IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1996 SESSION

FILED

April 12, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)
	) C.C.A. No. 01C01-9505-CC-00125
Appellee,	)
	) Lincoln County
V.	)
	) Hon. Charles Lee, Judge
	)
TERRY DEAN BAKER,	) (Burglary, Theft, Escape - 2 counts)
	)
Appellant.	)

FOR THE APPELLANT:

John Harwell Dickey
District Public Defender

Curtis H. Gann
Assistant Public Defender
P.O. Box 1119
Fayetteville, TN 37334

At Trial:
Robert Marlow
Assistant Public Defender
P.O. Box 1119
Fayetteville, TN 37334

Randall E. Self
Attorney at Law
131-A East Market Street
Fayetteville, TN 37334

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter

Clinton J. Morgan
Counsel for the State
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

William Michael McCown
District Attorney General

Weakley E. Barnard
and
Charles Crawford
Assistant District Attorneys General
215 East College Street
Fayetteville, TN 37334

OPINION FILED: _____

AFFIRMED AS TO ESCAPES;
REVERSED AND DISMISSED AS TO BURGLARY;
REMANDED FOR ENTRY OF A JUDGMENT OF ACQUITTAL AS TO THEFT

PAUL G. SUMMERS,
Judge

O P I N I O N

A jury found the appellant, Terry Dean Baker, guilty of burglary, theft of $1,000 or more, and two counts of escape. He was sentenced to eight years for burglary and four years on each escape conviction.[1] All sentences were consecutive. We affirm the escape convictions, but reverse and dismiss the burglary conviction and remand the theft case for entry of a judgment of acquittal.

FACTS

This case involves the burglary of Hills Brothers Grocery Store. Owner Phillip Hill testified. He stated that in the early morning hours of February 11, 1993, he observed someone entering and exiting the store "about five or six times." He lived approximately 150 feet from the store and was unable to see the perpetrator's face. He was further unable to testify as to the perpetrator's race or whether the perpetrator was a "big person" or a "little skinny fellow."

Officer Rick Sanders testified. He stated that on the morning of the incidents in question, he responded to a robbery call at Hills Brothers Grocery Store. While en route, he observed a light brown car at an intersection approximately one quarter mile from the store. He stated that he was travelling at "close to a hundred" when he observed the car. After arriving at the store, he stated that he observed the same light brown car drive by. He pursued and stopped the car. Appellant was driving the car. Sanders questioned the appellant. He stated that the appellant denied having been at the store and responded that he "was just coming from New Market." Sanders escorted the appellant to the store. At the store, the officer searched the appellant's vehicle and found a toboggan, gloves, and a small flashlight.

---

[1] Although the jury convicted the appellant of theft and assessed a fine of $5,000, the appellant was not sentenced on the theft conviction.

Testimony at trial indicated that a perpetrator gained access to the store by breaking a window. The store's burglar alarm was unplugged and a rear door was unlocked from the inside. Testimony established that cigarettes, coffee, money, and other items had been taken from the store. Behind the store, however, large garbage bags were found containing the store's missing inventory.[2]

The officers discovered a footprint beneath the shattered window entry point. They removed one of the appellant's shoes and made a comparison. They concluded that appellant's shoe tread was identical to the print found inside the store. The shoe print was lifted and preserved on butcher's paper. At trial, however, Sanders did not recognize the print[3] and Officer Crick indicated that the print had been damaged. The officers further testified that they observed broken glass in the squad car, where the appellant had been sitting, and in the appellant's shoes, gloves, and car. The officers placed tape over the sole of appellant's shoe to secure glass fragments. At trial, however, glass fragments from the squad car, the appellant's car, and the appellant's articles of clothing were not produced.[4]

A TBI forensic scientist with a specialty in shoe tracks testified. She described the appellant's shoe tread as unique. She stated that in six years she did not remember seeing a similar shoe tread design. She did not testify, however, that appellant's shoe tread was similar to the shoe print found inside the store.

---

[2] Owner Goodrich Hill testified that the value of the items removed was approximately $6,300.

[3] When Sanders viewed the shoe print at trial, he responded "it doesn't look like the shoe print. This is the particles."

[4] When questioned concerning the failure to preserve evidence, Detective Carlyle responded:

> We had already got what I thought was good solid evidence. We got the victim's merchandise back, and we had gotten the bad guy. And we had got all that done, felt like we had a good case, and normally I would have went back and got that glass, and as we were tied up in the investigation with all this other going on, it was forgotten.

A TBI forensic scientist with a specialty in glass analysis testified. He performed a microscopic examination of the appellant's shoes and gloves. He was unable to find any glass fragments. He further testified that upon removing the officer's tape on appellant's shoe, he discovered only sand.

