IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
JULY SESSION, 1996

FILED

March 4, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9603-CC-00102
Appellee	)	
	)	GREENE COUNTY
vs.	)	
	)	Hon. James E. Beckner, Judge
JERRY HILBERT CARTER,	)	
	)	(Robbery)
Appellant	)	

For the Appellant:

Douglas L. Payne
114 South Main Street
Greeneville, TN 37743

For the Appellee:

Charles W. Burson
Attorney General and Reporter

Robin L. Harris
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

C. Berkeley Bell, Jr.
District Attorney General

Eric D. Christiansen
Asst. District Attorney General
113 J. West Church
Greeneville, TN 37743

OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Jerry Hilbert Carter, was convicted by a Greene County jury of robbery, a class C felony. Tenn. Code Ann. § 39-13-401(b) (1991). The trial court sentenced the appellant as a range I, standard offender to six years confinement in the Tennessee Department of Correction. The appellant now challenges the sufficiency of the evidence supporting his conviction, the imposition by the trial court of the maximum sentence authorized by law, and the trial court's denial of an alternative sentence.

Following a review of the record, we affirm the judgment of the trial court.

Factual Background

The appellant's case proceeded to trial on September 25, 1995. At trial, the State adduced the following evidence. On the morning of April 20, 1995, Bobby Peters and the victim, John Pierce, were "out loafering, goofing off." At trial, Peters explained, "We were just out riding, trying to find a place to get off the road and drink a few beers." Eventually, they decided to drive to the home of James Williams, a former employer of Peters, where they encountered Williams and another acquaintance, Willie "Junior" Hensley. Hensley owned a four-wheel drive vehicle, "a little brown Subaru," and, at approximately 12:00 p.m., the four men left the house "to go up on the mountain and go four-wheeling." En route to their destination, they purchased more beer.

The group drove to Chimney Top Mountain, where they met yet another acquaintance, Jerry Light. Peters joined Light in his Jeep, and the group continued "four-wheeling." They arrived at a clearing in a "logging area." At this time, the appellant and his son, Jerry Allen Carter, approached the clearing from the opposite direction. According to Peters, upon arriving in the clearing, the

appellant stated, “I knowed some day my day would come.” The appellant approached the victim, Pierce, who was seated in the backseat of Hensley’s Subaru. The appellant demanded that the victim return money owed to the appellant. Peters recounted that the appellant then opened the door to the vehicle and “started smacking around on [the victim], beating up on him.” At some point, the appellant removed the victim’s shoes and socks and threw them down a hill. According to Williams, the appellant believed that the victim had hidden money in his socks.

Peters testified that the initial beating persisted for approximately twenty or thirty minutes, although Peters was uncertain whether the beating was continuous throughout this time period. The appellant assaulted the victim “[a] couple of times while [the victim] was in the car and then he left him alone for a while. [The victim] got out of the car and [the appellant] beat on him some more later on.” Peters conceded at trial that he was attempting to avoid observing the beating. Indeed, he “went over the hill to keep from looking.” Moreover, in order to avoid witnessing the assault, he and the other members of the excursion also raised the hood of Light’s Jeep and began “tinkering” with the motor. Following the beating, the victim “looked bad. He was black and blue and bleeding and his eyes was about swelled shut.” Additionally, the record reflects that, following the appellant’s assault, the appellant’s son kicked the victim, crushing the victim’s larynx and causing his death.

At some point, Peters observed the appellant searching through the victim’s wallet. Finally, the appellant approached Peters and the rest of the group, holding a five dollar bill. He stated, “I’ve got $5 on some beer. I guess that’s all I’ll ever get off the s-o-b.” Williams similarly testified that the appellant searched the victim’s wallet: “[The appellant] was going through all the papers and everything and he found a card in there, a bank card, and he wanted to

know what the pin number was on it. He kept asking John what it was and John wouldn't tell him and he said, 'I'll be back the first of the month and pick you up and we'll go get some money.'" According to Williams, the appellant subsequently stated that five dollars was probably the only money he would ever obtain from the victim. Henley, during the course of the beating, overheard the appellant and the victim arguing about money, but could not recall any conversation concerning a five dollar bill.[1]

Finally, John Huffine, a detective with the Greene County Sheriff's Department, testified that, on the evening of April 20, 1995, he received a call to investigate an incident on Chimney Top Mountain. Subsequently, he interviewed the appellant at the sheriff's department. After advising the appellant of his constitutional rights, Detective Huffine obtained the following statement:

> Sometime after I fed my hogs this morning and before I fed my hogs this evening me and my son was in Penley Hollow. I saw Jerry Light, Junior Hensley and Dorsey Penley and some other people. I just went up there riding around.

On the day of the offense, the detective also photographed the appellant's hands, which were considerably swollen. A photograph of the appellant's arm similarly revealed a mark or abrasion.

