IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

APRIL 1995 SESSION

FILED

May 7, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 01C01-9412-CC-00406
	)	
	)	Maury County
v.	)	
	)	Hon. Jim T. Hamilton, Judge
	)	
RANDY ANDERSON,	)	(Aggravated Burglary and Theft over $1,000)
	)	
Appellant.	)	

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OPINION FILED:_____

REVERSED AND REMANDED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Randy Anderson, appeals from his convictions in the Circuit Court of Maury County for aggravated burglary, a Class C felony, and theft of property valued at over one thousand dollars, a Class D felony. He received sentences of five years and two years, respectively, as a Range I, standard offender to be served concurrently in the custody of the Department of Correction. In this appeal as of right, the defendant contends that:

> (1) the trial court erred in overruling his pretrial motion to dismiss the unsigned indictment,
>
> (2) the trial court erred in overruling his motion for judgment of acquittal at the close of the state's proof,
>
> (3) the trial court erred in admitting hearsay evidence that violated the defendant's right to confrontation through May Jane Collier regarding whether her siblings had given the defendant permission to take items from the house,
>
> (4) the trial court erred in overruling the defendant's objection and motion for a mistrial based upon the state's improper remarks during closing argument regarding the defendant's previous intention to plead guilty to the charged offenses, and
>
> (5) the trial court erred in sentencing the defendant to five years for the aggravated burglary conviction and in refusing to grant him a sentence involving an alternative to confinement.

We hold that the defendant is entitled to a new trial because of improper remarks that were made during the state's closing argument.

The evidence in this case involves an entry into Lucille Collier's house and the taking of several items from the home in May of 1993. Bill Mabry, the father of Lucille Collier's son-in-law, testified that no one had lived in the house since Ms. Collier died in 1992. He recalled being at the home on May 30, 1993, with his grandson and his son, Ron. He said that they discovered that the house had been burglarized and

property had been stolen. He recalled that one of the back doors had been forced open and that the lock was broken from the door frame.

Ron Mabry testified that he noticed tire tracks leading to the back door of the house while he was there on May 30, 1993. He recalled that two of the three back doors were open. He said that he had been to the house three to four weeks earlier and that he did not notice the back doors being open at that time. He reported the burglary to the Maury County Sheriff's Department, his wife, and her sister, Jane Collier.

May Jane Collier testified that she and her five siblings had not yet decided how to divide their mother's possessions after her death and that they were all checking on the property periodically. She recalled that she had been to the property in early April 1993 and that everything was secure at the time. She said that she went to the house after receiving the telephone call from Ron Mabry and discovered that several items of antique furniture, china and some sleeping bags were missing. She testified that she has collected antiques as a hobby for over twenty years, and she estimated that the value of the stolen items totaled three thousand and five hundred dollars. Specifically, she estimated the value of an antique pie safe to be nine hundred dollars and the value of a cherry table to be six hundred dollars. Ms. Collier stated that she began looking around local antique shops for the stolen items and discovered several pieces at the Sante Fe Pike Antique Shop.

Betty Gibson, the owner of the Sante Fe Pike Antique Shop, recalled that she bought items from the defendant and his brother, Ricky, in May 1993. She said that she had known the brothers since they were young children and that they sold items to her for the first time around May 5, 1993. On that occasion she paid them between sixty-five and eighty-five dollars for a wood night table and other

miscellaneous items. About a week later, the brothers returned to her store and sold her a pie safe and various other items for one hundred fifty dollars. She said that she told the boys that she did not want anything that had been stolen and that they assured her that they had been roofing houses and had received the pie safe and other merchandise to clean out a garage. She also recalled that the defendant's brother, Ricky, sold her some more items about a week after she purchased the pie safe. Ms. Gibson estimated the total value of everything she bought from the defendant and his brother at four or five hundred dollars and testified that she sold the table for one hundred twenty-five dollars and the pie safe for two hundred fifty dollars.

Investigator George Holt of the Maury County Sheriff's Department testified that he took individual statements from the defendant and Ricky on June 2, 1993. He said that both the defendant and Ricky admitted to going to the house, taking the items and selling them to Betty Gibson. He stated that Ricky told him that an individual named Ray Erwin had given them permission to take the items from the house. Investigator Holt also testified that a search of Ricky's trailer uncovered three sleeping bags that were identified at trial as missing from the house. The defense rested without presenting any proof.

