

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER SESSION, 1996

STATE OF TENNESSEE,)

Appellee,)

VS.)

GREGORY B. BUFFORD,)

Appellant.)

C.C.A. NO. 02C01-9509-CR-00275

SHELBY COUNTY

HON. BERNIE WEINMAN
JUDGE

(Direct Appeal)

FILED

March 19, 1997

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Appellate Court Clerk

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OPINION FILED _____

AFFIRMED; SENTENCE MODIFIED

JERRY L. SMITH, JUDGE

OPINION

A Shelby County Criminal Court jury found Appellant Gregory B. Bufford guilty of aggravated robbery. As a Range I standard offender, he received a sentence of ten years in the Tennessee Department of Correction. In this direct appeal, Appellant presents the following issues for review: (1) whether the evidence presented at trial is legally sufficient to sustain a conviction for aggravated robbery; (2) whether the jury was properly instructed on eyewitness identification; and (3) whether his sentence is excessive.

After a review of the record, we affirm Appellant's conviction for aggravated robbery but modify his sentence to nine years.

I. FACTUAL BACKGROUND

As accredited by the jury's verdict, the proof shows that, during the early evening of August 20, 1994, Rose Marie Houston and her daughter Brenda King went to a Memphis bank for the purpose of withdrawing one hundred dollars from an automated teller machine. The bank itself was closed. While Ms. King waited in the car, Ms. Houston entered the lobby where the automated teller machine was located. As she entered, an unidentified woman was conducting a transaction and Appellant was standing in a corner. When the unidentified woman completed her transaction and left, Ms. Houston waited for Appellant to take his turn but soon concluded that he too was leaving. Ms. Houston then proceeded to withdraw one hundred dollars.

Upon completion of the withdrawal, Appellant, who had not left the bank lobby, confronted Ms. Houston with a gun and demanded her money. Ms. Houston hesitated, prompting Appellant to repeat his demand two more times, place the gun in her face, and threaten to kill her. Ms. Houston then turned over the money. As Appellant left the bank, he threatened to kill Ms. Houston if she attempted to leave the bank. Soon thereafter, Ms. King entered the lobby to check on her mother. Ms. Houston told her daughter that she had just been robbed. In response, Ms. King exited the bank in time to observe Appellant as he ran away.

On September 9, 1994, Ms. Houston identified Appellant from a photographic line-up that investigating officers brought to her house. On December 1, 1994, a Shelby County Grand Jury indicted Appellant for aggravated robbery in violation of Tennessee Code Annotated Section 39-13-402(a)(1). On February 27 and 28, 1995, Appellant was tried before a jury in the Shelby County Criminal Court. At the conclusion of the trial, the jury found Appellant guilty of the offense as charged in the indictment. Following a sentencing hearing on March 24, 1995, the trial court imposed a sentence of ten years.

II. SUFFICIENCY OF THE EVIDENCE

Appellant first alleges that the evidence presented at trial is legally insufficient to sustain a conviction for aggravated robbery. Specifically, he argues that the State failed to prove beyond a reasonable doubt that he was the perpetrator. In support of this argument, Appellant contends that Ms. Houston's description of the perpetrator was general and inconsistent with his

physical appearance, that Ms. King's identification was unreliable, and that the eyewitness testimony was uncorroborated by any circumstantial evidence.

When an appeal challenges the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the State, 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, 318 (1979); State v. Evans, 838 S.W.2d 185, 190-91 (Tenn. 1992); Tenn. R. App. P. 13(e). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). This Court will not reweigh the evidence, re-evaluate the evidence, or substitute its evidentiary inferences for those reached by the jury. State v. Carey, 914 S.W.2d 93, 95 (Tenn. Crim. App. 1995). Furthermore, in a criminal trial, great weight is given to the result reached by the jury. State v. Johnson, 910 S.W.2d 897, 899 (Tenn. Crim. App. 1995).

Once approved by the trial court, a jury verdict accredits the witnesses presented by the State and resolves all conflicts in favor of the State. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Determining the credibility of witnesses and the weight to be given their testimony as well as reconciling conflicts in the proof are matters entrusted exclusively to the jury as trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). A jury's guilty verdict removes the presumption of innocence enjoyed by the defendant at trial and raises a presumption of guilt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant then bears the burden of overcoming this

presumption of guilt on appeal. State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991).

