IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1998 SESSION

FILED

April 7, 1998

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. O1C01-9703-CR-00084**
Appellee,	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**HON. J. RANDALL WYATT, JR.**
LARRY BLAIR,	)	**JUDGE**
	)	
Appellant.	)	(Aggravated Robbery - 2 counts)

FOR THE APPELLANT:

KARL DEAN
Public Defender

JEFFREY A. DeVASHER
Asst. Public Defender
(On Appeal)

ROSS ALDERMAN
Deputy Public Defender
1202 Stahlman Bldg.
Nashville, TN 37201
(At Trial)

FOR THE APPELLEE:

JOHN KNOX WALKUP
Attorney General & Reporter

DARYL J. BRAND
Asst. Attorney General
425 Fifth Ave., North
Cordell Hull Bldg., Second Floor
Nashville, TN 37201

VICTOR S. JOHNSON, III
District Attorney General

KATRIN N. MILLER
Asst. District Attorney General
Washington Square, Suite 500
222 Second Ave., North
Nashville, TN 37201

OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted in October 1995 on six counts of aggravated robbery, one count of attempted aggravated robbery, and one count of burglary of a motor vehicle. The counts were severed into three groups. The defendant went to trial on the first two counts of aggravated robbery. A jury found him guilty of both counts, and the trial court sentenced the defendant to twenty-five years for each conviction and ordered the sentences to run consecutively. Subsequent to this trial, the defendant and the State reached an agreement as to the other charges, and the defendant ultimately pled guilty to two more counts of aggravated robbery.

In this appeal as of right, the defendant raises three issues that pertain to his trial on the first two counts of the indictment. He argues that the trial court erred when it refused to suppress the identification testimony of two witnesses. He further argues that the evidence was insufficient to support his conviction and that the trial court erred when it imposed consecutive sentences. After a review of the record and applicable law, we find no error and affirm the judgment of the court below.

The defendant's convictions stemmed from an armed robbery of Mary C. Curry and Robert L. Rucker. On the evening of May 30, 1995, as Curry and Rucker were leaving Lee's Chapel AME Church in Nashville, they were approached by a man with a gun. The man instructed Curry and Rucker to give him their wallets, their money, and their jewelry. They did as instructed and the man fled down a nearby alley.

As his first issue, the defendant argues that the trial court erred when it denied the defendant's motion to suppress the identification testimony of Rucker and

Curry. The defendant claims that the pretrial physical lineup viewed by Rucker and Curry was unnecessarily suggestive, thus depriving him of his right to a fair trial and due process of the law.

A pretrial hearing was held to determine whether the lineup was in any way tainted. After hearing testimony from Rucker, Curry, and the detective who prepared the lineup, the trial judge determined that the lineup was not suggestive and that the victims' identification of the defendant would be admissible at trial. As the pretrial hearing and the trial itself produced virtually identical testimony, we will not differentiate between the two in the following recounts of testimony.

Rucker, a professor at Middle Tennessee State University, testified that he had attended a bible study at his church on May 30, 1995, and had then stayed to work on a church newsletter. He and Curry left the church from a side exit, and as he was walking Curry to her car, a man approached them. Rucker testified that the man had been holding a gun and had ordered them to give him their wallets, their money, and their jewelry. Rucker testified that he had tried not to look the robber in the eye as he complied with his demands. He explained that he had read a magazine article some time ago that advised robbery victims not to look into their robber's eyes because the robber may see it as an attempt to be intimidating. For this reason, Rucker kept his eyes lowered until the robber was focused on obtaining items from Curry. While the robber had his gun pointed at Curry, Rucker took the opportunity to look at the man's face. He testified that he had clearly seen the man's face as the area was illuminated by street and security lights.

Rucker further testified that during the robbery, Reverend Edward B.

Thompson had begun exiting the building. Upon seeing Thompson, the robber instructed him to return to the church. The robber then fled the area, heading north down an alley. Rucker testified that he and Curry had then gone back into the church and found Thompson alerting the police. Rucker related to the police what had happened and then gave a description of the man that had robbed him. Rucker stated that the man was a black male who was thin, weighed approximately 160 to 170 pounds, appeared to be between five feet ten inches and six feet two inches tall, and had a "patchy, scrabby, scrubby beard." He further stated that the man had been wearing a light colored hooded sweatshirt and possibly a baseball hat. He estimated the man to be in his early thirties.

Rucker testified that about two and a half months after the robbery, he had been asked to view a lineup at the police department. He said after viewing a lineup of five men, he had recognized one, the defendant, as being the man who had robbed him. Rucker then made a courtroom identification of the defendant, and stated that he had no doubt that the defendant had been the robber.

Mary Curry offered similar testimony as to what happened on the night of the robbery. She testified that she had given the robber thirty-eight dollars ($38.00) but that she had refused to give him her bag because she had important papers in it. She described the robber as a black male that was tall and slender. She said he had a patchy type beard and had been wearing something on his head. She estimated him to be between twenty and thirty years old. Curry noted that the lighting in the area was sufficient for her to see the man's face.

