

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs December 2, 2014

STATE OF TENNESSEE v. DEREK HORNE

Appeal from the Criminal Court for Shelby County
No. 12-03720 James M. Lammey, Jr., Judge

No. W2014-00333-CCA-R3-CD - Filed January 13, 2015

The defendant, Derek Horne, appeals his Shelby County Criminal Court jury convictions of aggravated robbery, aggravated burglary, and employing a firearm during the commission of a dangerous felony, claiming that the evidence was insufficient to support his conviction of the latter. We affirm the convictions but remand for correction of clerical errors in one of the judgments.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed and Remanded

JAMES CURWOOD WITT, JR., J., delivered the opinion of the Court, in which D. KELLY THOMAS, JR., and ROGER A. PAGE, JJ., joined.

Andrew R. E. Plunk (at trial and on appeal) and Claiborne H. Ferguson (at trial), Memphis, Tennessee, for the appellant, Derek Horne.

Robert E. Cooper, Jr., Attorney General and Reporter; Caitlin Smith, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Jennifer Nichols and Eric Christensen, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

In August 2013, the Shelby County Criminal Court grand jury charged the defendant with one count each of aggravated robbery, aggravated burglary, and employing a firearm during the commission of a dangerous felony. The trial court conducted a jury trial in September 2013.

The State's proof at trial showed that on March 29, 2012, the defendant contacted his cousin, Edarious Hill, and asked Mr. Hill to drive him to an area near the University of Memphis campus. Mr. Hill arrived at the defendant's house in the late

afternoon, and the defendant, who was carrying a backpack, got into Mr. Hill's vehicle and directed Mr. Hill to a street near Reece Street. The defendant got out of the car with his backpack, and Mr. Hill watched him disappear between two houses. Mr. Hill was aware that the defendant intended to commit a burglary, but Mr. Hill did not know which house was the defendant's intended target. A few minutes later, the defendant called Mr. Hill's cellular telephone and informed Mr. Hill that he was "around the corner" on "Reece" street. Approximately 10 to 15 minutes later, Mr. Hill moved his vehicle to a different street because he became uncomfortable "just sitting in one spot."

Mr. Hill called the defendant and urged him to hurry. The defendant then called Mr. Hill and informed him that "[t]hey done pulled up." When Mr. Hill asked who the defendant meant, the defendant replied, "The people." The defendant asked Mr. Hill to wait a moment, and Mr. Hill then heard a young woman scream. Mr. Hill asked the defendant who had screamed, and the defendant stated, "The lady." When Mr. Hill asked the defendant what he was doing, the defendant replied, "Nothing," and he ended the call.

A few minutes earlier at 4:30 p.m., Kayla Grace, a nursing student at the University of Memphis, finished her classes for the day and proceeded to her residence at 480 South Reece Street, which she shared with two roommates. While en route, Ms. Grace spoke to her friend, Natalie Smith, by telephone, and the two discussed meeting for dinner later that evening. When Ms. Grace reached her residence, she unlocked the door, entered the house, set down her backpack, and realized that the interior lights were not working. Ms. Grace mentioned to Ms. Smith that the power must be out. As Ms. Grace was attempting to turn on a light in the hallway, "someone spun [her] around, and they held a gun to [her] and said . . . , 'Give me all your money.'" Ms. Grace screamed and dropped her telephone, causing the call with Ms. Smith to end abruptly. Ms. Grace recalled that the gun wielded by the defendant was "a small silver handgun." Ms. Grace immediately gave the man, whom she identified in court as the defendant, her wallet.

The defendant then asked Ms. Grace "where the Mac Book computer was." Although the computer was inside Ms. Grace's backpack, Ms. Grace told the defendant that she did not have it with her because she had all of her nursing work in her backpack. The defendant then demanded to know to whom Ms. Grace had been talking and insisted that Ms. Grace return the call to tell Ms. Smith that everything was alright. The defendant threatened to kill both Ms. Grace and Ms. Smith if Ms. Smith arrived at the house to check on her well-being. Just then, Ms. Smith called Ms. Grace's telephone. With the defendant pointing his gun at her, Ms. Grace told Ms. Smith that she had tripped on an air vent and fallen but that she was alright. Ms. Smith inquired if Ms. Grace was being held hostage, and Ms. Grace insisted that she was fine and that she would meet Ms. Smith later. Ms. Grace ended the call, and the defendant took her telephone.

