

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE**

**AT JACKSON**

**OCTOBER 1999 SESSION**

**FILED**

**March 15, 2000**

**Cecil Crowson, Jr.**

**Appellate Court Clerk**

**STATE OF TENNESSEE,**

Appellee,

v.

**GREGORY DAVIS,**

Appellant.

\* C.C.A. NO. W1999-02113-CCA-R3-CD

\* SHELBY COUNTY

\* Hon. Joseph B. Dailey, Jr., Judge

\* (Aggravated Burglary, Theft Over \$1,000,  
Evading Arrest)

\*

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OPINION FILED: \_\_\_\_\_

AFFIRMED

NORMA MCGEE OGLE, JUDGE

## OPINION

On November 4, 1998, the appellant, Gregory Davis, was convicted by a jury in the Shelby County Criminal Court of aggravated burglary, theft over \$1,000, and evading arrest. On January 14, 1999, the trial court sentenced the appellant as a persistent Range III offender to thirteen years incarceration for aggravated burglary, ten years incarceration for theft of property over \$1,000, and five years incarceration for evading arrest. The trial court also ordered that the aggravated burglary sentence be served consecutively to the theft sentence, and that the evading arrest sentence be served concurrently with the theft sentence for an effective sentence of twenty-three years incarceration in the Tennessee Department of Correction.

In this appeal as of right, the appellant presents the following issues for our review:

- (I) Whether the evidence is sufficient to sustain the appellant's convictions of aggravated burglary, theft over \$1,000, and evading arrest;
- (II) Whether the trial court erred by sentencing the appellant as a Range III offender, imposing an effective sentence of twenty-three years, and ordering the aggravated burglary sentence to be served consecutively to the theft sentence.

Following a review of the record and the parties' briefs, we affirm the judgment of the trial court.

### I. Factual Background

In the early morning hours of October 8, 1997, Laura Scheidt and her husband were asleep in their residence in Shelby county. At approximately 4:00 a.m., the Scheidts were awakened by the sound of their burglar alarm. Mr. Scheidt

went into the kitchen where he discovered that a window had been pried open. He also noticed muddy footprints leading from the open window to a doorway where Ms. Scheidt's purse had been hanging. The purse was missing. Outside the house, the Scheidts found an ice chest which had been placed under the open window. Also located nearby was a metal tool which had been used to pry open the window.

Later that morning, Ms. Scheidt received a telephone call from a neighbor, James Clark. Clark informed Ms. Scheidt that he had found several items belonging to her scattered across his front yard. As Ms. Scheidt walked to the Clark residence, she found additional items from her purse littered along the street. Ms. Scheidt stated that she had not given anyone permission to enter the house or take her black purse.

At approximately 5:15 a.m., that same morning, James Clark was leaving to go to work when noticed his wife's red Ford Aerostar minivan was missing from the driveway. Clark's car, which was parked in the driveway, had been vandalized and a key to the minivan that had been hidden under the floor mat of his car was missing. Scattered across Clark's yard were various papers and other items belonging to Ms. Scheidt. Clark stated that he had purchased the minivan in 1992 at a cost of more than \$10,000. He testified that he had not given anyone permission to drive the minivan.

At approximately 9:00 a.m., on October 8, 1997, Officers T. J. Ellis and Robert Campbell, of the Memphis Police Department, were monitoring traffic when they noticed a red Ford minivan traveling ten miles per hour over the speed limit. When the officers activated their blue lights and attempted to stop the minivan, the vehicle slowed down as if preparing to stop. Before coming to a stop, the minivan

again accelerated and the officers pursued it into a trailer park. The driver jumped from the minivan and was apprehended in a nearby wooded area. Officer Campbell searched the minivan and found Laurie Scheidt's black purse and a check made payable to Linda Clark.<sup>1</sup> Both officers identified the appellant as the driver of the minivan, and both officers identified the appellant in court as the man they apprehended.

## **II. Analysis**

### **Sufficiency of the Evidence**

The appellant contends that the evidence is not sufficient to sustain his conviction of aggravated burglary, theft over \$1,000, and evading arrest. Specifically, the appellant argues that the prosecution did not carry its burden of proof because the two victims of the crimes testified that they did not see the perpetrator commit the crimes.

In Tennessee, appellate courts accord considerable weight to the verdict of a jury in a criminal trial. In essence, a jury conviction removes the presumption of the defendant's innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will not support the jury's findings. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The appellant must establish that "no reasonable trier of fact" could have found the essential elements of the offenses beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn R. App. P. 13(e).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom.

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<sup>1</sup>Linda Clark is James Clark's wife.

State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

Although the evidence of the appellant's guilt is circumstantial in nature, a criminal offense may be established by circumstantial evidence alone. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987); State v. Lequire, 634 S.W.2d 608, 614 (Tenn. Crim. App. 1987); Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958). Moreover, burglary may be established by circumstantial evidence. State v. Holland, 860 S.W.2d 53, 59 (Tenn. Crim. App. 1993); State v. Bohanan, 745 S.W.2d 892, 895 (Tenn. Crim. App. 1987); Henry v. State, 562 S.W.2d 446, 447 (Tenn. Crim. App. 1977); State v. Riggins, No. 01C01-9512-CC-00408, 1997 WL 211256, at \*3-4 (Tenn. Crim. App. at Nashville, April 30, 1997).

