

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1997 SESSION

FILED
March 20, 1997
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee,)
)
 VS.)
)
 TERRY CHARLTON,)
)
 Appellant.)

C.C.A. NO. 01C01-9604-CC-00133
WILLIAMSON COUNTY
HON. CORNELIA A. CLARK,
JUDGE
(Aggravated burglary, Theft over \$1000, and Theft over \$500)

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OPINION FILED: _____

AFFIRMED

JOHN H. PEAY,
Judge

OPINION

On August 23, 1995, a jury found the defendant guilty of aggravated burglary, of theft over five hundred dollars (\$500), and of theft over one thousand dollars (\$1000). After a hearing, the defendant was sentenced as a career offender for the theft counts and as a Range III persistent offender for the aggravated burglary count. He received a fifteen year sentence for aggravated burglary and a concurrent twelve year sentence for theft over one thousand dollars (\$1000). Additionally, he received a consecutive sentence of six years for the remaining theft count. His effective sentence of twenty-one years is to run consecutively to other sentences he recently received in Cheatham and Hickman counties and consecutively to outstanding parole violations.

In this appeal as of right, the defendant challenges the sufficiency of the evidence and the appropriateness of his sentence. He alleges that the evidence is insufficient to find him guilty beyond a reasonable doubt and that the jury's verdict showed prejudice against him. He also alleges that the court erred when it sentenced him as a career offender and as a Range III persistent offender. As his last issue, the defendant alleges that the court erred when it admitted the victim impact statement of Jerry Crain at the sentencing hearing. After a thorough review of the record, we find these issues are without merit and, therefore, affirm the judgment of the court below.

The charges in this case stemmed from a burglary spree in Williamson County. The home of Jerry and Leah Crain was burglarized on two occasions, once in December of 1991 and again in April of 1992. Michael Jameson's home was burglarized in May of 1992 as was the home of Marjorie Stringer. In mid-May 1992, a neighbor alerted the Williamson County Sheriff's Department about a suspicious car in the area. Shortly thereafter, Detective Ricky Headley spotted the car and pulled it over. When the

car stopped, Headley asked the driver to get out of the car but ordered the passenger to remain seated. The defendant, who was the passenger, got out of the car, argued with Headley, and then fled from the scene. Headley did not pursue the defendant but did arrest the driver, Rolisa Seber. At the time of her arrest, several items belonging to Jameson were found in the car.

Seber informed Headley that the defendant had been staying at a local hotel. Upon obtaining a search warrant, Headley searched the defendant's hotel room and found a Harley Davidson saddle bag and striped sheet, both of which were later identified by Jerry Crain as belonging to him and his wife.

At trial, Mr. Crain testified that a television set, a VCR, and two guns were taken from his home during the December burglary. He further testified that the total value of these items was more than two thousand five hundred dollars (\$2500) and that he received a check near this amount from his insurance company. As for the second burglary, Mr. Crain testified that three guns, some jewelry, a striped sheet or pillow case, and an unusual Harley Davidson saddle bag were taken from his home. He estimated the value of these items to be between one thousand (\$1000) and one thousand two hundred dollars (\$1200).

Mr. Crain's wife, Leah Crain, also testified about the nature of the stolen items. Her testimony was similar to that of her husband's. Mr. Crain testified that he had seen the defendant in a wooded area near his house in between the two burglaries, but that he did not know the defendant nor did he or his wife give the defendant permission to be in their home.

Mike Jameson testified that his home was burglarized in May of 1992.

Items taken from his home included a Pioneer stereo system that included a tape player and a compact disc player, an Emerson VCR, a specially-ordered left-handed electric guitar, a laundry basket, and several compact discs. He estimated that the total value of these items was between two thousand (\$2000) and two thousand five hundred dollars (\$2500). While testifying, Jameson identified his speaker wires, three compact discs, and his laundry basket which were found in the back of Seber's car at the time of her arrest.

Marjorie Stringer testified that her home was also burglarized in May of 1992. Four guns, three of which she had purchased from the defendant a week before the burglary, were taken from her home. Her description of the three guns matched the description of the guns taken from the Crain home.

