IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE 1999 SESSION

STATE OF TENNESSEE,	*	C.C.A. NO. W1998-00509-CCA-R3-CD
Appellee,	*	SHELBY COUNTY
v.	*	Hon. Joseph B. Brown, Judge
THOMAS MITCHELL,	*	(Burglary of a Building)
Appellant.	*	

FILED

December 20, 1999

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Appellate Court Clerk

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OPINION FILED: _____

AFFIRMED

NORMA MCGEE OGLE, JUDGE

OPINION

On May 7, 1998, the appellant, Thomas Mitchell, was convicted by a jury in the Shelby County Criminal Court of burglary of a building, a class D felony.

On July 6, 1998, the trial court sentenced the appellant as a Range II multiple offender to an effective sentence of eight years incarceration in the Tennessee Department of Correction.

In this appeal as of right, the appellant presents the following issues for our review:

> (I) Whether the evidence is sufficient to sustain the appellant's conviction of burglary of a building;
>
> (II) Whether the trial court erred by failing to instruct the jury on the lesser included offense of attempted burglary of a building;
>
> (III) Whether the trial court erred by refusing to instruct the jury on the possible penalties for the charged offense;
>
> (IV) Whether the trial court erred by imposing a sentence of eight years.

Following a review of the record and the parties' briefs, we affirm the judgment of the trial court.

I. Factual Background

On September 4, 1997, Joseph Poindexter and his partner, both officers with the Memphis Police Department, were dispatched to the Florida Elementary School to investigate a possible burglary in progress. A school board dispatcher reported that the school's alarm system, which was capable of detecting sounds inside the school building, had detected the sound of glass breaking and movement inside the school annex building. The officers arrived on the scene within less than a minute of the dispatcher's call.

When the officers arrived at the scene, they proceeded to the annex building. As they approached the chain-link fence surrounding the school, the officers heard a noise inside the perimeter of the fence, and immediately began climbing over the fence. Officer Poindexter testified that as the officers started over the fence, they heard something like a pipe or metal object fall on the concrete. Once over the fence, Poindexter approached the annex building from the south as his partner approached it from the north. Neither officer observed anyone leave the

building. However, as both officers approached the far east side of the annex building, they noticed a pipe on the covered concrete walkway connecting the annex and the main building. Additionally, the officers noticed a hot plate and other items lying near an open window in the annex building.[1]

Because the officers had heard the pipe drop but had not seen anyone during their search, they realized that someone could be hiding on top of the awning covering the walkway. The officers climbed onto the awning where they discovered the appellant, lying approximately ten to fifteen feet away from them. Following a brief struggle, during which time the appellant attempted to flee, the appellant was taken into custody.

After the police placed the appellant in custody, the school dispatcher reported that the alarm system had detected voices in the main school building. The police dispatched a canine unit to investigate the report, but they were unable to locate any other intruders. The officers later concluded that their voices outside the building had triggered the alarm.

Eddie Hartley, a security guard for the Memphis City Schools, also responded to the alarm at the Florida Elementary School. When he arrived, the appellant was in police custody. Hartley recalled that the canine unit searched the building and found no other suspects. Hartley conducted his own investigation and also found the hot plate and other items outside the annex building window. Hartley then conducted a "complete search" of the main building and the annex building and found no additional points of entry or any indications of additional criminal activity.

II. Analysis

Sufficiency of the Evidence

The appellant contends that the evidence is not sufficient to sustain his conviction of burglary of a building. Specifically, the appellant argues that there is

[1]The record reflects that the window was open and a broken plexiglass sheet that had apparently covered the window was discovered nearby.

insufficient circumstantial evidence for the jury to conclude that he entered the annex building and was responsible for the burglary.

In Tennessee, appellate courts accord considerable weight to the verdict of a jury in a criminal trial. In essence, a jury conviction removes the presumption of the defendant's innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will not support the jury's findings. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The appellant must establish that "no reasonable trier of fact" could have found the essential elements of the offenses beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn R. App. P. 13(e).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

Although the evidence of the appellant's guilt is circumstantial in nature, a criminal offense may be established by circumstantial evidence alone. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987); State v. Lequire, 634 S.W.2d 608, 614 (Tenn. Crim. App. 1987); Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958). Moreover, burglary may be established by circumstantial evidence. State v. Holland, 860 S.W.2d 53, 59 (Tenn. Crim. App. 1993); State v. Bohanan, 745 S.W.2d 892, 895 (Tenn. Crim. App. 1987); Henry v. State, 562 S.W.2d 446, 447 (Tenn. Crim. App. 1977); State v. Riggins, No. 01C01-9512-CC-00408, 1997 WL 211256, at *3-4 (Tenn. Crim. App. at Nashville, April 30, 1997).

