IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1996 SESSION

FILED

May 20, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9502-CR-00049**
Appellee,	)	
	)	**SEVIER COUNTY**
VS.	)	
	)	**HON. REX HENRY OGLE,**
RONNIE ROBERTS,	)	**JUDGE**
	)	
Appellant.	)	(Aggravated burglary; theft)

FOR THE APPELLANT:

ROGER HOOBAN
P.O. Box 1483
Knoxville, TN 37901
(On Appeal)

EDWARD MILLER
District Public Defender

SUSANNA THOMAS
Asst. Public Defender
102 Mims Ave.
Newport, TN 37821
(At Trial)

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General & Reporter

DARIAN B. TAYLOR
Asst. Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0493

ALFRED C. SCHMUTZER, JR.
District Attorney General

G. SCOTT GREEN
Asst. District Attorney General
125 Court Ave., Suite 301
Sevierville, TN 37862

OPINION FILED:_____

CONVICTIONS AFFIRMED;
SENTENCE MODIFIED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted for aggravated burglary and misdemeanor theft. After a jury trial, he was convicted of both offenses. At his sentencing hearing, he was determined to be a persistent offender and was sentenced to fifteen years on the aggravated burglary conviction, and eleven months, twenty-nine days on the theft conviction, with the sentences to run consecutively. The trial court also ordered these sentences to run consecutively to a prior sentence on a conviction in Knox County.

The defendant now appeals, raising the following five issues:

1. The State failed to provide exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963);

2. He received ineffective assistance of counsel at trial;

3. The prosecutor made improper remarks during closing argument;

4. The trial court erred when it refused to give a requested jury instruction on the lesser included offense of attempted burglary; and

5. The defendant's sentence does not comport with the Sentencing Reform Act of 1989.

After a review of the record in this matter, we affirm the defendant's convictions but modify his sentences as set forth below.

In the early evening of December 12, 1993, James Gilreath received notice that his daughter's alarm system had been triggered. He got his 38 pistol and drove over to her house. Initially, he saw no one present. He then walked around one side of the house, along the back and started walking up the other side. At that point, he testified, he "saw a man standing there at the window." Gilreath testified that the man "made a move at me and I started shooting." The man was the defendant. Gilreath shot twice at the defendant, hitting him once in the back.

After he was hit, the defendant crawled around to the front of the house where Gilreath told him to wait until the police arrived. Gilreath testified that he had seen his daughter's typewriter lying on the ground "just outside the window." Gilreath denied that he had been in the house before the police arrived and stated that he did not have a key to the house with him when he got there.

Detective John David Brown testified that he arrived on the scene at about 6:30 p.m. At that time he found Officer Dana McReynolds, Gilreath and the defendant. The defendant was lying in the front yard and, according to Officer Brown, was wearing a belt with a knife sheath on his side and also a pair of gray work gloves. Officer Brown testified that the knife sheath had been empty and he had not found the knife near the defendant. He advised the defendant of his constitutional rights and asked him what he was doing there. He testified that the defendant had replied that he had been drinking with some friends and they had let him out and he thought he was at home.

Officer Brown then proceeded to investigate the scene, including the inside of the house, taking photographs as he went. Introduced into evidence at trial were photographs of a broken window, the typewriter lying outside the window, a cut screen that had been found lying on the ground in front of the window, a knife that had been found inside the house near the window, a ceramic figurine that had been found broken in the house near the window, and the work gloves that the officer had retrieved from the front yard. Officer Brown testified that there had been broken glass found both inside and outside of the window.

