IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

NOVEMBER 1995 SESSION

FILED

January 31, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	C.C.A. No. 02C01-9505-CR-00143
Appellee,	)	
	)	Shelby County Criminal
V.	)	
	)	Hon. Arthur T. Bennett, Judge
	)	
ROBERT D. DAVENPORT,	)	(Attempted Aggravated Robbery,
	)	Especially Aggravated Robbery)
Appellant.	)	

FOR THE APPELLANT:

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OPINION FILED: _____

CONVICTIONS AFFIRMED; SENTENCES AFFIRMED AS MODIFIED

PAUL G. SUMMERS,
Judge

O P I N I O N

The appellant, Robert D. Davenport, was convicted by a jury of attempted aggravated robbery and especially aggravated robbery. Sentenced as a Range II multiple offender in the attempted robbery conviction, the appellant received a ten-year sentence. Subsequently, sentenced as a Range III persistent offender in the especially aggravated robbery conviction, he received a consecutive fifty year sentence.

In this appeal the appellant raises three issues for review. First, he argues that the evidence was insufficient to support his attempted aggravated robbery conviction. Secondly, he claims that the trial court committed reversible error by failing to instruct the jury as to facilitation of a felony. Finally, he contends that his sentences were excessive. Following our review, we affirm the convictions. In addition, we affirm the sentences as modified.

The testimony at trial revealed that in the early morning hours of October 19, 1992, Ernest Norman and Marcel Nugent were leaving a friend's apartment when they were approached by some men who had gathered in the area. Norman testified that Nugent had been waiting for him at Norman's car when two men came up behind him and asked him where he was from and whether he had any "cheese" (money). When one of the men hit him in the back of his head, Norman escaped and ran to a nearby Texaco station to call the police. Norman said that while he was running he heard gunshots. When Norman returned to the scene he saw the ambulance and police car and watched them carry Nugent from the friend's apartment they had visited earlier. He also found his car with a broken window on the passenger side. Norman testified that he could not identify any of the perpetrators.

Nugent testified that when he saw the men hit Norman, he got into the vehicle and locked the doors. The men continually ordered Nugent out of the

vehicle but he refused. When the men became temporarily distracted by a vehicle which had approached, Nugent got out of the car and attempted to run away but was cut off by one of the men. Nugent returned to the vehicle and locked the doors. The men broke the window with a beer bottle and a plank and pulled Nugent from the car. As Nugent pulled away from the men, he ran out of his jacket. Nugent testified that as the men wrestled him to the ground, the appellant went through his pockets and took approximately eighty dollars in cash. On cross-examination Nugent admitted that it was dark on the night of the incident but insisted that he could identify the appellant because he saw his face when the appellant bent over to take the money. Soon after the money was taken, Nugent was shot three times in his legs; but he did not see who pulled the trigger. Nugent later identified the appellant in a photo lineup as the man who had taken the money from his pocket.

The defense presented the testimony of Charles Sanders, who lived in the same apartment complex where the incident occurred. Sanders testified that on the night of the incident he and others had been drinking and smoking at his apartment. Sanders said that at some point the other men left his apartment and within five minutes he heard shooting. According to Sanders, he and the appellant had met for the first time that night. He testified that the appellant was on his porch when the shooting occurred.

Terrence Pollard, one of the individuals present at Sanders' house, testified that Steve Davis had thrown beer cans at the two victims. When the victims ran to the car, Davis and Darrel Bailey attacked Norman who fled. However, Davis and Bailey broke the car window and pulled Nugent out of the car. Pollard said he saw Andre Bland shoot Nugent in the legs. Pollard corroborated the earlier testimony that the appellant had stood on Sanders' porch during the entire incident.

The appellant testified on his own behalf that he was on the porch when the incident occurred. The appellant said that he saw Norman's confrontation and eventual flight. He also watched as Davis broke the car window and pulled Nugent from the vehicle. The appellant stated that as Nugent ran away, his jacket was pulled off from him. Davis, Bailey and Little Larry were beating Nugent just seconds before he heard gunshots. The appellant did not see who pulled the trigger but said he later heard that Andre Bland had shot Nugent. The appellant left the scene and returned to his girlfriend's apartment. On cross-examination the appellant suggested that Nugent's identification of him was based on Nugent's recollection of the appellant as standing on the porch of the nearby apartment.

