

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1995 SESSION

<p>FILED</p> <p>November 29, 1995</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

<p>STATE OF TENNESSEE,</p> <p style="padding-left: 40px;">Appellee,</p> <p>V.</p> <p>DOCK BATTLES,</p> <p style="padding-left: 40px;">Appellant.</p>	<p>)</p> <p>) C.C.A. No. 02C01-9501-CC-00019</p> <p>)</p> <p>) Shelby County</p> <p>)</p> <p>) John P. Colton, Jr., Judge</p> <p>)</p> <p>) (Criminal Attempt to Commit) Aggravated Burglary)</p> <p>)</p>
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FOR THE APPELLANT:

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At Trial
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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

OPINION

The defendant, Dock Battles, was convicted by a jury of criminal attempt to commit aggravated burglary. He was sentenced as a persistent offender to twelve years in the TDOC. The defendant appeals pro se. He argues that the indictment is void because it fails to aver the essential elements of the crime. The defendant raised this issue prior to trial and the court denied relief.

We affirm the judgment of the trial court.

A person commits criminal attempt who, 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. T.C.A. § 39-12-101(a)(3) (1991).

The offense is aggravated burglary, which is defined as burglary of a habitation. T.C.A. § 39-14-403 (1991). The definition of burglary includes a person who without the effective consent of the property owner enters a building (or any portion thereof) not open to the public, with the intent to commit a felony or theft. T.C.A. § 39-14-402(a)(1) (1991).

The indictment in this case reads:

during the period of time between October 1, 1993[,] and October 2, 1993, in Shelby County, Tennessee, and before the finding of this indictment, did unlawfully attempt to commit the offense of Aggravated Burglary, as defined in T.C.A. § 39-13-403; in that he, the said Dock Battles, did unlawfully attempt to enter the habitation of Roshonda Weeden, not open to the public, without the effective consent of the said Roshonda Weeden, with intent to commit theft, in violation of T.C.A. § 39-12-101, against the peace and dignity of the State of Tennessee.

The defendant argues on appeal that the indictment is void because it fails to aver the essential elements of criminal attempt.

Criminal defendants have a state and federal constitutional right to know the nature and cause of the accusations brought against them. State v. Byrd, 820 S.W.2d 739, 740 (Tenn. 1991). "[I]n order to satisfy the constitutional requirement, an indictment or presentment must provide a defendant with notice of the offense charged, provide the court with an adequate ground upon which a proper judgment may be entered, and provide the defendant with protection against double jeopardy." Id. at 741. An indictment should state the facts constituting the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment. T.C.A. § 40-13-202 (1990); State v. Marshall, 870 S.W.2d 532, 537 (Tenn. Crim. App. 1993). When the indictment fails to adequately state the crime, all subsequent proceedings are void. State v. Perkinson, 867 S.W.2d 1, 5 (Tenn. Crim. App. 1992).

The defendant specifically argues that the indictment fails to allege that the defendant "intentionally," "knowingly" or "recklessly" engaged in any "conduct" or committed any "overt act" that would constitute a "substantial step" toward the commission of aggravated burglary. We disagree. The substantial step toward the commission of aggravated burglary is the defendant's attempt to enter the habitation of the victim. The ordinary meaning of attempt is "to make an effort to do, accomplish, solve, or effect." Webster's Ninth New Collegiate Dictionary (1983). In other words, the defendant tried to enter or effect entry into the victim's habitation. The indictment sufficiently alleges the mens rea required for criminal attempt. The indictment alleges that the defendant attempted to enter the habitation of the victim with the intent to commit theft. By alleging that the defendant attempted to enter the habitation "with the intent to

commit theft," the indictment implies that the defendant "intentionally" attempted to enter or tried to enter the victim's habitation. Marshall, 870 S.W.2d at 536-38. The indictment sufficiently alleges the particular offense for which the defendant was tried and convicted.

The defendant also argues that the court failed to instruct the jury on the offense upon which judgment was entered. In volume fourteen (14) of the record, the defendant told the court that he was not prepared to argue his motion for a new trial. Apparently the defendant had not filed a written motion at that time. The defendant told the court that he was appealing the indictment issue which he raised in a motion for arrest of judgment. There is an order overruling the defendant's motion for a new trial; but the defendant failed to cite to his motion, and its location in the record is not apparent to this Court.

The defendant has waived this issue because of inadequate citation to the record. Tenn. R. Ct. Crim. App. 10(b). Failure to raise an issue in a new trial motion also constitutes waiver. Hayslett v. State, 577 S.W.2d 211, 213 (Tenn. Crim. App. 1978).

AFFIRMED

PAUL G. SUMMERS, JUDGE

CONCUR:

JOE B. JONES, JUDGE

WILLIAM M. BARKER, JUDGE