In order to convict Appellant of aggravated robbery, the State had to present evidence establishing beyond a reasonable doubt that he was in fact the perpetrator. At trial, both Ms. Houston and Ms. King positively identified Appellant as the individual who had committed the robbery. Ms. Houston relied upon her somewhat lengthy, face-to-face interaction with Appellant in the well-lit bank lobby, commenting that she would “never forget his eyes.” Officer Stephen Ray Cole of the Memphis Police Department testified that Ms. Houston had “pretty quickly” identified Appellant from a photographic line-up. Ms. King relied upon her observation of Appellant as he fled the scene.

Despite this eyewitness testimony, Appellant maintained that he did not commit the robbery. In an effort to substantiate his claim of innocence, Appellant presented alibi testimony and questioned the reliability of the State’s eyewitness testimony. When factual conflicts arise in the proof, the jury must reconcile them by weighing the credibility of each witness. See Sheffield, 676 S.W.2d at 547. Here, it appears that the jury found the eyewitness testimony of Ms. Houston and Ms. King more convincing than the testimony of Appellant’s alibi witnesses. Under well-settled Tennessee law, the jury was within its province in doing so. We will not disturb the factual conclusions reached by the jury. See Carey, 914 S.W.2d at 95. Thus, we conclude that, when viewed in a light most favorable to the State, the evidence is legally sufficient to support Appellant’s conviction for aggravated robbery.

III. JURY INSTRUCTION

Appellant next alleges that the jury was not properly instructed on eyewitness identification. Appellant correctly points out that, in State v. Dyle, 899 S.W.2d 607 (Tenn. 1995), the Tennessee Supreme Court rejected as inadequate Tennessee's pattern jury instruction on eyewitness identification and promulgated the following new instruction:

One of the issues in this case is the identification of the defendant as the person who committed the crime. The state has the burden of proving identity beyond a reasonable doubt. Identification testimony is an expression of belief or impression by the witness, and its value may depend upon your consideration of several factors. Some of the factors which you may consider are:

- (1) The witness' capacity and opportunity to observe the offender. This includes, among other things, the length of time available for observation, the distance from which the witness observed, the lighting, and whether the person who committed the crime was a prior acquaintance of the witness;
- (2) The degree of certainty expressed by the witness regarding the identification and the circumstances under which it was made, including whether it is the product of the witness' own recollection;
- (3) The occasions, if any, on which the witness failed to make an identification of the defendant, or made an identification that was inconsistent with the identification at trial; and
- (4) The occasions, if any, on which the witness made an identification that was consistent with the identification at trial, and the circumstances surrounding such identifications.

Again, the state has the burden of proving every element of the crime charged, and this burden specifically includes the identity of the defendant as the person who committed the crime for which he or she is on trial. If after considering the identification testimony in light of all the proof you have a reasonable doubt that the defendant is the person who committed the crime, you must find the defendant not guilty.

Id. at 612. The Supreme Court held that this instruction applies to all cases on appeal at the time Dyle's issuance.¹ The Court further held that, if defense counsel fails to request the instruction where identification is a material issue, the trial court's failure to give it is reviewable under a harmless error standard. See Tenn. R. Crim. P. 52(a).

Appellant maintains that his jury would not have found him guilty had a Dyle instruction been given. We disagree. During the robbery, Ms. Houston had several minutes to observe her attacker from a very short distance away, in a well-lit area. Moreover, Ms. Houston expressed great certainty in her identification, quickly picking Appellant from a photographic line-up prior to trial and testifying that she would "never forget his eyes." At no point during the investigation of the robbery or during trial did Ms. Houston hesitate or vary from her identification of Appellant as the perpetrator. In our opinion, consideration of the factors set out in Dyle only serves to strengthen the State's identification testimony. Therefore, we conclude that the failure to give the Dyle instruction had no effect on the outcome of the case. See State v. Robinson, No. 02C01-9509-CR-00264, 1996 WL 417662, at *4 (Tenn. Crim. App. July, 26, 1996), perm. app. denied, (Tenn. Feb. 3, 1997); State v. Brown, No. 02C01-9509-CC-002, 1996 WL 218371, at *3 (Tenn. Crim. App. May 1, 1996).

