

**IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION IX**

STATE OF TENNESSEE)

v.)

No. 19-06482)

PAMELA MOSES,)

Defendant)

Filed 2/25/22
Heidi Kuhns, Clerk
BY [Signature] D.C.

ORDER GRANTING MOTION FOR NEW TRIAL

The Defendant, Pamela Moses is before this Court having been convicted of the Class D felony of making or consenting to false entries on official registration or election documents in violation of T.C.A. § 2-19-109. The defendant was found guilty by a jury of her peers on November 4, 2021. On January 31, 2022, this Court entered a written Sentencing Order. The motion for new trial was then set to be heard on February 25, 2022. Defense counsel filed his first written MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL on January 7, 2022. On February 22, 2022, Defendant, through legal counsel, filed an AMENDED MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL. This motion contains twelve (12) numbered paragraphs.

The first two paragraphs allege that the evidence presented at the trial was legally insufficient to support the jury's verdict requiring the Court to grant a judgment of acquittal and dismiss the charges. When an accused challenges the sufficiency of the evidence

to support a jury's verdict, the standard of review that this Court must employ by law is whether, after considering the evidence presented at trial in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307 (1979). This rule applies to findings of guilt by a jury based upon direct evidence, circumstantial evidence or a combination of direct and circumstantial evidence. State v. Winters, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003). In determining the legal sufficiency of the evidence, this Court should neither re-weigh the evidence nor substitute its inferences for those drawn by the jury. Id., at 655. Questions concerning the credibility of witnesses, the weight and value of the evidence, as well as the factual issues raised by the evidence are resolved by the jury. Simply put, this Court must afford the State the strongest legitimate view of the evidence presented at trial as well as all reasonable and legitimate inferences which may be drawn from the evidence presented in the trial. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

In this case the Defendant was convicted of the Class D felony of making or consenting to false entries on official registration or election documents in violation of T.C.A. § 2-19-109.

The jury was instructed in the exact language of the statute:

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant knowingly made or consented to any false entry on any permanent registration, poll list, election tally sheet or any other official registration or election document.

The only real issue for the jury during the trial was whether the Defendant knew the certificate of voting rights restoration form was not accurate when she obtained it and utilized it to attempt to register to vote. The Defendant did not testify at trial or call any defense witnesses. On the other hand, the State presented evidence during the trial that the Defendant obtained a court order from the Judge who was presiding over her

probation that she began her probation on April 29, 2015, that she was serving a three year sentence and a two year sentence consecutively for a total of five years, and that she would not finish her probation until 2022. Based on this evidence it was reasonable and legitimate for the jury to infer that the Defendant knew that the representations on the form about her probation were untrue when she obtained the statement from the probation officer and when she attempted to use the false information to register to vote. The fact that the Defendant did not personally write on the Certificate of Restoration of Voting Rights (CRVR) form does not provide a defense to the charge as the law prohibits either the making or "consenting" to the false statement. The evidence was legally sufficient to support the jury's verdict that she "consented" to the false statement when she utilized it to attempt to register to vote. Whether the (CRVR) was an official registration or election document was likewise a question for the jury. An examination of the document itself along with the testimony in the trial was legally sufficient to support the jury's finding that the document was within the purview of the statutory prohibition. Under the applicable standard of review, the evidence is legally sufficient to support the jury's verdict and the Defendant is not entitled to a judgment of acquittal.

Paragraphs (3) and (4) allege that the jury's verdict is against the weight of the evidence presented at the trial and the Court should disagree with the jury's verdict and grant a new trial. To the contrary, this Court does not disagree with the jury's verdict. The most logical and reasonable inference is that the Defendant attempted to circumvent the Court's order and try to register to vote knowing she was still on felony probation. Had the Defendant informed the probation officer that she had a court order saying she was still on probation, the probation officer would have never signed the CRVR. Instead, the probation officer testified that the Defendant was adamant that she was no longer on probation, appeared agitated and did not inform him about the court order. If the Defendant merely sought clarification of the court order, she would have disclosed that court order to the probation officer.