The state presented the rebuttal testimony of Sergeant K.R. Free of the Memphis Police Department who had initially questioned the appellant regarding his participation. Free's testimony was offered to rebut the appellant's testimony that he had not given a statement on an earlier occasion. Free testified that the appellant had not given an official statement but had answered some initial questions at the station. Contrary to his testimony at trial, the appellant had told the officers that he and Sanders had gone to the market when the shooting occurred. Free said that the appellant became defensive when told that a victim had identified him as the man who took the money from his pocket. However, Free admitted that the appellant continually denied any involvement in the incident.

I.

In his first issue, the appellant claims that the evidence was insufficient to support his conviction for attempted aggravated robbery of Ernest Norman. In Tennessee, great weight is given to the result reached by the jury in a criminal trial. A jury verdict accredits the state's witnesses and resolves all conflicts in favor of the state. State v. Williams, 657 S.W.2d 405 (Tenn. 1983). 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. Cabbage, 571 S.W.2d 832 (Tenn. 1978). Moreover, a guilty verdict replaces the presumption of innocence with a presumption of guilt. State v. Grace, 493 S.W.2d 474 (Tenn. 1973). The appellant has the burden of overcoming this presumption. Id.

In a sufficiency of the evidence challenge, the relevant question for this Court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or crimes beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); State v. Duncan, 698 S.W.2d 63 (Tenn. 1985); T.R.A.P. 13(e).

The appellant asserts that no evidence exists to tie him to the attempted aggravated robbery of Norman. The testimony established that two men approached Norman and hit him in the head before he escaped. The appellant's position at trial was that he was on the porch during the entire incident and did not participate in either infraction. However, we find that the jury made the nexus through circumstantial evidence.

The jury heard evidence that the second victim, Nugent, saw the man who took the money from his pockets. In addition, Nugent later identified this man at a photo lineup as the appellant. Obviously, the jury inferred from this proof that the appellant was involved in the night's events and was criminally responsible for the conduct of others in the group that had gathered that night.

Although the evidence of the appellant's guilt is circumstantial, it is a well established principle of law in Tennessee that circumstantial evidence alone may be sufficient to support a conviction. State v. Buttrey, 756 S.W.2d 718, 721 (Tenn. Crim. App. 1988). However, in order for this to occur, the circumstantial evidence "must be not only consistent with the guilt of the accused but it must

also be inconsistent with his [or her] innocence and must exclude every other reasonable theory or hypothesis except that of guilt." State v. Tharpe, 726 S.W.2d 896, 900 (Tenn. 1987). In addition, "it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that [the appellant] is the one who committed the crime." Id. at 896. Absolute certainty as to each element of the offense is not required. Id.

Because the two incidents occurred just moments apart and because the appellant was identified as a participant in the especially aggravated robbery, the jury chose to believe the state's argument that the appellant was also involved in the attempted aggravated robbery of Norman through criminal responsibility for the conduct of another. The weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury as triers of fact. State v. Sheffield, 676 S.W.2d 542 (Tenn. 1984); Byrge v. State, 575 S.W.2d 292 (Tenn. Crim. App. 1978). Because we will not reweigh the evidence, we find that the evidence was sufficient to convict the appellant of attempted aggravated robbery. This issue is meritless.

II.

The appellant's second claim is that the trial court committed plain and prejudicial error by failing to instruct the jury as to facilitation of a felony. He argues that basically every time one is charged with criminal responsibility for the conduct of another, facilitation of a felony must be charged as a lesser included offense. "A person is criminally responsible for the facilitation of a felony if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of a felony." Tenn. Code Ann. § 39-11-403(a) (1991). The Sentencing Commission Comments provide that "[this] section states a theory of vicarious responsibility because it applies to a person who facilitates criminal conduct of another by knowingly furnishing

substantial assistance to the perpetrator of the felony, but who lacks the intent to promote or assist in, or benefit from, the felony's commission." Id.

This case provides an interesting twist to the offense of facilitation of a felony. The evidence reveals that the appellant was identified as a participant in the especially aggravated robbery of Nugent and at least circumstantially a participant in the earlier attempted aggravated robbery of Norman. However, the appellant maintained throughout the trial and through his proof, including his own testimony, that he was standing on a nearby porch during the entire incident. He vehemently denies any participation in either offense. When an appellant, by his own proof, negates facilitation of a felony as being fairly raised by the evidence, the trial court commits no error in refusing to so charge. This issue is without merit.

III.

In his final issue, the appellant contends that his effective sentence is excessive. We conduct a de novo review of the sentences imposed by the trial court with a presumption that the determinations are correct. Tenn. Code Ann. § 40-35-401(d) (1990); State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993). This presumption of correctness is conditioned upon an 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). However, in the instant case we do not find that the court made such an affirmative showing. Therefore, we review these sentences without the presumption of correctness.