Officer Matthew Cubberly, who had been sent to the hospital to guard the defendant while he was there after having been shot, testified that he had overheard the defendant telling the doctor "that him and two of his friends were out riding around

drinking and the two friends dropped him off and . . . that he thought that it was his house when he broke the window." Officer Cubberly also testified that the defendant had indicated that he wanted to tell the officer what had happened, that he had then advised the defendant of his constitutional rights, and that the defendant had then told him the same story he had overheard the defendant telling the doctor. Officer Cubberly then asked the defendant if he knew a Kenneth Lowery or a Donnie Pittman, and the defendant denied knowing either one of them. At that point Officer Cubberly informed the defendant that both of these persons were being questioned about the burglary and shooting. Officer Cubberly testified that the defendant had then told him that Lowery was his stepson and Pittman was a friend of Lowery's. Officer Cubberly testified that the defendant went on, telling him "that he broke into the house to see if he could find some gas and look around for some other things."

The defendant testified that he had been riding around in a car with his stepson and a friend of his stepson's and that he had been taking Valium and drinking. He and the other occupants of the car were arguing so he told them to let him out and he would find his own way home. He testified that he had walked up to the house at issue and knocked on the door, hoping to use the phone. He testified that he had been "hitting [the door] pretty hard" and that the burglar alarm had gone off while he was beating on the door. No one answered the door, so, he testified, "I was starting around the side of the building and Mr. Gilreath come in around the back side of the house." He further testified that "He [Gilreath] said hold it right there or I'll kill you and, you know, I didn't know what was going on so I just turned to run." At that point, according to the defendant, Gilreath shot him. Subsequently, he testified, "Well, I was laying there, you know, I couldn't move and I was getting real dizzy, you know, I was about to go out of it and I seen Mr. Gilreath walking away, back towards the house. You know, I didn't know why he was leaving me for, you know, because he'd done come up and told me he

should just kill me, he'd done kicked me in the face, said I ought to just kill you. And he, after he sees I'm about out of it, about to pass out, he walks away around the side of the house. I don't know what he does or anything because I'm going out of it." The defendant denied breaking the window and entering the house, denied taking the typewriter, denied breaking the figurine, and denied that he had had any gloves. He did, however, admit to ownership of the knife that was found inside the house.

In his first issue the defendant complains that the State failed to furnish him with certain police reports which would have impeached the officer's and Gilreath's credibility and supported his own. Accordingly, he claims, the State violated Brady v. Maryland, 373 U.S. 83 (1963), and he is therefore entitled to a new trial.

Under Brady the State must furnish to the defendant, upon request, exculpatory evidence and favorable information that pertains to the guilt or innocence of the accused and/or the punishment which may be imposed if the defendant is convicted. Three prerequisites must be met before the prosecution is required to furnish this evidence and/or information:

> First, the evidence must be material. Second, the evidence must be favorable to the accused, his defense, or the sentence that will be imposed if found guilty. Third, the accused must make a proper request for the production of the evidence unless the evidence, when viewed by the prosecution, is obviously exculpatory in nature and will be helpful to the accused.

State v. Marshall, 845 S.W.2d 228, 232 (Tenn. Crim. App. 1992). However, "[t]he prosecution is not required to disclose information that the accused already possesses or is able to obtain." Id. at 233.

In this case the defendant complains that certain reports prepared by the police were not disclosed to him. Specifically, as he states in his brief,

> the [S]tate violated the Brady doctrine in refusing to disclose the statements regarding the shooter, James Gilreath, and the statements of the two officers who indicated that the accused was not wearing gloves when they came onto the scene. Of course, these statements ran counter to those of actual witnesses called to testify by the [S]tate, and would have surely been exculpatory to the defendant.

Initially, we note that the actual document which the defendant claims was undisclosed to him is described in the defendant's "Amended Motion for a New Trial" as "a supplementary report to the offense report," a copy of which was attached as an exhibit to the defendant's amended motion. This exhibit consists of what appears to be a computer printout, and it includes a "Supplementary Report" apparently prepared by Officer Brown and a "Brief Narrative" apparently prepared by Officer McReynolds. Officer McReynolds was the first officer on the scene; Officer Brown was the second.

It is unclear from the record whether or not these reports were actually provided to and/or made available to the defendant prior to trial. However, assuming arguendo that they were not, we find that the nondisclosure did not violate the principles of Brady.

