IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
MARCH SESSION, 1995

FILED

January 11, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 01C01-9411-CC-00391
Appellee	)	
	)	MARSHALL COUNTY
vs.	)	
	)	Hon. CHARLES LEE, Judge
JERRY LEE HUNTER,	)	
	)	(Burglary)
Appellant	)	

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Jerry Lee Hunter, appeals from a conviction and sentence for burglary, entered by the Circuit Court of Marshall County. Essentially, four issues are presented for our review. First, the appellant challenges the sufficiency of the evidence to sustain his conviction. Second, the appellant contends that his conviction for burglary is inconsistent with his acquittal on the charges of theft and attempted theft. Third, the appellant argues that the trial court erred in admitting into evidence tools found in the rear pocket of the appellant's pants at the time of his arrest. Finally, the appellant contends that the sentence imposed by the trial court is excessive, and that the trial court should have granted the appellant an alternative sentence.

After reviewing the record, we affirm both the conviction and the sentence imposed.

I. Factual Background

On January 23, 1994, between 1:00 a.m. and 1:30 a.m., Joe Lane "Buck" Beard, a former law enforcement officer in Marshall County, was in bed at his home in Belfast. He heard a noise outside, "like a motor was racing." Beard's son, who had been sleeping on the couch in the living room, told his father that somebody was in Beard's truck. Beard owns a 1992 Chevrolet pickup truck, equipped with a "straight shift, five speed in the floor." That morning, the truck was parked in the driveway, in front of Beard's house. At trial, Beard testified that the doors of the truck had been left unlocked and the keys had been left in the ignition.

Beard looked out the front door and saw that the truck's engine was

running and the headlights were blinking. According to Beard, the truck was lurching back and forth as if someone were trying to move the truck without disengaging the "hand break." Beard dressed and went outside.

A person, later identified as the appellant, exited the truck and began to leave. Beard, thinking that the appellant was a friend of his son, asked the appellant what he was doing. When the appellant turned around and looked at Beard, Beard asked the appellant to approach. As the appellant drew near, Beard realized that he did not know him. He then asked the appellant to come into the house.

Once in the house, Beard again asked the appellant what he had been doing in the truck. The appellant told Beard that he was repossessing the truck for a man named Tommy Burns.[1] According to Beard's testimony at trial, the appellant did not appear to be intoxicated. At this point, Beard called the police. The appellant attempted to leave, and Beard grabbed his vest in an effort to detain him. The appellant broke free, leaving Beard with the appellant's vest in his hand. Beard got his shotgun and pursued the appellant, who had fled toward the highway. The appellant escaped, and Beard returned to the house. At the house, while awaiting the arrival of the police, Beard searched the appellant's vest and found a wallet. The wallet contained a card with the appellant's name on it.

Robert Phelan and Jimmy Oliver, deputies with the Marshall County Sheriff's Department, were dispatched to the area in response to Beard's call. They found the appellant in the parking lot of the Belfast Market, squatting behind a cattle trailer. The market is approximately one hundred and fifty yards

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[1]Beard testified at trial that, although he knew Tommy Burns, he did not buy the truck from Burns, nor did he owe any money to Burns.

from Beard's home.

The appellant told Deputy Oliver that he was homeless and had entered Beard's truck in order to keep warm. According to Oliver, the appellant further stated that he and Beard were "real good friends," and that Beard had given the appellant permission to sleep in the truck.[2] Both deputies testified at trial that the appellant did not appear to be intoxicated. The deputies searched the appellant and found two screwdrivers, a pair of wire cutters, and a crescent wrench.

The appellant was arrested and indicted on numerous counts of burglary and theft. At the time of his trial, the appellant was charged with one count of burglary and one count of theft of property worth between $10,000 and $60,000.

At trial, Melissa Gale Hunter, the appellant's ex-wife, testified on behalf of the appellant. She testified that at the time of the offense, although divorced, she and the appellant were still living together. On the date in question, at approximately 6:00 p.m. or 6:30 p.m., the appellant went with a neighbor to the liquor store and bought a bottle of vodka. By the time the appellant returned home, one third of the bottle had already been drunk. Ms. Hunter, however, did not see the appellant drink the vodka.[3]

Approximately ten minutes after the appellant returned home from the liquor store, he and Ms. Hunter drove to Columbia to shop at the mall. They never arrived at the mall. Instead, they began to argue and decided to return

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[2]At the time the appellant made this statement to Oliver, Deputy Phelan was standing approximately four feet away. However, at trial, Phelan testified that the appellant never claimed to have permission to enter the truck.