IV. SENTENCING

¹ Dyle was released on May 15, 1995. Appellant's notice of appeal was filed on April 21, 1995. Therefore, the new instruction applies to Appellant's case despite the fact the defense never requested it.

Finally, Appellant alleges that his sentence is excessive. Specifically, Appellant argues that the trial court erred in determining the length of his sentence.

When an appeal challenges the length, range, or manner of service of a sentence, this Court conducts a de novo review with a presumption that the determination of the trial court was correct. Tenn. Code Ann. § 40-35-401(d) (1990). However, this presumption of correctness is “conditioned upon the affirmative showing that the trial court in the record considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In the event that the record fails to demonstrate such consideration, review of the sentence is purely de novo. Id. If appellate review reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this Court must affirm the sentence, “even if we would have preferred a different result.” State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In conducting a review, this Court must consider the evidence, the presentence report, the sentencing principles, the arguments of counsel, the nature and character of the offense, mitigating and enhancement factors, any statements made by the defendant, and the potential for rehabilitation or treatment. State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993). The defendant bears the burden of showing the impropriety of the sentence imposed. State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993).

We note initially that, because the record demonstrates that the trial court adequately considered the sentencing principles and all relevant facts

and circumstances, our review of Appellant's sentence will be de novo with a presumption of correctness.

In the absence of enhancement and mitigating factors, the presumptive length of sentence for a Class B, C, D, and E felony is the minimum sentence in the statutory range while the presumptive length of sentence for a Class A felony is the midpoint in the statutory range. Tenn. Code Ann. § 40-35-210(c) (Supp. 1995). Where one or more enhancement factors apply but no mitigating factors exist, the trial court may sentence above the presumptive sentence but still within the range. Id. § 40-35-210(d). Where both enhancement and mitigating factors apply, the trial court must start at the minimum sentence, enhance the sentence within the range as appropriate to the enhancement factors, and then reduce the sentence within the range as appropriate to the mitigating factors. Id. § 40-35-210(e). The weight afforded an enhancement or mitigating factor is left to the discretion of the trial court so long as the trial court complies with the purposes and principles of the Tennessee Criminal Sentencing Reform Act of 1989 and its findings are supported by the record. State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995).

Appellant was convicted of aggravated robbery, a Class B felony. See Tenn. Code Ann. § 39-13-402(b). As a Range I standard offender convicted of a Class B felony, Appellant's statutory sentencing range was eight to twelve years. See id. § 39-17-417(c)(1). The trial court found the following enhancement factors applicable to the sentence:

- (1) the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
- (2) a victim of the offense was particularly vulnerable because of age or physical or mental ability;
- (3) the defendant had no hesitation about committing a crime when the risk to human life was high; and
- (4) the crime was committed under circumstances under which the potential for bodily injury to a victim was great.²

Id. § 40-35-114(1), (4), (10), (16). The trial court found no mitigating factors.

At the conclusion of the sentencing hearing, the trial court imposed an effective sentence of ten years. Appellant contests the application of all four enhancement factors.³ We will address each contested enhancement factor in turn.

1. PREVIOUS CRIMINAL HISTORY

Appellant first argues that the trial court improperly applied enhancement factor (1), concerning his previous criminal history. Appellant's pre-sentence report reveals only a misdemeanor conviction for reckless endangerment and various driving offenses. Nevertheless, there is no

² Appellant argues that the trial court also considered the frequency of automated teller machine robberies as an enhancement factor. Appellant correctly points out that no such enhancement factor is codified at Tennessee Code Annotated Section 40-35-114 and that the application of non-statutory factors to enhance a sentence is improper. See State v. Strickland, 885 S.W.2d 85, 89 (Tenn. Crim. App. 1995). However, the record fails to demonstrate that the trial court applied this consideration as an enhancement factor. Instead, we believe that the trial court properly considered deterrence under Tennessee Code Annotated Sections 40-35-102(3)(A) and 40-35-103(1)(B) justifying incarceration.

