IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
APRIL SESSION, 1999

STATE OF TENNESSEE,	)	
	)	**No. 02C01-9806-CR-00192**
Appellee	)	
	)	**SHELBY COUNTY**
vs.	)	
	)	**Hon. John P. Colton, Jr., Judge**
MARVIN BEDFORD,	)	
	)	**(Aggravated Robbery)**
Appellant	)	

For the Appellant:

AC Wharton, Jr.
Shelby County Public Defender

Tony N. Brayton
Asst. Public Defender
201 Poplar, Suite 2-01
Memphis, TN 38103

(ON APPEAL)

Barry W. Kuhn
Attorney at Law
5100 Stage Road
Memphis, TN 38134

(AT TRIAL)

For the Appellee:

Michael E. Moore
Solicitor General

Patricia C. Kussmann
Assistant Attorney General
Criminal Justice Division
425 Fifth Avenue North
2d Floor, Cordell Hull Building
Nashville, TN 37243-0493

William L. Gibbons
District Attorney General

James J. Challen, III
Asst. District Attorney General
Criminal Justice Complex, Suite 301
201 Poplar Avenue
Memphis, TN 38103

OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Marvin Bedford, appeals as of right his conviction by a Shelby County jury for aggravated robbery, a class B felony. The appellant was sentenced to eight years confinement in the Department of Correction. In this appeal, he raises as error:

> I. The trial court's ruling that the appellant's prior convictions could be used by the State for impeachment purposes should the appellant testify; and
>
> II. The sufficiency of the convicting evidence.

Finding no error of law requiring reversal, we affirm the judgment entered by the trial court.

Background

On April 30, 1996, Michael Sanders drove his girlfriend to the Regional Medical Center in Memphis for the birth of twins. The vehicle driven by Sanders, a 1989 Ford Escort, was owned by Easy Auto Sales. At the time, Sanders was in the process of completing the purchase of the vehicle. Once at the hospital, Sanders parked the Escort by a parking meter in front of the building. The appellant, an acquaintance of Sanders, arrived at the hospital after the birth of the twins. During the visit, the appellant asked Sanders if he could borrow his vehicle. Sanders refused because he had not paid for the vehicle and the car displayed a dealer tag. Sanders then left the hospital room to use the restroom. When he returned, the appellant and the keys to the Escort were gone. Worried, Sanders went outside to check on his vehicle. The appellant was found seated in the Escort and was attempting to start the engine. When Sanders asked him where he was going, the appellant retorted "I'm leaving." Sanders again told the appellant that he could not take the vehicle. At this point, the appellant "pulled out a pocket knife and stuck it toward the window." Sanders, fearful that he might be harmed, made no further

attempt to stop the appellant from taking his vehicle. The appellant then drove off in the Escort.

Because Sanders "[did not] want to see [the appellant] go to jail," he hesitated about reporting the incident to the police. Instead, Sanders attempted to locate the appellant by calling the appellant's family members and by driving around the neighborhood. Sanders even left a note on the car of the appellant's mother advising that he would be forced to report the incident to the police if the appellant did not return the Escort. Two weeks later, unable to find the appellant or his Escort, Sanders reported the incident to law enforcement authorities.

After filing the complaint with the police, Sanders, while looking for his car in the "New Chicago" area of Memphis, encountered the appellant. The appellant agreed to accompany Sanders in his search for the vehicle. The search proved futile as the vehicle was not at any of the places mentioned by the appellant. Frustrated, Sanders proceeded to the police station. While the appellant remained in the truck, Sanders informed police officers that there was an individual in his truck for whom a warrant had been issued. The appellant was then arrested.[1]

At trial, the appellant chose not to testify. However, in his defense, he presented family members who testified that Sanders had given the appellant permission to borrow his vehicle.

I. Impeachment by Use of Prior Convictions

Prior to trial, the State provided the appellant with notice of its intent to use the appellant's prior convictions for impeachment purposes. At trial, a jury out hearing was held to determine whether the appellant's prior convictions for forgery,

[1]The proof at the appellant's trial revealed that the Escort eventually was recovered. Six weeks after the appellant's arrest, Sanders paid $375.00 to retrieve the Escort from the police impound lot. The car had sustained substantial damage, *i.e.*, the windows were broken, the seats were cut and the tires were cut.

sale of a controlled substance, setting fire with intent to burn, and grand larceny would be admissible to impeach the appellant's testimony should he elect to testify. The trial court found that "the probative value on the credibility outweighs the unfair prejudicial effect on these particular convictions" and permitted the use of these prior convictions for impeachment purposes.[2] Based on the court's ruling, the appellant elected not to testify, but proceeded to present a defense of consent.[3] The appellant now contests the trial court's ruling with regard to his September 14, 1988 convictions for grand larceny and setting fire with intent to burn. Specifically, he contends that his previous conviction for grand larceny is too similar to the present charge of aggravated robbery and that both prior convictions are more prejudicial than probative.