I

The defendant contends that the trial court erred in failing to dismiss the indictment because it was not signed by the grand jury foreperson. The state argues that the indictment was proper. Although the copy of the indictment in the record in this case does not bear the signature of the grand jury foreperson, the record reflects that the grand jury foreperson did sign the original indictment sometime after it was handed down and before the trial in this case.

The defendant was indicted and tried jointly with his brother, Ricky Anderson, and his sister-in-law. The defendant made a pretrial motion for the indictment to be dismissed because it was not signed by the grand jury foreperson. At a hearing on the motion, the defendant's counsel acknowledged that the state had tried to remedy the problem by having the foreperson sign the indictment but argued that the signing of the indictment was invalid. At the hearing on the motion for a new trial, the defendant's attorney renewed his motion that the indictment be dismissed. However, he acknowledged that a single indictment named all of the defendants and that the original indictment had been signed by the grand jury foreperson. The fact that the defendant's copy of the original indictment never got signed does not entitle him to relief.

II

The defendant contends that the trial court erred in overruling his motion for judgment of acquittal at the close of the state's proof. He argues that the state failed to prove that he acted without the effective consent of all six of the Collier siblings who, as heirs, were the owners of the property and the house that was the object of the offenses. The state contends that there is overwhelming proof that the defendant acted without the effective consent of May Jane Collier and that there is sufficient circumstantial evidence that the defendant acted without the effective consent of the five other siblings.

In Tennessee, whether the issue of the sufficiency of the evidence for acquittal purposes is being considered by the trial court upon motion for a judgment of acquittal or by an appellate court upon review, the standard to apply is the same. State v. Adams, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995). That standard is "whether, after viewing 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, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

May Jane Collier testified that neither she nor her siblings gave anyone permission to enter her mother's home and take items. Mr. Mabry testified that he discovered that the house had been burglarized and property stolen when he found the lock on the back door had been broken, and Ms. Gibson testified that the defendant and his brother told her that they got the items they sold her from a garage, not a house. The jury could reasonably infer from the damage to the lock and the defendant's lack of truthfulness that the defendant did not have permission to enter or take property from the home. Therefore, we conclude that the evidence is sufficient to establish that the defendant acted without the permission or consent of the owners when he entered the home and took the items.

III

The defendant contends that the trial court erred in admitting hearsay evidence regarding whether the non-testifying Collier siblings gave the defendant permission to take items from the house. He also contends that the admission of Ms. Collier's statement that none of her other siblings had granted anyone permission to enter the home violates the Confrontation Clause of both the United States and Tennessee Constitutions. He cites the following exchange between the state and Ms. Collier as violative of the hearsay rule and his rights under the Confrontation Clause:

> STATE: To your knowledge, has anybody ever given -- has any of you six children, the owners of this property
>
> . . .

> DEFENSE COUNSEL: Objection to that. It would be calling for hearsay; the six owners, Your Honor.
>
> COURT: Overruled.
>
> STATE: To your knowledge, have any of the six --
>
> DEFENSE COUNSEL: I would also make that on the ground of the confrontation clause.
>
> COURT: Well, overruled. Go ahead.
>
> STATE: Have any of the six given permission to Ray Erwin to enter on this property?
>
> MS. COLLIER: No, sir.
>
> STATE: Given him permission to give anybody else permission to enter on the property?
>
> MS. COLLIER: No, sir. We do not know him, and my brothers and sisters have not given anyone permission to go into our parents' home to take anything out of it.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). On the record before us, we are unable to determine the extent, if any, to which Ms. Collier's testimony is based upon hearsay. Ms. Collier may have based her testimony on her personal observations of her siblings. Although Ms. Collier may have lacked personal knowledge about whether her siblings gave the defendant consent to enter their mother's house, see Tenn. R. Evid. 602, she did not testify to an out-of-court statement. Thus, her testimony did not constitute hearsay, and the trial court properly overruled the defendant's objection.

