IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER 1999 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 03C01-9905-CR-00215
Appellee,	*	HAMILTON COUNTY
VS.	*	Hon. Douglas A. Meyer, Judge
EDWARD E. GENTRY, JR.,	*	(Reckless Driving, Evading Arrest, and Felonious Operation of a Motor Vehicle)
Appellant.	*	

For Appellant:

Russell Bean, Attorney
615 Walnut Street, Suite 200
Chattanooga, TN 37402

For Appellee:

Paul G. Summers
Attorney General and Reporter

Elizabeth B. Marney
Assistant Attorney General
Criminal Justice Division
425 Fifth Avenue North
Nashville, TN 37243

Parke Masterson
Assistant District Attorney General
313 Courts Building
600 Market Street
Chattanooga, TN 37402

OPINION FILED:_____

AFFIRMED

GARY R. WADE, PRESIDING JUDGE

OPINION

The defendant, Edward E. Gentry, Jr., was convicted of reckless driving, evading arrest, and felonious operation of a motor vehicle. See Tenn. Code Ann. §§ 55-10-205, 39-16-603, and 55-10-616. The trial court imposed a sentence of six months for the Class B misdemeanor (reckless driving) and concurrent Range I sentences of one year on each of the two Class E felonies (evading arrest and felonious operation of a motor vehicle). Fines totaled $2,250.00.

In addition to his challenge to the sufficiency of the evidence, the defendant presents the following issues on appeal:

(1) whether the trial court erroneously permitted evidence of the defendant's prior criminal record;

(2) whether the trial court erred by allowing the state to impeach by his prior criminal record an alibi witness for the defense; and

(3) whether there was prosecutorial misconduct during final argument.

The judgment of the trial court is affirmed.

At approximately 10:00 A.M., on March 4, 1997, Hamilton County Deputy Richard Hight[1] observed the defendant driving a 1986 gold Chevrolet Monte Carlo on Hixson Pike in Chattanooga. Because Officer Hight, a twenty-four year veteran of the department, knew the defendant and was aware that his license had been previously revoked, he activated his lights and siren.[2] The defendant stopped his vehicle but, when asked, was unable to produce a driver's license. The license plate number, according to the officer, was 893-BVF. As Officer Hight determined by radio dispatch that the car was registered to the defendant, the defendant sped away, almost causing a collision with another motorist. Officer Hight ran back to his car, activated his blue lights and siren, and pursued the defendant. Officer Hight

[1]The transcript and the state's brief refer to the officer as Hight; the appellant's brief refers to Officer Hyatt.

[2]The record indicates the defendant had been declared a habitual traffic offender and prohibited from driving by order entered June 26, 1996.

followed for a time but when the speed of the defendant's vehicle reached 55 to 70 miles per hour on side roads, he terminated the chase for safety reasons. The officer obtained a warrant and some three weeks later, he issued a citation to Sherrie Clayton, who was operating the same gold Monte Carlo. Ms. Clayton was given a citation for driving a vehicle with a plate, 075-QRL, registered to a different vehicle. By then, ownership of the vehicle was in the name of Tony Sullivan.

The defense produced witnesses who supported his theory of misidentification and alibi. The defendant's sister, Becky Youngblood, testified that the defendant lived at her residence on March 4, 1997, and only a few weeks before had sold his gold Monte Carlo vehicle to Tony Sullivan. She claimed that the defendant had been at her residence on the date in question "working around in the [back] yard" and not leaving until after lunchtime. She testified that Officer Hight arrived that afternoon looking for the defendant and that she explained that the defendant "had sold that car" and had "just left a few minutes ... ago."

Kenneth Patrick Hammock testified that he was with the defendant by 10:00 A.M. on March 4 and that they worked on a car together until noon. Hammock claimed that he was present when the gold Monte Carlo was sold to Sullivan some weeks before. On cross-examination, Hammock admitted that he had been convicted "four or five times" of crimes "involving dishonesty or false statement or a felony offense." Hammock admitted that he had been arrested an estimated twenty times and had been "convicted of the same crimes, or at least some of the same crimes" for which the defendant had been indicted. Hammock specifically acknowledged that he had been convicted of reckless driving and evading arrest.

The defendant's mother, Martha Gentry Shahan, testified that she and her husband and her daughter had driven the defendant's gold Monte Carlo as had the defendant's ex-girlfriend. She stated that the defendant generally did not drive the vehicle but she conceded that she was unaware of whether the defendant was

driving the vehicle on the date in question.

