IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs April 8, 2020

STATE OF TENNESSEE v. GORDON LYNN DUNKIN

Appeal from the Circuit Court for Henderson County
No. 19041-2 Donald H. Allen, Judge

No. W2019-01684-CCA-R3-CD

Gordon Lynn Dunkin, Defendant, was indicted for theft of property "equal to or over" the value of $2,500.00, a Class D felony, and a jury convicted him of the lesser offense of theft of property in the value of more than $1,000.00, but less than $2,500.00, a Class E felony. Following a sentencing hearing, the trial court determined Defendant to be a Range I standard offender and sentenced him to two years' incarceration. On appeal, Defendant claims that there was insufficient evidence to sustain the conviction and that the trial court erred in not sentencing him to an alternative sentence. Discerning no error, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and ROBERT H. MONTGOMERY, JR., JJ., joined.

George Morton Googe, District Public Defender, and Hayley F. Johnson, Assistant District Public Defender, for the appellant, Gordon Lynn Dunkin.

Herbert H. Slatery III, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Jody S. Pickens, District Attorney General; and Angela Scott, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Jury Trial

Stephanie Honeywell testified that, in August of 2018, she reported that her blue 2006 Nissan Rogue had been stolen in Manchester, Tennessee. Ms. Honeywell initially

thought her stepson, Hunter Taylor, was responsible for taking her vehicle without her permission, and a warrant issued for Mr. Taylor's arrest. According to Ms. Honeywell, Mr. Taylor ultimately pleaded guilty to theft. She was notified by a law enforcement officer that her vehicle had been found in Henderson County. When she recovered the vehicle, the transmission was damaged, and the vehicle was missing its hubcaps and keys. Ms. Honeywell testified that she bought the vehicle for approximately $8,000 in March 2018 and that it was in about the about the same condition at the time it was stolen as when she bought it. Ms. Honeywell did not know Defendant and did not give him permission to have her vehicle. She said that she paid $125.00 to have the vehicle towed to Manchester, $80.00 for new keys, and $296.33 for new hubcaps. She said that the purchase and installation of a remanufactured transmission would cost $3,243.75.

Deputy Katie Carroll of the Henderson County Sheriff's Department (HCSD) testified that on August 29, 2018, at the request of someone named "Matt," she conducted a "welfare check" on Cecily Alexander on Poplar Springs Bargerton Road in Lexington, Tennessee. She knocked on the door of the residence, and Defendant answered the door and let her come inside. She stated that, in addition to Defendant, two other men, Nick Fowler and Lucas Larue, were in the residence. When questioned about Ms. Alexander, Defendant told Deputy Carroll that Ms. Alexander had not been there in a few days.

Defendant gave Deputy Carroll consent to search his home and the property to see if Ms. Alexander was there. While conducting the search of the property, Deputy Carroll saw a vehicle "partially covered by a tarp" in some weeds near the house. She said that the vehicle was clearly visible from the front door. When she inspected the vehicle, she saw that it was a blue Nissan with Coffee County tags. Deputy Carroll ran the tags and learned that the vehicle had been reported stolen. Defendant told Deputy Carroll that he "didn't know anything about" the vehicle and did not "know where the vehicle came from." During the search of the house, Deputy Carroll found the vehicle's radio on the bed in Defendant's bedroom. Deputy Carroll contacted HCSD Investigator Alan Nowell.

Investigator Nowell arrived at Defendant's residence before Deputy Carroll left. He testified that Defendant at first denied knowledge of a theft but that Defendant later stated that a man named "Scotty Tubbman" brought the Nissan "to him and Cecily Alexander" and left it there. He said that Ms. Alexander and Mr. Tubbman later told him that it was stolen. Investigator Nowell testified that the vehicle was missing hubcaps and the radio from the center dash. Defendant claimed that "he didn't know how [the radio] got on his bed." Investigator Nowell arrested Defendant and charged him with theft of property "equal to or over" the value of $2,500.00. During cross-examination, Investigator Nowell affirmed that Defendant told him "that someone named Scotty and Cecily had shown up with this vehicle." Investigator Nowell said that he "tried to look up both those subjects," but he "didn't find either one of them, neither one of them were

on the scene with the property, and [Investigator Nowell] knew [Defendant] had already lied to [them] once about it, so [he] really couldn't take his word after that."

Defendant testified that he owned the house on Poplar Springs Bargerton Road and had lived there for about three years. He stated that Ms. Alexander was "[j]ust a friend" who "just drops by for hours at a time" but did not live there. He admitted that he knew about the stolen vehicle before Deputy Carroll asked him about it, and he explained that "[Ms. Alexander] introduced me to this Scotty Tubbman and I tried to be good to them, but when I heard stolen, I run them off, and that's about it." On direct examination, when asked when he told Ms. Alexander and Mr. Tubbman to leave, he answered, "I guess it was right about seven, eight that night before, something like that." He claimed that he had not been outside before Deputy Carroll came to his house that morning, so he "didn't know that they'd come back and parked [the vehicle] there." When asked why he did not call the police when he found out that the vehicle was stolen, he claimed that he had not had his phone for three days. He explained, "Because I didn't know it till I got out of jail, but that [Mr.] Larue had my phone the whole time he was there because I found pictures on my cloud after I got out of jail [that] showed he had my phone." Defendant denied taking anything out of the vehicle or seeing anyone take anything out of the vehicle.