The appellant testified. He stated that he lived in New Market, Alabama, and worked in Tennessee. He estimated that his average commute from home to work was one and one half hours. He stated that he usually reported for work around 5:00 or 5:30 a.m.

The appellant testified that on the morning of the arrest, he was stopped around 3:30 a.m. He maintained that he was driving to work when stopped. He estimated that he had a forty minute drive remaining from the location of the stop to work. On cross-examination, the appellant was asked why he was reporting to work so early. The appellant responded that he had "about a two and-a-half hour drive going toward Columbia . . . that day" and his boss told him they were leaving early. He further stated that "[i]f it had been any other day, [he]'d probably left and sat in the restaurant and ate breakfast." Appellant admitted to having been at the store the day before he was arrested.

Appellant's father and boss testified. His father stated that appellant lived with him in New Market, Alabama. He stated that the appellant did not leave New Market until after 2:30 a.m. on the morning he was arrested. Appellant's boss testified that the appellant usually reported for work around 5:00 to 5:30 a.m.

I

In appellant's first assignment of error, he contends that the evidence was insufficient to sustain a conviction for escape. This assignment of error,

however, is not supported by argument, citation to authorities, or reference to the record. Pursuant to Tenn. R. Ct. Crim. App., Rule 12, this issue is treated as waived. Those judgments are affirmed.

II

Intertwined in appellant's first issue, he challenges the sufficiency of the evidence to sustain a conviction for burglary and theft. He argues that the state failed to meet its burden in proving each element of the crimes. We agree.

We are mindful that jury verdicts accredit state's witnesses and resolve all evidentiary conflicts in the state's favor, State v. Banes, 874 S.W.2d 73, 78 (Tenn. Crim. App. 1993) and on appeal, the state is entitled to both 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). Although we do not reweigh or reevaluate evidence, State v. Brown, 823 S.W.2d 576 (Tenn. Crim. App. 1991), the evidence against appellant is circumstantial. Therefore, the evidence must "exclude all reasonable hypotheses other than that of guilt." Davis v. State, 577 S.W.2d 467, 469 (Tenn. Crim. App. 1978). "A web of guilt must be woven around the defendant from which he cannot escape and from which the facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." State v. Crawford, 470 S.W.2d 610, 613 (Tenn. 1971).

The evidence linking appellant to the crimes is mere testimony that appellant's shoe tread appeared identical to a shoe print found inside the store. The appellant was not in possession of stolen merchandise. He was neither seen at the store nor on the store's property at the time of the theft. There were no finger prints connecting the appellant to the crime. A forensic scientist examined the appellant's shoes and gloves under a microscope and was unable

to detect any glass fragments. A TBI expert in shoe tracks examined both the print and the appellant's shoes and did not testify that they were similar.

From this evidence, the jury could only have speculated that the appellant's shoe left the print inside the store at the time the robbery occurred. Criminal convictions, however, may not be based solely upon conjecture, guess, speculation, or a mere possibility. State v. Cooper, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987). Accordingly, we find that the evidence in the case sub judice was "not so closely interwoven and connected that the finger of guilt [was] pointed unerringly at the defendant." Crawford, 470 S.W.2d at 613. Appellant's conviction for burglary is, therefore, reversed and vacated.

As to theft, the jury found appellant guilty and assessed a fine of $5,000. However, for an undetermined reason, the trial judge did not sentence the appellant on the theft conviction. Having found, though, that the evidence is insufficient to support a theft conviction, we remand that case to the trial court for the entry of a judgment of acquittal.

III

In the appellant's last assignment of error, he contends that the trial court erred in consolidating his charges. He alleges that the escape charges should have been tried separately from the charges of theft and burglary.

Although a close call, we believe that the trial court should have severed the charges. The property offenses were neither similar in modus operandi nor relatively close in proximity to time and location to the escape offenses. State v. Peacock, 638 S.W.2d 837, 840 (Tenn. Crim. App. 1982). Therefore, the

offenses were not part of a common scheme or plan and should not have been consolidated. Id. at 839-40; see Tenn. R. Crim. P. 13(a) & 8(a).

However, appellant has suffered no prejudice. Evidence of escape or attempted escape, after being charged with a criminal offense, is admissible for the purpose of establishing guilt, consciousness of guilt, or knowledge of guilt. State v. Burton, 751 S.W.2d 440 (Tenn. Crim. App. 1988). Also, because of our dispositions on the burglary and theft charges, appellant has not been affected by the consolidation.

CONCLUSION

We reverse the burglary conviction and dismiss that case. We remand the theft case to the trial court for the entry of a judgment of acquittal. The judgments of conviction for the escapes are affirmed.

_____
PAUL G. SUMMERS, Judge

CONCUR:

_____
JOSEPH M. TIPTON, Judge

_____
DAVID H. WELLES, Judge