Donald Hixson of the Hamilton County Clerk's office testified that his office records indicated that the 1987 Chevrolet Monte Carlo bore license tag number 795-YQR with an expiration date of April 30, 1999. He testified that license tag number 893-BVF, the license number recorded by Officer Hight, had not been issued in Hamilton County. Hixson conceded that "if a person has attached a tag [to] a car that doesn't belong to that car, [a] search is not going to lead you to that automobile."

Initially, the defendant claims that the eyewitness identification by Officer Hight was insufficient because Officer Hight had seen him on only one prior occasion. He points out that Officer Hight had originally identified the Monte Carlo as maroon in color and was uncertain of the color or type of shirt the driver of the vehicle was wearing on the morning in question. He argues that the testimony of Hammock established a credible alibi.

Our scope of review is limited on appeal. The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after viewing the evidence in the light most favorable to the state, any rationale trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); Rule Tenn R. App. P. 13(e). The evidence is sufficient when a rational trier of fact can conclude that the defendant is guilty as charged. Jackson v. Virginia, 443 U.S. 307 (1979). This court may not reweigh the evidence nor substitute its inferences for those drawn by the trier of fact. Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury as the triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978).

In this case, the jury chose to accredit the testimony of Officer Hight. It acted within its prerogative by rejecting the testimony offered by Hammock and that of Becky Youngblood, the defendant's sister. The state proved the essential elements of reckless driving, evading arrest, and the felonious operation of a motor vehicle. The evidence of each crime, in our view, is sufficient.

As his next issue, the defendant complains that "his record was allowed to be summarily introduced to the jury and this established a prejudice on the part of the jury." The defendant submits that he chose not to testify because he did not want his prior record to be placed into evidence.

The ground has been waived. The defendant has failed to make references to the record. Tenn. R. App. P. 27(g). Thus, it is unclear how the state "summarily introduced" his prior record. Furthermore, the defendant has failed to cite authority in support of this issue. Tenn. R. App. P. 27(a)(7); Rule 10(b), Tenn. Ct. Crim. App. Under these circumstances, an issue is waived. State v. Aucoin, 756 S.W.2d 705 (Tenn. Crim. App. 1988); State v. Eberhardt, 659 S.W.2d 807 (Tenn. Crim. App. 1983).

Next, the defendant argues that the trial court committed error by allowing the state to cross-examine Hammock about misdemeanor offenses and prior convictions which did not involve moral turpitude. He contends that he should not have been asked about his prior driving offenses. Outside the presence of the jury, there was a determination that Hammock had been convicted of aggravated assault, two burglaries, theft of property, and felony evading arrest. The state received permission from the trial court to question Hammock on this basis as to his bias or prejudice (against the Hamilton County Sheriff's Department) under Rule 616 of the Tennessee Rules of Evidence. The cross-examination proceeded, in part, as follows:

> Q. Mr. Hammock, have you ever been convicted of a crime involving dishonesty or false statement or a felony offense?

A. Yes, I guess so.

Q. Okay. About how many times?

A. Four or five.

Q. And have you had occasion to be arrested by the ... Hamilton County Sheriff's Department ... that arrested Mr. Gentry?

A. Yes, I have.

Q. Approximately how many times?

A. A few times.

Q. A few? Would 20 be a fair estimate?

A. Yes, sir.

Q. And on occasion, have you been convicted of the same crimes, or at least some of the same crimes that Mr. Gentry is on trial for today, including, say, reckless driving?

A. Yes, sir.

***

Q. Have you been arrested and convicted for the crime of reckless driving?

A. Yes, sir, I have.

Q. Evading arrest?

A. Yes, sir, I have.

In State v. Galmore, 994 S.W.2d 120 (Tenn. 1999), our supreme court held that limiting reference to a prior conviction as "a felony" without further identification is improper:

> Not identifying the felony ... would permit a jury to speculate as to the nature of the prior conviction. Furthermore, instructing the jury on an unnamed felony would provide inadequate information for a jury to properly weigh the conviction's probative value as impeaching evidence. We hold that the proper application of the balancing test under Tenn. R. Evid. 609(a)(3) requires identification of a prior conviction.

Id. at 122 (emphasis added) (citations omitted). Rule 609 of the Tennessee Rules of Evidence provides that the credibility of a witness who has been convicted of a crime may be impeached after notice by the state and a jury-out hearing to determine whether the probative value of the evidence outweighs its prejudicial

effect. The crime must include punishment in excess of a year unless it involved "dishonesty or a false statement." Id. The rule, which incorporated the holding in State v. Morgan, 541 S.W.2d 385 (Tenn. 1976), did not adopt the old "moral turpitude" standard for admissibility.

