IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 03C01-9508-CC-00253**
	)	
Appellee,	)	
	)	
	)	**UNICOI COUNTY**
VS.	)	
	)	**HON. ARDEN L. HILL**
ROY VANCE,	)	**JUDGE**
	)	
Appellant.	)	(Aggravated Burglary)

ON APPEAL FROM THE JUDGMENT OF THE CRIMINAL COURT OF UNICOI COUNTY

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant, Roy Vance, brings this appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. He was convicted by jury verdict of aggravated burglary[1] and sentenced as a Range II multiple offender to serve ten years in confinement. The Defendant appeals his conviction and sentence. We affirm the judgment of the trial court.

The Defendant was arrested on July 29, 1992 and charged with the aggravated burglary of his friend's home. On February 13, 1993, the district attorney general filed a notice of intent to seek enhanced punishment, based on the Defendant's four prior convictions. He was tried by a jury and convicted of aggravated burglary on March 30, 1993. On direct appeal, that conviction was reversed by this court, and the case was remanded for a new trial based on the trial court's failure to instruct the jury on the lesser-included offense of criminal trespass. State v. Vance, 888 S.W.2d 776 (Tenn. Crim. App. 1994).

On November 30, 1994, the Defendant was again tried and convicted by jury verdict of aggravated burglary. The State did not file a notice of intent to seek enhanced punishment before this second trial. After a sentencing hearing, the trial court found four applicable enhancement factors and no applicable mitigating factors. The Defendant did not file any mitigating factors with the trial court prior to the sentencing hearing, nor did he argue the applicability of any

[1]Aggravated burglary, as defined by Tennessee Code Annotated section 39-14-403, is the unlawful entry of a habitation, without the effective consent of the property owner, with the intent to commit a felony or theft.

mitigating factors at the sentencing hearing. The trial court sentenced the Defendant to ten years in confinement as a Range II multiple offender.

The Defendant filed a motion for a new trial on December 28, 1994. Although the record contains no order indicating a ruling on the motion for a new trial, the Defendant states that the motion was denied. The Defendant now properly brings this appeal.

Late on the evening of July 28, 1992, the Defendant visited the home of the victim, Jay Hicks. Hicks and the Defendant had known each other since elementary school and had, at one time, been roommates. Hicks testified that the Defendant told him that he had just gotten out of jail, that he had lost his job, and that he did not have any money. At that time, Hicks was attending a truck driving school in North Carolina. He commuted to school five days a week, leaving at about 5:30 a.m. and returning home around 6:00 p.m. Hicks testified that the Defendant asked him specific questions concerning when Mr. Hicks normally left for school and when he would return. The Defendant also asked Mr. Hicks for his unlisted telephone number.

Hicks testified that the next morning he decided not to go to school, but to sleep late. That morning, Hicks' telephone rang repeatedly, but he did not answer it. Instead, he unplugged the phone and went back to sleep. A short time later, Hicks testified that he heard someone knock at the door, but again he did not answer it. When the knocking stopped, he heard a car start. He looked out the window and saw the Defendant's car going down the driveway.

Hicks testified that a short time later, he heard knocking at his front door again. He then heard the doorknob "shake, " followed by the sound of breaking glass. When he heard the glass break, he picked up his pistol and went into the bathroom, called the sheriff's office, and reported that someone was breaking into his house. Minutes later, he heard the sound of more breaking glass, then footsteps walking through the glass. He came out of the bathroom and found the Defendant walking toward his kitchen cabinets. Hicks told the Defendant to freeze and kept the gun pointed at him until the sheriff arrived.

Hicks testified that the Defendant said, "Don't do this," then, "I'll go back to the pen." Hicks also said that the Defendant told him that he was in the house to borrow a gun because someone shot at him the night before.

Officer Ron Arnold and Lieutenant William Rogers responded to Hicks' call and arrived on the scene a few minutes later. Officer Arnold testified that the Defendant's car was parked off the driveway near two sheds. He testified that the car was not visible from the road and could not be seen until one was very close to it. In examining the scene, he found that a small basement window had been knocked out. The basement led up to an enclosed back porch and the door to the kitchen window. The glass pane in the door had been broken. He also found a broom with small pieces of glass on the handle, suggesting that it had been used to break the window.

The Defendant testified that he called Hicks that morning, but received no answer. He then became worried that something had happened to Hicks, so he drove out to check on him. When no one answered his knock on the door, he

became alarmed and broke into the house to see if Hicks was hurt. The Defendant denied ever making the statement that he came to borrow a gun. He also denied that he broke into the house for any reason except to check on his friend.

I. Sufficiency of the Evidence

The Defendant first asserts that the evidence "preponderates against the verdict and in favor of the defendant." Specifically, he argues that the proof only shows that the Defendant was found inside the house, and the only intent shown was not to steal, but to check on his friend.