The appellant did not testify at trial. However, Dorsey Ray Penley testified on behalf of the appellant. He stated that on April 20, 1995, sometime between 4:00 p.m. and 6:00 p.m., he observed the appellant and the appellant's son near Penley's home, at the bottom of Chimney Top Mountain. The appellant had just "come off the mountain," and did not appear to be worried or concerned. The appellant and Penley discussed the appellant's plans to purchase a goat from Penley's cousin. Penley did not notice any bruises or abrasions on the

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[1]Peters, Henley, and Williams admitted that they had drunk a considerable quantity of beer on the day of the offense. Williams indicated that the group had also smoked marijuana. Peters denied that he was intoxicated on that day. Henley and Williams conceded that they were intoxicated.

appellant's hands or arms, but conceded that his attention was focused elsewhere. He did notice that the appellant and his son had been drinking.

Robert Frank Penley testified. He also encountered the appellant in the evening of April 20, after the appellant and his son drove down from Chimney Top Mountain. Penley confirmed that he spoke with the appellant concerning the purchase of a goat and did not observe anything unusual in the appellant's behavior.

Finally, Brenda Carter, the appellant's wife, testified that her husband is currently a farmer. She further stated that, due to injuries suffered while the appellant was employed by the logging industry, his hands are frequently swollen.

At the conclusion of the trial, the jury found the appellant guilty of robbery. The trial court immediately conducted a sentencing hearing. The State relied upon the evidence adduced at trial and the pre-sentence report. The appellant introduced the testimony of Robert W. Susong, a loan officer at Greene County Bank. Mr. Susong testified that the appellant has been a customer of the bank since 1974 and has always met his financial obligations. He further stated that, if the appellant were unable to make his payments on his current loans, the bank would repossess the appellant's farm equipment. Paul Guthrie, a friend of the appellant, testified that he had known the appellant for approximately seven years. During the seven years, the appellant was "always willing to help [Guthrie]." Moreover, Guthrie believed the appellant to be honest. He asserted that, generally, the appellant enjoyed a good reputation in the community.

In sentencing the appellant to six years confinement in the Department of Correction, the trial court found the following enhancement factors:

(1) The defendant has a previous history of criminal convictions or criminal behavior;
(2) The defendant was a leader in the commission of an offense involving two or more criminal actors;
(4) A victim of the offense was particularly vulnerable because of ... physical or mental disability;
(5) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;
(6) The personal injuries inflicted upon ... the victim was particularly great;
(10) The defendant had no hesitation about committing a crime when the risk to human life was high.

Tenn. Code Ann. § 40-35-114 (1995 Supp.). With respect to mitigating factors, the trial court concluded, "After considering this case very long and hard, ... I do not believe that any are fairly raised." The trial court then denied the appellant an alternative sentence, relying primarily upon the seriousness of the offense and deterrence.

Analysis

a. Sufficiency of the Evidence

First, the appellant challenges the sufficiency of the evidence supporting the jury's verdict. A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant must establish that the evidence presented at trial was so deficient that no "reasonable trier of fact" could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994), cert. denied, __ U.S. __, 115 S.Ct. 743 (1995); Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of the two. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Accordingly, this court may not substitute its inferences for those drawn by the trier of fact from circumstantial evidence.

State v. Boyd, 925 S.W.2d 237, 242 (Tenn. Crim. App. 1995), perm. to appeal denied, (Tenn. 1996)(citing Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956)).

In other words, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). See also State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). An appellate court may neither reweigh nor reevaluate the evidence when determining its sufficiency. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and 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, and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990). "A jury verdict approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory." Williams, 657 S.W.2d at 410.

In order to obtain a conviction in the instant case, the State was required to prove beyond a reasonable doubt (1) the intentional or knowing theft of property from the person of another (2) by violence or putting the person in fear. Tenn. Code Ann. § 39-13-401(a). Viewing the evidence in the light most favorable to the State, the record establishes that the appellant brutally beat the victim in an effort to obtain money allegedly owed to the appellant by the victim. Two witnesses, Peters and Williams, saw the appellant searching through the victim’s wallet. Thereafter, Peters observed the appellant holding a five dollar bill, and he and Williams overheard the appellant remark that five dollars was probably the only money the appellant would ever obtain from the victim. While none of the witnesses observed the appellant remove the money from the wallet, a defendant’s guilt may be proven by circumstantial evidence. State v. Adams, 916 S.W.2d 471, 476 (Tenn. Crim. App. 1995)(citing Marable v. State, 313

S.W.2d 451, 456-457 (Tenn. 1958). This issue is without merit.

b. Sentencing

The appellant next challenges the trial court's imposition of a sentence of six years confinement in the Department of Correction and the trial court's denial of an alternative sentence. Review, by this court, of the length or manner of service of a sentence is *de novo* with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d) (1990). This presumption only applies, however, if the record demonstrates that the trial court properly considered sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If the trial court applies inappropriate factors or otherwise fails to comply with the 1989 Sentencing Act, the presumption of correctness falls. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). For reasons subsequently set forth in this opinion, the presumption of correctness does not accompany the trial court's sentencing determination.

