IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER 1994 SESSION

STATE OF TENNESSEE,	*	C.C.A.# 03C01-9407-CR-00260
APPELLEE,	*	SULLIVAN COUNTY
VS.	*	Hon. Edgar P. Calhoun, Judge
CLYDE DEWAYNE WESEMANN,	*	(Aggravated Burglary)
APPELLANT.	*	

For the Appellant:

Stephen M. Wallace
Assistant Public Defender
P.O. Box 839
Blountville, TN 37617

For the Appellee:

Charles W. Burson
Attorney General and Reporter
450 James Robertson Parkway
Nashville, TN 37243-0493

Sharon S. Selby
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Rebecca H. Davenport
Assistant District Attorney
P.O. Box 526
Blountville, TN 37617

OPINION FILED: _____

AFFIRMED

Gary R. Wade, Judge

OPINION

The defendant, Clyde Dewayne Wesemann, was convicted of aggravated burglary. The trial court imposed the maximum, Range II sentence of ten years, to be served consecutively to other, prior sentences.

In this appeal, the defendant challenges the sufficiency of the convicting evidence and the length of his sentence. We find no error and affirm.

On May 11, 1992, the defendant, who had mowed the lawn of the victim, Virginia Trusley[1], on three or four previous occasions, entered her residence and took four rings from a crystal ring holder in the kitchen area. The victim was not present. Later, the defendant confessed to the theft.

TBI Special Agent Franklin C. McCauley, Jr., recovered three of the rings, two from the defendant's mother and one from the defendant's girlfriend. Lieutenant Tommy Archer of the Sullivan County Sheriff's Department recovered the fourth from the defendant's grandmother.

Sullivan County Detective Mike Yaniero took the pretrial statement from the defendant:

> About one month ago I was mowing at Ms. Trusley's. She had left a note that said she was at her sister's, so I started mowing[.] I saw the front door was open. I walked in the house and took three (3)

[1]In a prior, separate trial, the defendant had been convicted for the shooting death of the victim. The trial court imposed a sentence of life for that crime.

> or four (4) rings that were in the kitchen on a ring holder. I gave one of the rings to Marlene, one to my mom, and one to my grandma. While I was at the house I don't remember if [I] saw the gun or not. This is a true statement.

The defendant testified at trial. He admitted that he stole the rings, but insisted that a note the victim left gave him permission to go inside to get a glass of water. He explained that the victim always brought him something to drink while he mowed. The defendant claimed that he initially entered the house with the sole intention of getting some water, but once inside, saw the rings and decided to take them. He insisted that he had informed officers that the note had given him permission to enter the residence, despite the fact that this information was not included in his pretrial statement.

The defendant's girlfriend, Marlene Waters, testified that she had helped the defendant mow the victim's yard on a prior occasion. She stated that the victim had brought them something to drink after their work was complete and then invited them inside her screened-in porch so that she could write the defendant a check. Ms. Waters acknowledged that the defendant had given her one of the rings stolen from the victim. Even though she believed the ring had been stolen, she did not ask the defendant where he got it.

Sullivan County Detective Louie Eleas testified in rebuttal for the state. He stated that he was present when the defendant was questioned and did not recall any claim that

he had been given permission to enter the victim's home.

Initially, the defendant asserts that the evidence was insufficient to support an aggravated burglary conviction because he had permission to enter the victim's home and did not intend to steal anything at the time he went inside. Burglary, in pertinent part, is defined as follows:

> A person commits burglary who, without the effective consent of the property owner:
>
> (3) Enters a building and commits or attempts to commit a felony or theft[.]

Tenn. Code Ann. § 39-14-402(a)(3). "Aggravated burglary is burglary of a habitation as defined in §§ 39-14-401 and 39-14-402." Tenn. Code Ann. § 39-14-403(a).

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, 835 (Tenn. 1978). 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 triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational 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), cert. denied, 465 U.S. 1073 (1984); Tenn. R. App. P. 13(e).