The first paragraph labeled (5) on page one of the motion is somewhat unclear, but appears to contend that a judgment declaring the Defendant infamous was never entered, presumably on her two felony convictions in 2015, such that she never lost her right to vote. The paragraph does not allege what effect, if true, this would have on Defendant's conviction for making or consenting to false entries on official registration or election documents in violation of T.C.A. § 2-19-109. The reason is because it would have no effect.

The second paragraph labeled (5) on page two of the motion alleges that the trial judge erred in not granting a motion to dismiss "all charges" in the indictment on the grounds that the laws of Tennessee violated the Defendant's Due Process and Equal Protection rights as referenced in the Defendant's *pro se* MOTION TO DISMISS INDICTMENT filed on November 1, 2021. An examination of the *pro se* Motion filed by the Defendant on November 1, 2021, shows that its only specific allegation with reference to the crime for which she was convicted T.C.A § 2-19-109, is that the State would not be able to prove her guilt of that offense. The balance of the Motion seems to be an attack upon the Constitutionality of Tennessee statutes that create a crime of "voting while ineligible due to a criminal conviction." The Defendant does not cite the specific statutes she is challenging but uses words similar to those just quoted above thirteen (13) times in her written motion. To the extent that the Motion attacks the crime for which the Defendant was actually convicted, it is nothing more than a motion for judgment of acquittal. To the extent that it attacks any other statute it fails to comply with specificity requirements and it was rendered moot by the State voluntarily dismissing counts 1 through 12 of the indictment.

Paragraph (6) is also unclear but appears to be a challenge to the legal sufficiency of the evidence that this Court has addressed in response to the first two paragraphs.

Paragraphs (7) and (8) allege that the form called Certificate of Restoration of

Voting Rights (CRVR) is not an official registration or elections document and as alleged this appears to be nothing more than a challenge to the legal sufficiency of the evidence that this Court has addressed in response to the first two paragraphs.

Paragraph (9) alleges that “[t]he court erred in granting the State’s Motion in Limine concerning the 404(b) evidence of prior convictions at the start of the trial.” This paragraph lacks specificity, but was elaborated on by Counsel during the hearing on the Motion for New Trial. It appears that defense counsel is arguing that the Defendant’s 2000 felony conviction and her 2014 restoration of her voting rights should not have been admitted into evidence. At the time the State initially filed its written motion requesting to introduce this evidence, the Defendant was facing 12 counts of illegal voting. Evidence of Defendant’s 2000 conviction, the loss of her right to vote and her subsequent restoration of her right to vote was highly relevant to establish that she knew that it was illegal for a convicted felon to vote before having his or her rights restored. Further, the probative value of this evidence greatly outweighed the danger of unfair prejudice.

On the other hand, by the time this matter was presented to the trial court for its pre-trial determination, the State had voluntarily dismissed the 12 counts of illegal voting. Nevertheless, the State maintained that this evidence remained relevant to establish the contextual background as well as to prove the Defendant’s intent and guilty knowledge. Under the law, although the admissibility of 404(b) evidence may be tentatively determined pre-trial, the final decision whether to allow proof of other crimes should be made after considering the evidence presented at trial. If a trial court makes pre-trial rulings they may have to be reconsidered based on the actual proof in the case. State v. Gilley, 173 S.W.3d 1, 6 (Tenn. 2005). After considering the actual proof presented in this case, this Court believes that its pre-trial ruling allowing this 404(b) evidence was not proper. After hearing all the proof in this trial, this Court is hard pressed to find that the evidence was relevant to any material issue in the case. More importantly, even if it could be argued that the evidence was relevant to some material issue, whatever probative value it had was outweighed by the danger of unfair prejudice. As stated earlier in this

Order, the only real issue for the jury during the trial was whether the Defendant knew the certificate of voting rights restoration form was not accurate when she obtained it and utilized it to attempt to register to vote. The fact that she was convicted of a felony in 2000 and had her right to vote restored in 2014 has no significant relevance to establish that the Defendant knew she was still on probation at the time she obtained the CRVR form. Defendant is entitled to a trial in which this 404(b) evidence is not presented to the jury for its consideration.