Nevertheless, the appellant bears the burden of establishing that the sentence imposed by the trial court is erroneous. State v. Lee, No. 03C01-9308-CR-00275 (Tenn. Crim. App. at Knoxville, April 4, 1995). In determining whether the appellant has met this burden, this court must consider the factors listed in Tenn. Code Ann. § 40-35-210(b)(1990) and the sentencing principles described in Tenn. Code Ann. § 40-35-102 (1995 Supp.) and § 40-35-103 (1990).

Moreover, with respect to the length of a sentence, Tenn. Code Ann. § 40-35-210 provides that the minimum sentence within the appropriate range is the presumptive sentence. 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. Id. If there are no mitigating factors, the court may set the sentence above the minimum in that range, but still within the range. Id. See also State v. Dies, 829 S.W.2d 706, 710 (Tenn. Crim. App. 1991). "[T]here is no particular value assigned by the 1989 Sentencing Act to the various factors and the 'weight afforded mitigating or enhancement factors derives from balancing relative degrees of culpability within the totality of the circumstances of the case involved.'" State v. Marshall, 870 S.W.2d 532, 541 (Tenn. Crim. App. 1993)(citation omitted).

The trial court imposed the maximum sentence authorized by law. See 40-35-112(a)(3) (1990)(the applicable sentencing range is not less than three years nor more than six years). The appellant now contends that the trial court erroneously relied upon six enhancement factors. Initially, we note that we are unable to review the trial court's application of enhancement factor (1), concerning the appellant's previous history of criminal convictions or criminal behavior, as the appellant's pre-sentence report has not been included in the record.[2] It is the appellant's duty to ensure that the record on appeal contains all of the evidence relevant to those issues that are the bases of appeal, including evidence considered by the trial court in setting a sentence. Boring, No. 03C01-9307-CR-00224; Tenn. R. App. P. 24(b). "In the absence of an adequate record on appeal, this court must [conclusively] presume that the trial court's rulings were supported by sufficient evidence." State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). See also State v. Banes, 874 S.W.2d 73, 82 (Tenn. Crim. App. 1993); Boring, No. 03C01-9307-CR-00224. Therefore, we must presume that the trial judge's assessment of the appellant's criminal history is

[2]The record does include the pre-sentence report pertaining to the appellant's son, Jerry Allen Carter. Regardless of whether the inclusion of the wrong pre-sentence report was the fault of the appellant or the clerk, it is the duty of the appellant to ensure that the record on appeal is complete. State v. Boring, No. 03C01-9307-CR-00224 (Tenn. Crim. App. at Knoxville, February 9, 1994); Tenn. R. App. P. 24(b). The appellant could have corrected the record pursuant to Tenn. R. App. P. 24(e), but failed to request any such correction.

accurate. In any event, the trial court afforded enhancement factor (1) little weight.

With respect to enhancement factor (2), that the appellant was the leader in the commission of an offense involving two or more criminal actors, the appellant contends that "[t]here is no evidence in the record to conclude that [the appellant] was leading ... any other party to participate in the attack on the victim." The evidence adduced at trial only established that the appellant's son, Jerry Allen Carter, accompanied the appellant to the scene of the offense. At the sentencing hearing, the prosecutor informed the trial court that the appellant's son was pleading guilty to the reckless homicide of the victim. However, he was unsure whether "Allen" Carter would also plead guilty to the robbery.[3] It was undisputed at the sentencing hearing that, immediately following the appellant's assault and robbery, his son kicked the victim, crushing his larynx. The prosecutor conceded, however, that there was no evidence that the appellant's son had actively participated in the assault or robbery before fatally kicking the victim. However, the prosecutor indicated that the State's witnesses at trial could have testified that the appellant's son was "guarding his daddy's back" during the appellant's assault and robbery of the victim.

The trial court afforded considerable weight to this enhancement factor, noting "the fact that during the course of this violence upon the victim he was beaten to a pulp ... beaten senseless and he truly was from all the evidence in the case. And there were two people involved in that, [the appellant] and Jerry Allen Carter." Thus, the trial court appears to have concluded that the appellant was the leader in the commission of an assault. However, the relevant offense is

[3]Jerry Allen Carter's pre-sentence report, apparently inadvertently included in the record, reflects that he was, in fact, indicted for robbery, in addition to reckless homicide, reckless driving, and evading arrest.

the robbery. Other than the prosecutor's statements at the sentencing hearing, the evidence supporting the participation of two criminal actors in the robbery of the victim includes Allen Carter's presence at the scene of the offense, his assault of the victim following his father's assault and robbery, and his indictment for both the robbery and reckless homicide of the victim. We conclude that the trial court erroneously applied this factor.