The information regarding Gilreath contained in the Supplementary Report is as follows: "Officer McReynolds asked [the defendant] who [shot you]? Mr. Gilreath replied 'I shot him.' Mr. Gilreath advised he did shoot him, he tried to run and he tried to jump me." The Brief Narrative recites that, after Officer McReynolds asked Gilreath if he had shot the defendant, "Mr. Gilreath said 'Yes,' 'He tried to run.' 'He tried to jump me.' " Apparently, the defendant is arguing that this information is exculpatory because Gilreath's statement "he tried to jump me" follows the statement "he tried to run," thereby creating an inference that no "jumping" actually occurred and Gilreath added those words as an afterthought to protect himself from the consequences of shooting someone

without sufficient provocation. We cannot, however, draw that conclusion from what amounts to less than a scintilla of evidence.

With respect to the gloves, the Supplementary Report reflects that the defendant "was wearing grey working gloves," which, contrary to the defendant's allegations in his brief, is consistent with what Officer Brown testified to at trial. Thus, this report does not afford any impeachment or otherwise exculpatory material about this issue. Officer McReynolds' report states that he found the defendant with "a pair of gray work gloves wadded up, holding them in his hands." Officer McReynolds was not called to testify at the trial. However, given that Officer McReynolds arrived at the scene before Officer Brown did, we do not conclude from this difference in their respective reports that one of them was necessarily mistaken in or lying about their observations. It is plausible that the defendant put the gloves on during the interval between the first and second officers' arrivals.

Moreover, we fail to see how the statement contained in Officer McReynolds' report, even though different from the statement in Officer Brown's report, could have been used to the defendant's benefit at trial. Officer Brown could not have testified to what Officer McReynolds saw or claimed to have seen, and therefore could not have been impeached with Officer McReynolds' observations. The defendant's lawyer did cross-examine Officer Brown about whether he in fact saw the defendant wearing the gloves, and Officer Brown consistently maintained that he had.

The only way that the defendant can even attempt to argue that this information in Officer McReynolds report was exculpatory is to claim that, had he had the report pretrial, he would have subpoenaed Officer McReynolds and elicited the "inconsistent" observation about the state of the defendant's hands. However, we fail to

see how this testimony would have been material. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985). Clearly, the investigating officers' observations of the defendant's hands and gloves do not meet this definition of material.

Finally, the Supplementary Report includes Officer Brown's observation of "a very strong odor . . . of an alcoholic beverage upon [the defendant's] breath." While we agree that this statement is consistent with the defendant's own testimony, we fail to see how its nondisclosure affected the outcome of this trial in any respect. While it corroborates the defendant's testimony that he had been drinking prior to committing the offenses, there was never any contrary evidence introduced. Therefore, corroboration on this point was unnecessary and not helpful to the extent of being material. Additionally, the only way this statement could have been used for impeachment purposes was if Officer Brown had testified that the defendant had been sober. He did not do so.

The defendant's claim that the State violated Brady is without merit.

In the defendant's second issue he claims that he was denied the effective assistance of counsel. Specifically, he contends that his trial lawyer, Assistant Public Defender Susanna Thomas, did not spend sufficient time with him preparing his case; did not subpoena witnesses; and asked him inappropriate questions on direct examination about his prior criminal record without having first obtained a Tenn. R. Evid. 404(b) ruling.

In reviewing the defendant's Sixth Amendment claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To prevail on a claim of ineffective counsel, a defendant "must show that counsel's representation fell below an objective standard of reasonableness" and that this performance prejudiced the defense. There must be a reasonable probability that but for counsel's error the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 692, 694 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985).

The only proof in the record as to Ms. Thomas' failure to spend sufficient time with the defendant and preparing the case was elicited immediately before the trial of this matter. At that time the defendant complained to the court that he didn't think his lawyer was doing anything for him, that she wasn't trying to help him out "a bit," that "she's just not trying," and that he didn't think she'd done all she could to help him. With respect to this last assertion, he specifically mentioned his interest in suing Gilreath.

