IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

AUGUST 1996 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 02C01-9510-CR-00301
Appellee,	*	SHELBY COUNTY
VS.	*	Hon. Joseph B. Dailey, Judge
CARL ROSS,	*	(Two Counts of Attempt to Commit Second Degree Murder, Three Counts of
Appellant.	*	Aggravated Robbery, and Theft in Excess of $1,000)
	*	

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OPINION FILED:_____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Carl Ross, was convicted on two counts of attempt to commit second degree murder, three counts of aggravated robbery, and one count of theft in excess of $1,000.00. The trial court classified the defendant as a Career Offender and imposed consecutive sentences of thirty years on each of the attempted murder and robbery convictions and twelve years for the theft. The effective sentence is 162 years at 60%.

In this appeal of right, the defendant, in addition to his challenge to the sufficiency of the evidence, presents the following issues for review:

(1) whether the trial court erred by allowing the testimony of the defendant's parole officer;

(2) whether the accomplice testimony was adequately corroborated; and

(3) whether the sentence is excessive.

We affirm the judgment of the trial court.

At about 11:30 A.M. on November 5, 1993, Clifton Drake discovered that his 1987 maroon Caprice automobile, valued at more than $1,000.00, had been stolen from the Southland Mall parking lot in Memphis. Almost two hours later, four armed, masked men wearing gloves entered the EZ Pawn Shop, ordered all of the occupants to the floor and demanded the cash drawer keys. One of the four men struck the manager, Christopher Caldwell, in the head with a pistol, ordered him to unlock the drawer, and took the contents. Caldwell, who was by then also lying on the floor, heard gunshots, screaming, and the shattering of glass as the robbers left.

A videotape of the robberies showed four of the robbers taking guns from the pawn shop showcases. One of the robbers searched the pockets of Paul Pannell, an employee at the shop. The robbers took the entire cash drawer, jewelry, and guns.

Police took several photographs of the interior of the shop. One depicted a bullet fired into a showcase and two of the others documented the nature of the injury to Caldwell.

An inventory taken after the robberies indicated that the robbers had taken $2,100.00 in cash, 160 to 170 items of jewelry valued at approximately $30,000.00, and eighteen guns with a value of approximately $4,000.00. Later, Memphis police returned a portion of the guns and the jewelry and $20.00 in cash.

An assistant manager, Frank Siler, was in the back office at the time of the robberies. He observed the robbers through a one-way mirror into the public access area, set off the alarm, and hid under his desk. Siler described one of the robbers as 5'8" to 5'10" with a stocky build; he had long sleeves and a stocking over his face. Siler estimated the weight of that individual to be approximately 180 pounds. That description matched the build of the defendant.

Officers who investigated the scene found bullet fragments, a blood-stained piece of glass, and shell casings. Officer Amos Corbitt identified the shell casings as .9 mm.

Roderick Cunningham and Charles Woods, plainclothes officers, were only two blocks away and driving an unmarked automobile when they heard a report

of the robberies. They arrived just as the suspects were driving away in a maroon Caprice. Officer Cunningham, who got within two car lengths while in pursuit, observed the face of one of the robbers who had turned to look out the rear window of the Caprice; he described that person as a black male with a dark complexion and a medium size Jheri-curl. The Caprice suddenly stopped and two of the occupants got out of the car, firing several shots at the officers. Neither of the two were wearing masks at that point. The unmarked police vehicle was struck by several bullets and the officers returned fire. The gunmen got back into the car and fled. The officers pursued until their car began to smoke and they lost sight of the Caprice.

Officer Cunningham testified that he got a good look at the gunman in the backseat who kept looking back at the officers and fired the shots. He made a positive identification of the defendant as that person. Officer Cunningham was able to identify Drake's 1987 maroon Caprice as the getaway car at the robberies.

Officer Charles Woods identified the other robber who had fired shots at the officers as Charles "McClinton" or "McCullen" (actually McClelland). He described that person as a black male, twenty-one years of age, about 5'8", and 100 to 145 pounds.

