IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1997 SESSION

FILED

September 2, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	NO. 01C01-9608-CR-00385
	)	
Appellee	)	WHITE COUNTY
	)	
V.	)	HON. JOHN TURNBULL, JUDGE
	)	
TERRY LYNN KIRBY	)	(Burglary, Theft and Sentencing)
	)	
Appellant	)	
	)	

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OPINION FILED:_____

AFFIRMED

William M. Barker, Judge

Opinion

The Appellant, Terry Lynn Kirby, appeals as of right his convictions for one count of burglary and one count of theft of less than $500.00. He also appeals the sentence for his burglary conviction. He argues on appeal that:

> (1) The trial court erred by denying his motion for judgment of acquittal for burglary and theft because the evidence introduced at trial was insufficient.
>
> (2) The state prosecutor's closing argument that another person involved in the burglary, Charlie Cecil Price, Jr., would be dealt with later was so prejudicial to the Appellant that a new trial should be granted.
>
> (3) The trial court erred by imposing a sentence for his burglary conviction that was too long and improper.

We have carefully reviewed the record on appeal and find no merit to the Appellant's contentions. Accordingly, we affirm the trial court's judgment.

Factual Background

On April 13, 1995, at approximately 6:50 p.m., Deputy Sheriff Kenny Dobson patrolled the area surrounding the Carter Hickory Mill on Cookeville Road in White County. Driving past the mill, Deputy Sheriff Dobson noticed the Appellant and two or three other persons in a maroon Oldsmobile. The Appellant, who was behind the steering wheel, drove the car slowly past the front of the building. Because the Appellant worked at the mill, Deputy Sheriff Dobson did not consider the Appellant's behavior suspicious.

A few minutes later, however, Deputy Sheriff Dobson received a call over his police radio from which he learned that the Carter Hickory Mill had been burglarized. He notified the dispatcher that he had seen the Appellant at the scene of the crime and then returned to the mill. He noticed that a window was broken, but could not find the Appellant. He radioed Sergeant Bill Bumbalough, a police officer on his way to the mill to investigate the burglary, and told him that he was going to try to find the Appellant.

When Sergeant Bumbalough arrived at Carter Hickory Mill, he was met by Ronnie Carter and the two of them entered the mill's office. According to Carter's testimony at the trial, the office was in its normal condition and he could not see that anything had been moved or was missing. Suspecting that something must have been stolen, Carter started going through his drawers and soon realized that six blank payroll checks were missing.

At approximately 7:30 p.m., that same evening, Officer Paul Sherill was called to an accident in Sparta that involved a maroon Oldsmobile. When he arrived at the scene of the accident, the Appellant, who was the driver, and one other man were in the car. Apparently two other men, one of them being Charlie Cecil Price, had also been in the car when the accident occurred, but both those men had escaped. Having heard over the radio that Deputy Sheriff Dobson was looking for a maroon Oldsmobile in connection with a burglary, Officer Sherill searched the car and found one blank Carter Hickory Mill check in the car's backseat right behind the driver's seat. Shortly thereafter, when the car was moved, Officer Sherill also discovered several torn up pieces of Carter Hickory Mill checks on the ground under the driver's seat.

The White County Grand Jury indicted the Appellant for burglary, theft, and forgery. On January 23, 1996, after one mistrial, a jury convicted the Appellant of burglary and theft of less than $500.00. At the sentencing hearing, the trial court ordered the Appellant to serve six months for the theft and three years and nine months for the burglary, to be served consecutively. On May 21, 1996, the trial court entered an order denying the Appellant's motion for a new trial and ordering his sentences to be served concurrently instead of consecutively. The Appellant now appeals.

Argument

The Appellant's first argument is that the trial court erred by denying his motion for judgment of acquittal for burglary and theft because the evidence introduced at trial was insufficient. The Appellant's argument has no merit.

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 would 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 reevaluate 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). 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).

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).