However, before an accused may be convicted of a criminal offense based upon circumstantial evidence alone, the facts and circumstances "must be so

strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971). In other words, "[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." Crawford, Id. at 613.

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 at 457; see also State v. Gregory, 862 S.W.2d 574, 577 (Tenn. Crim. App. 1993); 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).

The jury found the appellant guilty of burglary of a building pursuant to an indictment charging that the appellant:

> did unlawfully and knowingly enter a building other than a habitation of Memphis City Schools, not open to the public, without the effective consent of the said Memphis City Schools, with the intent to commit theft. . . .

With respect to the appellant's conviction of burglary of a building, the applicable statute provides:

> (a) A person commits burglary who, without the effective consent of the property owner:
>
> (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with the intent to commit a felony, theft, or assault. . . .

Tenn. Code Ann. § 39-14-402(a)(1) (1997). Moreover, the applicable statute defines "enter" as the intrusion of any part of the body or intrusion of any object in physical contact with the body or controlled by remote control, electronic or otherwise. Tenn. Code Ann. § 39-14-402(b) (1997).

Viewing the evidence in the light most favorable to the State, we

conclude that the State adduced ample evidence to convict the appellant of burglary of a building. The State presented proof that police officers found the appellant hiding on top of a metal awning within minutes of an alarm that indicated the presence of an intruder and broken glass in the school. Once the officers found the appellant, he attempted to flee. A defendant's flight, coupled with other facts and circumstances, is evidence of guilt. State v. Zagorski, 701 S.W.2d 808, 813 (Tenn. 1985). Furthermore, the appellant was the only person found in the area, and the officers found him a short distance from the open or broken annex building window. Additionally, a hot plate and other items that had apparently been removed from inside the annex building were lying nearby.

Although the appellant concedes that the evidence is sufficient to prove that someone entered the building, the appellant asserts that because the alarm indicated the presence of someone in the main building after he had been taken into custody, a reasonable doubt remains as to whether the appellant ever entered the building. However, the officers later concluded that the alarm system had detected the voices of Poindexter and his partner when they were outside the building. Furthermore, neither the canine unit nor Hartley found anyone inside the main building, and no other possible point of entry was located. Therefore, the evidence is sufficient for a rational juror to conclude beyond a reasonable doubt that the appellant committed the burglary.

Jury Instructions - Lesser Included Offense

The appellant contends that the trial court erred by failing to instruct the jury on the lesser included offense of attempted burglary of building.[2] The trial judge has a duty to charge the jury as to all the law of each offense included in the indictment, even absent a request by the defendant. State v. Cleveland, 959 S.W.2d 548, 553 (Tenn. 1997); Tenn. Code Ann. § 40-18-110(a) (1997). Moreover,

[2] We note that the record does not include a transcript of the instructions as read to the jury. Failure to include a transcript normally waives review of the appellate issues pertaining to jury instructions because without a complete record, it is impossible for this court to discern whether the written jury instructions conform to the instructions as read to the jury and thus, whether error actually occurred. See T.R.A.P. 24(b); State v. Jones, 623 S.W.2d 129 (Tenn. Crim. App. 1981). In the instant case, however, we will review the issues presented, as the State does not dispute that the requested special jury instructions were not read to the jury.

a defendant has a right to have every issue of fact raised by the evidence and material to his or her defense submitted to the jury on proper instructions. State v. Robinette, No. 03C01-9611-CR-00430, 1997 WL 671889, at *3 (Tenn. Crim. App. at Knoxville, October 29, 1997). Thus, a defendant has a right to a jury instruction on all lesser included offenses of the charged offenses if "the evidence introduced at trial is legally sufficient to support a conviction for the lesser offense. State v. Langford, 994 S.W.2d 126, 128 (Tenn. 1998) (citing State v. Bolden, 979 S.W.2d 587, 593 (Tenn. 1998)); see also State v. Cutshaw, 967 S.W.2d 332, 341-342 (Tenn. Crim. App. 1997); Tenn. Code Ann. § 40-18-110 (1997); Tenn. R. Crim. P. 31(c).

Our supreme court recently stated that whether a lesser included offense must be charged in a jury instruction is a two-part inquiry. State v. Burns, No. 02S01-9806-CC-00058, 1999 WL 1006315, at *12 (Tenn., at Jackson, November 8, 1999) (publication pending). First, the trial court must determine whether a particular lesser offense is included in the greater charged offense. Id. If the trial court concludes that a lesser offense is included in the charged offense, the trial court must determine whether the evidence justifies a jury instruction on such lesser offense. Id.