Terrence Jones, who was washing his 1981 Caprice automobile on the afternoon of the robberies observed Drake's Caprice speed down Malone Street, where Officer Cunningham had lost sight of the robbers. Jones testified that the four occupants stopped, got out of the car, and then stole his car. Two of the men displayed guns; Jones described one as having light-colored blue jeans and a blue-jean shirt, a red skull cap, dark shades, and a gold tooth. The men placed several

items into his car before they drove away. Later, police discovered rings, an empty gun case, a gun clip, and ring display cases, all from the EZ Pawn Shop, in the interior of Drake's abandoned Caprice. Police also recovered a $20 bill and assorted change amounting to $12.09; a Mickey Mouse hat and a baseball cap were also found inside.

Later Jones' car was found abandoned on McLemore Street. There were traces of blood on the passenger's side front and rear doors. Some jewelry was found within 100 yards of the vehicle.

Charles McClelland, who had been indicted as one of the four robbers, agreed to testify for the state in return for a fifteen-year sentence. McClelland claimed that the defendant, an uncle, had picked him up in a stolen vehicle. There were two other men in the car. He recalled that the men put on masks and gloves after deciding to rob the EZ Pawn Shop. McClelland, who was armed and had a bag in his possession, acknowledged breaking into a jewelry case and cutting his hand. He remembered that gunshots had been exchanged with those in pursuit. He testified that he and the others stole a second car, abandoned it at McLemore, and accepted a ride to the defendant's residence with a friend. He testified that he and the other men then divided the money, the jewelry, and the guns. McClelland recalled that he spent the night with the defendant and was alone at the defendant's residence when police officers arrived around noon the next day. After being placed under arrest, McClelland told officers that the defendant was involved in the robberies.

Upon cross-examination, McClelland acknowledged that he had not been entirely honest with the police. He testified that he had made his statement

after promises by officers that his brother, Antonio, would be released from custody. He acknowledged telling officers that the other robbers were "Little John" and "Xavier."

Sergeant William Walsh of the Memphis Police arrested McClelland after determining that the defendant was a suspect in the robberies. Upon entering the defendant's residence, he saw that McClelland had a fresh cut on his hand and noticed surgical gloves, ski masks, bandages, and EZ Pawn tickets. Sergeant Walsh also found a Tec-9 automatic pistol and clip. A shotgun stock without a barrel, believed to have been taken in the robberies, was also at the residence. A number of jewelry display cases and the wallet and identification of one of the robbery victims, Paul Pannell, were also found. Money was found on a shelf in the bedroom rolled into the same kind of wrappers used by EZ Pawn. Glass taken from a trash can in the kitchen was similar to that in the EZ Pawn Shop.

While attempting to locate the defendant, Officer Matt Pugh checked a Looney Street address. After being denied entry to the residence, Officer Pugh looked through a window and saw Antonio McClelland running to the rear of the house with a bag in his hands. Assie Ross eventually opened the door, signed a consent to search, and called for Antonio McClelland; the bag he had been carrying contained twelve or thirteen guns, a sawed-off shotgun, and pieces of broken glass. The residence at Looney Street was listed in the name of Danette Ross, wife of the defendant.

A little over two weeks after the robberies, Officer Jimmy Myers of the West Memphis Arkansas Police Department observed a person later identified as the defendant acting suspiciously just outside a parked vehicle at approximately

1:00 A.M. When Officer Myers shined his light on the defendant, the defendant ran to a vehicle and fled. Although Officer Myers gave chase, Officer Thomas Dill made the arrest. The defendant initially identified himself as Charles Robertson.

Reginald Ross, brother of the defendant, testified for the defense. He claimed that the defendant resided with him in the Kenilworth Apartments in November of 1993 and not at the Looney Street address.

Assie Ross claimed that she was just visiting the Looney Street address on the night of Antonio McClelland's arrest. She testified that she had not seen the defendant for some two months prior to the robberies.

Lamar Trent, a parole officer, testified on rebuttal for the state. He recalled that the defendant, who was under his supervision, gave the Looney Street residence as his address in August, September, and October of 1993.

Initially, the defendant claims that the evidence was insufficient to support his convictions, particularly the EZ Pawn robberies. He asserts that the verdict of the jury cannot be based upon conjecture, guess, speculation, or mere possibility and contends that no rational trier of fact could have found the defendant guilty beyond a reasonable doubt of the offenses charged.