Even if the evidence of the Appellant's guilt is entirely circumstantial in nature, it is a well-established principle of law in this state that circumstantial evidence alone may be sufficient to support a conviction. State v. Buttrey, 756 S.W.2d 718, 721 (Tenn. Crim. App. 1988). However, the circumstantial evidence "must be not only consistent with the guilt of the accused but it must also be inconsistent with his innocence and must exclude every other reasonable theory or hypothesis except that

of guilt." State v. Tharpe, 726 S.W.2d 896, 900 (Tenn. 1987). In addition, "it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that the [Appellant] is the one who committed the crime." Id. at 896.

In evaluating the sufficiency of the circumstantial evidence, this Court must remember that the jury decides the weight to be given to circumstantial evidence and that "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence are questions primarily for the jury." Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958); Pruitt v. State, 460 S.W.2d 385, 391 (Tenn. Crim. App. 1970).

In order to convict the Appellant of theft of property, the State had to prove that the Appellant acted with an "intent to deprive the owner of property [and] knowingly obtain[ed] or exercise[d] control over the property without the owner's effective consent." Tenn. Code Ann. §39-14-103 (1991). In order to convict the Appellant of the burglary as charged, the State had to prove that the Appellant, without the owner's consent, entered a building other than a habitation not open to the public with the intent to commit a felony or theft. See Tenn. Code Ann. §39-14-402(a)(1) (1991).

The Appellant specifically complains that the State failed to prove that he did not have the owner's effective consent to enter the building and take the payroll checks.[1] The Appellant also complains that the State failed to prove that he exercised control over the payroll checks, arguing that they were not found on his person. The State will have met its burden if it introduced evidence at the trial from which a reasonable jury could have concluded that the Appellant did not have consent to enter the Carter Hickory Mill office and that the Appellant exercised control over the payroll checks. See State v. Hill, 856 S.W.2d 155, 156 (Tenn. Crim. App. 1993).

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[1]The Tennessee Code defines consent as "assent in fact, whether express or apparent, including assent by one legally authorized to act for another." Tenn. Code Ann. § 39-11-06(9) (Supp. 1996).

We find that the convicting evidence was sufficient. Deputy Sheriff Dobson observed the Appellant driving slowly in front of the Carter Hickory Mill only minutes before he learned that it had been burglarized. Sergeant Bumbalough and Ronnie Carter saw that an office window had been broken and that somebody had forced his way through that window. Inside the office, Carter noticed that nothing had been disturbed except that six blank payroll checks were missing. Thirty to forty-five minutes after the burglary, Officer Sherill investigated a car accident involving the Appellant and found, in and around the car, five out of the six stolen checks. Four of those stolen checks had been torn to pieces.

The evidence, circumstantially, was sufficient to convict the Appellant. A reasonable jury could have concluded that nobody had given the Appellant consent to enter the office because of the broken window used to gain entry into the office. A reasonable jury could also have concluded that nobody had given the Appellant consent to take the checks because he attempted to destroy and hide them when investigated by a police officer at the scene of the car accident that same evening.

A reasonable jury could also have found, circumstantially, that the payroll checks were in the Appellant's possession. The checks were found behind the driver's seat and under the car where the driver's seat was located in the car the Appellant drove. Moreover, the Appellant did not introduce any testimony at trial explaining why or how the checks were in the car. See Nunley v. State, 479 S.W.2d 836, 837 (Tenn. Crim. App. 1972). The trial court did not err in denying the Appellant's motion for judgment of acquittal.

The Appellant next argues that the prosecutor's closing argument that another person involved in the burglary, Charlie Cecil Price, Jr., would be dealt with later was so prejudicial to the Appellant that a new trial should be granted. This issue is also without merit.

In his closing argument, counsel for the Appellant said:

> Now, the State through its testimony on direct, they told you about [checks numbers] 5308, 5307, 5306, 5305, and 04. They didn't tell you about [check number] 5303. You see, I brought that out in cross examination about this. Now, don't you have to ask yourself, "Well, why wouldn't the State tell us the whole thing to begin with? Why wouldn't they tell us about [check number] 5303?"
>
> Well, the reason they didn't want to tell you about that is because they don't want you to know that Charlie Cecil Price is the person who cashed one of these checks that were missing from that office. Maybe Charlie Cecil Price is the one who committed the burglary. But there's no proof that [the Appellant] committed the burglary. And he didn't run.