The defendant instructed Ms. Grace to go upstairs, but Ms. Grace refused. The defendant then forced Ms. Grace to “get on [her] hands and knees on the kitchen floor” while he retrieved two computers from outside the house and placed them in his backpack. The defendant walked Ms. Grace into her room and kicked her backpack, asking what was inside. Ms. Grace told him it was only nursing books, but the defendant forced her to open the backpack, revealing Ms. Grace’s Mac Book laptop computer. Ms. Grace apologized, and the defendant forced Ms. Grace at gunpoint to give the computer to him. Ms. Grace testified at trial that, with the exception of a 10-second time period in which the defendant placed the gun in his pocket to retrieve the computers he left outside, the defendant kept the handgun out “the whole time.”

While the defendant ransacked Ms. Grace’s room searching for other items to steal, the defendant’s cellular telephone continued to ring. The defendant finally answered the telephone and told the caller, “I’m almost ready – I’m almost done.” The defendant told Ms. Grace to get back onto her hands and knees. He informed her that he would return in one hour and that, if he saw a police car at the house, “he wasn’t even going to wait until tomorrow; that he was going to kill [her] in [her] sleep that night.” He also instructed Ms. Grace to tell people that a white man had robbed her. The defendant left the room but returned a moment later, saying, “I’m sorry I have to do this, but I just can’t trust you.” The defendant then put the gun to Ms. Grace’s head and cocked it before fleeing from the house.

When the defendant returned to Mr. Hill’s vehicle, Mr. Hill noticed that the defendant’s backpack contained three laptop computers, a cellular telephone that Mr. Hill knew did not belong to the defendant, and a small handgun. Later that evening, Mr. Hill drove the defendant to a fast food restaurant where the defendant sold one of the computers. The defendant paid Mr. Hill \$50 for his services, and Mr. Hill denied that anyone else was involved in the robbery and burglary on March 29.

After the defendant fled from Ms. Grace’s residence, Ms. Grace sought help from a neighbor who contacted the police. Memphis Police Department (“MPD”) officers who responded to the scene found that the interior security alarm keypad had been removed from the wall; an exterior chair had been placed beneath a window which was slightly ajar; and the exterior electrical meter had been removed from the house and was on the ground. Two televisions were sitting in the backyard, and Ms. Grace’s computer, along with the laptop computers of her two roommates, were missing. After the defendant was identified as a suspect, officers went to his home, and the defendant’s mother gave permission for the officers to search her residence. In the defendant’s bedroom, officers found the defendant’s black backpack with the loaded handgun inside of it.

In early April, Brian Kemp, a cable installer and repair technician, noticed a

listing on an internet site for a \$180 Mac Book computer. Mr. Kemp contacted the seller and arranged to meet him at a fast food restaurant to purchase the computer. Mr. Kemp identified the defendant as the seller of the computer. After repairing the computer, Mr. Kemp sold it to a friend. One day later, Mr. Kemp sent a text message to the defendant, asking if the defendant had any other computers for sale. Shortly thereafter, Mr. Kemp was contacted by the MPD and informed that the Mac Book he had purchased from the defendant had been stolen. Mr. Kemp retrieved the computer from his friend and turned it over to the MPD.

Following Ms. Grace's identification of the defendant through a photographic lineup, MPD Sergeant Kevin Brown brought the defendant in for questioning on April 8. The defendant signed a rights waiver form and agreed to speak with Sergeant Brown. He explained that he had selected Ms. Grace's residence to burglarize based on an application on his cellular telephone that indicated the presence of a Mac Book computer inside that house. The defendant, who gave a signed statement, admitted that he broke into Ms. Grace's house and stole the computers; that he was familiar with the process to disconnect electrical meters; that he owned a silver handgun; that he had threatened Ms. Grace; and that "he had the gun out and told [Ms. Grace] not to move." The defendant, however, insisted that someone named "Markel" had been the mastermind of the burglary and that he had only assisted. Sergeant Brown stated that no one named Markel was ever linked to the crimes at issue.