In response to these allegations Ms. Thomas responded, "I had no contact with Mr. Roberts until the day before his case was set for trial last week, when I called him. He advised me that he had been too busy to contact me. I asked him if he wanted a trial or to enter a plea. He said that he guessed he would just enter a plea. I negotiated the plea and came, we prepared to enter the plea and he said he'd rather have a trial. He appeared today and said he'd rather have another lawyer. He has not made any effort to contact me or to provide me with any information that could be used as any sort of defense in this case." She also asked the defendant, "Have you ever called my office or contacted me in any way about your case?" The defendant responded, "No, the only time I've seen you is up here when you called me. . . . I've seen

you about three times up here."

The trial court told the defendant, "based on what you've told the Court, the Court does not feel that a change of counsel is going to solve any problem you have nor based on what has been said at the bench here is there anything the Court feels that Ms. Thomas has done or not done that has interfered or has deprived you of the ability to have a fair trial in this case." We agree with this ruling by the trial court.

There is no proof whatsoever in the record that the Ms. Thomas failed to subpoena any witnesses that would have been helpful to the defendant had they testified. Accordingly, the defendant has shown no prejudice from this "failure" and, hence, no ineffective assistance of counsel in this regard.

On direct examination, Ms. Thomas elicited testimony from the defendant about a 1993 felony conviction involving drugs. She also asked, "I believe that some years ago you have also suffered other felony convictions," to which the defendant responded, "Yes, ma'am." She then established that these "several felony convictions" had occurred more than ten years ago. During this questioning, the trial court sua sponte told the jury, "In regards to previous felony convictions, ladies and gentlemen, those may be considered by you not for the purpose of his guilt o[r] innocence in this proceeding but may be used by you solely to determine his credibility as a witness." On cross-examination, the State then questioned the defendant about 1978 convictions for concealing stolen property, second-degree burglary, and the temporary use of an automobile; a 1976 conviction for burglary of an automobile; and a 1989 conviction for aggravated assault. The defendant's lawyer did not object during this portion of the State's cross-examination. Nor, apparently, had she sought any ruling from the court about the admissibility, for any purpose, of any of these convictions.

We are concerned that the defendant's lawyer did not seek a ruling with respect to the admissibility of his prior convictions and that she did not object when the State cross-examined the defendant about convictions which were more than ten years old. We find that her failures to do so satisfy the first prong of the Strickland test. However, the defendant has not carried his burden of proving that her inadequate performance in this regard prejudiced him to the extent required by the second prong of the Strickland test.

Had counsel motioned the court to exclude the defendant's previous convictions, it would have been a proper exercise of the trial court's discretion to have allowed the 1989 and 1993 felony convictions under Tenn. R. Evid. 609(a). That rule provides, inter alia, that convictions less than ten years old for crimes punishable by imprisonment of over one year are admissible for impeachment purposes where the "probative value on credibility outweighs its unfair prejudicial effect on the substantive issues." Here, the prior convictions were for possession of drugs with intent to sell and aggravated assault. These convictions were properly admissible in the defendant's trial for aggravated burglary and theft. See, e.g., State v. Tune, 872 S.W.2d 922, 927 (Tenn. Crim. App. 1993) (proper exercise of discretion to admit, under Tenn. R. Evid. 609(a), a prior felony drug possession conviction in a murder trial); State v. Ratliff, 673 S.W.2d 884 (Tenn. Crim. App. 1984) (prior felony convictions of assault with intent to commit second-degree murder and escape admissible for impeachment purposes in prosecution for concealing stolen property). Moreover, even though the trial court had not been requested to make a ruling on the admissibility of these convictions, it gave the appropriate limiting instruction under Rule 609 to the jury after the defendant's counsel questioned him about his record on direct examination.

The defendant's 1976 and 1978 convictions were not, however, admissible.