The State responded:

> You know, [the Appellant's attorney] wanted to infer that the State did things to try to hide evidence from you. [Deputy Sheriff Dobson] was the first witness. We hadn't got to [payroll check number] 5303 [that Mr. Price cashed in a grocery store] yet.
>
> When it came in, it was obvious it was one stolen. It was obvious Mr. Price was with [the Appellant] and Mr. Price was guilty of these crimes, too, and another jury will take care of Mr. Price when his time comes up.

At the time of the Appellant's trial, Mr. Price, who had cashed one of the six stolen checks in a grocery store, had already pled guilty to worthless checks and theft for less than $500.00. The Appellant now argues that the State intentionally misled the jury into thinking that Mr. Price would be prosecuted for burglary.

The Appellant did not contemporaneously object to the State's argument and has, therefore, waived this issue on appeal. See Tenn. R. App. P. 36(a); State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988). Moreover, the Appellant has failed to show that the State's closing argument prejudiced the outcome of his trial. The evidence presented was more than sufficient to convict the Appellant. If any prosecutorial error occurred, such error was harmless beyond a reasonable doubt. Tenn. R. App. P. 36 (b); Tenn. R. Crim. P. 52 (a).

The Appellant finally argues that the trial court erred by imposing a sentence for his burglary conviction that was too long and improper.[2] This issue is without merit.

Burglary, a Class D felony, carries a sentence of two to four years for a Range I standard offender. See Tenn. Code Ann. § 40-35-112(a)(4) (1990). Here, the trial

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[2]The Appellant does not appeal his six month sentence for theft.

court applied four enhancement factors and sentenced the Appellant to three years and nine months in the Tennessee Department of Corrections. The trial court found that the Appellant has a previous history of criminal convictions and criminal behavior, that he was a leader in the commission of the offense, that he has a previous history of unwillingness to comply with the conditions of sentencing involving release into the community, and that he committed the felony while on probation. See Tenn. Code Ann. § 40-35-114 (Supp. 1996). The record supports the trial court's findings.

When an Appellant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d) (1991). The burden of showing that the sentence is improper is upon the appealing party. Id, (Sentencing Commission Comments). This presumption, however, is conditioned upon an 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).

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. Tenn. Code Ann. § 40-35-210 (1990). The trial judge has full discretion to determine the weight given to each factor, as long as it does not violate the principles of the Sentencing Reform Act. Id. (Sentencing Commission Comments).

The Appellant argues that he was not a leader in the commission of an offense involving two or more criminal actors. We disagree. The evidence introduced at trial shows that Deputy Sheriff Dobson saw the Appellant and two or three men in the maroon Oldsmobile outside the Carter Hickory Mill only a few minutes before he learned that there had been a burglary. The Appellant, the car's driver, was the only

individual in the car who worked at the mill and, presumably, the only person who knew where the payroll checks were kept. When the police found the Appellant, five out of the six checks were still in the Appellant's possession.

The Appellant also argues that the trial court did not place enough emphasis on the mitigating factor that his conduct neither caused nor threatened serious bodily injury to any individual. See Tenn. Code Ann. § 40-35-113(1) (1990). However, the court stated, "I will find that that mitigating factor applies, but I will give it relatively little weight." Considering the circumstances surrounding the offense, the Appellant's extensive criminal record, and the other enhancement factors, we find that the trial judge was well within his discretion to give the mitigating factor little weight. Accordingly, we affirm the Appellant's sentence.

The Appellant's convictions and sentences are affirmed.

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WILLIAM M. BARKER, JUDGE

CONCUR:

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JOE B. JONES, PRESIDING JUDGE

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THOMAS T. WOODALL, JUDGE