Rolisa Seber testified that she had driven the defendant around the Kingston Springs area to "scout" houses and that the defendant told her he had taken items from Jameson's house. Seber identified Jameson's house from a photo and testified that it was the house from which the guitar, stereo, and other items were taken. She further testified that she had accompanied the defendant to Nashville to sell the guitar, the stereo, and the guns.

Upon hearing this evidence, the jury found the defendant guilty on only three counts of the nine count indictment. The defendant was found guilty of theft over five hundred dollars (\$500) in connection with the items taken from the Crain residence in April¹ and of aggravated burglary and theft over one thousand dollars (\$1000) in connection with the Jameson residence. He was acquitted on the counts relating to the December 1991 burglary and theft of the Crain residence, as well as on the count of

¹In the indictments, Leah Crain's name appeared on the counts relating to the April 1992 burglary while Jerry Crain's name appeared on the counts relating to the December 1991 burglary despite the fact that the property taken belonged to both of them and was taken from their marital home. Of the four counts pertaining to the two burglaries of the Crains' home, only one was returned with a guilty verdict.

evading arrest. The defendant now maintains that the evidence is insufficient to support the three guilty verdicts.

A defendant challenging the sufficiency of the proof has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether “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, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

First, the defendant complains that the evidence is insufficient as to the theft charges because the State failed to prove beyond a reasonable doubt the fair market value of the property stolen. He further complains that the evidence is insufficient to support a conviction for aggravated burglary. We find no merit to either complaint.

Ample testimony was offered at trial as to the value of items taken from the Crain home. Value is defined as either the fair market value of the property at the time and place of the offense or, if the fair market value is not available, value is the cost of replacing the property within a reasonable time after the offense. T.C.A.

§ 39-11-106(35)(A). At trial, Mr. Crain testified that during the second burglary, three guns, a Harley Davidson saddle bag, some jewelry, and a striped pillow case or sheet were taken. He estimated that he had paid about two hundred dollars (\$200) for one of the guns and less than fifty dollars (\$50) for another. He estimated that the total value of all the items was between one thousand (\$1000) and one thousand two hundred dollars (\$1200). Mrs. Crain also testified that the items recited above were taken from their home in April of 1992.

Tennessee Rule of Evidence 701(b) allows a witness to testify as to the fair market value of his or her property. When the State attempts to prove value as an element of an offense, the testimony offered must be sufficient to support the element beyond a reasonable doubt. Here, Mr. Crain testified that the property taken during the April 1992 burglary had a value of at least one thousand dollars (\$1000). Given the legitimate inference in favor of the State on appeal, we find the testimony from Mr. Crain and his wife is sufficient to support a guilty verdict as to the charge of theft of over five hundred dollars (\$500).² The defendant has failed to carry his burden of demonstrating

²Tennessee Code Annotated § 36-4-121(b)(1)(A) provides that all property, real and personal, acquired by both parties or either of them during the marriage is marital property. Thus, it makes no difference which one of the Crains testified about the value of the marital property that was stolen from their home.

to this Court why the evidence is insufficient.

Similarly, the defendant fails to show why the evidence is insufficient as to the verdicts relating to the burglary of Jameson's home. Jameson testified that his stolen guitar alone was valued at approximately fifteen hundred dollars (\$1500). This in itself is sufficient to convict the defendant of theft of over one thousand dollars (\$1000). Jameson testified that the guitar plus other stolen items such as a Pioneer stereo, an Emerson VCR, and several compact discs had a total value between two thousand (\$2000) and two thousand five hundred dollars (\$2500). There is no deficiency in this evidence; the jury's verdict is sufficiently supported by the evidence.

The defendant's challenge of the evidence as to the aggravated burglary charge likewise has no merit. Tennessee Code Annotated § 39-14-401, 402 and 403 provide that a person commits aggravated burglary if, without the effective consent of the property owner, he enters a habitation not open to the public, with the intent to commit a felony, theft or assault. Jameson testified that he had given no one permission to be in his home on the day that the burglary was committed. Seber testified that the defendant had told her he had broken into Jameson's home and stolen several items. In fact, Seber testified that she had accompanied the defendant to Nashville where they sold Jameson's left-handed guitar. Some of the items taken were found in Seber's automobile. This evidence is clearly sufficient to support the jury's finding.