Following deliberations, the jury found Defendant guilty of the lesser-included offense of theft of property in the value of more than $1,000, but less than $2,500.

Sentencing Hearing

The investigative report was entered without objection as Exhibit 1, and certified judgments showing that Defendant was convicted of lewd and lascivious acts with a minor and purchase of cocaine from Hillsborough County, Florida, were entered as Exhibit 2.

Sandra Doreen Gussmus, Defendant's older sister, testified that she was "the one that pretty much took care of" Defendant and their other brother. She stated she and her husband lived in Alabama. She said that Defendant had a head injury from an accident when he was young and had "blackout spells." She said that, although he had difficulty learning, he could do anything with his hands. She said that he could barely read and that he dropped out of school in the ninth grade. She said that he was always a hard worker and had his own concrete business in Florida. She said that he "had gotten involved with a girl, a young girl" and was incarcerated in Florida. She claimed the girl's parents wanted them to get married, but she was underage. When Defendant was released from custody, he moved to Henderson County to help his mother. She stated that Defendant was "very adamant" about complying with the sexual offender registration requirements.

She said that Defendant was divorced and currently on disability for mental issues. She claimed that Defendant was never someone who could make it on his own. She said that she "came up here and got him and took him home, fed him, and [] gave him a car" and that she and Defendant were "in the process of hi[s] selling his home to move back to Alabama[.]"

After argument, the trial court found that Defendant "had knowledge that the vehicle was on his property," that the radio that had been removed from the vehicle was on his bed, and that he admitted he knew the vehicle was stolen. The court found that Defendant was "a Range I standard offender, although he has two felony convictions" from Florida. The court determined that the Florida cocaine conviction would be considered a Class A misdemeanor in Tennessee. The court noted that Defendant served an eighteen-month sentence for a cocaine conviction and a fifty-four-month sentence for a lewd and lascivious act involving a minor conviction. The court found that Defendant had six misdemeanor convictions in Henderson County. The court gave great weight to Defendant's history of criminal convictions. Based on the presentence report, the court gave great weight to the prior illegal drug usage by Defendant, including recent use of marijuana. The court said that Defendant had been to two treatment facilities but left both before completing the program. The court found that Defendant had previously failed to comply with conditions of release into the community, noting that his probation for the lewd and lascivious act involving a minor had been revoked and that Defendant had been ordered to serve his sentence. The court found that Defendant's "criminal conduct in this case neither caused nor threatened bodily injury" but gave only slight weight to that as a mitigating factor. The court found that, after being released from incarceration in Florida, Defendant moved to Tennessee and continued his criminal activity. The court found that "means less restrictive than confinement have [been] applied . . . without success" and that "a sentence of probation would unduly depreciate the seriousness of this offense, especially in light of his recent drug history and also his prior criminal history." The court sentenced Defendant to two years to serve, and Defendant timely appealed.

Analysis

Defendant claims that there was insufficient evidence to sustain the conviction for theft of property and that the trial court erred in not sentencing him to an alternative sentence. The State argues that the evidence was sufficient and that the trial court did not err in sentencing Defendant to two years' confinement. We agree with the State.

Sufficiency of the Evidence

Our standard of review for a sufficiency of the evidence challenge 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 (1979) (emphasis in original); *see also* Tenn. R. App. P. 13(e). Questions of fact, the credibility of witnesses, and weight of the evidence are resolved by the fact finder. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh the evidence. *Id*. Our standard of review "is the same whether the conviction is based upon direct or circumstantial evidence." *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)) (internal quotation marks omitted).

A guilty verdict removes the presumption of innocence, replacing it with a presumption of guilt. *Bland*, 958 S.W.2d at 659; *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant bears the burden of proving why the evidence was insufficient to support the conviction. *Bland*, 958 S.W.2d at 659; *Tuggle*, 639 S.W.2d at 914. On appeal, the "State must be afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom." *State v. Vasques*, 221 S.W.3d 514, 521 (Tenn. 2007). "A jury verdict approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory." *State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983).

Theft of Property

"A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." Tenn. Code Ann. § 39-14-103(a) (2018). Theft of property valued at more than one thousand dollars ($1,000) but less than two thousand five hundred dollars ($2,500) is a Class E felony. Tenn. Code Ann. § 39-14-105(a)(2) (2018).