At the pretrial hearing, Curry testified that following the robbery, she had been watching television when she saw the defendant being arrested in Memphis. She

testified that when she saw the defendant, she immediately recognized him as the man who robbed her. Shortly thereafter, she was asked to view a lineup at the police department. From the lineup of five men, Curry identified the defendant as the robber. She testified that she had picked the defendant because she recognized him from the night of the robbery, not from television. She further testified that she had no difficulty identifying the defendant.

Detective Danny Collins, the Metro police officer that prepared the lineup, testified that the lineup consisted of five men that looked similar to the defendant. He testified that the men were similar in height, complexion, weight, and physical characteristics. He further testified that the men were all dressed identically, including a baseball hat on their heads.

Collins stated that he had contacted Curry and Rucker and had told them that a possible suspect was in custody. The defendant had been arrested in Memphis and had been returned to Nashville. Curry and Rucker viewed the lineup together, but each was asked outside the other's presence to make an identification. Both identified the defendant as the man who had robbed them. Collins testified that the defendant is actually five feet nine inches tall, weighs 157 pounds, and was born in 1955.

From this testimony and from viewing the photographs of the lineup, the trial court determined that the lineup was not suggestive in any way. While the judge noted that the defendant's complexion was the lightest of the five men, there was not a significant difference in his complexion or any other physical characteristic. The judge stated, "I'm looking at the pictures now and I do not find anything in those pictures that would be improper. The men don't look exactly alike, but no five men over at the jail, I

don't think, are going to look exactly alike." The trial judge also noted that the witnesses were quite clear in identifying the defendant and that their identifications were based on their recollections of the man's appearance on the night of the robbery.

The defendant now argues that the lineup was suggestive because his complexion was lighter than the others in the lineup, because the detective told Rucker and Curry that the police had a suspect in custody, and because Curry had seen the defendant on television after he had been arrested in Memphis.

A defendant's due process rights may be violated by a lineup if the identification procedure was so suggestive as to give rise to "a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968). To determine whether a pretrial identification procedure was unreasonably suggestive, the United States Supreme Court developed a five-factor test. Neil v. Biggers, 409 U.S. 188 (1972). The factors to be considered in determining whether an identification can withstand a due process attack are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the time between the crime and the confrontation. Neil, 409 U.S. at 199-200.

The degree of reliability of the identification, as indicated by these factors, should be assessed in light of the suggestiveness of the identification procedure and the totality of the circumstances to determine whether a violation of due process has occurred. Sloan v. State, 584 S.W.2d 461, 466 (Tenn. Crim. App. 1978).

The defendant first complains that the lineup was suggestive because his complexion was lighter than the others. We agree that from the photographs provided this Court, the defendant does appear to have lighter skin. While this could be considered somewhat suggestive, we find that it was not so suggestive as to affect the reliability of the identification.[1] Likewise, we find that the fact that Curry and Rucker had been told a suspect was in custody and that Curry had seen the defendant on television does not affect the reliability of the identification.

In the case before us, both Rucker and Curry testified that they had an opportunity to view the man who robbed them. Rucker testified that he had studied the robber while the robber was focused on taking Curry's money. Curry too testified that she had had an opportunity to observe the man, and both witnesses testified as to adequate lighting. Furthermore, unlike casual witnesses to a crime, Curry and Rucker were the targets of the crime, and thus had a significant degree of attention. Curry and Rucker both described the robber with some degree of accuracy, although they were not entirely accurate as to the defendant's age. However, during the lineup procedure, both Curry and Rucker had no difficulty identifying the defendant as the man who robbed them, and both made it quite clear that they based their identification upon their recall of the night of the robbery. And finally, the lineup was held on August 15, 1995, approximately two and a half months from the May 30, 1995, robbery.

Using the Neil factors above and considering the totality of the circumstances, we can only determine that the victims' lineup identification of the defendant was entirely reliable. Therefore, the testimony pertaining to the identification as well as the in-court identifications themselves were properly admitted by the trial court.

---

[1] See State v. Michael L. Kindall, No. 01C01-9503-CR-00061, Davidson County (Tenn. Crim. App. filed Jan. 26, 1996, at Nashville).

This issue has no merit.

The defendant next challenges the sufficiency of the evidence. As such, he 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).

The defendant argues that he was convicted solely upon the identification testimony of Curry and Rucker. His argument is that the lineup identification should have been suppressed, and that if it had, the remaining evidence was insufficient to support his conviction. As stated above, the identification of the defendant by Curry and Rucker was entirely reliable, thus, their testimony and identification of the defendant were properly admitted. Therefore, this issue is without merit. The defendant's convictions are clearly supported by the evidence.

The defendant next contends that the trial court erred when it ordered him to serve two consecutive twenty-five year sentences. He argues that the sentence is excessive and that the trial court erroneously applied at least three enhancement factors. He further submits that the imposition of consecutive sentences was error.