With this evidence, the State rested. Following the trial court's denial of the defendant's motion for judgments of acquittal and a *Momon*¹ colloquy, the defendant elected not to testify and chose not to present any proof. Based on this evidence, the jury convicted the defendant as charged of aggravated robbery, aggravated burglary, and employing a firearm during the commission of a dangerous felony. Following a sentencing hearing, the trial court sentenced the defendant to 12 years for the aggravated robbery conviction and 6 years for both the aggravated burglary conviction and the conviction of employing a firearm during the commission of a dangerous felony. The trial court ordered all three sentences to be served consecutively to one another for a total effective sentence of 24 years.

Following the denial of his timely but unsuccessful motion for new trial, the defendant filed a timely notice of appeal. In this appeal, the defendant contends only that the evidence was insufficient to prove that he "possessed a firearm with the intent to go armed during the commission of the offense" and that the evidence did not establish that he "actually possessed the firearm with the requisite intent."

We review the defendant's claim of insufficient evidence mindful that our

¹See *Momon v. State*, 18 S.W.3d 152, 161-62 (Tenn. 1999).

standard of review is whether, after considering 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. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324 (1979); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011).

When examining the sufficiency of the evidence, this court should neither reweigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Id.* Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, this court must afford the State the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id.*

As charged in count three of the indictment, “it is an offense to employ a firearm during the . . . [c]ommission of a dangerous felony.” T.C.A. § 39-17-1324(b)(1). Aggravated burglary is one of the enumerated dangerous felonies contemplated by this statute. *See* T.C.A. § 39-17-1324(i)(1)(H).

Before reaching the issue of the sufficiency of the evidence, we must note that the defendant’s argument that the State failed to prove that he “possessed a firearm with the intent to go armed” is inapt. The defendant was not convicted of possession of a firearm with the intent to go armed during the commission of a dangerous felony; rather, he was convicted of *employing* a firearm during the commission of a dangerous felony. *Compare* T.C.A. § 39-17-1324(a) *with* § 39-17-1324(b)(1). Despite the defendant’s mistake, we will address the sufficiency of the evidence as pertains to the conviction of employing a firearm during the commission of the dangerous felony of aggravated burglary.

The proof at trial established that the defendant asked Mr. Hill to drive him to a specific area near the University of Memphis where he had learned of the presence of a Mac Book computer. Mr. Hill was aware that the defendant intended to commit a burglary, and Mr. Hill testified that the defendant left Mr. Hill’s vehicle on March 29 carrying a backpack. The defendant then proceeded to break into Ms. Grace’s home, where he moved the laptop computers of her two roommates and two televisions into the backyard. When Ms. Grace entered her home and encountered the defendant, the defendant kept his handgun out “the whole time,” using it to threaten Ms. Grace and force her to comply with his demands to move through the house, assure Ms. Smith that all was well, and relinquish her computer. When the defendant returned to Mr. Hill’s vehicle following the burglary, Mr. Hill saw the

handgun inside the defendant's backpack, and MPD officers found the loaded handgun still inside the defendant's backpack when they searched his house days later. The defendant admitted to Sergeant Brown that he had used a handgun during his crimes against Ms. Grace.

Viewing this evidence in the light most favorable to the prosecution, we hold the evidence adduced at trial overwhelmingly supports the defendant's conviction of employing a firearm during the commission of a dangerous felony.

We detect, however, errors that require correction in the judgment for the conviction of employing a firearm during the commission of a dangerous felony. Based on the transcript of the sentencing hearing and the defendant's judgment for aggravated burglary, it is clear that the defendant was considered a standard, Range I offender. In the judgment for employing a firearm, however, the trial court, in the release eligibility section, checked the box for "Violent 100%" and checked nothing in the section for offender status. Tennessee Code Annotated section 39-17-1324(h)(1) provides that a violation of subsection (b) "is a Class C felony, punishable by a mandatory minimum six-year sentence to the department of correction." Given the trial court's ruling at the sentencing hearing that "the employing a firearm" conviction is a "mandatory" six-year sentence, we believe the trial court was attempting to effectuate the mandatory minimum sentence by indicating release eligibility at 100 percent. However, because the defendant is a standard offender, the judgment must be corrected.

Accordingly, on remand, the trial court shall enter an amended judgment to acknowledge the defendant's status as a standard offender; to remove the designation for release eligibility of "Violent 100%"; and to enter the sentence length of six years in the section for "Mandatory Minimum Sentence Length" for the violation of section 39-17-1324. In all other respects, the judgments of the trial court are affirmed.

JAMES CURWOOD WITT, JR., JUDGE