

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1995 SESSION

<p>FILED</p> <p>June 21, 1996</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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STATE OF TENNESSEE,	*	C.C.A. # 01C01-9503-CC-00100
Appellee,	*	MARSHALL COUNTY
VS.	*	Hon. Charles Lee, Judge
WILLIAM LAYNE MILLER,	*	(Aggravated Burglary)
Appellant.	*	

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, William Layne Miller, was convicted of aggravated burglary. The trial court imposed a Range III sentence of twelve years.

In this appeal of right, the defendant presents two issues:

(1) whether the trial court properly admitted evidence of three prior felonies for impeachment purposes; and

(2) whether the trial court properly classified the defendant as a Range III, persistent offender.

We affirm the judgment.

From July 1, 1993, to July 20, 1993, the defendant worked as a carpenter's helper in renovating a residence owned by the victims, Rick and Phyllis Rockwell. Sometime during this period, the defendant burglarized the residence and stole the victims' checkbook and credit cards.

The victims had hired the defendant's uncle, Columbus Bob Miller, to put a new roof on their trailer. The defendant and Gordon Shelton worked for Miller. Both of the victims worked during the course of the day and locked the door before leaving. No one had permission to be inside the trailer. Rick Rockwell testified that he kept some of his credit cards in a dresser drawer in his bedroom and that he kept his new checkbook in a box in the pantry.

During the evening on July 20, 1993, Kristi Jones, a security employee at JC Penney in Nashville, received a call from one of the store clerks who asked about some purchases made by the defendant. Ms. Jones then called the victims to determine whether anyone had permission to use their credit card. The victims, who were unaware that the cards were missing from their home, told her that no one had permission to use their credit.

Ms. Jones arranged for the defendant to come to the store office to discuss the purchases. The defendant cooperated. In the meantime, a second man who was with the defendant when he made the purchases, left the store.

Officer Danny Driskell, who had been called to investigate, found the checkbook, the victims' credit cards, and several credit card receipts in the possession of the defendant. Initially, the defendant claimed that he had found both the checkbook and the credit cards next to the victims' mailbox. Later, however, he asserted that he had found the items while he was working near the rear of the victims' trailer. The defendant conceded that he had entered the trailer once to use the restroom but denied that he had taken the items from inside the residence. Later, the defendant pled guilty to several charges of theft in Davidson County based upon the purchases he made by use of the victims' credit cards.

Both Miller and Shelton, testifying for the

defendant, claimed that they never saw the defendant go inside the victims' residence. Each, however, acknowledged that there were brief periods during the course of their work when the defendant was not in their sight.

The defendant testified in his own behalf. He admitted to taking the credit cards and using them to purchase several items but claimed that he had never gone inside the trailer. He contended that he had found the stolen cards and checkbook on the deck behind the trailer.

I

The defendant, who was tried September 14, 1994, first claims that the trial court erred by allowing the state to introduce three of his prior convictions involving dishonesty for purposes of impeachment. See Tenn. R. Evid. 609. The defendant argues that other of his convictions, which were less than ten years old, provided the state with an adequate basis for impeachment.

Several of his felony convictions were admitted for impeachment purposes:

- (1) third degree burglary while possessing a firearm (February 16, 1981);
- (2) conspiracy to commit robbery by the use of a deadly weapon (February 16, 1981);
- (3) second degree burglary (August 29, 1984);
- (4) second degree burglary (April 24, 1990);
and
- (5) forgery (March 17, 1994).

A 1981 conviction for conspiracy to take a human life was

excluded. Thus, only two convictions over ten years old were admitted for impeachment purposes, not three as argued by the defendant.

The trial court ruled that "five felony convictions over a 12- or 13-year period of time, all involving dishonesty, ... shows a continuing course of conduct." In an attempt to limit the prejudice based upon the similarity of any prior convictions to those charged here, the five convictions were admitted simply as felonies "involving dishonesty" rather than by referring to each by the specific felony previously committed. No issue has been raised concerning the trial court's ruling that the felonies could be referred to as "generic" felonies; the only issue raised and the only objection made at trial was whether the "stale" 1981 convictions should have been admitted. Cf. State v. Ronald Summerall, No. 03C01-9412-CR-00253 (Tenn. Crim. App., at Knoxville, December 28, 1995) ("generic" felony references disapproved when admitted on issue of credibility).

The Tennessee Rules of Evidence provide that a judgment of conviction may be used by the state to generally impeach the testimony of the defendant. See Tenn. R. Evid. 609; State v. Morgan, 541 S.W.2d 385 (Tenn. 1976). Convictions are not admissible if a period of more than ten years has elapsed between the date of release from confinement and the commencement of the prosecution unless their probative value, supported by specific facts and circumstances, substantially outweighs their prejudicial effect. Tenn. R.

Evid. 609(b). The burden upon the state is greater than that standard applicable to prior offenses less than ten years old; as to the latter, the state must only show that the probative value marginally outweighed the prejudicial effect. A trial court's ruling under Rule 609 will not be reversed absent an abuse of discretion. See Johnson v. State, 596 S.W.2d 97, 104 (Tenn. Crim. App. 1979).