The jury charge should be applicable to the facts of the case. State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986). The instruction is not required if there is no proof in the record to support a conviction for the lesser offense. State v. Howard, 926 S.W.2d 579, 586 (Tenn. Crim. App. 1996). In addition, before a trial court is required to instruct the jury on a lesser included offense, there must be evidence in the record to support a conviction for the lesser offense. State v. Stephenson, 878 S.W.2d 530, 549-50 (Tenn. 1994); State v. Mellons, 557 S.W.2d 497 499 (Tenn. 1977). Furthermore, in Burns our supreme court adopted a two-step analysis for determining whether a lesser included offense instruction should be given. No. 02S01-9806-CC-00058, 1999 WL 1006315, at *14. First, the trial court must determine whether any evidence exists that reasonable minds could accept as to the lesser included offense. Id. In making this determination, the trial

court must view the evidence liberally in the light most favorable to the existence of the lesser included offense without making any judgments on the credibility of such evidence. Id. Second, the trial court must determine if the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser included offense. Id.

Criminal attempt occurs when a person, acting with the kind of culpability otherwise required for the offense, acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense. Tenn. Code Ann. § 39-12-101(a)(3) (1997). Attempted burglary of a building is a lesser included offense of burglary of a building. See Burns, No. 02S01-9806-CC-00058, 1999 WL 1006315, at *12 (an offense is a lesser included offense if it consists of an attempt to commit the offense charged); Tenn. R. Crim. P. 31(c). However, our inquiry does not stop here. Having concluded that attempted burglary of a building was a lesser included offense of burglary of a building as charged in the indictment, we now must determine whether the lesser included offense instruction regarding attempted burglary of a building should have been instructed.

The appellant's contention that there was proof in the record to support a conviction for attempted burglary is misplaced. In this case, the trial court instructed the jury on burglary and criminal trespass. The State presented evidence indicating that before the appellant was discovered outside the building, he had entered the annex building through a window and removed a hot plate and other items from the annex building. Thus, the appellant achieved his intended criminal objective and completed the criminal act of burglary by entering the building and removing the hot plate and other items. Therefore, a jury instruction on attempt, which contemplates an appellant's failure to achieve the intended criminal objective, was not supported by the evidence.

Moreover, the appellant claims that there was some evidence that

another intruder was inside the building after he was in custody from which a rational juror could infer that the appellant was simply attempting to burglarize the building. However, the appellant's claim is contradicted by the testimony concluding that the voices detected by the alarm belonged to the police and that a search of the buildings produced no other suspects. This issue is without merit.

Jury Instructions - Possible Penalties

The appellant also contends that the trial court erred by refusing to instruct the jury on the possible penalties for the charged offense. At the time of the appellant's offense, the applicable statute provided: "In all contested criminal cases . . . upon the motion of either party, filed with the court prior to the selection of the jury, the court shall charge the possible penalties for the offense charged and all lesser included offenses."[3] Tenn. Code Ann. § 40-35-201(b)(1) (1997) (emphasis added). Furthermore, the statute stated:

> (i) When a charge as to possible penalties has been requested pursuant to subdivision (b)(1), the judge shall also include in the instructions for the jury to weigh and consider the meaning of a sentence of imprisonment for the offense charged and any lesser included offenses. Such instruction shall include an approximate calculation of the minimum number of years a person sentenced to imprisonment for the offense charged and lesser included offenses must serve before reaching such person's earliest release eligibility date. Such calculation shall include such factors as the release eligibility percentage established by § 40-35-501, maximum and minimum sentence reduction credits authorized by § 41-21-236 and the governor's power to reduce prison overcrowding pursuant to title 41, chapter 1, part 5, if applicable.
>
> (ii) Such instructions to the jury shall also include a statement that whether the defendant is actually released from incarceration on the date when such defendant is first eligible for release is a discretionary decision made by the board of paroles based upon many factors, and that such board has the authority to require the defendant to serve the entire sentence imposed by the court.

Tenn. Code Ann. § 40-35-201(b)(2)(A) (1997) (emphasis added).[4]

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[3] Tenn. Code Ann. § 40-35-201(b) was amended, effective May 18, 1998, to provide that "the judge shall not instruct the jury . . . on possible penalties for the offense charged nor all lesser included offenses."

[4] Recently, our supreme court upheld the constitutionality of Tenn. Code Ann. § 40-35-201(b)(2). State v. King, 973 S.W.2d 586, 592 (Tenn. 1998).

The appellant is entitled to a complete and correct charge of the law. State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990), including the law governing issues raised by the evidence. State v. Zirkle, 910 S.W.2d 874, 892 (Tenn. Crim. App. 1995). A court commits no error by refusing a special charge if the instructions given impart a correct, full, and fair statement of the applicable law. Id.; See also Bohanan, 745 S.W.2d at 897 (Tenn. Crim. App. 1987); State v. Ivy, No. 02C01-9707-CR-00273, 1998 WL 813405, at *9 (Tenn. Crim. App. at Jackson, November 25, 1998).