In conducting our review, we consider the evidence presented at the sentencing hearing, the presentence report, the sentencing principles, arguments of counsel, statements of the defendant, the nature and characteristics of the offense, mitigating and enhancing factors, and the

defendant's amenability to rehabilitation. Tenn. Code Ann. § 40-35-210(b) (1990); Ashby, 823 S.W.2d at 168; Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990).

The appellant was sentenced as a Range II multiple offender in the attempted aggravated robbery charge and received a ten-year sentence. In reaching Range II status, the trial judge found that the appellant had prior Class-A felony convictions for assault with intent to commit first degree murder and for second degree murder. Although these offenses occurred on the same date, the trial court properly found that pursuant to Tenn. Code Ann. § 40-35-106(b)(4) (1990), crimes involving violence are not construed to be a single course of conduct. As a Range II offender, the possible range of punishment was from six to ten years for a Class-C felony. Tenn. Code Ann. § 40-35-101 (1990). Based upon the "tragic facts and circumstances of the case," the trial judge gave the appellant the maximum sentence.

In the especially aggravated robbery conviction, the trial judge sentenced the appellant as a Range III persistent offender. As his basis, the trial judge concluded that pursuant to Tenn. Code Ann. § 40-35-107, the appellant's two prior Class-A felonies elevated the appellant to Range III. The range of punishment for such a Class-A felony is forty to sixty years. The trial judge sentenced appellant to fifty years on this count.

The trial judge failed to set forth in the record any enhancement factors to support a sentence above the minimum. Further, the state neither detailed even one enhancement factor in its notice to seek enhanced punishment nor did it present such factors at the hearing. Similarly, the appellant failed to establish the existence of any mitigating factors. Tenn. Code Ann. § 40-35-210(c) (1990) provides that if there are no mitigating or enhancing factors, the minimum sentence within the range is the presumptive sentence. In our review of the

sentencing hearing transcript, we do not find that the record supports a sentence above the minimum presumptive sentence in either conviction. As noted by the appellant, many enhancement factors are removed from consideration due to the double enhancing effect. That is, because the elements of the offenses and the enhancement of the range of punishment automatically elevate the sentence, many potential enhancement factors are inappropriate for consideration. For these reasons, we modify the sentences to the minimum with the range, i.e., six years and forty years respectively.

The appellant's next challenge within this sentencing argument is that the trial court improperly ordered the sentences to run consecutively. The state argues that because the appellant is a dangerous offender, the trial judge properly ordered the sentences to run consecutively. Again, we note that the trial judge failed to make such a finding on the record. Instead, the trial judge concluded that the sentences would run consecutively because the appellant is a persistent offender. As stated above, the presumption of correctness is removed and we conduct our review accordingly.

In State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995), our Supreme Court established the proper considerations for imposition of consecutive sentencing. Initially, a determination must be made as to whether the appellant is a dangerous offender. Under Tenn. Code Ann. § 40-35-115(b)(4) (1990), consecutive sentencing is appropriate where "[t]he 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." Here, the appellant participated in an especially aggravated robbery of a victim who was shot at least twice in the legs as he lay on the ground. As recognized by the trial court, although the victim did not die from these wounds, he could have quite easily. The photos contained in the record depicting a significant amount of blood lost on the apartment floor attest to this possibility. We find that

the appellant's conduct satisfies the conditions of Tenn. Code Ann. § 40-35-115(b)(4) and that he is a dangerous offender.

However, the Wilkerson court went further to state that:

> [p]roof that an offender's behavior indicated little or no regard for human life and no hesitation about committing a crime when the risk to human life was high, is proof that the offender is a dangerous offender, but it may not be sufficient to sustain consecutive sentences. Every offender convicted of two or more dangerous crimes is not a dangerous offender subject to consecutive sentences. . . .

Wilkerson, 905 S.W.2d at 938. The Court emphasized that the trial court must not only find that the defendant is a dangerous offender but must also find that the proof establishes "that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender." Id.

In the present case, we find that due to the nature of the especially aggravated robbery as set forth in the facts above, the sentences as modified are reasonably related to the severity of the offenses. Further, based upon appellant's record of violence, these sentences are necessary to protect the public from a continual course of violent conduct.

In conclusion, we affirm the convictions but modify the sentences to six years for the attempted aggravated robbery and forty years for the especially aggravated robbery. In addition, we find that the sentences are to run consecutively.

PAUL G. SUMMERS, Judge

CONCUR:

DAVID H. WELLES, Judge

WILLIAM M. BARKER, Judge