³ Having asserted that no enhancement factors apply, Appellant goes on to argue that he should have been sentenced as an especially mitigated offender. A sentencing court may assign especially mitigated offender status if (1) the defendant has no prior felony convictions and (2) mitigating but no enhancement factors apply. Tenn. Code Ann. § 40-35-109(a). The determination of whether a defendant is an especially mitigated offender rests within the sound discretion of the sentencing court. State v. Hicks, 868 S.W.2d 729, 730 (Tenn. Crim. App. 1993). Here, Appellant fails to even allege that any mitigating factors apply, nor do we believe that any do. Thus, even if we agreed that no enhancement factors apply, Appellant would still not be eligible for sentencing as an especially mitigated offender because no mitigating factors apply. See Tenn. Code Ann. § 40-35-109(a)(2).

prohibition against using prior misdemeanor convictions to enhance a sentence. See State v. Dixon, No. 02C01-9508-CC-00247, 1996 WL 417668, at *3 (Tenn. Crim. App. July 26, 1996), perm. app. denied, (Tenn. Dec. 23, 1996); State v. Shy, No. 01C01-9301-CC-00033, 1993 WL 247954, at *2 (Tenn. Crim. App. July 8, 1993). Thus, we conclude that enhancement factor (1) is applicable.

2. PARTICULAR VULNERABILITY

Appellant next argues that the trial court improperly applied enhancement factor (4), concerning the particular vulnerability of the victim. This enhancement factor is applicable when a victim, as a result of natural physical or mental limitations, is unable to resist the commission of a crime, to call for help, or to testify against the perpetrator. State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995). In order to establish this enhancement factor, the State must show that the victim was particularly vulnerable because of age, physical disability, or mental disability, see State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993), and that the condition of the victim was a factor in the commission of the offense. See State v. Seals, 735 S.W.2d 849, 853-54 (Tenn. Crim. App. 1987). The State fails to make such a showing here. While there was evidence that Ms. Houston was elderly and suffered from high blood pressure, there was no evidence offered establishing that this disability made her particularly vulnerable to attack or her physical condition was a factor in the commission of the offense. Moreover, Ms. Houston was able to testify effectively against her attacker. Thus, we conclude that enhancement factor (4) is inapplicable.

3. HIGH RISK TO HUMAN LIFE

Appellant also argues that the trial court improperly applied enhancement factor (10), concerning the high risk to human life. While this enhancement factor is inapplicable when the only person subject to injury is the victim, this Court has consistently held that it is applicable when other individuals are subject to a high risk of injury. See State v. Johnson, 909 S.W.2d 461, 464 n.1 (Tenn. Crim. App. 1995); State v. Makoka, 885 S.W.2d 366, 373 (Tenn. Crim. App. 1994). The record reveals that this robbery took place in a bank lobby open to the public. The record further reveals that the bank was situated at the intersection of two well-traveled Memphis streets. Moreover, evidence presented at trial established that an unidentified woman left the lobby just prior to the robbery and that Ms. King entered just following it. By employing a firearm during the commission of the offense, Appellant subjected not only Ms. Houston to a high risk of injury but also the unidentified woman, Ms. King, and nearby motorists. Thus, because individuals other than the actual victim were subject to a high risk of injury during the commission of the offense, we conclude that enhancement factor (10) is applicable.

4. GREAT POTENTIAL FOR BODILY INJURY

Finally, Appellant argues that the trial court improperly applied enhancement factor (16), concerning the great potential for bodily injury. When proof that the potential for bodily injury to the victim was great also proves an essential element of the offense charged, this enhancement factor is inapplicable. State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994). However, in situations where individuals other than the victim are in the area and are

subject to injury, this enhancement factor is applicable. State v. Sims, 909 S.W.2d 46, 50 (Tenn. Crim. App. 1995). Here, the circumstances of the robbery created great potential for bodily injury to individuals other than Ms. Houston. As stated previously, Appellant's use of a firearm to threaten Ms. Houston also threatened the woman who had just left the bank, Ms. King as she sat in her car just outside the bank, and all motorists driving past the bank at the time of the robbery. Thus, because the potential for bodily injury to these individuals was great, we conclude that enhancement factor (16) is applicable.

Because of the improper application of enhancement factor (4), we modify Appellant's sentence to nine years.

Accordingly, the judgment of the trial court convicting Appellant of aggravated robbery is affirmed. The sentence is modified to nine years. This case is remanded solely for entry of a new sentencing order.

JERRY L. SMITH, JUDGE

CONCUR:

JOE B. JONES, PRESIDING JUDGE

DAVID H. WELLES, JUDGE