Tenn. R. Evid. 609(b) permits the use of convictions more than ten years old[1] where "the [State] gives to the [defendant] sufficient advance notice of intent to use such evidence to provide the [defendant] with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." Here, the State had filed a "Notice of Range Enhancement" which listed all of the felonies about which it cross-examined the defendant. While this notice was filed almost a month before the trial commenced, it did not satisfy the notice requirement of Rule 609(b). See State v. Baker, 751 S.W.2d 154, 159 (Tenn. Crim. App. 1987) (pretrial written notice of prior convictions provided for sentencing purposes was not adequate to give notice of the intent to impeach with remote convictions).

Moreover, the probative value of these convictions as to the defendant's credibility did not substantially outweigh their prejudicial effect. Two of these remote convictions involved theft crimes, and the other two were burglaries: the very types of offenses for which the defendant was on trial. While theft crimes and burglaries are considered probative of a defendant's dishonesty, and therefore credibility, see State v. Butler, 626 S.W.2d 6, 11 (Tenn. 1981), and State v. Miller, 737 S.W.2d 556, 559 (Tenn. Crim. App. 1987), we think the similarity between the prior convictions and the instant offenses here created a prejudicial effect that was simply not sufficiently outweighed by the probative value of the prior convictions to satisfy the requirements of Rule 609(b).

However, this does not mean that the defendant is entitled to a new trial. While we find the admission of the 1976 and 1978 convictions to have been error, we also find that error to have been harmless. The proof of the defendant's guilt in this case

[1] "Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed between the date of release from confinement and commencement of the action or prosecution; if the witness was not confined, the ten-year period is measured from the date of conviction rather than release." Tenn. R. Evid. 609(b).

can fairly be characterized as overwhelming. His own statements about why he was at the victim's house were inconsistent and incredible. Accordingly, this error does not "affirmatively appear to have affected the result of the trial on the merits." Tenn. R. Crim. P. 52(a). See also State v. Baker, 751 S.W.2d 154 at 159 (trial court's erroneous admission of convictions over ten years old was "harmless in view of the overwhelming evidence of defendant's guilt.") Additionally, because we find the error to have been harmless, we also find that the defendant's lawyer's failures with respect to this proof did not prejudice the defendant as required under Strickland.

We also note that the error in failing to get a ruling on the admissibility of the remote convictions was attributable to the State rather than to the defendant's attorney (although this does not excuse her from failing to object to the State's improper questions). "When evidence [of convictions more than ten years old] is going to be offered to impeach under Morgan,[2] the state should request the jury-out hearing before blurting out questions about prior convictions as was done in this case." State v. Davis, 741 S.W.2d 120, 123 (Tenn. Crim. App. 1987).

The defendant next complains that he was denied a fair trial because the prosecuting attorney made improper remarks during closing argument. Specifically, the defendant points to the prosecutor's repeated references to his prior criminal record, and to the prosecutor's comments about the defendant's failure to call his stepson as a witness.

In order for the defendant to be granted a new trial on this ground, he is required to show that the argument was so inflammatory or the conduct so improper that

[2]Prior to the adoption of Tenn. R. Evid. 609(b), our Supreme Court adopted substantially the same language from Fed. R. Evid. 609(b) in State v. Morgan, 541 S.W.2d 385 (Tenn. 1976).

it affected the verdict to his detriment. Harrington v. State, 385 S.W.2d 758, 759 (Tenn. 1965). In reviewing an allegation of improper conduct, this Court should consider several factors including the intent of the prosecutor, the curative measures which were undertaken by the court, the improper conduct viewed in context and in light of the facts and circumstances of the case, the cumulative effect of the remarks with any other errors in the record, and the relative strength or weakness of the case. Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976).

The trial judge has wide discretion in controlling the argument of counsel. That discretion will not be interfered with on appeal in the absence of an abuse thereof. Smith v. State, 527 S.W.2d 737, 739 (Tenn. 1975).