During a consensual search of Defendant's residence and real property, Deputy Carroll saw a vehicle "partially covered by a tarp" in some weeds. She said that the vehicle was clearly visible from the front door of Defendant's residence. Upon inspection, she noticed that the vehicle had an out of county license plate. When she ran the license plate through the HCSD's data system, she discovered that the vehicle had been reported stolen. The radio removed from the vehicle was found on Defendant's bed. Defendant admitted that he knew the vehicle was stolen.

Ms. Honeywell testified that she purchased her blue 2006 Nissan Rogue for approximately $8,000.00 in March 2018 and that it was in about the same condition at the

time it was stolen as when she bought it. She said that she paid $125.00 to have the vehicle towed to Manchester, $80.00 for new keys, and $296.33 for new hubcaps. She said that installation of a remanufactured transmission would cost $3,243.75. She did not know Defendant and did not give him permission to have her vehicle. The proof was sufficient for the jury to determine that Defendant knowingly obtained or exercised control over Ms. Honeywell's vehicle without her consent and with the intent to deprive Ms. Honeywell of property valued at more than one $1,000.00 but less than $2,500.00.

Sentencing

A trial court's within-range sentencing decisions, if based upon the purposes and principles of sentencing, are reviewed under an abuse of discretion standard, accompanied by a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). The same standard applies to "questions related to probation or any other alternative sentence." *State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012). "*Bise* specifically requires trial courts to articulate the reasons for the sentence in accordance with the purposes and principles of sentencing in order for the abuse of discretion standard with a presumption of reasonableness to apply on appeal." *State v. Pollard*, 432 S.W.3d 851, 861 (Tenn. 2013) (citing *Bise*, 380 S.W.3d at 698-99); *see also State v. Trent*, 533 S.W.3d 282, 292 (Tenn. 2017). When a qualified defendant seeks an alternative sentence and the trial court fails to articulate the reasons for denying the alternative sentence, the "abuse of discretion standard with a presumption of reasonableness" does not applying on appeal. *Caudle*, 388 S.W.3d at 278-79

Purposes and Principles of Sentencing

Tennessee Code Annotated section 40-35-102, states that "[t]he foremost purpose of [the Tennessee Criminal Sentencing Reform Act of 1989] is to promote justice, as manifested by [section] 40-35-103." Subsection 40-35-102(3) provides:

> (3) Punishment shall be imposed to prevent crime and promote respect for the law by:
>
> > (A) Providing an effective general deterrent to those likely to violate the criminal laws of this state;
> >
> > (B) Restraining defendants with a lengthy history of criminal conduct;
> >
> > (C) Encouraging effective rehabilitation of those defendants, where reasonably feasible, by promoting the use of alternative sentencing

> and correctional programs that elicit voluntary cooperation of defendants; and
>
> (D) Encouraging restitution to victims where appropriate[.]

Tenn. Code Ann. § 40-35-102(3) (2018).

Tennessee Code Annotated section 40-35-103, which lists certain principles to be applied to implement the purposes of sentencing, provides:

> (1) Sentences involving confinement should be based on the following considerations:
>
> > (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
> >
> > (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
> >
> > (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Tenn. Code Ann. § 40-35-103(1) (2018).

Defendant, who was a Range I standard offender convicted of Class E felony theft of property, was statutorily eligible for an alternative sentence. Although eligible for full probation, "the burden of establishing suitability for probation rests with [D]efendant." Tenn. Code Ann. § 40-35-303(b) (2018).

The trial court found that Defendant served an eighteen-month sentence for a cocaine conviction and a fifty-four-month sentence for a lewd and lascivious act involving a minor. The court found that Defendant had six misdemeanor convictions since moving from Florida to Henderson County. The court found that, after being released from incarceration in Florida, Defendant moved to Tennessee and continued his criminal activity. The court gave great weight to Defendant's history of criminal convictions and conduct, including prior illegal drug usage and recent use of marijuana. The court did not err in finding that "[c]onfinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct" under Tennessee Code Annotated section 40-35-103(1)(A).

The trial court found that "a sentence of probation would unduly depreciate the seriousness of this offense, especially in light of his recent drug history and also his prior criminal history." The court did not err in finding that "[c]onfinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses" under Tennessee Code Annotated section 40-35-103(1)(B).

The trial court found that Defendant had previously failed to comply with conditions of release into the community because his probation for the lewd and lascivious act involving a minor had been revoked and Defendant had been ordered to serve his sentence. The court noted that Defendant had been to two treatment facilities but left both before completing the program. The court did not err in finding that "[m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant" under Tennessee Code Annotated section 40-35-103(1)(C).

The trial court articulated on the record the factors it considered for ordering Defendant to serve the within-range, two-year sentence. We therefore review sentencing under an abuse of discretion standard with a presumption of reasonableness. The court did not abuse its discretion in denying an alternative sentence and by sentencing Defendant to two years to serve.

Conclusion

The judgment of the trial court is affirmed.

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ROBERT L. HOLLOWAY, JR., JUDGE