When an accused challenges the sufficiency of the convicting evidence, the standard is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). Questions concerning the credibility of the witnesses, 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, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). Nor may this court reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). On appeal, the State is entitled to the strongest legitimate

view of the evidence and all inferences therefrom. State v. Cabbage, 571 S.W.2d at 835. Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Grace, 493 S.W.2d at 476; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

A burglary is committed when one, without the effective consent of the owner, enters a building other than a habitation not open to the public, with intent to commit a felony or theft. Tenn. Code Ann. § 39-14-402(a)(1). Aggravated burglary is the burglary of a habitation. Tenn. Code Ann. § 39-14-403(a).

The evidence undisputably shows that the Defendant broke into the home of Mr. Hicks. The Defendant contends that the State failed to establish that he broke and entered the victim's home with the intent to commit a felony or theft. The State correctly asserts that the intent for burglary may be inferred by circumstantial evidence. Bollin v. State, 486 S.W.2d 293, 296 (Tenn. Crim. App.), cert. denied, id. (Tenn. 1972). Also, the State correctly contends that when a defendant has entered, without authorization, an occupied habitation that contains valuable property, a jury would be warranted in inferring that entry was made with the intent to commit a theft or felony. Bennett v. State, 530 S.W.2d 788, 791 (Tenn. Crim. App.), cert. denied, id. (Tenn. 1975).

The testimony at trial reflects that the Defendant broke the basement window, crawled through the basement to the back porch, broke the window on the door, and entered the victim's house without his consent. The victim testified

that the Defendant said on the previous evening that he was without a job or money and then asked the victim specific questions as to when he would be away from his home.

The jury obviously accredited the testimony of the State's witnesses over that of the Defendant. In viewing the evidence in the light most favorable to the State, we cannot agree with the Defendant's assertion that the evidence "preponderates against the jury's verdict." We conclude that the essential elements of the crime could have been found beyond a reasonable doubt and that the evidence is sufficient to uphold a conviction for aggravated burglary.

II. Notice of Enhanced Punishment

The Defendant next asserts that because this court reversed his first conviction and remanded the case for a new trial, the district attorney general was required to file a new notice of intent to seek enhanced punishment under Tennessee Code Annotated section 40-35-202(a). However, although the Defendant argues that the district attorney erred in failing to file such notice, he does not allege that he was misled, surprised, or that he was prejudiced in any way.

Section 40-35-202(a) requires the district attorney general to file a notice of intent to seek enhanced punishment not less than ten days before trial if he believes that a defendant should be sentenced as a multiple, persistent or career offender. The purpose of such notice is to aid in trial strategy, to inform decisions concerning pleadings, and to aid the parties in the advisability of plea bargaining.

State v. Adams, 788 S.W.2d 557, 559 (Tenn. 1990). Notice was filed before the Defendant's first trial, but the district attorney did not again file such a notice before the second trial.

In support of his argument, the Defendant cites State v. Pender, 687 S.W.2d 714 (Tenn. Crim. App. 1984), perm to appeal denied, id. (Tenn. 1985). In Pender, this court found that, because the State failed to file a notice of intent to seek enhanced punishment either before or after trial, the trial court was without authority to impose Range II sentences upon the defendant and remanded the case for resentencing. Id. at 720.

The Defendant also cites State v. Chase, 873 S.W.2d 7 (Tenn. Crim. App. 1993), in which a defendant had been indicted for theft. The first indictment was nolled, but the defendant had been reindicted on the same offense. The State had filed the requisite notice on the first indictment, but not on the second. The defendant challenged his sentence, arguing that the notice filed in the first indictment was not sufficient notice for the second indictment. Id.

The Chase court disagreed, holding that both indictments applied to the same crime, the same defendant, the same victim, the same vehicle, and the same date and time. Id. at 9. The court found that the notice filed in the first indictment gave the defendant fair warning that the State intended to seek enhanced punishment, and because the defendant was well aware of the existence of both indictments and because both charged the same crime, "there was no reason to believe enhanced sentencing would not apply to a conviction under either indictment." Id.

The case sub judice is analogous to the situation in Chase. This Defendant was retried under the same indictment and for the same crime for which he had originally been tried. Notice of the State's intent to seek enhanced punishment was filed in the first proceeding. As in Chase, there was no reason to believe enhanced sentencing would not apply to a conviction under either indictment or in both trials. The purposes of the notice as set out in Adams, were clearly met with the filing of the first notice. Moreover, this court has held that in the absence of written notice, substantial compliance with the statute would be found if the defendant had actual or constructive notice of the State's intent to seek enhanced punishment. See State v. Brown, 795 S.W.2d 689, 697, 699 (Tenn. Crim. App. 1990).