With respect to the prosecutor's remarks about the defendant's prior record, the statements about which the defendant objects are as follows:

> This man right here, not a one-time, not a two-time, but a seven-time convicted felon can come in here and out-swear a gentleman who for seventy-two years has never broken the law.

and

> Take the word of this convicted felon over [Officer Brown's]? We're in a heap of trouble.

and

> I submit to you when you look at all of the credible evidence, there is one and only one verdict that can be done in justice. And that is that this convicted felon is again convicted of the felony of Aggravated Burglary and the commission of a theft.

The defendant's lawyer objected to these comments. The trial court overruled her objection. We agree with the trial court. The prosecutor was not using the defendant's prior convictions as proof of the defendant's guilt, but rather as proof against the defendant's credibility. This is a permissible use of these convictions. State v. Hardison,

705 S.W.2d 684, 687 (Tenn. Crim. App. 1985). Moreover, given the overwhelming nature of the proof of the defendant's guilt in this case, any error in the State's reference to the defendant as "this convicted felon" was harmless.

The comments concerning a missing witness about which the defendant complains are as follows:

> Where is the step-son? Right there. Now this is the man right here that's trying to tell you that he was going down the road with his step-son and another man and they got in an argument and they let him out. Did that step-son take the stand and support him in that?

and

> He got up there and tried to lie his way out of it. And couldn't even get his step-son to get up here and get in the lie with him. Didn't hear it from either one of those people that would have supported or corroborated what he had to say. And they're sitting right here in the Courtroom.

Again, the trial court overruled the defendant's lawyer's objection.

In Delk v. State, our Supreme Court held that a party may comment about an absent witness when the evidence demonstrates "[1] that the witness had knowledge of material facts, [2] that a relationship exists between the witness and the [adverse] party that would naturally incline the witness to favor [that] party and [3] that the missing witness was available to the process of the Court for the trial." 590 S.W.2d 435, 440 (Tenn. 1979). See also, State v. Francis, 669 S.W.2d 85, 88 (Tenn. 1984). In this case, the defendant had been riding around in a car with his stepson immediately prior to showing up at Gilreath's daughter's house. Thus, his stepson had knowledge about why the defendant had gotten out of the car, a material fact at issue. The familial relationship between the defendant and his stepson would, presumably, naturally incline the stepson to favor the defendant. Finally, the stepson was available to the process of the trial court: he was present in the courtroom. Accordingly, the trial court did not abuse its discretion

when it overruled the defendant's objection and allowed these remarks to be made. This issue is without merit.

In his fourth issue the defendant contends that the trial court erred when it refused his request for a jury instruction on the lesser included offense of attempted burglary. The defendant argues that the evidence of his intoxication, together with his prior statements to the police that he thought he was at his own house, raised the possibility that he had, in fact, tried to break into the house, but only because he was mistaken as to whose house it was. However, at trial the defendant flatly denied that he had even tried to break into the house. Based on the defendant's testimony at trial, the lower court correctly denied the requested instruction.

Even if the defendant's story at trial had matched his prior statements to the police, however, an instruction on attempted burglary would not have been proper. An attempted burglary requires the accused to have been "acting with the kind of culpability otherwise required for the offense" of burglary. T.C.A. § 39-12-101. The "kind of culpability" required for the offense of burglary is unconsented entry with the intent to commit a felony or theft. T.C.A. § 39-14-402. Had the defendant actually believed he was at his own house, any effort he made to enter the house would not have been made with the requisite intent. Thus, an instruction on attempted burglary would not have been appropriate: only an acquittal (or dismissal) of any burglary charge would have been correct.

The lesser included charge of attempted burglary would have been appropriate only if there had been proof that the defendant had unsuccessfully tried to break into the house with the intent to commit a theft or felony within. There was no such proof by either the State or the defendant. Where there is no evidence to support any

lesser included offenses, the practice of so charging is not favored. State v. Mellons, 557 S.W.2d 497, 499 (Tenn. 1977); Whitwell v. State, 520 S.W.2d 388, 343 (Tenn. 1975). This issue is without merit.

