IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JUNE 1997 SESSION

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 03C01-9608-CR-00309
	)	
	)	Sullivan County
v.	)	
	)	Honorable Frank L. Slaughter, Judge
	)	
RICHARD A. TAYLOR,	)	(Aggravated Robbery)
	)	
Appellant.	)	

For the Appellant:

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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Richard A. Taylor, appeals as of right from his jury conviction in the Sullivan County Criminal Court for aggravated robbery, a Class B felony. The trial court sentenced the defendant as a Range I, standard offender to twelve years in the custody of the Department of Correction and imposed a fifteen-thousand-dollar fine. The defendant contends that the trial court erred by failing to instruct the jury regarding the proper consideration of his prior convictions and by sentencing the defendant to the maximum sentence within the sentencing range. We disagree and affirm the judgment of conviction.

At trial, the victim testified that on June 3, 1996, he was hitchhiking from Appalachia, Virginia, to Bristol, Virginia, to visit his daughter when the defendant picked him up along the interstate near Kingsport. The victim said that he told the defendant where he was traveling, and the defendant told the victim that he could only take him to the other side of Kingsport. The victim stated that the defendant then drove along backstreets until he arrived on Stone Drive in Kingsport. He testified that the defendant then turned into a parking lot near a nursing home, stopped the car, pulled out a knife, and told the victim to give him his money or he would cut him. The victim said that after he gave the defendant twenty-four dollars, the defendant ordered the victim out of the car. The victim testified that he picked up his shirt and a returned check of Verna Lawson from the floorboard of the car. He said that as the defendant was driving away, he saw the license tag number of the car the defendant was driving. The victim stated that he then walked to a nearby nursing home where he wrote the tag number on the returned check and called the police. The victim was not injured during the offense.

The defendant denied threatening the victim with a knife and robbing him. He testified that Verna Lawson, a friend, loaned him her car to go to Kingsport,

Tennessee, and to run errands for Ms. Lawson. He said that on the way to Kingsport, he picked up the victim who was hitchhiking. The defendant stated that after picking up the victim, he asked the victim whether he had any marijuana, and the victim responded that he did not have any marijuana, although he had twenty-four dollars. The defendant said that he offered to contribute a dollar to the purchase of marijuana and to locate a drug supplier if the victim would give him a marijuana cigarette. According to the defendant, the victim agreed. He related how he drove the victim to several acquaintances in search of marijuana. He said that at one of the stops, the victim gave the money to a potential drug supplier who told the victim that he could obtain the marijuana. The defendant claimed that the potential supplier left to get the drugs but did not return.

The defendant testified that the victim became upset because he did not receive any marijuana and his money was not returned. The defendant stated that the victim demanded that the defendant repay the twenty-four dollars, but the defendant told the victim that the money he had did not belong to him. He said that he told the victim that he had to return the car to Ms. Lawson but that he would drive the victim as far as he could before letting him out of the car. The defendant said that the victim then threatened to call the police and accuse him of robbing him if the defendant did not drive him to Bristol and return his money. The defendant testified that he then pulled into a parking lot located near a church and told the victim to get out of the car. He said that the victim got out of the car, slammed the door and cursed the defendant. When the defendant arrived at Ms. Lawson's residence, he was told that the police wanted to talk to him, and the defendant waited for the police to arrive.

I. LACK OF INSTRUCTION ON PRIOR CONVICTIONS

The defendant asserts that the trial court erred by failing to instruct the jury that evidence of the defendant's prior convictions could only be considered to impeach the defendant's testimony and not to determine the defendant's guilt or innocence. He also argues that the trial court erred by allowing the prosecutor to question the defendant during cross-examination about an alias, "Gary Theodore Leishchner," used by the defendant when previously convicted of accessory after the fact to the offenses of grand larceny and second degree burglary and by allowing the prosecutor to refer to the alias during closing argument. Further, the defendant contends that the prosecutor engaged in prosecutorial misconduct during closing argument by referring to the defendant's prior convictions in a context other than attacking the defendant's credibility. In response, the state contends that because the defendant failed to request a limiting instruction pursuant to Rule 105, Tenn. R. Evid., the issue is waived. With respect to the errors made by the prosecutor during cross-examination and closing argument, the state asserts that the issues may not be considered on appeal because the issues are not contained in the defendant's motion for a new trial.