[3]Ms. Hunter later found an empty vodka bottle on the couch in the living room.

home. On the way home, they continued to argue, and finally Ms. Hunter stopped the car at a bar, "Big Jim's," and told the appellant to get out. As she drove away, Ms. Hunter saw the appellant enter the bar.

During his case-in-chief, the appellant testified that, on the night in question, after his wife left him at Big Jim's, he went into the bar. He had a drink and asked several people to drive him home. A man from Fayetteville, whose name the appellant was unable to remember, finally offered the appellant a ride home. On the way home, the appellant took some medication and fell asleep. The driver drove one half of a mile past the appellant's home before awakening the appellant. The appellant exited the vehicle and began walking home. It was very cold outside, and the appellant was not wearing heavy clothing. According to the appellant's testimony, he happened upon Beard's truck and entered the truck in order to keep warm.

On cross-examination, the appellant admitted that he had been convicted of four previous felonies. However, he reiterated that he climbed into Beard's truck because he was cold. He denied either revving the truck's engine or rocking the truck back and forth. Moreover, he denied telling Beard that he was attempting to repossess the truck. He claimed that Beard never gave him an opportunity to explain his presence in the truck, but immediately began "cursing" at the appellant and threatening to call the police. The appellant testified that he ran from Beard because he was afraid that Beard might have a weapon. However, he conceded that he later crouched behind the cattle trailer in order to hide from the police. Finally, the appellant's testimony was ambivalent when he was asked if he had told Deputy Oliver that he had Beard's permission to enter the truck. At trial, the appellant admitted that he did <u>not</u> have Beard's permission.

The jury found the appellant guilty of burglary of an automobile, but found him not guilty of theft of the automobile or the lesser included offense of attempted theft. At a subsequent sentencing hearing, the trial court sentenced the appellant to three years and ten months confinement with the Tennessee Department of Correction.

II. Sufficiency of the Evidence

The appellant challenges the sufficiency of the evidence to sustain a conviction for 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 commits burglary when such person, without the effective consent of the property owner, "enters any freight or passenger car, automobile, truck, trailer or other motor vehicle with intent to commit a felony or theft." Tenn. Code Ann. § 39-14-402(4) (1991). The appellant admitted at trial that he did not have permission to enter Beard's truck. However, the appellant contends that the evidence is insufficient to conclude beyond a reasonable doubt that he intended to commit a felony or theft.

This court has often found that 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); State v. Burkley, 804 S.W.2d 458, 460 (Tenn. Crim. App. 1990). See also State v. Moore, No. 01C01-9008-CC-00190 (Tenn. Crim. App. at Nashville, May 16, 1991). 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." Burkley, 804 S.W.2d at 460. See also State v. Mitchell, No. 3 (Tenn. Crim. App. at Jackson), perm. to appeal denied, (Tenn. 1989). Logically, when one enters another's vehicle without authorization, a similar inference may be drawn.

The jury was entitled to reject the appellant's claim that he entered the vehicle because it was cold outside. Questions concerning the credibility of witnesses and 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, and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990). Moreover, at various times and to various people, the appellant offered contradictory explanations for his presence in Beard's vehicle. For example, he told Beard that he was repossessing the car for Tommy Burns. He then allegedly told Deputy Oliver that he was attempting to keep warm, and that he

had obtained Beard's permission to sleep in the truck. Finally, he testified at trial that he was trying to keep warm, but that he did not have Beard's permission to sleep in the truck.