Here, the defendant concedes that he stole the rings, but claims the conviction should be modified to theft because he had permission to enter the residence of the victim. We disagree. The jury is entitled to draw inferences from the proof. Each of the two officers present during the pretrial interrogation of the defendant testified that the defendant made no claim of a permitted entry. Any or all elements of an offense may be proven by circumstantial evidence so long as there is an evidentiary basis upon which the jury can exclude every other reasonable theory or hypothesis except that of guilt. Pruitt v. State, 3 Tenn. Crim. App. 256, 460 S.W.2d 385 (1970). Here, the jury chose to accredit the theory of the state and reject that of the defense. In our view, that was their prerogative.

The defendant also claims that he did not form the intent to steal these rings until he was already inside the house and, therefore, cannot be convicted of burglary because an intent to commit a felony had to exist at the time of entry. Again, we disagree. The statute requires only that a felony be committed or attempted once the perpetrator enters the building. Tenn. Code Ann. § 39-14-402(a)(3). Criminal intent does not have to occur either prior to or simultaneously with the entry. See State v. James R. Bishop, No. 03C01-9308-CR-00268 (Tenn. Crim. App. at Knoxville, August, 18, 1994), perm. to app. denied, (Tenn. 1994). Consequently, the evidence was sufficient to establish each element of aggravated burglary.

Next, the defendant contends that the trial court erred by imposing the maximum sentence and by requiring that the sentence be served consecutively to those imposed as a result of his prior convictions. He specifically argues that the trial court should have given more consideration to his severe mental disorder as a mitigating circumstance.

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). This presumption 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 Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and 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 offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; State v. Smith, 735 S.W.2d 859, 862 (Tenn. Crim. App. 1987).

Here, the trial court applied three enhancement factors and two mitigating factors. It determined that the victim was particularly vulnerable because of her advanced age and health; it ruled that the defendant had a history of unwillingness to comply with conditions of a sentence involving release into the community; and it found that the offense was committed while the defendant was on probation. Tenn. Code Ann. § 40-35-114(4), (8), and (13)(C). The defendant does not challenge the application of any of these factors.

The trial court did conclude that the defendant might be entitled to some mitigation because of his mental condition and because the offense did not threaten serious bodily injury. Tenn. Code Ann. § 40-35-113(13) and (1). The pre-sentence report from the defendant's previous trial was admitted into evidence at his sentencing hearing and suggests that the defendant did suffer from a mental disorder. There was little indication, however, that the disorder had any bearing on the defendant's burglary and, thus, the trial court found the factor had little weight. While the trial court did conclude the crime did not threaten serious bodily injury, that factor obviously did not overcome the greater weight assigned to each of the enhancement factors.

In our view, at least two of the enhancement factors are due considerable weight. The defendant had a fairly extensive prior criminal history in which he had failed to comply with conditions of release on more than one occasion.

The defendant had committed burglary on prior occasions and was on probation for one such offense when he committed this crime. Thus, the record demonstrates that the defendant is not amenable to rehabilitation. Under these circumstances, we hold that the trial court properly imposed the maximum sentence.

We turn now to the issue of consecutive sentencing. Prior to the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case, our supreme court ruled that aggravating circumstances must be present before placement in any one of the classifications. Later, in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), the court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. The 1989 act is, in essence, the codification of the holdings in Gray and Taylor. Consecutive sentencing may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria exists:

> (1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
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> (2) The defendant is an offender whose record of criminal activity is extensive;
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> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
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> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
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> (6) The defendant is sentenced for an offense committed while on probation; or
>
> (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b).

The defendant committed these offenses while on probation from a Davidson County burglary conviction. That alone is sufficient to support the trial court's imposition of consecutive sentences. See Tenn. Code Ann. § 40-35-115(b)(6); see also State v. Roger L. McCormick, No. 01C01-9404-CR-00136 (Tenn. Crim. App. at Nashville, January 12, 1995), perm. app. to denied, (Tenn. 1995). For that reason, we need not address whether the trial court properly classified the defendant as a dangerous offender or as "an offender whose record of criminal activity is [sufficiently] extensive." See Tenn. Code Ann. § 40-35-115(b)(2) and (3).

Accordingly, the judgment is affirmed.

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Gary R. Wade, Judge

CONCUR:

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Joseph M. Tipton, Judge

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Robert E. Burch, Special Judge