Finally, the defendant complains that his sentence is excessive. Specifically, he alleges that the trial court's findings on enhancement and mitigating factors are incorrect; that he should not have received maximum sentences; that his sentences for these two offenses should not have been run consecutively to one another or to a prior sentence; and that he is not a persistent offender.

When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "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).

A portion of the Sentencing Reform Act of 1989, codified at T.C.A. § 40-35-210, established a number of specific procedures to be followed in sentencing. This section mandates the court's consideration of the following:

> (1) The evidence, if any, received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in his own behalf about sentencing.

T.C.A. § 40-35-210.

In addition, this section provides that the minimum sentence within the range is the presumptive sentence for Class B, C and D felonies. The presumptive sentence for A felonies is mid-range. 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. If there are no mitigating factors, the court may set the sentence above the minimum in that range but still within the range. The weight to be given each factor is left to the discretion of the trial judge. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

The Act further provides that "[w]henever the court imposes a sentence, it shall place on the record either orally or in writing, what enhancement or mitigating factors it found, if any, as well as findings of fact as required by § 40-35-209." T.C.A. § 40-35-210(f) (emphasis added). Because of the importance of enhancing and mitigating factors under the sentencing guidelines, even the absence of these factors must be recorded if none are found. T.C.A. § 40-35-210 comment. These findings by the trial judge must be recorded in order to allow an adequate review on appeal.

The misdemeanant, unlike the felon, is not entitled to the presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). However, in determining the percentage of the sentence to be served in actual confinement, the court must consider enhancement and mitigating factors as well as the purposes and principles of the Criminal Sentencing Reform Act of 1989, and the court should not impose such percentages arbitrarily. T.C.A. § 40-35-302(d).

In this case the defendant was convicted of aggravated burglary, a Class C

felony, and theft in an amount under five hundred ($500) dollars, a Class A misdemeanor. He was sentenced on the felony as a Range III, persistent offender, to fifteen years: the maximum sentence. T.C.A. § 40-35-112(c)(3). He was sentenced on the misdemeanor to eleven months, twenty-nine days at seventy-five percent release eligibility, also the maximum sentence. T.C.A. §§ 40-35-111(e)(1); 40-35-302(d).

We disagree with the defendant that the court erred when it classified him as a persistent offender. "A 'persistent offender' is a defendant who has received: (1) Any combination of five (5) or more prior felony convictions within the conviction class or higher, or within the next two (2) lower felony classes." T.C.A. § 40-35-107(a). At the sentencing hearing, the State offered proof of three prior Class E felonies (two automobile burglaries and concealing stolen property over one hundred ($100) dollars) and two prior Class C felonies (aggravated assault and second degree burglary). The State also offered proof of a 1978 felony conviction for temporary use of an automobile, and argues that this is an additional Class E felony. While this felony is not contained in the conversion table for the classification of prior felony offenses, T.C.A. § 40-35-118, nor is it expressly classified as an E felony in the "catch-all" conversion provision because it occurred prior to July 1, 1982, T.C.A. § 40-35-119, it is still a prior felony conviction. All prior felony convictions, including those which occurred before November 1, 1989, are to be included in making a persistent offender determination. T.C.A. § 40-35-107(b)(2). Moreover, that the Sentencing Reform Act of 1989 reclassified joy riding as a misdemeanor for offenses occurring after November 1, 1989, does not help the defendant. It remains a prior felony for purposes of range enhancement. State v. Stone, No. 01C01-9310-CC-00350, Marshall County (filed December 1, 1994, at Nashville). Thus, it must be considered at least a Class E felony, and as such is within the next two lower felony classes of the defendant's Class C conviction in this case.

The defendant's attorney argued at the sentencing hearing that the second-degree burglary and concealing stolen property convictions must be counted as a single conviction under T.C.A. § 40-35-107(b)(4) because the State offered no competent evidence that these offenses occurred on different days. The State conceded this at the sentencing hearing. Thus, one of the Class E felonies "merges" into one of the Class C felonies.