Additionally, the jury was entitled to credit the testimony of the victim, who stated that the appellant appeared to be attempting to drive the truck. Also, the appellant fled from the scene of the incident and, subsequently, attempted to evade the police by crouching behind a cattle trailer. "[A]ny ex post facto indication by an accused of a desire to evade prosecution may be shown as a circumstance from which guilt may be inferred." Mitchell, No. 3. Finally, when the police apprehended the appellant, they discovered tools that could be used in the commission of a burglary in the rear pocket of his pants.[4]

After a review of the record, we conclude that the jury could have found beyond a reasonable doubt that the appellant entered Beard's truck with the intent to commit a felony or theft.

III. Inconsistent Verdicts

The appellant contends that his conviction for burglary is inconsistent with his acquittal on the charges of theft and attempted theft of Beard's truck. However, our supreme court has held that consistency between verdicts on separate counts of an indictment is not necessary. Wiggins v. State, 498 S.W.2d 92, 93-94 (Tenn. 1973). See also State v. Jones, No. 03C01-9302-CR-00057 (Tenn. Crim. App. at Knoxville, November 22, 1994), perm. to appeal denied, (Tenn. 1995); State v. Eaton, No. 03C01-9202-CR-00044 (Tenn. Crim. App. at Knoxville, December 29, 1992), perm. to appeal denied, (Tenn. 1993).

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[4]We conclude later in this opinion that these tools were properly admitted into evidence at trial. See *infra* part IV.

In Wiggins, the court stated that

> [a]n acquittal on one count cannot be considered res judicata to another count even though both counts stem from the same criminal transaction. This Court will not upset a seemingly inconsistent verdict by speculating as to the jury's reasoning if we are satisfied that the evidence establishes guilt of the offense upon which the conviction was returned.

498 S.W.2d at 94. Our supreme court specifically declined to adopt the rule of a minority of jurisdictions that reversible inconsistency results when the verdict acquitting a defendant on one count negates an element essential to the crime charged in the count for which the defendant is convicted. Id. at 93.

In any event, the verdicts in the instant case are not inconsistent. The appellant argues that, when the jury found him not guilty of theft and attempted theft of Beard's truck, it necessarily found that he did not intend to commit theft when he entered Beard's truck. We disagree.

First, Count Two of the indictment charged the appellant with the theft of Beard's truck. The jury may have concluded that, although the appellant did not intend to steal the truck, he entered the truck intending to steal anything of value therein. Second, in order to find the appellant guilty of theft of the truck, the jury would have had to find, not only that the defendant intended to commit theft, but also that he "knowingly obtain[ed] or exercise[d] control" over the truck. See Tenn. Code Ann. § 39-14-103 (1991). Similarly, in order to find the appellant guilty of attempted theft, the jury would also have had to find that the appellant's conduct constituted a "substantial step" toward the commission of the theft. Tenn. Code Ann. § 39-12-101(a)(3) (1991). In other words, the offenses of theft and attempted theft are not entirely congruent with the *mens rea* element of burglary. Thus, the jury's verdict, acquitting the appellant of theft and attempted

theft, did not negate that essential element.[5]

IV. The Admissibility of the Tools

The appellant contends that the trial court erred in admitting into evidence the tools found in the appellant's rear pocket when he was arrested. The appellant argues that, at trial, the tools were irrelevant to his guilt or innocence, and, in the alternative, that any probative value was substantially outweighed by the danger of unfair prejudice.

The determination of the relevance or probative value of evidence is within the trial court's discretion. State v. Leath, 744 S.W.2d 591, 593 (Tenn. Crim. App. 1987). The decision of the trial court will not be overturned absent a clear showing of an abuse of that discretion. State v. Voaden, No. 01C01-9305-CC-00151 (Tenn. Crim. App. at Nashville, December 22, 1994), perm. to appeal denied, (Tenn. 1995). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. The Advisory Commission Comments to Rule 401 provide that the "test for admissibility is a lenient one." See State v. Marion, No. 02C01-9406-CR-00126 (Tenn. Crim. App. at Jackson, December 14, 1994).