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]henever 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 defendant was convicted of two counts of aggravated robbery, Class B felonies. He was sentenced as a Range III persistent offender and was sentenced to twenty-five years, the midrange point for such an offender on a Class B felony. The trial court applied the following enhancement factors from T.C.A. § 40-35-114: that the

defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range (1); that a victim of the offense was particularly vulnerable because of age (4); that the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community (8); that the defendant had no hesitation about committing a crime when the risk to human life was high (10); and that the felony was committed while the defendant was on parole (13). The defendant now argues that the trial court erred by applying factors one, four, and ten.

As to factor one, the State produced evidence of five previous felony convictions, the number necessary to sentence the defendant as a Range III persistent offender. In addition, the State produced evidence that the defendant had been convicted of misdemeanor theft in May of 1995. The defendant argues that this one misdemeanor conviction does amount to a "history of criminal convictions or criminal behavior." While one misdemeanor conviction is not a significant history, it is history nonetheless. Thus, the enhancement factor is applicable. Once a factor is deemed applicable, it is for the trial court to determine the weight afforded that factor. State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App.1995). Here, the trial judge noted that while factor one was applicable, he would not place a great deal of weight on that factor. Therefore, we can find no error in the trial court's application and slight consideration of this factor.

The defendant next argues that the trial court erred in applying factor four, that the victim was particularly vulnerable because of age. The State concedes that this factor is not applicable in this case. See State v. Adams, 864 S.W.2d 31 (Tenn. 1993). While the trial judge thought this factor applied, he noted again that he would not put much emphasis on it. We find that it was error for the trial court to consider factor four at

all as the State did not prove the existence of this factor.

The defendant also challenges the application of factor ten, that the defendant had no hesitation about committing a crime when the risk to human life was high. Again, the State concedes that this factor was improperly applied. See State v. Claybrooks, 910 S.W.2d 868 (Tenn. Crim. App. 1994). The trial court erred by applying this factor.

The defendant does not challenge enhancement factors eight and thirteen. Thus, these factors, in addition to factor one, were proper consideration for the trial court in sentencing the defendant. The trial court is required to 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. In this case there were no mitigating factors. We find that a midrange sentence is entirely appropriate for this defendant. The three enhancement factors discussed above are sufficient to have enhanced the defendant's sentence five years beyond the minimum sentence. Thus, we affirm the length of the defendant's sentences.

As his final issue, the defendant argues that the trial court erred when it ordered him to serve his sentences consecutively. As noted above, when the defendant committed the instant offenses, he was on parole from an earlier conviction. As such, his sentences in this case must run consecutively to the sentence in which he violated his parole. Tenn. R. Crim. P. 32(c). The defendant does not challenge this portion of his sentence, but he does challenge the trial court's decision to have him serve the two sentences consecutively.

At the sentencing hearing, the trial judge stated that by "looking at this case, this Defendant, his record, the circumstances of the offense, and everything about it," he had determined that consecutive sentences were warranted. The judge further found that the defendant was a professional criminal with convictions dating back to 1974 and that the defendant's criminal record was extensive. The defendant does not contest these findings by the court, rather he argues that the proof did not establish that the sentence imposed was reasonably related to the severity of the offenses committed nor did the proof show that such a sentence was necessary in order to protect the public from further criminal acts committed by him.

Tennessee Code Annotated § 40-35-115 states that a trial court may sentence a defendant to consecutive sentences if the proof establishes that the defendant meets the defined criteria. In addition to this statutory criteria, the proof must show that the terms of the sentence "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." State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995); State v. Zachery L. Barnes, No. 01C01-9704-CC-00138, Rutherford County (Tenn. Crim. App. filed March 5, 1998, at Nashville).

The trial court's decision to run the defendant's sentences consecutively is clearly supported by the record. The defendant's history of criminal convictions demonstrates that such a sentence is necessary to protect the public from further criminal behavior by the defendant. In addition to these two serious convictions, the defendant has been convicted of two other counts of aggravated robbery, one count of grand larceny, one count of burglary of a business, and one count of robbery. Furthermore, in connection with the indictment in this case, the defendant pled guilty to two additional

aggravated robberies. The offenses committed in this last string of events were all committed while the defendant was on parole. Thus, we have no trouble concluding that the record justifies the trial court's conclusion that consecutive sentences are needed to protect the public and that the sentences imposed reasonably relate to the severity of the offenses. See State v. Freeman, 943 S.W.2d 25, 33 (Tenn. Crim. App. 1996); State v. Nix, 922 S.W.2d 894, 904 (Tenn. Crim. App. 1995).

Thus, for the foregoing reasons, we affirm the judgment of the court below.

_____
JOHN H. PEAY, Judge

CONCUR:

_____
JERRY L. SMITH, Judge

_____
THOMAS T. WOODALL, Judge