Next, the defendant complains that he was erroneously sentenced as a career offender and as a Range III 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. 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]henver 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 trial court sentenced the defendant as a career offender as to the two theft charges. First, the defendant argues that because the evidence is insufficient to support these convictions, the trial court erred in sentencing him under a felony range. Having found that the convictions are based on sufficient evidence, the defendant's argument is now moot. Regardless, we shall discuss the appropriateness of the defendant's sentence because he also makes a general complaint about the appropriateness of his sentence.

For the charge of theft over one thousand dollars (\$1000), a Class D felony, he received a sentence of twelve years. For the charge of theft over five hundred dollars (\$500), a Class E felony, he received a sentence of six years. Tennessee Code Annotated § 40-35-108(a)(3) provides that a career offender is a defendant who has received "[a]t least six (6) prior felony convictions of any classification if the defendant's conviction offense is a Class D or E felony." In this case, the State showed that the defendant had at least six felony convictions including two assault convictions in Davidson County, aggravated robbery in South Carolina, attempted aggravated robbery in South Carolina, two burglary convictions from a single course of conduct in Cheatham County and two more burglary convictions from a single course of conduct also in Cheatham County. While these convictions account for the six needed to sentence the defendant as a career offender, the defendant has been convicted of additional felonies including two theft convictions and two aggravated burglaries in Hickman County. The trial court was correct in determining that this defendant meets the definition of a career criminal. As such, the defendant must receive the maximum sentence within the applicable Range

III. T.C.A. § 40-35-108(c). Therefore, the trial court had no need to discuss enhancing or mitigating factors as to these two sentences.

The trial court sentenced the defendant as a persistent offender as to the aggravated burglary charge, a Class C felony. A persistent offender is a defendant who has received “[a]ny combination of five (5) or more prior felony convictions within the conviction class or higher, or within the next two (2) lower felony classes, where applicable.” T.C.A. § 40-35-107(a)(1). As recited above, the defendant has been convicted of numerous felonies. He certainly meets the requisite for five felonies within the lower felony classes of D and E. The trial court made no error in classifying the defendant as a persistent offender.

As a persistent offender, the defendant must receive a sentence within Range III. T.C.A. § 40-35-107(c). The trial court, using enhancing factors, sentenced the defendant to fifteen years, the maximum for Range III offenders convicted of a Class C felony. The defendant makes a general complaint about the application of these factors. The trial court found that the following enhancement factors of T.C.A. § 40-35-114 applied: “(1)The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; (2)The defendant was a leader in the commission of an offense involving two (2) or more criminal actors; . . . (8) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community;” and (13)(B)The felony was committed while the defendant was on parole.

In discussing the defendant’s criminal record, the trial judge remarked that the defendant’s record of criminal activity is extensive and that it was one of the most extensive that she had ever seen. The above recitation of the defendant’s numerous

felonies certainly supports the trial judge's observation. The defendant has been convicted of several felonies that were not employed to establish the range.

While the trial court noted that the defendant was a leader in the commission of these crimes as evidenced by the testimony of his partner, Rolisa Seber, the trial judge expressed that she would put little emphasis on this factor. As to the remaining two factors, it is obvious that they apply because the defendant was on parole at the time he committed these felonies. Thus, we conclude that the trial court made no error in applying these enhancement factors.

The defendant next complains that the trial court should not have admitted the victim impact statement from Jerry Crain at the sentencing hearing because the jury acquitted the defendant on the charges that listed Mr. Crain on the indictment. However, the defendant did not include the statement as a part of the record. It is the defendant's duty to have prepared an adequate record in order to allow a meaningful review on appeal. T.R.A.P. 24(b); State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983); State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988). When no evidence is preserved in the record for review, we are precluded from considering the issue. Roberts, 755 S.W.2d at 836.

We note, however, that the contents of the victim impact statement are of little consequence. As discussed above, the property that was stolen from the Crain home belonged to both Mr. and Mrs. Crain. Additionally, the record does not reveal that the trial court in any way relied on this statement in sentencing the defendant. The trial court certainly had several enhancement factors from which to choose. Therefore, we conclude that the trial court made no error in sentencing the defendant and affirm all sentences.

Thus, after a thorough review of the record, we find no merit to the defendant's arguments. His convictions and his sentences are accordingly affirmed.

JOHN H. PEAY, Judge

CONCUR:

JERRY L. SMITH, Judge

JOE G. RILEY, Judge