The general rule is that prior convictions can be used to impeach the credibility of the accused in a criminal case who takes the stand in his own defense. See Tenn. R. Evid. 609. Before the State is permitted to impeach an accused's credibility, certain conditions and procedures must be satisfied. The prior conviction must be for a crime punishable by incarceration in excess of one year, or for a crime involving dishonesty or false statement. Tenn. R. Evid. 609(a)(2). See also State v. Blanton, 926 S.W.2d 953, 959 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1996). Such conviction, however, is not admissible if a period of more than ten years has elapsed between the date of release from confinement and commencement of the present action. Tenn. R. Evid. 609(b). The rule also

---

[2]The trial court failed to make explicit findings on the record relative to its ruling on the admissibility of the appellant's prior convictions. Rather, the trial court summarily concluded that the probative value of the prior convictions outweighs its unfair prejudicial effect on the substantive issues. We admonish the trial courts to "explicitly state their reasons for allowing or disallowing the admission of prior conviction evidence for the purpose of impeachment so the appellate courts may properly determine [whether] the rule has been followed in reaching the decision." State v. Long, 607 S.W.2d 482, 485 (Tenn. Crim. App. 1980).

[3]The appellant made an offer of proof outside the presence of the jury. See State v. Martin, 642 S.W.2d 720, 724 (Tenn. Crim. App. 1982)(defendant should make offer of proof so appellate court can assess impact of trial court's ruling). See also NEIL P. COHEN, ET. AL., TENNESSEE LAW OF EVIDENCE § 609.9, footnote 330 (3d ed. 1995). In essence, the appellant stated that he did not rob Michael Sanders. Rather, he stated that Sanders permitted him to use the Escort in order to run an errand. While on this errand, the Escort broke down and the appellant left the vehicle on Manassas Street.

mandates that the State give reasonable written notice prior to trial of the particular convictions it intends to use to impeach the accused. Tenn. R. Evid. 609(a)(3). In the present case, the State provided the appellant with notice of its intended use of the appellant's convictions prior to trial. Moreover, both convictions were punishable by imprisonment in excess of one year, and both convictions were within the ten year limit. Accordingly, we need not address these preliminary criteria in our analysis.

However, before permitting the use of a prior conviction, the trial court must find that the probative value of the conviction on the issue of credibility outweighs its unfair prejudicial effect on the substantive issues. Tenn. R. Evid. 609(a)(3). In making this determination, two factors are critical. The trial court must first consider the similarity between the prior crime and the charged crime. See Blanton, 926 S.W.2d at 959 (citing State v. Farmer, 841 S.W.2d 837, 839 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1992); see also State v. Finch, No. 02C01-9309-CC-00224 (Tenn. Crim. App. at Jackson, June 7, 1995), perm. to appeal denied, (Tenn. 1995)). The more similar the crime, the more prejudicial, and thus, the less likely to be admitted. Next, the court should consider the impeachment value of the prior crime. See Blanton, 926 S.W.2d at 959 (citing Farmer, 841 S.W.2d at 839; see also Finch, No. 02C01-9309-CC-00224). The more probative the prior crime is on the issue of whether the defendant is now telling the truth, the more likely it is to be admitted.

a. Prior Conviction for Grand Larceny

Again, the appellant contends that the trial court erred in permitting use of the appellant's prior conviction for grand larceny because of its similarity to the present charge of aggravated robbery. Indeed, the appellant relies upon the premise that "evidence of a defendant's conviction for an offense similar to the one for which he is presently on trial should not be introduced because there is too great a danger of

it improperly showing a propensity to commit that type of crime." See State v. Smith, No. 02C01-9707-CR-00259 (Tenn. Crim. App. at Jackson, Aug. 10, 1998), perm. to appeal denied, concurring in results only, (Tenn. Feb. 1, 1999)(citations omitted). Although the offense of grand larceny and aggravated robbery both involve an unlawful taking, they remain dissimilar in other respects. Aggravated robbery is an offense against the person, while larceny is a crime against property. Cf. State v. Johnson, No. 02C01-9504-CC-00097 (Tenn. Crim. App. at Jackson, Feb. 27, 1997). Moreover, this court has ruled that the similarity between the case on trial and the prior conviction does not, as a matter of law, render the prior conviction inadmissible.[4] Crimes such as larceny, receiving stolen property and burglary are directly probative of a witness's credibility. See Smith, No. 02C01-9707-CR-00259 (citations omitted). Thus, impeachment through the use of the appellant's prior conviction for grand larceny would not create too great a danger of improperly showing a propensity to commit the crime of aggravated robbery. See, e.g., Johnson, No. 02C01-9504-CC-00097 (prior conviction for larceny permissible to impeach accused in charge for robbery). Accordingly, the probative value of permitting use of this conviction far outweighs any prejudicial effect. This claim is without merit.

b. Prior Conviction for Setting Fire with Intent to Burn

At the *"609"* hearing, the State did not advance any specific argument to establish the relevance of this conviction to the appellant's credibility, nor did the trial court offer any opinion warranting any rational basis for making such a conclusion. Although the appellant concedes that the offense of "setting fire with intent to burn"