We conclude that the tools obtained from the appellant were relevant in determining the appellant's intent when he entered Beard's truck. Even the

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[5]Implicit in the appellant's argument is the contention that theft and attempted theft are lesser included offenses of burglary. However, the courts of this state have held otherwise. State v. Davis, 613 S.W.2d 218, 221 (Tenn. 1981); Jones v. State, 569 S.W.2d 462, 463 (Tenn. 1978); State v. Campbell, 721 S.W.2d 813, 818 (Tenn. Crim. App. 1986); State v. Wright, 650 S.W.2d 57, 59 (Tenn. Crim. App. 1983); State v. Lindsay, 637 S.W.2d 886, 889 (Tenn. Crim. App. 1982); Petree v. State, 530 S.W.2d 90, 93-94 (Tenn. Crim. App. 1975).

appellant, in his brief, refers to the tools as "potential burglar's tools." Clearly, the appellant's possession of such tools on the night in question contradicted his subsequent claims that he was only looking for a place to keep warm when he happened upon Beard's truck. Thus, the tools were admissible pursuant to Tenn. R. Evid. 402.

However, Tenn. R. Evid. 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ... " We have previously observed that any evidence, whether introduced by the prosecution or the defense, is prejudicial. State v. Welch, No. 02C01-9402-CC-00026 (Tenn. Crim. App. at Jackson, December 14, 1994); State v. Jones, No. 03C01-9110-CR-330 (Tenn. Crim. App. at Knoxville, July 8, 1992) (Wade, J., dissenting). "The issue is one of simple fairness. Prejudice becomes unfair when the primary purpose of the evidence at issue is to elicit emotions of 'bias, sympathy, hatred, contempt, retribution, or horror.'" Jones, No. 03C01-9110-CR-330 (Wade, J., dissenting). Our supreme court has stated that unfair prejudice is "an undue tendency to suggest decision on an improper basis, commonly ... an emotional one." State v. Banks, 564 S.W.2d 947, 951 (Tenn. 1978). See also Welch, No. 02C01-9402-CC-00026. Moreover, by adopting the "substantially outweighed" test, Rule 403 places a heavy burden on the party who wants the evidence excluded. NEIL P. COHEN ET AL., TENNESSEE LAW OF EVIDENCE § 403.3, AT 117 (2nd ed. 1990). Here, the appellant has failed to adequately explain why the introduction of the tools was unfairly prejudicial, nor does the record support a broad assertion of unfair prejudice. The trial judge did not abuse his discretion in admitting the evidence. This claim has no merit.

V. The Sentence

Burglary of an automobile is a class E felony, Tenn. Code Ann. § 39-14-

402 (d) (1991), and carries a sentence ranging from one year to six years imprisonment. Tenn. Code Ann. § 40-35-111(b)(5) (1991). On April 8, 1994, the State filed a notice of intention to seek enhanced punishment in this case. The notice listed five prior felony convictions obtained against the appellant, including two convictions for third degree burglary, one conviction for receiving stolen property, another conviction for the improper disposition of a dead human body, and a conviction for felony possession of marijuana. At the sentencing hearing, the State presented to the trial court copies of the prior convictions. However, the State conceded that two of the felonies listed occurred "as part of a single course of conduct within twenty-four (24) hours," and would therefore, pursuant to Tenn. Code Ann. § 40-35-106(b)(4) (1990), be considered one prior felony. Thus, in essence, the State presented four prior felonies at the sentencing hearing. The appellant stipulated that the appropriate range of sentencing was Range II. Therefore, the appellant was subject to not less than two years nor more than four years imprisonment. Tenn. Code Ann. § 40-35-112(b)(5) (1991). The trial court sentenced the appellant to three years and ten months with the Tennessee Department of Correction.

The appellant contends that the sentence imposed by the trial court is excessive, and that he should have been sentenced under the Community Corrections Act. 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 record reveals that the trial court, in imposing sentence, considered the evidence received at trial and the presentence report. Additionally, the court considered the testimony of the appellant at the sentencing hearing.[6] The trial court also considered mitigating and enhancing factors. In mitigation, the court found that the appellant neither caused nor threatened serious bodily injury. Tenn. Code Ann. § 40-35-113(1) (1990). The court found two enhancement factors. First, the trial court observed that the appellant "has a previous history of criminal convictions and behavior in addition to those necessary to establish the appropriate range." See Tenn. Code Ann. § 40-35-114(1) (1994 Supp.). Second, the court noted that, at the time of the offense, the appellant was on probation for a misdemeanor offense. On the basis of this finding, the court concluded that the appellant "has a previous history of unwillingness to comply with the conditions of release in the community." See Tenn. Code Ann. § 40-35-114(8). Finally, the trial court considered alternative sentencing options. Thus,

[6]At the sentencing hearing, the appellant testified that, in the past, drug and alcohol abuse had largely precipitated his criminal activities. However, he continued to maintain his innocence in the instant case, again stating that he entered Beard's truck in order to keep warm.

we conclude that the presumption of correctness applies to the trial court's sentencing determination in this case.

