IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
APRIL SESSION, 1995

STATE OF TENNESSEE,	)	
	)	No. 03C01-9408-CR-00294
Appellee	)	
	)	BLOUNT COUNTY
vs.	)	
	)	Hon. **D. Kelly Thomas, Jr.**, Judge
FOREST DALE BUCKLAND,	)	
	)	(Aggravated Burglary)
Appellant	)	

For the Appellant:

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Forest Dale Buckland, appeals from a conviction and sentence for aggravated burglary, a class C felony, entered by the Circuit Court for Blount County. Two issues are presented for our review. First, the appellant challenges the sufficiency of the evidence to sustain his conviction. Second, the appellant contends that the sentence imposed by the trial court is excessive.

After a review of the record, we affirm the judgment of the trial court.

On May 30, 1993, Bob and Pat Winter were having a barbecue in the backyard of their home in Maryville. Several people were present, including their son Larry, who is an officer with the Maryville Police Department. The Winters and their guests began to hear thunder, and Larry Winter walked to the front of the house in order to close the windows of his girlfriend's car. As he was rolling up one of the windows, Winter looked toward the front of his parents' house and saw a person, later identified as the appellant, standing inside the front door. As Winter watched, the appellant slowly backed out of the house. Because he did not recognize the intruder, Winter approached the appellant and yelled, "What the hell are you doing in my house?" Startled, the appellant turned and ran into the door. Winter then tackled and apprehended the appellant. When again asked by Winter what he was doing in the house, the appellant answered that he was looking for his dog.

Winter then brought the appellant to the backyard. Mrs. Winter called the police. While awaiting the arrival of the police, Larry Winter thoroughly searched the appellant. He found nothing, and, in fact, Mr. and Mrs. Winter testified at the appellant's trial that nothing was missing from their house.

The appellant was arrested and, on September 13, 1993, was indicted for aggravated burglary. The case proceeded to trial on January 26, 1994. At the trial, Officer Steve Blankenship, a patrol officer with the Blount County Sheriff's Department, testified that he was the first officer to arrive at the scene of the burglary. He further testified that, following his arrival, the appellant's car was found in the driveway next door. Larry Winter testified that this car was hidden from the Winters' house and backyard by a "thick island ... of pine trees and ... dogwoods."

Detective Thomas Hatcher testified that, following the appellant's arrest, the appellant was taken to the Detective Division of the Blount County Sheriff's Department. At the Detective Division, the appellant told Hatcher that he had entered the Winters' home in order to look for his dog. The appellant further claimed that he had knocked on the Winters' door before entering the house, and had thought he heard someone tell him to come inside.

Mrs. Winter testified that neither she nor her husband had ever seen the appellant before the day of the burglary, nor did the appellant have their permission to enter their house. During the barbecue, the front door of the house was closed, but unlocked. However, the storm or screen door in front of the wooden door was locked. Mrs. Winter further testified that, following the appellant's capture, as she went through the front door of her house to call the police, she noticed that the handle on the storm door was twisted and the front door was wide open. Also, a pillow that had been on the couch in the living room was on the floor by the front door.

Mr. Winter testified that, following the burglary, the lock on the storm door was broken and had to be replaced. Mr. Winter stated that "a good jolt" or "a good force" could break the lock on the storm door and that, possibly, the lock could be broken without a tool.

Finally, Mr. Winter testified that although the family dog, "Smoky," was inside the house at the time of the burglary, the Winters and their guests would have been unable to hear the dog bark from their location in the backyard. Testimony revealed that Smoky was twelve years old at the time of the burglary, "[h]is hearing is gone and he's got arthritis real bad. He's pretty, you know, crippled up now." Mr. Winter observed that Smoky is not "as good a watchdog as he ever was."

The jury found the appellant guilty of aggravated burglary and imposed a fine of one thousand dollars. After conducting a sentencing hearing, the trial court sentenced the appellant to twelve years imprisonment as a Range III persistent offender.

I. Sufficiency of the Evidence

The appellant challenges the sufficiency of the evidence to sustain his conviction for aggravated burglary. A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant must establish that the evidence presented at trial was so deficient that no "reasonable trier of fact" could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994), cert. denied, __ U.S. __, 115 S.Ct. 743 (1995); Tenn. R. App. P. 13(e).