"Application of [enhancement factor (2)] contemplates one offense involving two or more actors." State v. White, No. 02C01-9402-CC-00024 (Tenn. Crim. App. at Jackson, October 5, 1994), perm. to appeal denied, (Tenn. 1995). However, the mere fact that a defendant was accompanied to the scene of his offense by one who committed a separate crime does not trigger this enhancement factor. There is no evidence in the record before us that the appellant needed his son's assistance to commit the robbery or, in fact, received such assistance.

The appellant also challenges the trial court's reliance upon enhancement factor (4), concerning the victim's vulnerability due to a physical or mental disability. The trial court found that the victim's intoxication rendered him particularly vulnerable. Generally, this factor may be applied when the victim is severely intoxicated. State v. Rhodes, No. 02C01-9406-CC-00124 (Tenn. Crim. App. at Jackson), perm. to appeal denied, (Tenn. 1995). See also State v. Burns, No. 03C01-9406-CR-00208 (Tenn. Crim. App. at Knoxville, June 2, 1995)(that the victim was intoxicated, never fought back, and continued to apologize throughout the beating would indicate that the victim was particularly vulnerable due to a physical disability); State v. Miller, No. 01C01-9309-CR-00329 (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1994)(this enhancement factor was applicable when tests indicated that the victim's blood alcohol content was .22 percent and a pathologist related how this degree of

intoxication would affect a person). The record before the court indicates that, on the day of the offense, the victim and his companions had been drinking heavily since the early morning. Indeed, at some point, the victim was drinking quarts of malt liquor. The record further supports an inference that the victim did not physically resist the appellant's assault. Although the victim was savagely beaten, the appellant suffered no injuries other than swollen hands and a small mark or abrasion on one arm. The record supports the application of this enhancement factor.

In any event, assuming that the trial court erroneously considered enhancement factor (4), we conclude that the record supports the remaining factors. These factors alone would justify the appellant's sentence of six years, outweighing the mitigating evidence presented by the appellant at the sentencing hearing. With respect to enhancement factor (5), the appellant unquestionably treated the victim with exceptional cruelty during the commission of the robbery. We acknowledge that, when applying enhancement factor (5), the trial court should state what actions of the defendant, apart from the elements of the offense, constituted exceptional cruelty. State v. Hill, No. 03C01-9508-CR-00230 (Tenn. Crim. App. at Knoxville, June 7, 1996), perm. to appeal denied, (Tenn. 1997)(citing State v. Goodwin, 909 S.W.2d 35, 45-46 (Tenn. Crim. App. 1995)). However, we agree with the trial court that "[t]he facts and circumstances [of this case] speak loudly to that." Certainly the savagery of the beating in this case far exceeded any violence necessary to accomplish the robbery. Moreover, regarding enhancement factor (6), the record clearly reflects that the victim, even prior to the fatal kick by the appellant's son, suffered particularly great personal injuries. Finally, this court has held that enhancement factor (10), concerning a high risk to human life, is not an essential element of the offense of robbery and may be applied under certain factual circumstances. State v. High, No. 02C01-9312-CR-00275 (Tenn. Crim. App. at Jackson, October

12, 1994). We believe the circumstances of this offense overwhelmingly support the application of this factor. Contrary to the appellant's characterization in his brief of his conduct, the appellant did far more than "hit[] someone in the face while sitting in a car ... ."

Accordingly, we reject the appellant's challenge to the length of his sentence. We also conclude that he is not entitled to an alternative sentence. Briefly, we agree that, despite the presumption in favor of an alternative sentence, Tenn. Code Ann. § 40-35-102 (6), confinement of the appellant is necessary to avoid depreciating the seriousness of the offense. Tenn. Code Ann. § 40-35-103(1)(B).[4]

> In order to deny an alternative sentence based on the seriousness of the offense, "the circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree," and the nature of the offense must outweigh all factors favoring a sentence other than confinement.

State v. Bingham, 910 S.W.2d 448, 454 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995)(citing State v. Hartley, 818 S.W.2d 370, 374-375 (Tenn. Crim. App. 1991)). The circumstances of this offense amply satisfy this standard.

We therefore affirm the judgment of the trial court.

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DAVID G. HAYES, Judge

CONCUR:

[4]In the instant case, the trial court made a general reference to deterrence in determining the length of the appellant's sentence. We simply note that a finding of deterrence cannot be conclusory, but must be supported by the evidence. State v. Dockery, 917 S.W.2d 258, 261 (Tenn. Crim. App. 1995)(citing Ashby, 823 S.W.2d at 170).

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JOE B. JONES, Presiding Judge

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WILLIAM M. DENDER, Special Judge