During the cross-examination of the defendant, the state introduced evidence of the defendant's prior convictions for three counts of theft under five hundred dollars and for accessory after the fact to the offenses of second degree burglary and grand larceny. In questioning the defendant, the prosecutor also asked the defendant whether he used the name "Gary Theodore Leishchner" when convicted of the crimes of accessory after the fact to the offenses of second degree burglary and grand larceny. The defendant objected, and the objection was overruled.[1] During the rebuttal, the prosecutor argued the following:

[1] We note that a bench conference was conducted with respect to the defendant's objection. However, the discussion was not transcribed as the tape was inaudible. Nor was the record supplemented to include a statement of the proceeding as permitted by Rule 24(c), T.R.A.P.

> [The defendant] said what happened and what he did. And he came before you and raised his hand to tell the truth. Now, [defense counsel] says that doesn't make sense, but he told you what happened. Now, [the defendant] says, yep, December 12 of '86 I was convicted of burglary second degree and grand larceny in Greenville, South Carolina, under my name also known as Gary Theordore [sic] Leishchner or whatever it is. That's Greenville, South Carolina. That's another state. As a matter of fact, you've got to go through North Carolina to get down into South Carolina from here. That doesn't make any sense that after that he comes up here on April the 14th and he's convicted in Sullivan County Sessions Court for two (2) charges --
>
> [DEFENSE COUNSEL]: Your honor, I object to this line of argument.
>
> [PROSECUTOR]: Of theft under five hundred dollars ($500.00).
>
> THE COURT: Well, its just arguments of counsel. The jury will recall what the evidence is.
>
> [PROSECUTOR]: The state says that doesn't make sense when you've already been convicted of burglary in the second degree and grand larceny in South Carolina to come up here and commit misdemeanor theft two (2) times in Sullivan County Sessions Court April 14, 1994. That doesn't make sense and then it doesn't make sense that he comes along and in June 22, '95 and gets another conviction for misdemeanor theft in Sullivan County Sessions Court. Now, a lot of crime doesn't make sense, ladies and gentleman, but it occurs. And if it didn't occur [defense counsel] and I wouldn't have a job and you wouldn't be here today and the Judge wouldn't be here.
>
> THE COURT: There might be a few divorces or something come up.
>
> [PROSECUTOR]: Criminal jurisdiction. But, ladies and gentleman, that doesn't make sense but it happens. That's a part of our life. We can't get away from it. It may not make sense but it happens and this Defendant committed these offenses prior to this offense and we submit that you can consider it on his credibility and we submit on the basis of the proof that you've heard here today that this Defendant at knifepoint robbed [the victim] of twenty-four dollars ($24.00) in Kingsport, Sullivan County, Tennessee, on June 3, 1995 . . . .

Pursuant to the conditions and the procedures set forth in Rule 609, Tenn. R. Evid., the credibility of the accused may be attacked by presenting evidence of prior

convictions. The court in State v. Morgan, 541 S.W.2d 385 (Tenn. 1976), held that evidence of a defendant's prior convictions must be "limited to the fact of a former conviction and of what crime, with the object only of affecting the credibility of the witness, not prejudicing the minds of the jury as to the guilt of the defendant witness of the crime for which he is on trial." Id. at 389. The trial court "upon request shall restrict the evidence to its proper scope and instruct the jury accordingly" when evidence is introduced for a limited purpose. Tenn. R. Evid. 105 (emphasis added).

Though the defendant neither requested that the trial court give a limiting instruction nor objected to the omission of an instruction, he argues that a request for an instruction would have been futile because the trial court overruled his objection to the prosecutor's closing argument relating to the defendant's prior convictions. We disagree.