[4] See, e.g., State v. Gibson, 701 S.W.2d 627, 628-629 (Tenn.Crim.App.1985) (prior drug convictions admissible in prosecution for possession of drugs); State v. Goad, 692 S.W.2d 32, 37 (Tenn.Crim.App.1985) (prior conviction for armed robbery admissible in prosecution for armed robbery); State v. Norris, 684 S.W.2d 650, 654 (Tenn.Crim.App.1984) (prior conviction for armed robbery admissible in prosecution for murder first degree and armed robbery); Johnson v. State, 596 S.W.2d 97, 104 (Tenn.Crim.App.1979) (prior conviction for burglary admissible in prosecution for burglary).

is not in any way similar to the offense of aggravated burglary, he does contend that this offense has no relevance whatsoever as to the issue of credibility.

In determining whether a crime is probative of one's credibility, the court must look at both the technical elements of the statutory offense and the actual circumstances supporting the conviction. In the present case, the failure of the State to introduce the circumstances of the appellant's conviction for setting fire with intent to burn precludes this court from making this determination. Absent such facts, we are unable to assess the impeachment value of the offense. Accordingly, the trial court's ruling permitting the State to use the appellant's prior conviction for "setting fire with intent to burn" was erroneous. Notwithstanding this holding, however, we do not wish to infer that all crimes of this nature are absent any indicia of dishonest conduct. Cf. State v. Young, No. 01C01-9601-CC-00195 (Tenn. Crim. App. at Nashville, Aug. 15, 1997), perm. to appeal denied, (Tenn. Mar. 2, 1998) (offense of arson not probative of credibility). But see State v. Hunter, No. 30 (Tenn. Crim. App. at Jackson, Feb. 8, 1989) (crime of arson relevant to credibility).

Although error, we conclude that the trial court's ruling permitting the State to use the conviction for "setting fire with intent to burn" was harmless given the facts and circumstances of this case. Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a); see also Farmer, 841 S.W.2d at 840. The appellant elected not to take the witness stand based on the trial court's ruling. Accordingly, none of the appellant's prior convictions were introduced during the guilt phase of the trial. However, the appellant did make an offer of proof regarding his intended testimony. See Martin, 642 S.W.2d at 724 (offer of proof aids appellate court in assessing impact of trial court's error). The offer of proof reveals that the appellant's testimony was merely cumulative to the testimony of his mother, brother, and niece. See *supra* note 3. In other words, the appellant's theory of the case was adequately presented to the jury by these witnesses. Moreover, since the State could have properly impeached the

appellant with prior convictions for grand larceny, forgery, and sale of a controlled substance, the impact of impeachment by evidence of one more offense, *i.e.*, "setting fire with intent to burn," is insignificant. See Martin, 642 S.W.2d at 724. This issue is without merit.

II. Sufficiency of Convicting Evidence

In his final issue on appeal, the appellant challenges the sufficiency of the evidence necessary to uphold his conviction. Although he concedes that he "cannot argue . . . that there is no evidence to support his conviction in light of the testimony of Sanders," he contends that the testimony of Sanders, the State's sole witness, is not credible. Indeed, he supports his argument with evidence of Sanders' prior conviction for armed robbery, Sanders' failure to immediately report the crime, the State's failure to produce any other witnesses, and his assertion that Sanders' behavior is inconsistent with the actions of a "true victim" of aggravated robbery.

The appellant's challenge is one of witness credibility. In essence, the appellant requests that this court trespass upon the jury's responsibility to evaluate the credibility of the witnesses and reweigh the evidence introduced at the trial by reassessing the credibility of the victim, Michael Sanders. It is not the duty of this court to revisit questions of witness credibility on appeal, that function being within the province of the trier of fact. See generally State v. Adkins, 786 S.W.2d 642, 646 (Tenn. 1990); State v. Burlison, 868 S.W.2d 713, 718-19 (Tenn. Crim. App. 1993); State v. Matthews, 805 S.W.2d 776, 779 (Tenn.Crim.App.1990). We decline the appellant's invitation to overturn his conviction by making a choice different from that of the jury.

Moreover, we conclude that the evidence is more than sufficient to support the jury's verdict. The evidence, taken in the light most favorable to the State,

reveals that the appellant "pulled out a pocketknife and stuck it toward the window" at the victim. "[B]ecause [Sanders] didn't want to get cut . . .[and] [he] had fear then," Sanders "just backed up and walked away." The appellant then drove off in the victim's Ford Escort. This proof is more than sufficient to establish the elements of aggravated robbery.[5] Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e). This issue is without merit.

Based on this court's review of the record on appeal, we find no error of law requiring reversal. The judgment of the trial court is affirmed.

_____
DAVID G. HAYES, Judge

CONCUR:

_____
JOSEPH M. TIPTON, Judge

_____
L. T. LAFFERTY, Senior Judge

[5]See Tenn. Code Ann. § 39-13-402(a)(1).