We are guided in our analysis by several well-established principles. On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the evidence are matters

entrusted exclusively to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292 (Tenn. Crim. App. 1978). A criminal conviction can be set aside only when the reviewing court finds that the "evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This court must not reweigh nor re-evaluate the evidence; nor may we substitute our inferences for those drawn by the jury. Liakas v. State, 286 S.W.2d 856 (Tenn. 1956).

The collective testimony of the state's witnesses established that the defendant, with the help of others, stole the Drake vehicle; participated in the Caldwell, the Pannell, and the Jones robberies; and fired shots at an unmarked police vehicle occupied by Officers Cunningham and Woods. McClelland and Officer Cunningham made positive identifications of the defendant. Proceeds from the robberies were found inside his Looney Street residence. The defendant fled from police and left his residence. It was over two weeks before he was found by the West Memphis Arkansas Police. Obviously, the jury chose to accredit the theory of the state. The evidence fully supports each of the verdicts. We conclude that a rational trier of fact could have found the essential elements of the crimes. The proof by the state met the standard prescribed in Jackson v. Virginia, 443 U.S. 307 (1979).

I

The defendant complains that testimony of his participation in the robberies by the accomplice, Charles McClelland, was inadequately corroborated. Rule 601, Tenn. R. Evid., provides that every witness is "presumed competent." Our law, however, requires corroboration of the testimony of an accomplice before a conviction can stand. Marshall v. State, 497 S.W.2d 761 (Tenn. Crim. App. 1973); see Rule 601, Tenn. R. Evid. That is, there must be some fact entirely independent of accomplice testimony which, taken by itself, leads to the inference that the defendant is guilty of the crime. The corroborative testimony must in some way establish the identity of the defendant. Hawkins v. State, 469 S.W.2d 515 (Tenn. Crim. App. 1971). Such evidence may be direct or circumstantial and it need not be adequate taken alone to support the conviction. Id. The requirement is met if the corroborative evidence fairly and legitimately tends to connect a defendant with the commission of the crime charged. Stanley v. State, 222 S.W.2d 384 (Tenn. 1949); Henley v. State, 489 S.W.2d 53 (Tenn. Crim. App. 1972). Slight circumstances may be sufficient to furnish the necessary corroboration. Garton v. State, 332 S.W.2d 169 (Tenn. 1960). Whether an accomplice's testimony has been sufficiently corroborated is a matter entrusted to the jury as the triers of fact. State v. Sanders, 842 S.W.2d 257 (Tenn. Crim. App. 1992).

In our view, there was more than enough corroboration of the defendant's participation in each of the robberies. Officer Cunningham identified the defendant as an occupant in the getaway car. Several of the items taken in the robberies were found inside the Drake vehicle and at the residence of the defendant. Gloves and masks were found in the defendant's home. Clearly, there was adequate corroboration of the accomplice's testimony.

II

Next, the defendant argues that the state should not have been allowed to call Parole Officer Lamar Trent as a witness. The defendant argues that the prejudicial effect of implying to the jury that the defendant had been previously convicted of a crime and was, therefore, on parole outweighed the probative value of the evidence. The defendant bases his argument on Rule 403, Tenn. R. Evid., which provides as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This rule basically provides trial judges with the discretion to exclude some evidence which, while relevant, might be unfair to the trial process. Because the test requires that the danger of unfair prejudice must "substantially outweigh" the probative value, the evidence should be admitted if the question is close. See State v. Banks, 564 S.W.2d 947 (Tenn. 1978). The trial court ruled, of course, that the probative value, in this instance, outweighed the prejudice. An important issue raised in the defense proof was where the defendant resided at the time of the robberies. Because stolen items and items used to hide the identity of the robbers were found in the residence, the state was obliged to refute the defendant's claim. While a jury might easily infer that a parole officer for the defendant indicated his involvement in a previous crime, the probative value to the state establishing the defendant's residence during the three months prior to this offense is apparent. In our view, the trial court did not abuse its discretion by admitting the evidence. See State v. Thomas Wayne Walden, No. 01C01-9204-CC-00116 (Tenn. Crim. App., at Nashville, April 15, 1993).