Paragraph (10) alleges that the Court erred in failing to instruct the jury on the defense of Mistake of Fact. This paragraph lacks specificity, but was elaborated on by Counsel during the hearing on the Motion for New Trial. Defense counsel argued more specifically that it can be inferred from the evidence that the Defendant did not believe she was on probation and that this constituted a mistake of fact. Ignorance of the law is not a valid legal defense in Tennessee. See T.C.A. § 39-11-502, Sentencing Commission Comments. Whether the Defendant was on probation is a matter of law, not fact. Further, this defense was not fairly raised by the evidence.

Paragraph (11) alleges that the jury instructions defining the crime were not correct and/or that there was a fatal variance between the indictment and the proof presented at trial. The jury instructions were provided to the Defense before they were read to the jury and there was no objection to the instructions. The instructions were virtually a verbatim recitation of the statute. The instructions were accurate. On the other hand, there is no "pattern jury instruction" on this criminal offense and it does not appear that any Tennessee appellate court has ruled upon the meaning of "consent" as set forth in the statute or elaborated on the *actus rea* required to support a conviction. This appears to be a matter of first impression in Tennessee.

In the past, Tennessee followed a rather stringent variance rule, and if a person or thing necessary to be mentioned in an indictment is described with greater particularity than is requisite, such person or thing must be proved exactly as described in the

indictment. Bolton v. State, 617 S.W.2d 909 (Tenn. Crim. App. 1981). The policy now followed in this and in most jurisdictions, however, is that before a variance will be held to be fatal it must be deemed to be material and prejudicial. State v. Moss, 662 S.W.2d 590 (Tenn. 1984). Moreover, a variance between an indictment and the proof in a criminal case is not material where the allegations and proof substantially correspond, the variance is not of a character which could have misled the defendant at trial and is not such as to deprive the accused of his right to be protected against another prosecution for the same offense. Id. This indictment specifically alleged that on September 3, 2019, the Defendant in violation of T.C.A. 2-19-109 made or consented to a false entry on her "permanent voter registration." The statute makes it illegal to make or consent to a false entry on any registration or election document. Hence, the indictment did describe the document in more detail than was required by the statute but this variance was not material and prejudicial under the particular circumstances of this case.

On February 25, 2022, counsel for the Defendant filed a SECOND AMENDED MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL which alleged a Brady violation in failing to provide to the defense an email from Joe S. Williams with regard to an internal investigation by the Department of Corrections of the incident for which the Defendant stands convicted. Said document was discoverable by the defense under Tenn. R. Crim. P. 16(a)(1)(F) as well as under the dictates of Brady v. Maryland, 373 U.S. 83 (1963). The Assistant District Attorney who handled the case for the State indicated that he had not seen this document prior to the Defense providing him a copy. Of course, Brady and Rule 16 are applicable regardless of the good faith of the prosecution. Under Brady and Rule 16, the prosecution is responsible for knowing what is contained in all state agency files and is held strictly liable for failure to disclose even when it has no actual knowledge of the existence of the information. The Defense is not suggesting in any way that there was an intentional failure to disclose and this Court finds no such intentional failure on the part of the prosecution. The more difficult issue is whether this information is "material" under the

Brady rule, as the record in this case reveals that defense counsel cross-examined probation officer Billington at length about his mistakes and negligence in verifying the Defendant's probation status. Nevertheless, the document does contain information that was not addressed in the direct and cross-examinations of Billington and contained the identity of an additional possible witness for the defense. Treating this as an inadvertent failure to provide discovery under Rule 16, in conjunction with the 404(b) evidentiary issue, this Court is granting a new trial.

IT IS THEREFORE ORDERED that the Defendant's Motion for New Trial is granted.

ENTERED this 25th day of February, 2022.



JUDGE W. MARK WARD
CRIMINAL COURT DIVISION IX