We conclude that the Defendant was not prejudiced, misled, or surprised by the State's failure to file notice of intent to seek enhanced punishment in the second trial. The notice was properly filed in the first proceeding, and the Defendant had actual or constructive notice of the State's intent to seek enhanced punishment in the second proceeding. Thus, any error is harmless in this instance, and this issue is without merit.

III. Access to Trial Transcript

The Defendant next argues that an indigent defendant should have the right to a state-provided transcript prior to the motion for a new trial. The State disagrees and contends that this issue is waived under Rule 36(a) of the Tennessee Rules of Appellate Procedure because the Defendant failed to take

whatever action reasonably available to prevent or nullify the harmful effect of the error.

The Defendant contends that he was indigent at the time of trial and because of this did not receive a transcript until eight months after the sentencing hearing. He apparently argues that he was put at a disadvantage by not receiving a copy of the transcript in a timely manner. In support of this contention, he cites State v. Draper, 800 S.W.2d 489, 497 (Tenn. Crim. App. 1990), which says: "As a general rule, the defendant is entitled to a transcript of the proceedings relevant to the issues raised in his motion for a new trial if counsel asserts that the issues will be raised in the appellate court."

Tennessee Code Annotated sections 40-14-312 and 40-14-309 collectively state that upon the direction of the court in the case of an indigent defendant, a reporter designated by the court shall transcribe from the original records such parts of the proceeding as are requested, with the fee being paid by the State of Tennessee.

In Draper, this court outlined the procedures for an indigent defendant to obtain a transcript of the trial proceedings. When the defendant is declared indigent for purposes of appeal, an order should be entered reflecting this finding and directing the official court reporter to transcribe the proceedings relevant to the issues that will be presented for review in the appellate court. Draper, 800 S.W.2d at 495. In this case, the only order of indigency was entered by the trial court prior to trial. Once the judge has found the defendant to be indigent, entered an order to that effect, and directed the court reporter to furnish a

complete transcript of the proceedings, the defendant is required to file a written document with the clerk of the trial court designating the portions of the proceedings that the defendant deems necessary within fifteen (15) days after the date on which he filed his notice of appeal. T.R.A.P. 24(b) (emphasis added). The order should also state whether the State of Tennessee is paying for the transcript. Id.

The transcript, certified by the appellant, his counsel, or the reporter as an accurate account of the proceedings, shall be filed with the clerk of the trial court within ninety (90) days after filing the notice of appeal. Id.

The Defendant apparently contends that he was put at a disadvantage by not receiving the transcript until eight months after the sentencing hearing. However, he does not set forth any reasons as to how he was prejudiced by this delay. Although Draper mandates that a transcript be provided in connection with an appeal, the Defendant presents no authority that the entitlement should be extended in connection with a motion for a new trial.

Clearly, if the procedure set forth in the statute and the Rules of Appellate Procedure (and explicitly outlined in Draper) was followed, the Defendant should have received a transcript and filed it with the appellate court within ninety (90) days from the date on which he filed his notice of appeal. Nothing in this record indicates that the Defendant sought a transcript at an earlier date or that he sought a copy at any time after his notice of appeal was filed. Nothing in the record indicates that the Defendant requested a transcript of the proceedings at the conclusion of trial, before he filed his motion for a new trial, at the conclusion

of the hearing on the motion, or at the sentencing hearing. Nor does the record contain any written motions or requests pertinent to this matter.

Moreover, this court has previously found no error when trial transcripts were not provided to defendants prior to their motions for a new trial. State v. Hill, 598 S.W.2d 815 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1980); State v. Banks, 556 S.W.2d 88 (Tenn. Crim. App.), cert. denied, id. (Tenn. 1977). We conclude that the Defendant was not prejudiced by not getting the trial transcript before the hearing on his motion for a new trial. This issue is without merit.

IV. Sentencing

As his last assignment of error, the Defendant argues that mitigating factor three, that substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense, should have been applied to mitigate his sentence. Tenn. Code Ann. § 40-35-113(3). Apparently, the Defendant does not contest any other aspect of the imposition of his sentence.

When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption 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).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

The trial court did not find any mitigating factors applicable and the defense did not argue the applicability of this particular factor at the sentencing hearing. The Defendant does not present any supporting argument or authority as to why this factor should be applied. In reviewing the evidence, we conclude that the Defendant's testimony denying the offense and his explanation of why he broke into the house do not amount to substantial grounds to excuse or justify his conduct. Moreover, the jury obviously did not in any way accredit the Defendant's testimony. In applying the presumption of correctness, we conclude that the Defendant's contention is not supported by the record and that the trial court did not err in not applying this factor.

The judgment of the trial court is, therefore, affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

_____
GARY R. WADE, JUDGE

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WILLIAM M. BARKER, JUDGE