Moreover, an appellate court may neither reweigh nor reevaluate the evidence when determining its sufficiency. State v. Cabbage, 571 S.W.2d 832,

835 (Tenn. 1978). "A jury verdict approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory." State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073, 104 S.Ct. 1429 (1984). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. Id. See also State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992), cert. denied, __ U.S. __, 113 S.Ct. 1368 (1993).

A person is guilty of aggravated burglary if that person (1) enters a habitation without the effective consent of the property owner (2) with the intent to commit a felony or theft. Tenn. Code Ann. § 39-14-402(a)(1)(1991) and Tenn. Code Ann. § 39-14-403(a)(1991). In the instant case, the appellant concedes that he entered the victims' home without consent. He contends, however, that the evidence was insufficient to support a finding that he had the intent to commit theft or, indeed, any intent other than the intent to find his dog.

This court has often found that specific intent may be established by circumstantial evidence. State v. Chrisman, 885 S.W.2d 834, 838 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994). Thus, "[w]hen one enters, without authorization, an occupied dwelling which contains valuable property, a jury is entitled to infer that the entry was made with the intent to commit a felony." State v. Burkley, 804 S.W.2d 458, 460 (Tenn. Crim. App. 1990). Because the jury is able to infer that there is intent to commit theft when there is a breaking and entering, the evidence of a pried door or broken lock is enough to prove a burglary. State v. Collins, No. 01C01-9311-CC-00411 (Tenn. Crim. App. at Nashville, February 23, 1995). As previously mentioned, Mrs. Winter testified that, after the appellant was apprehended, she noticed that the handle on the storm door was twisted. Mr. Winter testified that the lock on the storm door was broken and had to be replaced. We conclude that, in this case, the jury could

have properly inferred that the appellant entered the victims' home with the intent to commit theft.

Moreover, the appellant's explanation for his entry into the Winters' home is not supported by the evidence. The appellant claims that he was looking for his dog. Yet there is no evidence that the appellant owned a dog, that such dog was missing, or that the appellant lived in the same area as the victims. In any event, this court may not substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Id. Again, "[q]uestions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court." Id. The first issue is without merit.

II. Sentencing

Aggravated burglary is a class C felony, Tenn. Code Ann. § 39-14-403(b)(1991), and carries a sentence ranging from three to fifteen years. Tenn. Code Ann. § 40-35-111(b)(3)(1990). Prior to trial, the prosecution, pursuant to Tenn. Code Ann. § 40-35-202(1990), filed a notice of intention to seek enhanced punishment. The notice listed six prior felony convictions obtained against the appellant. The appellant stipulated at the sentencing hearing that the appropriate range of sentencing was Range III. The trial judge, therefore, determined that the appellant was a Range III persistent offender and sentenced the appellant to twelve years imprisonment. Tenn. Code Ann. § 40-35-210(a) and (b)(1990); Tenn. Code Ann. § 40-35-112(c)(3)(1990). The appellant now contends that the twelve year sentence imposed by the trial court is excessive, and that the appellant should have received the minimum sentence in Range III of ten years.

Review, by this court, of the length, range, or manner of service of a sentence is *de novo* with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d) (1990). This presumption only applies, however, if the record demonstrates that the trial court properly considered sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The legislature has listed factors that the trial judge shall consider in determining the specific sentence and, if appropriate, a combination of sentencing alternatives. Tenn. Code Ann. § 40-35-210(b)(1990). These factors include the following:

> 1. The evidence, if any, received at the trial and the sentencing hearing;
> 2. The presentence report;
> 3. The principles of sentencing and arguments as to sentencing alternatives;
> 4. The nature and characteristics of the criminal conduct involved;
> 5. Evidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and
> 6. Any statement the defendant wishes to make in his own behalf about sentencing.

Id. General principles of sentencing are the potential or lack of potential for rehabilitation; the imposition of a sentence no greater than that warranted by the offense; the imposition of the least severe measure necessary to achieve the purposes for which the sentence is imposed; and the availability of alternatives to incarceration. Tenn. Code Ann. §§ 40-35-103(2)-(6)(1990).