A jury charge as to possible penalties is available only upon request. The appellant incorrectly contends that a jury charge pursuant to Tenn. Code Ann. § 40-35-201(b) is mandatory. Moreover, the statute is clear that if an appellant requests a charge as to possible penalties, a charge as to range of punishment is mandatory. Tenn. Code Ann. § 40-35-210(b)(2)(A).

Here, the appellant requested that the court deviate from the mandatory instructions dictated by the statute. Specifically, he requested a jury charge as to possible penalties but no charge as to range of punishment. The trial court correctly declined to give the special instruction as requested and did not charge the jury as to possible penalties or range of punishment.

Additionally, we note that the record does not contain a transcript of the hearing in which the trial court addressed the request for the instruction on possible penalties.[5] This transcript is essential to conducting a complete review of this issue because the record is unclear as to whether the appellant withdrew his request for instructions pursuant to Tenn. Code Ann. § 40-35-201(b) after the trial court denied his motion for special instructions, or whether the appellant asked for a charge in compliance with the statute. The appellant has the burden on appeal to prepare a record that presents a complete and accurate account of what transpired in the trial court with respect to the issues on appeal. Tenn. R. App. P. 24(b). The

[5] The only information we have regarding the instruction on possible penalties is contained in the transcript of the motion for new trial hearing. The trial discussion of the appellant's motions and the trial court's ruling apparently occurred while the court reporter was not present.

failure to do so results in a waiver of such issues and a presumption that the findings of the trial court are correct. State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). This court cannot presume or speculate that the trial court erred when the record is inadequate. This issue is without merit.

Excessive Sentence

The appellant contends that the trial court erred by imposing a sentence of eight years. Specifically, the appellant argues that the trial court erred by imposing the maximum sentence within the appellant's range when the trial court found only two enhancement factors and one mitigating factor.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997). This presumption of correctness 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). The burden is upon the appellant to demonstrate the impropriety of the sentence. State v. Wilkerson, 905 S.W.2d 933, 934 (Tenn. 1995).

Our review of the appellant's sentence requires an analysis of (1) the evidence, if any, received at trial and at the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offenses; (5) any mitigating or enhancement factors; (6) any statements made by the appellant on his own behalf; and (7) the appellant's potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-102, -103, and -210 (1997).

The presumptive sentence for Class B, C, D, and E felonies is the minimum sentence in the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210 (1997). If the trial court finds that there are

enhancement or mitigating factors, the court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors. Id. The weight given to any existing factor is left to the trial court's discretion so long as the trial court complies with the purposes and principles of sentencing and the court's findings are adequately supported by the record. State v. Shropshire, 874 S.W.2d 634, 642 (Tenn. Crim. App. 1993). See also State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

In the instant case, the appellant was convicted as a Range II multiple offender of burglary of a building, a class D felony. Tenn. Code Ann. § 39-14-402 (1997). The sentencing range applicable to the appellant for this offense is four to eight years. Tenn. Code Ann. § 40-35-112 (b)(4) (1997). The appellant received the maximum sentence of eight years.

In determining the appellant's sentence for the conviction of burglary of a building, the trial court found two enhancement factors: the appellant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; and the appellant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community. See Tenn. Code Ann. § 40-35-114 (1997). The trial court found that the only mitigating factor was that the appellant's criminal conduct neither caused nor threatened serious bodily injury. See Tenn. Code Ann. § 40-35-113 (1997). In balancing these factors, the trial court placed great weight on the appellant's extensive criminal history and placed little weight on the lack of serious bodily injury.[6] As a result, the trial court sentenced the appellant to eight years incarceration in the Department of Corrections.

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[6] The appellant's prior convictions consist of evading arrest on May 22, 1997; burglary on August 27, 1996; burglary on March 10, 1995; driving with a revoked license on April 25, 1995, November 22, 1993, May 17, 1990, and February 27, 1987; driving while intoxicated on April 25, 1995; disorderly conduct on June 11, 1993; probation violation on December 9, 1988 and May 21, 1987; failure to appear on February 14, 1989; weapon possession on February 24, 1987; malicious mischief on February 24, 1987; disturbing the peace on September 29, 1986; assault and battery on April 5, 1986; and two counts of receiving stolen property on September 28, 1982.

Furthermore, the weight to be given to each factor is left to the sound discretion of the trial court. The record reflects that the trial court correctly considered the sentencing principles and all relevant facts and circumstances. The trial court determined that reduction of the appellant's sentence for burglary because the crime did not involve serious bodily harm was not appropriate. In light of the appellant's extensive criminal record, the maximum sentence was appropriate in this case. This issue is without merit.

Accordingly, the judgment of the trial court is affirmed.

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Norma McGee Ogle, Judge

CONCUR:

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David H. Welles, Judge

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David G. Hayes, Judge