III

Next, the defendant contends that a 162-year effective sentence is excessive. The defendant generally argues that the trial court failed to follow the principles and considerations of the Criminal Sentencing Reform Act of 1989, especially in that there has been inequality in the effective sentence.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-40l(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 l66, l69 (Tenn. l99l). See State v. Jones, 883 S.W.2d 597 (Tenn. 1994). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (l) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-l02, -l03, and -2l0; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

In calculating the sentence for Class B, C, D, or E felony convictions, the presumptive sentence is the minimum within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are

enhancement factors but no mitigating factors, the trial court may set the sentence above the minimum. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210. The sentence may then be reduced within the range by any weight assigned to the mitigating factors present. Id. The presumptive sentence for a Class A felony is now the midpoint of the range. Tenn. Code Ann. § 40-35-210 (1996 Supp.).

Prior to the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case, our supreme court ruled that aggravating circumstances must be present before placement in any one of the classifications. Later, in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), the court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. There were, however, additional words of caution:

> [C]onsecutive sentences should not be routinely imposed ... and ... the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.

739 S.W.2d at 230. The Sentencing Commission Comments adopted the cautionary language. Tenn. Code Ann. § 40-35-115. The 1989 Act is, in essence, the codification of the holdings in Gray and Taylor; consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria[1] exist:

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[1]The first four criteria are found in Gray. A fifth category in Gray, based on a specific number of prior felony convictions, may enhance the sentence range but is no longer a listed criterion. See Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments.

(l) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;

(2) The defendant is an offender whose record of criminal activity is extensive;

(3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

(4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;

(5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

(6) The defendant is sentenced for an offense committed while on probation; or

(7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-ll5(b).

In Gray, our supreme court had ruled that before consecutive sentencing could be imposed upon the dangerous offender, as now defined by subsection (b)(4) in the statute, other conditions must be present: (a) that the crimes involved aggravating circumstances; (b) that consecutive sentences are a necessary means to protect the public from the defendant; and (c) that the term reasonably relates to the severity of the offenses.

More recently, in State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995),

our high court reaffirmed those principles and ruled that consecutive sentences cannot be required for any of the classifications "unless the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public from further serious criminal conduct by the defendant." Id. at 938. The Wilkerson decision, which modified guidelines adopted in State v. Woods, 814 S.W.2d 378, 380 (Tenn. Crim. App. 1991), governing the sentencing of dangerous offenders, described sentencing as "a human process that neither can nor should be reduced to a set of fixed and mechanical rules." Wilkerson, 905 S.W.2d at 938 (footnote omitted).

The attack made upon this sentence is general. The defendant has made no complaint that the trial court failed to follow the specific statutory procedure. He does not argue that his prior offenses did not qualify him as a Career Offender. He does not contend that consecutive sentencing is inappropriate under the established guidelines.

Because the defendant did qualify as a Career Offender, maximum sentences were warranted in each instance. See Tenn. Code Ann. § 40-35-108(c). While the defendant argued against consecutive sentencing at the hearing conducted by the trial court, it is apparent that he warranted consecutive sentences: (1) his criminal record and lack of work history support the finding that he is a professional criminal; (2) the planned nature of the EZ Pawn robberies, the related crimes, and the use of weapons against the police supports the trial court's conclusion that he was a dangerous offender who did not hesitate to commit the crime even though the risk to human life was significant; and (3) that the defendant has an extensive prior criminal record.

In Wilkerson, our supreme court authorized lengthy sentences when they bore a reasonable relationship to the severity of the offenses, were necessary to protect the public, and were in accordance with the principles of the act. Clearly a lengthy sentence is warranted under these circumstances. The act, however, also requires some judicial restraint in the development of a sensible sentencing scheme. The purposes of the act include "eliminating unjustified disparity in sentencing and providing a fair sense of predictability of the criminal law and its sanctions...." Tenn. Code Ann. § 40-35-102(2). Sentences involving confinement should be the least severe measure necessary to achieve its purposes. Tenn. Code Ann. § 40-35-103(4). We question whether the trial court adequately considered these provisions.

The aim of the trial court was apparently to incarcerate the defendant, age 31, for life. A Career Offender is eligible for release only after 60% service of his sentence. A lesser sentence than 162 years would have met the aim of the trial court. Yet the defendant has made no argument that the aggregate length of the sentence was disproportionate under the Wilkerson guidelines. We hesitate to make that argument for him. Moreover, the sentence does carry the presumption of correctness.

Accordingly, the judgment is affirmed.

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Gary R. Wade, Judge

CONCUR:

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William M. Barker, Judge

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Jerry L. Smith, Judge