The State also offered proof of a 1993 conviction which it now concedes cannot be considered a "prior conviction" in the persistent offender calculus under our Supreme Court's ruling in State v. Blouvett, __ S.W.2d __ (Tenn. 1995). Although the defendant admitted during his trial that he had been convicted in 1993 of a felony drug offense in Knox County, the State did not introduce a copy of any judgment entered in this conviction.[3] Indeed, the only other proof in the record relative to this conviction is in the presentence report. It is there stated that the defendant had pled guilty but that the judgment was "reserved and pending." In Blouvett the court held that a " 'prior conviction' means a conviction that has been adjudicated prior to the commission of the more recent offense for which sentence is to be imposed." Id. Here, there is no proof as to when this prior conviction was adjudicated.[4]

Accordingly, the State proved two Class E felonies, two Class C felonies, and one felony of undetermined class. However, since there is no class of felonies lower than E, and none higher than A, all felonies are "within the [C] convictions class or higher, or within the next two (2) lower felony classes." T.C.A. § 40-35-107(a). Thus, the defendant was properly found a persistent offender. Id. As a persistent offender, the

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[3]We also note that the State did not include this conviction in its notice of range enhancement filed in this case. Thus, the State failed to satisfy the notice requirements of T.C.A. § 40-35-202(a).

[4]Although not a part of the record, the defendant's lawyer (inappropriately) attached to his brief a copy of the judgment which was finally entered on this offense. The judgment was entered on December 9, 1994: long after the commission of the instant offense.

defendant was properly sentenced within Range III. T.C.A. § 40-35-107(c).

At the sentencing hearing the trial court found and applied four enhancement factors:

> -- a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
>
> -- the defendant was a leader in the commission of an offense involving two or more criminal actors;
>
> -- the defendant possessed a deadly weapon during the commission of the offense; and
>
> -- the defendant was either on probation or parole at the time he committed the offenses.

T.C.A. § 40-35-114(1), (2), (9), (13)(B), (C). The court found "absolutely no mitigating factors that apply."

The State correctly concedes that the trial court's application of the second and fourth enhancement factors listed above was incorrect. There was no competent proof in the record to support the application of these two factors. However, the other two enhancement factors were properly applied. The defendant has been convicted of at least two felonies that were not used to classify him as a persistent offender, and the defendant used a large knife in the commission of the offenses. Moreover, the presentence report states that the instant offenses were committed while the defendant was on bail for a felony of which he was ultimately convicted.[5] This is another applicable enhancement factor. T.C.A. § 40-35-114(13)(A). Furthermore, we find that the trial court did not abuse its discretion in finding no mitigating factors.

[5]The defendant also admitted at trial that he had been convicted of this particular offense.

The applicable enhancement factors and lack of any mitigating factors support maximum sentences in this case.

With respect to the defendant's contention that the trial court erred when it ordered his sentences for these two offenses to run consecutively, we disagree. The trial court found that the defendant was "an offender whose record of criminal activity is extensive." The trial court did not abuse its discretion in making this finding, and the consecutive sentencing is therefore proper. T.C.A. § 40-35-115(b)(2).

The trial court erred, however, when it ordered these sentences to run consecutively to the sentence imposed for the 1993 conviction in Knox County. As set forth above, no copy or other proof of a final judgment in this prior felony was introduced. A sentence for a subsequent conviction cannot be run consecutively to the sentence for a prior conviction unless a final judgment has previously been entered in the prior conviction. T.C.A. § 40-20-111(a); State v. Arnold, 824 S.W.2d 176 (Tenn. Crim. App. 1991). Accordingly, we reverse the lower court's order that the instant sentences run consecutively to the sentence for the Knox County offense.

For the reasons set forth above, we affirm the defendant's convictions. We reverse the lower court's order that his sentences run consecutively to his sentence for the Knox County offense. The defendant's sentences are otherwise affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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DAVID G. HAYES, Judge

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WILLIAM M. BARKER, Judge