In State v. Reece, 637 S.W.2d 858 (Tenn. 1982), our supreme court stated that generally, "no assignment of error based upon omission or inadequacy of the judge's instructions to the jury will be considered unless a special request was tendered . . . ."[2] Id. at 861. See also State v. Howell, 868 S.W.2d 238, 255 (Tenn. 1993) (defendant waived the issue of the trial court's failure to instruct the jury that proof of other crimes could only be considered on the questions of identity and flight by failing to make a special request for an instruction and by failing to object to the omission of such instruction). "However, if the state's case is weak and the prior inconsistent statements are extremely damaging, the failure to give the limiting instruction may amount to fundamental error constituting grounds for reversal, even in the absence of a special request." Reece, 637 S.W.2d at 861. The Reece court specifically limited its holding to "those exceptional cases in which the impeaching

[2] We note that pursuant to Rule 30(b), Tenn. R. Crim. P., the failure to object to the content of an instruction given or to the failure to give a requested instruction does not prevent the defendant from raising the issue in a motion for new trial. However, the defendant did not request that an instruction be given in this case.

testimony is extremely damaging, the need for the limiting instruction is apparent, and the failure to give it results in substantial prejudice to the rights of the accused. Id.

In this case, we do not believe that the "fundamental error" rule set forth in Reece is applicable. We recognize that "there is a significant possibility of misuse with testimony about a defendant's commission of other crimes, and limiting instructions are critical in preventing improper and prejudicial use of proof of other crimes." Howell, 868 S.W.2d at 255. Thus, the need for an instruction is apparent.

However, we do not believe that the introduction of evidence of the defendant's prior convictions without a limiting instruction was extremely damaging or resulted in substantial prejudice to the defendant which affected the result of the trial. Though the prosecutor's argument was improper to the extent that it was for the purpose of showing the defendant's propensity to commit the present offense, we believe that the argument was sufficiently tailored to the issue of the defendant's credibility. See State v. Holtcamp, 614 S.W.2d 389, 394 (Tenn. Crim. App. 1980) (trial court's failure to instruct the jury as to the proper consideration of the defendant's prior convictions was not reversible error when defendant made no request for the instruction and the prosecutor argued in closing argument that the evidence could only be considered by the jury to determine her credibility as a witness). Therefore, under the circumstances of this case, we conclude that the failure to give a limiting instruction did not constitute reversible error.

As for the defendant's contentions regarding the improper questioning of the defendant during cross-examination and the improper argument during closing argument, the defendant failed to include these issues in his motion for new trial. Pursuant to Rule 3(e), T.R.A.P., an issue is considered waived for appellate review purposes if it is not specifically included in the motion for new trial. Such is the case

before us. Moreover, in the context of plain error, we see nothing that affects the substantial rights of the defendant. See Tenn. R. Crim. P. 52(b).

II. SENTENCING

The defendant contends that the trial court erred by sentencing the defendant to the maximum sentence within Range I. He asserts that the trial court failed to consider mitigating factors. The defendant argues that the correctness of the sentence must be reviewed de novo without a presumption of correctness because the trial court did not articulate how the enhancement and mitigating factors had been evaluated and balanced in determining the sentence. He asserts that a sentence less than the maximum is appropriate in this case. The state responds that the trial court properly sentenced the defendant. We agree.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d). As the Sentencing Commission Comments to this section notes, the burden is now on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action 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). In this respect, for the purpose of meaningful appellate review,

> the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

Also, in conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103 and -210; see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229, 236-37 (Tenn. 1986).

The sentence to be imposed by the trial court is presumptively the minimum in the range unless there are enhancement factors present. T.C.A. § 40-35-210(c).[3] Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. T.C.A. § 40-35-210(d) and (e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. T.C.A. § 40-35-210, Sentencing Commission Comments; Moss, 727 S.W.2d at 237; see Ashby, 823 S.W.2d at 169.