The trial judge's statements at the sentencing hearing indicate that the judge considered the evidence adduced at trial and the presentence report. The trial judge also considered the dangerous nature of home burglaries and the appellant's history of criminal convictions, factors the trial judge used to enhance the appellant's sentence within the appropriate range. Finally, the judge considered the imposition of alternative sentencing. In denying alternative sentencing, the trial judge noted the appellant's unwillingness to accept

responsibility for his crime. "[The appellant is] not appropriate for Community Corrections. For one thing, he still says he was out looking for a dog in a neighborhood that he didn't even live in." This court has observed that the appellant's credibility and willingness to accept responsibility for his crime are circumstances relevant to determining his rehabilitation potential. State v. Dowdy, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994). See also Tenn. Code Ann. § 40-35-103(5)(1990).

However, the record is silent as to the trial court's consideration of mitigating factors. Generally, the presence *or absence* of mitigating factors must be noted on the record. State v. Dies, 829 S.W.2d 706, 710 (Tenn. Crim. App. 1991); Tenn. Code Ann. § 40-35-210(1990), Comments. "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 ... These findings by the trial judge must be recorded in order to allow an adequate review on appeal." Chrisman, 885 S.W.2d at 839. Nevertheless, this court will apply the presumption of correctness even in the absence of an explicit listing of the rejected mitigating factors so long as the record and the findings are reasonably clear as to their absence. State v. Parks, No. 02C01-9401-CC-00010 (Tenn. Crim. App. at Jackson, April 5, 1995). As subsequently discussed, we conclude that the record adequately supports the absence of mitigating factors.

Therefore, the presumption of correctness applies. The appellant bears the burden of establishing that the sentence imposed by the trial court was erroneous. State v. Lee, No. 03C01-9308-CR-00275 (Tenn. Crim. App. at Knoxville, April 4, 1995). In determining whether the appellant has met this burden, we, like the trial court, must consider the factors listed in Tenn. Code Ann. § 40-35-210(b)(1990) and sentencing principles described in Tenn. Code Ann. § 40-35-102 (Supp. 1994) and § 40-35-103 (1990). Ashby, 823 S.W.2d at

168; Farmer v. State, No. 03C01-9405-CR-00161 (Tenn. Crim. App. at Knoxville, February 3, 1995).

First, the appellant contends that he is an appropriate candidate for alternative sentencing. Initially, we note that the appellant is not entitled to the statutory presumption of alternative sentencing under Tenn. Code Ann. §§ 40-35-102(5) and (6)(Supp. 1994).[1] Under section 40-35-102 (6), the presumption only applies to especially mitigated or standard offenders. Moreover, the appellant cannot have a criminal history evincing either "a clear disregard for the laws and morals of society" or "failure of past efforts at rehabilitation." Tenn. Code Ann. § 40-35-102(5)(Supp. 1994). See also State v. Bingham, No. 03C01-9404-CR-00127 (Tenn. Crim. App. at Knoxville, February 14, 1995); Chrisman, 885 S.W.2d at 840. At the sentencing hearing, the appellant stipulated that he is a persistent offender.

Furthermore, the 1989 Criminal Sentencing Reform Act provides that sentences involving confinement should be based on the following considerations:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the [appellant] ...

Tenn. Code Ann. § 40-35-103(1)(1990). The first consideration is applicable in the instant case. Again, the appellant has stipulated that his criminal record includes at least five prior felonies. Indeed, the appellant's counsel, at the

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[1] We also note that the trial judge correctly concluded that the appellant was ineligible for probation under Tenn. Code Ann. § 40-35-303(a)(Supp. 1994).

sentencing hearing, remarked that the appellant "has a rather extensive criminal history, all for the same ... types of crimes." Most importantly for purposes of review, the trial judge not only found that the appellant's criminal history includes additional convictions, other than those necessary to establish the appropriate range, but also found that "given [the appellant's] record, I think -- he's either been in custody or been violating the law, close to a professional criminal."