We also disagree with the defendant's contentions regarding his rights under the Confrontation Clause of the federal and state constitutions. See U.S. Const. amend. VI; Tenn. Const. art. I, § 9. The defendant argues that he was deprived of his right to confront the witnesses against him because, although he did not have the opportunity to question Ms. Collier's siblings, Ms. Collier was permitted to testify that her siblings did not give anyone their consent to enter the house.

Pursuant to the Confrontation Clause of the United States and Tennessee Constitutions, the defendant had the right to face and cross-examine the witnesses who testified against him. State v. Middlebrooks, 840 S.W.2d 317, 332 (Tenn. 1992). In this case, the defendant faced and cross-examined Ms. Collier. As previously noted, Ms. Collier did not identify the basis for her conclusion that none of her siblings gave anyone permission to enter the house. Because nothing in the record before us establishes that Ms. Collier's siblings presented evidence against the defendant, we conclude that admission of Ms. Collier's testimony did not violate the defendant's confrontation rights under the United States and Tennessee Constitutions.

IV

Next, the defendant contends that the state made improper remarks in its closing argument. He argues that the prosecuting attorney suggested to the jury that they should find the defendant guilty even if they were not convinced of the defendant's guilt beyond a reasonable doubt. He also contends that the trial court erred in overruling his objection and motion for a mistrial when the prosecuting attorney commented about the defendant's initial intention to plead guilty in this case. We conclude that the trial court committed reversible error relative to the prosecutor's remarks about the defendant's intention to plead guilty.

The defendant contends that the prosecuting attorney committed reversible error when he commented:

> [L]ike I said, there will be details that can't be answered. Proof that can't be presented. But, now ladies and gentlemen, you know, if you are talking to your neighbor, later on, and you say, well, we know that Ricky and Randy Anderson did it, but there were just to[o] many unanswered questions, and the State didn't present enough proof; if you have said that, then your doubts are not based on common sense. Your common sense is telling you that they did it.

Although we agree with the defendant that this part of the state's closing argument describes a lower standard of proof than is required for a criminal conviction in Tennessee, the defendant waived the issue by failing to object at trial. See T.R.A.P. 36(a). In any event, the trial court instructed the jury on its duty to consider the case and return a verdict based upon the appropriate standard of proof.

The defendant did, however, object when the prosecuting attorney commented on his initial intention to plead guilty in this case. The prosecuting attorney stated:

> [L]et me explain the mysteries in this case. I mean, you are saying, why are we having a trial? These folks confessed.
>
> Ladies and gentlemen, every body has a right to a jury trial. These two men confessed to George Holt. They said, I went in there. I took the stuff. I sold it at Mrs. Gibson's. Both of them. And I'm sure you are asking why are we having a trial? You have a right to have a trial; to have twelve people pass a verdict on your case.
>
> Obviously, at the very beginning, Ricky and Randy wanted to own up to it, and wanted to pled [sic] guilty, and didn't want a trial, but they changed their mind.

After the trial court overruled defense counsel's objection to the above argument, the prosecuting attorney continued, "Now, the reason for that we don't know. That's another of those unanswered questions. Suspicion at the time that there may be a desire to maybe take the route and get [the defendant's sister-in-law] out, but we don't know. That's an unanswered questioned. They changed their minds later." After the closing argument, the defendant moved for a mistrial, but the trial court refused.

The state contends that these remarks were proper because the prosecuting attorney was merely articulating a conclusion that most people would draw after a person makes a confession. We disagree. The proof at trial did not establish that the defendant ever intended to plead guilty to the charges against him. In fact, the

state would have been prohibited from introducing proof regarding plea negotiations that it had with the defendant. See Tenn. R. Evid. 410; Tenn R. Crim. P. 11(e)(6).

We also disagree with the state's characterization of the defendant's statement as a confession. See State v. Lee, 631 S.W.2d 453, 455 (Tenn. Crim. App. 1982) (error for prosecutor to refer to defendant's statement as a confession because defendant did not admit to all of the elements of the crime). The only proof regarding the defendant's statement was admitted through the testimony of Investigator Holt. Holt testified that the defendant admitted going to the house, taking the items and selling them. Nothing in the record indicates that the defendant admitted that he acted without the owners' effective consent when he entered the house and exercised control over the property in it. See T.C.A. §§ 39-14-102 and -402.