At the sentencing hearing, Eddie Harrison, an out-patient mental health counselor at the Scott County Mental Health Center, testified that the defendant came to the Scott County Mental Health Center on May 1, 1995, approximately one month

[3] For Class A felonies committed on or after July 1, 1995, the presumptive sentence is the midpoint of the range. See T.C.A. § 40-35-210(c).

before the offense occurred, at the request of Verna Lawson. He stated that at the time the defendant was living under a bridge in Scott County along with his registered wolf. Mr. Harrison testified that the defendant had problems relating to people, especially in the workplace. Mr. Harrison believed the defendant to be delusional about work and to be paranoid. He said that the defendant told him that the defendant had over one hundred jobs in the past twenty years. Mr. Harrison also stated that the defendant stated that his father had died before he was born, that his stepfather abused him physically and sexually, and that he had left home when he was approximately thirteen years old.

Mr. Harrison testified that he continued to see the defendant after the offense occurred. He said that the defendant went to live with his mother after being released from jail while on bond, and he stated that the defendant's appearance improved significantly during this time. Mr. Harrison expressed the opinion that the defendant suffered from paranoid schizophrenia, and he stated that a psychiatrist agreed with the diagnosis and signed the treatment plan without ever examining the defendant. He conceded that the defendant had never been examined by a doctor. However, he recommended that the defendant go see a psychiatrist and take medication, but the defendant refused, stating that it was against his religious beliefs. Mr. Harrison stated that the defendant asked him the ingredients of the medication so that he could mix it up himself.

On cross-examination, Mr. Harrison conceded that he had not conducted any tests on the defendant, although he testified that he had seen the defendant about seven times. He also stated that he did not obtain his license as a clinical social worker until after his meetings with the defendant. Further, Mr. Harrison admitted that he had not reviewed a report reflecting that the defendant did not suffer from a mental disease or defect that would result in a substantial impairment of his capacity to appreciate the

wrongfulness of his conduct. He said that the defendant did not tell him about all of his prior convictions, and he said that the defendant claimed that he was wrongly convicted in South Carolina.

Myrtle Stacy, the defendant's mother, testified that the defendant's father died four days before the defendant was born. She said that the defendant had a good relationship with his first stepfather but not his second stepfather. She stated that the defendant ran away from home when he was eleven or twelve years old. As for the defendant's school performance, Ms. Stacy testified that the defendant did not do well in school and always skipped classes, resulting in the defendant being sent to a behavioral school where the defendant came home only on the weekends. She said that the defendant began living at home on a full-time basis when he was thirteen but that he moved out when he was sixteen years old. Ms. Stacy stated that while the defendant was released on bond, the defendant lived with her. She testified that the defendant was not a violent person.

Benjamin Miller, an acquaintance of the defendant, testified that the defendant and his mother attend religious meetings where he conducts a Bible class. He said that since October 1995, he and the defendant had studied the Bible together on a weekly basis. He believed that the defendant was a gentle, generous and helpful person. Velma Casteel, also an acquaintance of the defendant who met the defendant at religious meetings, testified that the defendant was always quiet and respectful, and she believed that the defendant was a nice person.

Laura Tomlinson, a relative of the defendant's stepfather, testified that she had known the defendant since he was a young boy. She said that she did not believe that the defendant was violent. She stated that the defendant was a nice person and that he had helped her on occasions and also helped elderly people in the

community. She conceded that she had not heard other people say whether the defendant was or was not peaceful.

The record reflects that upon the defendant's request before trial, the trial court ordered that the defendant be evaluated to determine his competency to stand trial and his sanity at the time the offense occurred. The evaluation provides that the defendant was found to be competent and that an insanity defense could not be supported.