Generally, this court will not set aside findings of fact made by the trial court after an evidentiary hearing unless the evidence contained in the record preponderates against the trial court's findings. State v. Dick, 872 S.W.2d 938, 943 (Tenn. Crim. App. 1993); State v. Young, 866 S.W.2d 194, 197 (Tenn. Crim. App. 1992). In the context of sentencing hearings, this court similarly defers to the trial court's findings of fact. State v. Raines, 882 S.W.2d 376, 383 (Tenn. Crim. App. 1994). The rationale underlying this rule is that the trial court has the opportunity to observe the manner and demeanor of the witnesses. Id. Notwithstanding this general rule, our obligation to perform de novo review precludes reliance on the trial court's findings when "evidence is stipulated or is in the form of a deposition, a statement contained in the presentence report, or a record introduced into evidence." Id. at 384. Having examined the transcript of the sentencing hearing, we conclude that the trial judge relied upon the presentence report in evaluating the appellant's criminal history. Therefore, we must look directly to the presentence report.

However, the presentence report is not included in the record.[2] It is the

[2] We note that the appellant requested that a copy of the presentence report be included in the record pursuant to Tenn. R. App. P. 24. Apparently, however, the clerk inadvertently omitted inclusion of the presentence report in the record. Notwithstanding the clerk's omission, it is the duty of the appellant to ensure that the record on appeal is complete. State v. Boring, No. 03C01-9307-CR-00224 (Tenn. Crim. App. at Knoxville, Feb. 9, 1994). Moreover, the appellant could have corrected the record pursuant to Tenn. R.

appellant's duty to ensure that the record on appeal contains all of the evidence relevant to those issues that are the bases of appeal, including evidence considered by the trial court in setting a sentence. State v. Boring, No. 03C01-9307-CR-00224 (Tenn. Crim. App. at Knoxville, February 9, 1994); Tenn. R. App. P. 24(b). "In the absence of an adequate record on appeal, this court must [conclusively] presume that the trial court's rulings were supported by sufficient evidence." State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1991). See also Boring, No. 03C01-9307-CR-00224; State v. Banes, 874 S.W.2d 73, 82 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994)(an appellate court cannot consider an issue which is not preserved in the record for review). Therefore, we must presume that the trial judge's assessment of the appellant's criminal history is accurate. Similarly, in the absence of the presentence report, we must presume that the trial judge correctly noted the appellant's unwillingness to accept responsibility for his crime, again a circumstance relevant to the appellant's rehabilitation potential.[3] Dowdy, 894 S.W.2d at 306; Tenn. Code Ann. § 40-35-103(5)(1990). Hence, the appellant has failed to demonstrate that he is an appropriate candidate for alternative sentencing.[4]

We next consider whether the trial judge should have imposed the minimum sentence within Range III. Tenn. Code Ann. § 40-35-210(1990) provides that the minimum sentence within the appropriate range is the

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App. P. 24(e). The appellant failed to request any such correction.

[3] Because the transcript of the sentencing hearing does not support this finding, we assume that the trial judge was again relying upon the presentence report.

[4] The general principles articulated in the Criminal Sentencing Reform Act of 1989 provide an initial gateway through which the appellant must pass in order to arrive at the Community Corrections Act. Tenn. Code Ann. § 40-35-104(c)(Supp. 1994). Therefore, although the appellant meets the requirements of Tenn. Code Ann. § 40-36-106 (1990), he is ineligible for community corrections under the Sentencing Act.

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. Id. If there are no mitigating factors, the court may set the sentence above the minimum in that range, but still within the range. Id. See also State v. Dies, 829 S.W.2d 706, 710 (Tenn. Crim. App. 1991). "[T]here is no particular value assigned by the 1989 Sentencing Act to the various factors and the 'weight afforded mitigating or enhancement factors derives from balancing relative degrees of culpability within the totality of the circumstances of the case involved.'" State v. Marshall, 870 S.W.2d 532, 541 (Tenn. Crim. App. 1993)(citation omitted). The weight assigned to any existing factor is generally left to the trial judge's discretion. Id.

The trial court found two enhancement factors. First, the trial court noted the appellant's prior convictions other than those necessary to place the appellant within Range III. Tenn. Code Ann. § 40-35-114(1)(Supp. 1994). Second, the trial court observed, "Home burglaries are dangerous. The risk to human life is high in a burglary. And I think that's present here." Both the appellant and the state have interpreted this statement as an application of enhancement factor (10) in Tenn. Code Ann. § 40-35-114(Supp. 1994), that the appellant "had no hesitation about committing a crime when the risk to human life was high."