In State v. Taylor, 993 S.W.2d 33 (Tenn. 1999), however, reference to a prior conviction as a "felony involving dishonesty" was determined to be an improper means of impeachment under Tenn. R. Evid. 609(a)(3). Our supreme court observed that "the degree to which the impeaching conviction is probative of untruthfulness can vary with the nature of the offense, even with felonies involving dishonesty." Id. at 35. The reference to "crime involving dishonesty or false statement or a felony offense" was, therefore, improper.

Rule 616 allows for a cross-examination of a witness as to any bias "in favor of" or prejudice "against a party or another witness." Id.; see Creeping Bear v. State, 113 Tenn. 322, 87 S.W. 653 (1905). Our supreme court ruled that "partiality for one party ... or hostility to the other" is "always competent" on the issue of credibility. An interest in the outcome of a trial is one of the most common examples of impeachment under this rule. See, e.g., State v. Byerley, 658 S.W.2d 134 (Tenn. Crim. App. 1983). The witness must always be allowed to deny or explain an allegation of bias. See State v. Lewis, 803 S.W.2d 260 (Tenn. Crim. App. 1990).

Here, the state should have been more specific in identifying the "felony offenses" even though the defendant admitted they involved "dishonesty or false statement." Conceivably, the jury could have speculated on the nature of the crimes, an exercise condemned in the Galmore and Taylor rulings. In that regard, there was error by analysis under Rule 609.

By making reference to the inordinate number of prior arrests of the witness Hammock by the Hamilton County Sheriff's Department, the state sought to establish he held a prejudice against the department. That is, he had a reason to lie

about the defendant's whereabouts on the date in question in order to "get even" for his own mistreatment. That, in our view, is a proper basis for cross-examination. Ironically, the state identified at least one of the prior felony offenses of the witness, evading arrest, and classified them generally as similar to those charges against the defendant, thereby limiting the degree of speculation on the nature of his record.

The question is whether the error more probably than not affected the judgment to the prejudice of the defendant. Rule 52(a), Tenn. R. Crim. P., Rule 36(b), Tenn. R. App. P. In both Galmore and Taylor, our supreme court ruled that the error was harmless in the context of those trials. We reach a similar result here. In the context of the entire trial, it is our assessment that the error in this case did not affect the result.

As his fourth and final issue, the defendant argues that the state was guilty of prosecutorial misconduct during final argument. He contends that the state "continuously brought out the convictions" of Hammock, which served to influence the jury and referred to the defendant as a habitual offender. He contends that the state improperly referred to him as "habitualized" by the introduction of the prior court order prohibiting his operation of a vehicle. The state points out that it was necessary to establish that the defendant was a habitual motor vehicle offender as an element of the felonious operation of a vehicle.

Initially, the defendant made no contemporaneous objections during the final argument which related to any of the issues presented either in the motion for new trial or in his appellate brief. In that regard, the issue has been waived. Tenn. R. App. P. 36(a). It has been firmly established that objections must be made to an improper jury argument in order to preserve the issue for appellate review; otherwise, any improper remarks by the state would afford no ground for a new trial. State v. Compton, 642 S.W.2d 745, 747 (Tenn. Crim. App. 1982); State v. Duncan, 698 S.W.2d 63 (Tenn. 1985); see also Hill v. State, 513 S.W.2d 142 (Tenn. Crim. App. 1974). Further, we cannot find any portion of the argument which attributes

any of Hammock's prior convictions, particularly burglary or theft, to the defendant. Finally, the state's argument provided, in part, as follows:

> The first crime that the defendant's charged with is that on March 4th of 1997, he had been declared a habitual offender, okay? That's the first element. All the other issues relate to driving the car, okay, so they're all kind of lumped in the same category.
>
> You've seen the documentation that the defendant, in 1996, was declared by Judge Gerbitz to be a habitual offender not to operate a motor vehicle in the State of Tennessee. You've seen that. I don't think there's any question that he was habitualized.
>
> The act of just driving the car [completes] the elements [necessary] of proving that particular charge: He was habitualized, was driving a car after that was done, okay?

In our view, that was a proper explanation of the defendant's habitual motor vehicle offender status, a prerequisite to a conviction for the felonious operation of a motor vehicle.

Accordingly, the judgment is affirmed.

_____
Gary R. Wade, Presiding Judge

CONCUR:

_____
David H. Welles, Judge

_____
David G. Hayes, Judge