In determining whether the probative value of a prior conviction on the issue of credibility is outweighed by its prejudicial effect on the substantive issues, a trial court should "(a) 'assess the similarity between the crime on trial and the crime underlying the impeaching conviction,' and (b) 'analyze the relevance the impeaching conviction has to the issue of credibility.'" State v. Farmer, 841 S.W.2d 837, 839 (Tenn. Crim. App. 1992) (quoting N. Cohen, D. Paine, and S. Sheppard, Tennessee Law on Evidence, § 609.9 at 288 (2d ed. 1990)); see also State v. Jerry Lee Finch, No. 02C01-9309-CC-00224 (Tenn. Crim. App., at Jackson, June 7, 1995), perm. to appeal denied, (Tenn. 1995).

Here, the trial court admitted the 1981 convictions, both of which involved dishonesty, to show a continuing course of criminal conduct. This court has consistently held that the probative value of ten-year plus convictions may substantially outweigh any prejudicial effect where a defendant's criminal record shows "a continuing course of conduct which was probative of ... credibility." Johnson v. State, 596 S.W.2d at 104; see also State v. Andrew Walton,

No. 02C01-9109-CR-00205 (Tenn. Crim. App., at Jackson, August 12, 1992); State v. Jesse Eugene Harris, No. 87-294-III (Tenn. Crim. App., at Nashville, June 29, 1988), perm. to appeal denied, (Tenn. 1988). Here, the 1984, 1990, and 1994 convictions also involved dishonesty.

The defendant claimed at trial that he was telling the truth and that other witnesses had been "mistaken" in their testimony. Thus, the credibility of the defendant was a central issue. At the close of the proof, the trial court provided the jury with an appropriate instruction limiting the consideration of these prior convictions to the issue of credibility. Under these circumstances, we cannot say that the trial court abused its discretion in admitting this evidence.

II

Next, the defendant challenges the trial court's finding that he qualified as a persistent offender. He maintains that three of the six prior convictions relied upon should have been treated as one conviction under Tenn. Code Ann. § 40-35-106(b)(4).

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); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). 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, 863 (Tenn. Crim. App. 1987).

In calculating the sentence for a felony conviction, the presumptive sentence is the minimum within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). But see 1995 Tenn. Pub. Acts ch. 493 (amending the statute for offenses occurring on or after July 1, 1995, to make the presumptive sentence in a Class A felony the midpoint in the range). If there are enhancement factors but no mitigating factors, the trial court may set the sentence above the minimum. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code

Ann. § 40-35-210(e). The sentence may then be reduced within the range by any weight assigned to the mitigating factors present. Id.

The defendant was convicted of aggravated burglary, a Class C felony. Tenn. Code Ann. § 39-14-403(b). Tenn. Code Ann. § 40-35-107(a)(1) provides that "[a] 'persistent offender' is a defendant who has received ... [a]ny combination of five (5) or more prior felony convictions within the conviction class or higher, or within the next two (2) lower felony classes." At the sentencing hearing, the trial court relied upon the following prior felony convictions in classifying the defendant as a persistent offender:

- (1) third degree burglary while possessing a firearm (February 16, 1981);
- (2) conspiracy to commit robbery by the use of a deadly weapon (February 16, 1981);
- (3) conspiracy to take a human life (February, 16, 1981);
- (4) second degree burglary (August 29, 1984);
and
- (5) second degree burglary (April 24, 1990).

Pursuant to Tenn. Code Ann. § 40-35-107(b)(4), "[c]onvictions for multiple felonies committed as part of a single course of conduct within twenty-four (24) hours constitute one (1) conviction for the purpose of determining prior convictions: however, acts resulting in bodily injury or threatened bodily injury to the victim or victims shall not be construed to be a single course of conduct." The defendant argues that the three prior 1981 convictions were committed within a twenty-four (24) hour period and as part of a

continuous scheme or plan. In addition, he claims that because the victim was not aware of any threatened bodily injury, the "threatened bodily injury exception" would not apply.

At the sentencing hearing, the defendant admitted that he was carrying a weapon at the time of the 1981 offenses. The offenses of conspiracy to commit robbery by the use of a deadly weapon and conspiracy to take a human life both inherently involved a threat of bodily injury to the victim. See Tenn. Code Ann. §§ 39-904 and 39-1104; cf. State v. Tony Wayne Snyder, No. 03C01-9403-CR-00101 (Tenn. Code Ann., at Knoxville, Nov. 21, 1995) (conspiracy to commit first degree murder). Neither offense requires that the victim have knowledge of the conspiracy or threat.

Once we have determined that at least two of the prior felonies from a single course of conduct involved threatened bodily injury to a victim, each conviction "would be treated as separate convictions for range enhancement purposes." State v. Horton, 880 S.W.2d 732, 736 (Tenn. Crim. App. 1994). Therefore, the trial court acted within its authority in determining that the defendant had five prior felony convictions and qualified as a persistent offender.

Accordingly, the judgment of the trial court is affirmed.

Gary R. Wade, Judge

CONCUR:

David H. Welles, Judge

(NOT PARTICIPATING)

Robert E. Corlew, III, Special Judge