As to the first enhancement factor, under section 40-35-114(1) the appellant must have a history of criminal convictions *in addition* to those necessary to establish the appropriate range. As already stated, absent the presentence report, this court must conclusively presume that the appellant's criminal history includes more than the requisite five prior felonies. We must also, therefore, presume that the trial judge correctly applied the enhancement

factor in question. Moreover, we note that, at the sentencing hearing, the appellant did not contest the state's listing of six prior felonies in the state's notice of intention to seek enhanced punishment, nor did the appellant contest the state's assertion at the hearing that the presentence report listed criminal convictions in addition to those necessary to establish the appropriate range.

As to enhancement factor (10), set forth in Tenn. Code Ann. § 40-35-114 (Supp. 1994), the Criminal Sentencing Reform Act of 1989 provides that an enhancement factor may be applied to increase the appellant's sentence within the appropriate range if the factor is not an "essential element" of the offense. Tenn. Code Ann. § 40-35-114 (Supp. 1994). The test for determining if an enhancement factor is an essential element of an offense is whether the same proof necessary to establish the enhancement factor would also establish an element of the offense. State v. Jones, 883 S.W.2d 597, 601 (Tenn. 1994). Moreover, factors that are inherent in a particular offense, even if not designated as an element, may not be applied to increase the appellant's sentence. State v. Claybrooks, No. 01C01-9403-CC-00092 (Tenn. Crim. App. at Nashville, November 3, 1994), perm. to appeal denied, (Tenn. 1995).

This court has noted that any burglary carries a risk to human life. State v. Jones, No. 01C01-9405-CR-00175 (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1995). The determinative language in factor (10) is "the risk to human life was high." Jones, 883 S.W.2d at 602; Bingham, No. 03C01-9404-CR-00127. Nevertheless, there are certain factual scenarios in which factor (10) may be applied to enhance a sentence for an aggravated burglary conviction. Id. The facts must demonstrate culpability distinct from and appreciably greater than that incident to the offense of aggravated burglary. Jones, 883 S.W.2d at 603. "The focus of the court should be on the [appellant]

and the specific facts of the crime he committed rather than on the crime of burglary in general ... " Jones, No. 01C01-9405-CR-00175.

In applying factor (10), the trial judge improperly focused on the nature of burglaries, rather than on the facts of this case. Nevertheless, we conclude that the facts demonstrate the requisite heightened culpability. There is sufficient evidence in the record to support an inference that the appellant was aware that the victims, if not in the house, were nearby. First, he parked his car in a location where it could not be seen from the Winters' house or yard. Second, numerous cars were parked in front of the Winters' house. The appellant's knowledge that the burglarized residence was probably occupied justifies the imposition of enhancement factor (10). Id. Because the appellant knew the victims were at home, he should have expected that there was great danger to not only the victims, but himself. State v. Potter, No. 01C01-9301-CC-00021 (Tenn. Crim. App. at Nashville, August 1, 1994).

Finally, we find no mitigating factors. Tenn. Code Ann. § 40-35-113(1990). The appellant contends that the trial judge should have applied the mitigating factor that the appellant neither threatened nor caused serious bodily injury. Tenn. Code Ann. § 40-35-113(1)(1990). This court has observed that "application of the mitigating factor under Tenn. Code Ann. § 40-35-113(1) should occur unless the conduct related to *serious* bodily injury and the factor should be considered in relation to the facts and circumstances of the particular case." State v. Christman, No. 01-C-01-9211-CC-00361 (Tenn. Crim. App. at Nashville, September 2, 1993). We have already concluded that the presence of the victims at the burglarized residence created an immediate "threat of confrontation" and, therefore, a threat to human life. See State v. Roberts, No. 03C01-9301-CR-00009 (Tenn. Crim. App. at Knoxville, September 23, 1993). It would be inconsistent, therefore, to find that the appellant's conduct did not

threaten serious bodily injury.

In the absence of mitigating factors, and considering the applicable enhancement factors, we conclude that the sentence imposed is not excessive. The appellant has failed to overcome the presumption that the trial judge's sentencing determination is correct. Accordingly, we affirm both the appellant's conviction and his sentence.

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DAVID G. HAYES, Judge

CONCUR:

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DAVID H. WELLES, Judge

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JOHN A. TURNBULL, Special Judge