35-306. Thus, the trial judge erred in sentencing these defendants. A remand is necessary for the trial judge to appropriately sentence the defendants.

On remand, the trial judge must also consider the defendants as candidates for straight probation. The defendants have the burden of proof of establishing suitability for full probation and as such must demonstrate to the court that "probation will 'subserve the ends of justice and the best interest of both the public and the defendant[s].'" State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990)(citation omitted).

Tennessee Code Annotated § 40-35-103 sets out sentencing considerations which are guidelines for determining whether or not a defendant should be incarcerated. These include the need "to protect society by restraining a defendant who has a long history of criminal conduct," the need "to avoid depreciating the seriousness of the offense," the determination that "confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses," or the determination that "measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." T.C.A. § 40-35-103(1).

The trial judge denied the defendants' request for straight probation, but he failed to adequately state his reasons for doing so. Thus, on remand, in reconsidering the defendants' sentence, the trial judge should also reconsider the defendants' requests for full probation. Should a denial of full probation be appropriate, the trial judge shall place

in the record the reason for such a denial.

In conclusion, we find that defendant Stanley's two convictions for harboring a fugitive should be reversed and dismissed. We affirm her two remaining convictions as well as Lillard's two convictions. We find that the errors addressed above committed by the State and the trial court were harmless beyond a reasonable doubt and have no bearing upon the defendants' convictions. We further find that the trial judge erred in sentencing and that this cause should be remanded to the trial court for resentencing of both defendants.

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JOHN H. PEAY, Judge

CONCUR:

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DAVID G. HAYES, Judge

_____

WILLIAM M. BARKER, Judge

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
SEPTEMBER SESSION, 1997

FILED

December 23, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**No. 03C01-9704-CR-00123**
Appellee	)	
	)	**COCKE COUNTY**
vs.	)	
	)	**Hon. William R. Holt, Jr., Judge**
WANDA STANLEY and,	)	
JEFF LIPPARD,	)	
	)	**(Harboring a Fugitive and**
Appellants	)	**Providing Aid to a Fugitive**

CONCURRING IN PART; DISSENTING IN PART

The majority opinion affirms the appellant Stanley's convictions for providing aid to avoid arrest and vacates her two convictions for harboring fugitives. I am unable to join in this result: I would affirm Stanley's two convictions for harboring and vacate her two convictions for providing aid to the fugitives. My reasons for reversal of the latter offenses are two-fold. First, the majority opines that Stanley's convictions for providing aid to the two fugitives are supported by the fact that, when asked by law enforcement agents if anyone was at the Crumby house, she responded that no one was at home and that she failed to tell the truth in the first place. Thus, the question for our inquiry is whether failing to tell the truth to a

police officer or a false response to the officer is sufficient to establish that the appellant "provided aid" to the fugitives.

It is clear from the plain language of the statute that the element of the offense "provides or aids in providing" proscribes an affirmative act and not the omission or failure to act which the proof establishes occurred in the present case. Cf. State v. Levandowski, No. 03S01-9611-CR-000116 (Tenn. at Knoxville, Oct. 6, 1997) (*for publication*). Other jurisdictions are in accord with this position as is the MODEL PENAL CODE from which our accessory after the fact offense is patterned. See, e.g., State v. Brandstetter, 908 P.2d 578 (Idaho App. 1995); State v. D'Addario, 482 A.2d 961 (N.J. Super. 1984); Commonwealth v. Neckerauer, 617 A.2d 1281 (Pa. Super. 1992). Passive failure to report the commission of a crime should not make the actor guilty of hindering an arrest, although such conduct may fall within the common law offense of misprision. MODEL PENAL CODE Section 242.3 (1980) ("Mere failure to report crime is not proscribed by this section. Neither is giving misleading or even false answers to inquiries initiated by the police. . . .[T]his offense proscribes only the borderline case of volunteered misinformation to the police, which is not covered elsewhere.").

Second, I conclude, from a reading of the statute before us, that accessory after the fact is an ongoing or continuous criminal enterprise which, although committed by different forms or by different means, it nevertheless remains a single crime. See Tenn. Code Ann. § 40-13-206. A single offense may not be divided into separate parts. Generally, a single wrongful act may not furnish the basis for more than one criminal prosecution. State v. Phillips, 424 S.W.2d 662, 665 (Tenn. 1996). The fact remains that, although the appellant's actions may have been committed by different forms and means, Stanley acted with the single "intent to hinder the arrest . . . of the offenders."

In this context, although the majority concludes that "[e]vidence that Stanley had a crawl space in her house, two beer bottles in the attic, and a duffle bag of canned food in an upstairs bedroom is . . . not enough to sustain a conviction for harboring fugitives," I find the proof sufficient to support the appellant Stanley's convictions under the respective counts for harboring or concealing the two fugitives. A consensual search of Stanley's home revealed fresh insulation on the bathroom floor, two beer bottles in the attic, and a duffle bag containing canned food and a flashlight.[6] Stanley's daughter attempted to explain the presence of these items in the house. Specifically, she claimed ownership of the duffle bag and its contents. She also admitted that she had placed the beer bottles in the attic "a couple of years" prior to the search. Stanley's daughter's testimony explaining the presence of the beer bottles contradicts the evidence that fresh insulation was found on the bathroom floor. Moreover, Wanda Stanley's false and misleading statements to law enforcement officers supplies further evidence of her guilt. As stated by the majority, circumstantial evidence alone may be sufficient to support a conviction. State v. Gilliam, No. 01C01-9603-CC-00105 (Tenn. Crim. App. at Nashville, May 7, 1997) (*for publication*) (citation omitted). When reviewing the convicting evidence, this Court must remember that the jury decides the weight to be given to circumstantial evidence and that "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence are questions primarily for the jury." Id. (citations omitted). Thus, I conclude that the fruits of the consensual search in conjunction with Stanley's subsequent actions permit a rational jury to find that the circumstantial evidence is consistent with Stanley's guilt and inonsistent with her innocence. See State v. Tharpe, 726 S.W.2d 896, 900 (Tenn. 1987). Accordingly, I would vacate Stanley's two sentences for providing aid to the two fugitives and would affirm her convictions for harboring the two fugitives.

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[6]A crawl space led from this bathroom into the attic.

DAVID G. HAYES, JUDGE