The prosecuting attorney's comments regarding the defendant's initial intention to plead guilty were undoubtedly improper. However, the ultimate issue is not whether the prosecuting attorney's remarks were improper, but whether the improper remarks could have affected the verdict. See Judge v. State, 539 S.W.2d 340, 344-45 (Tenn. Crim. App. 1976). In Judge, this court identified the following five factors to be considered in assessing the prejudicial effect of improper argument or conduct:

> 1. The conduct complained of viewed in context and in light of the facts and circumstances of the case.
>
> 2. The curative measures undertaken by the court and the prosecution.
>
> 3. The intent of the prosecutor in making the improper statement.
>
> 4. The cumulative effect of the improper conduct and any other errors in the record.
>
> 5. The relative strength or weakness of the case.

Id. at 344. The prosecuting attorney told the jury that the defendant intended to plead guilty in this case but later changed his mind. The trial court did not take any curative

measures, but, instead, sanctioned the improper remarks by overruling the defendant's objection and allowing the prosecuting attorney to encourage the jury to speculate about the reason the defendant changed his mind about pleading guilty.

The contested aspect of this case was the defendant's mental state, the removal of property from the house being admitted. He claimed innocent purpose, while the state did not have overwhelming evidence of his having a criminal intent. Under these circumstances, the prosecutor's comment was damaging and prejudicial. Thus, the defendant's convictions must be reversed.

V

With respect to his sentencing, the defendant contends that his sentence of five years for aggravated burglary is excessive and that the trial court should have imposed some alternative to incarceration. The state responds that the trial court correctly enhanced the defendant's sentence based upon his criminal history and that the trial court was justified in denying an alternative sentence based upon the defendant's history of criminal convictions and his admission to the daily use of marijuana up until the time of his convictions in this case.

As a Range I, standard offender, the defendant faced a sentence of three to six years for the aggravated burglary conviction. The trial court enhanced the defendant's sentence to five years based upon the defendant's history of criminal behavior. See T.C.A. § 40-35-114(1). The presentence report reflects multiple convictions for driving while under the influence of an intoxicant, simple possession of marijuana, driving on a revoked license as well as convictions for reckless driving, public intoxication, misdemeanor theft, violation of a protective order and the intentional killing of animals. The defendant acknowledged many of these convictions at the

sentencing hearing. The convictions date back to 1983, when the defendant was eighteen years old, and continue with the bulk of convictions occurring in 1991.

The record also supports enhancement of the defendant's sentence based on T.C.A. § 40-35-114(8), regarding the defendant's unwillingness to comply with conditions of release. The presentence report reflects that the defendant committed the present offenses and his third D.U.I. offense while he was on probation for killing his animals. The presentence report also indicates that the defendant was on probation in 1991 when he committed various offenses.

With respect to mitigation, the defendant asserts that his conduct neither caused nor threatened serious bodily injury. See T.C.A. § 40-35-210(1). The record is unclear as to whether the trial court considered this fact in mitigation. However, even considering that the defendant's actions neither caused nor threatened serious bodily injury, a five-year sentence for aggravated burglary remains justified in light of the defendant's history of criminal behavior and history of unwillingness to comply with conditions of a sentence involving release into the community. See T.C.A. § 40-35 -114(1) and (8).

The defendant also claims that he should have been granted an alternative sentence. As a Range I, standard offender convicted of Class C and Class D felonies, the defendant was presumed to be a favorable candidate for alternative sentencing options. See T.C.A. § 40-35-102(6). At the sentencing hearing, the defendant presented evidence that he was approved for entry into the Community Corrections Program and that he would maintain full-time employment if he received an alternative sentence. However, the defendant's prior record and his past lack of amenability to less restrictive sentencing sufficiently rebutted the presumption of

suitability for alternative sentencing. See T.C.A. § 40-35-103(1)(A) and (C). The record supports the sentence the trial court imposed.

In consideration of the foregoing, and the record as a whole, the defendant's convictions for theft and aggravated burglary are reversed and the case is remanded to the Circuit Court of Maury County.

_____
Joseph M. Tipton, Judge

CONCUR:

_____
Paul G. Summers, Judge

_____
William M. Barker, Judge