Nevertheless, the appellant contends that he is an appropriate candidate for alternative sentencing. Initially, we note that, contrary to the trial court's conclusion at the sentencing hearing, the appellant is not entitled to the statutory presumption of alternative sentencing under Tenn. Code Ann. §§ 40-35-102(5) and (6)(Supp. 1994). 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), perm. to appeal denied, (Tenn. 1995); State v. Chrisman, 885 S.W.2d 834, 840 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994). At the sentencing hearing, the appellant conceded that he is a multiple offender.

Furthermore, the 1989 Sentencing 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. The presentence report reveals that the appellant has committed six prior felonies and numerous misdemeanor offenses. Thus, we conclude that the appellant is ineligible for an alternative sentencing option.

Finally, the prerequisites to alternative sentencing 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)(8)(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.

The appellant further contests the length of his sentence. Tenn. Code Ann. § 40-35-210(1990) provides that the minimum sentence within the appropriate range is the 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.), perm. to appeal denied, (Tenn. 1993)(citation omitted). The weight assigned to any existing factor is generally left to the trial judge's discretion. Id.

The appellant argues, in part, that the trial court improperly rejected the appellant's claim that he was acting under strong provocation, Tenn. Code Ann. § 40-35-113(2), and substantial grounds existed tending to excuse or justify the appellant's criminal conduct. Tenn. Code Ann. § 40-35-113(3). Specifically, the trial court, like the jury, rejected the appellant's claim that he only entered the victim's truck because he was freezing. 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.), perm. to appeal denied, (Tenn. 1993); State v. Young, 866 S.W.2d 194, 197 (Tenn. Crim. App. 1992), perm. to appeal denied, (Tenn. 1993). 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.), perm. to appeal denied, (Tenn. 1994).

The appellant also challenges the trial court's application of enhancement factor (1). Under section 40-35-114(1), the appellant must have a history of criminal convictions or criminal behavior in addition to that necessary to establish the appropriate range. In order to qualify as a multiple offender, a defendant must have received "[a] minimum of two (2) but not more than four (4) prior felony convictions." Tenn. Code Ann. § 40-35-106(a)(1) (1990). Again, the State introduced copies of essentially four prior convictions. Only two prior convictions were necessary to establish the appropriate range. Moreover, the presentence report reveals an extensive history of misdemeanor convictions. Thus, the trial court's application of factor (1) was proper.

The trial court also applied enhancement factor (8), noting "the rather short period of time from the time that the defendant was placed on probation ... until violating the terms and conditions of his probation by committing this offense." Although the appellant does not contest the application of enhancement factor (8), we note that this court has held that "the commission of the offense for which a defendant is being sentenced should not make factor (8) applicable, emphasizing that there must be a *previous* history of unwillingness" to comply with the conditions of a sentence involving release in the community. State v. Hayes, 899 S.W.2d 175, 186 (Tenn. Crim. App.), perm. to appeal

denied, (Tenn. 1995).[7] Thus, factor (8) is inapplicable in the instant case. Nevertheless, the sentencing court attributed "significant weight" to the application of enhancement factor (1). Having reviewed the record, we conclude that enhancement factor (1) would alone support the sentence imposed.

VI. Conclusion

The judgment of the trial court and the sentence imposed are affirmed.

[7] The terms of the appellant's probation included regular attendance at AA meetings. When the appellant was asked by the trial court at the sentencing hearing if he had complied with this condition, his response was somewhat unclear. Nevertheless, the trial court did not find that the appellant had violated this condition.

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DAVID G. HAYES, Judge

CONCUR:

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JERRY SCOTT, Judge

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JOSEPH M. TIPTON, Judge