The presentence report reflects that the then thirty-three-year-old defendant denied robbing the victim. The report shows that the defendant did not cooperate with the police in their investigation. As a juvenile, the defendant was convicted of housebreaking and petit larceny. The defendant absconded while on probation for this offense and committed the offense of concealing stolen property, resulting in the revocation of the defendant's probation. The defendant also has an adult criminal record, including prior convictions for housebreaking, petit larceny, theft of property valued under five hundred dollars, receiving stolen goods, disorderly conduct, carrying a concealed weapon, shoplifting and simple possession. Regarding the defendant's educational background, the report states that the defendant dropped out of school in the ninth grade. It also shows that the defendant completed a course in auto body repair and anger management while incarcerated for his prior convictions.

The presentence report also reflects that the defendant reported having problems mentally and with his nerves and that as a result, the defendant has received disability benefits since 1995. The report states that the defendant received extensive inpatient mental health treatment as a juvenile because of his behavioral problems at school. The defendant denied using alcohol but admitted that he began using marijuana when he was sixteen years old. The defendant claimed that he used

marijuana approximately every six months and that he last used the drug on the day of the offense when he smoked two marijuana cigarettes. Regarding the defendant's employment history, the presentence report reflects that the defendant worked approximately one month at a grocery store in 1985, but he quit the job.

At the conclusion of the hearing, the trial court sentenced the defendant as a Range I, standard offender to twelve years in the custody of the Department of Correction and fined the defendant fifteen thousand dollars. In sentencing the defendant, the trial court determined that the following enhancement factors under T.C.A. § 40-35-114 applied:

> (1) The defendant has a previous history for criminal convictions or criminal behavior; and
>
> (8) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community.

It also stated that it did not find the defendant to be a credible witness, believing that the defendant obviously lied, but it stated that it attached no significance to the defendant's dishonesty. Instead, the trial court attached great weight to the defendant's prior criminal record.

In mitigation, the trial court recognized that the defendant's father died four days before the defendant was born, but it stated that the factor was not of much significance under the circumstances of the case. See T.C.A. § 40-35-113(13). The trial court declined to consider the following as mitigating factors pursuant to T.C.A. § 40-35-113:

> (8) The defendant was suffering from a mental condition that significantly reduced the defendant's culpability for the offense;
>
> (13) The defendant waited for the police to arrive after being notified that they wanted to speak to him rather than evading arrest; and
>
> (13) The defendant has a good reputation for peacefulness in the community.

The trial court determined that there was "no significant evidence of any kind of a mental condition that should significantly reduce [the defendant's] sentence or speak directly to his culpability." In its decision, the trial court found that Mr. Harrison expressed a lay opinion that was not based upon medical testing or adequate interviewing. The trial court also stated that the evidence did not establish that the defendant had a reputation for truthfulness or peacefulness.

As for the defendant's claim that the trial court failed to follow the sentencing principles and consider all relevant facts and circumstances, we disagree. The trial court did not enhance the defendant's sentence based upon its belief that the defendant was not credible. Rather, the trial court noted that the defendant obviously lied but attached no significance to the factual finding. Also, the trial court specified the weight it was giving to the applicable enhancement and mitigating factors.

As for the defendant's argument with respect to the trial court's decision that certain mitigating factors did not apply, we believe that the evidence supports the trial court's decision. The trial court found Mr. Harrison's testimony to be incredible and believed that he lacked the expertise to give an opinion that the defendant suffered from paranoid schizophrenia, noting that the defendant had not been tested or examined by a doctor. We give great weight to the trial court's determinations concerning the credibility of witnesses. State v. Raines, 882 S.W.2d 376, 383 (Tenn. Crim. App. 1994). The evidence supports the trial court's determination. It also supports the trial court's findings that the defendant did not have a reputation for peacefulness and did not cooperate with the police.

The weight to be given to enhancement and mitigating factors is left to the trial court's discretion. State v. Marshall, 888 S.W.2d 786, 788 (Tenn. Crim. App.

1994). Therefore, we conclude that the trial court properly sentenced the defendant to the maximum sentence of twelve years

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

_____
Joseph M. Tipton, Judge

CONCUR:

_____
John H. Peay, Judge

_____
Curwood Witt, Judge