However, before an accused may be convicted of a criminal offense based upon circumstantial evidence alone, the facts and circumstances "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971). In other words, "[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." Crawford, Id. at 613.

While following the above guidelines, this court must remember that the jury decides the weight to be given to circumstantial evidence and that "[t]he

inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence are questions primarily for the jury.” Marable v. State, 313 S.W.2d at 457; see also State v. Gregory, 862 S.W.2d 574, 577 (Tenn. Crim. App. 1993); State v. Coury, 697 S.W.2d 373, 377 (Tenn. Crim. App. 1985); Pruitt v. State, 460 S.W.2d 385, 391 (Tenn. Crim. App. 1970).

To sustain a conviction for aggravated burglary, the State must prove that the appellant entered a habitation with an intent to commit a felony, theft, or assault. Tenn. Code Ann. § 39-14-403 (1997). The State is not required to produce a witness who saw the appellant break and enter the premises in order to convict them of burglary. State v. McGlowan, No. 02C01-9706-CR-00225, 1999 WL 234784, at \* 5 (Tenn. Crim. App. at Jackson, April 22, 1999) (citing Ramsey v. State, 571 S.W.2d 822, 824 (Tenn. 1978)). Unexplained possession of recently stolen property is sufficient evidence to sustain a burglary conviction. State v. McGlowan, No. 02C01-9706-CR-00225, at \*5 (citing Smart v. State, 544 S.W.2d 109, 110-111 (Tenn. Crim. App. 1976)); see also State v. Land, 681 S.W.2d 589, 591 (Tenn. Crim. App. 1984) (citing State v. Hatchett, 560 S.W.2d 627, 629 (Tenn. 1978)).

Viewing the evidence in the light most favorable to the State, we conclude that the State adduced ample evidence to convict the appellant of aggravated burglary. The State presented proof that on October 8, 1997, the Scheidt’s burglar alarm sounded at approximately 4:00 a.m.. Lauri Scheidt testified that someone had pried open the kitchen window, entered the house, and taken her black purse. She later found a trail of the contents of her purse leading from her house to the Clark’s house. She confirmed she had not given anyone permission to enter the house or take her purse. Finally, the police officers who apprehended the

appellant found Scheidt's black purse in the minivan driven by the appellant. From a review of the record, we conclude that the evidence presented, along with the inference which may be properly drawn from the appellant's possession of Lauri Scheidt's recently stolen purse, is sufficient to support the appellant's aggravated burglary conviction beyond a reasonable doubt. This issue is without merit.

One may be convicted of theft of property if the State proves that a person, with the intent to deprive the owner, knowingly obtained or exercised control over property without the owner's consent. Tenn. Code Ann. § 39-14-403 (1997). In Tennessee, it is well-established that the possession of recently stolen property gives rise to an inference that the possessor has stolen it or had knowledge the property was stolen and may, in light of surrounding circumstances, support a conviction for theft. State v. Woodlee, No. 01C01-9611-CC-00465, 1998 WL 75430, at \*5-6 (Tenn. Crim. App. at Nashville, February 24, 1998) (citing State v. Land, 681 S.W.2d at 591) (citations omitted); State v. Hamilton, 628 S.W.2d 742, 746 (Tenn. Crim. App. 1981) (citations omitted)).

Viewing the evidence in the light most favorable to the State, we conclude that the State adduced ample evidence to convict the appellant of theft over \$1,000. The State presented proof that on October 8, 1997, the Clark's minivan was stolen from the driveway of their home. James Clark testified that he had not given anyone permission to drive the minivan. Only hours after the minivan was reported stolen, the appellant was stopped while driving the minivan. The appellant attempted to flee, but was eventually apprehended. A defendant's flight, coupled with other facts and circumstances, is evidence of guilt. State v. Zagorski, 701 S.W.2d 808, 813 (Tenn. 1985). From our review of the record, we conclude that the evidence presented, along with the inference which may be properly drawn

from the appellant's possession of the Clark's recently stolen minivan, is sufficient to support the appellant's theft conviction beyond a reasonable doubt. This issue is without merit.

One may be convicted of evading arrest if the State proves that a person, while operating a motor vehicle, intentionally fled or attempted to elude any law enforcement officer, after having received any signal from such officer to bring the vehicle to a stop. Tenn. Code Ann. § 39-16-603(b)(1) (1997).

Viewing the evidence in the light most favorable to the State, we conclude that the State adduced ample evidence to convict the appellant of evading arrest. Officer Ellis and Officer Campbell both testified that they noticed a minivan traveling ten miles per hour over the speed limit. The officers immediately activated their blue lights and attempted to stop the minivan. The minivan increased its speed and attempted to escape the officers. After briefly eluding the officers, the driver pulled into a trailer park and jumped out of the vehicle. Officer Ellis pursued on foot and finally apprehended the driver. Both Officer Ellis and Officer Campbell identified the appellant as the driver of the minivan. We conclude the evidence is sufficient to support the appellant's evading arrest conviction beyond a reasonable doubt. This issue is without merit.

## **II. Sentencing**

The appellant also argues that the trial court erred by sentencing the appellant as a persistent Range III offender, imposing an effective sentence of twenty-three years, and ordering that the aggravated burglary sentence be served



consecutively to the theft sentence.<sup>2</sup>

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997). This presumption of correctness 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). The burden is upon the appellant to demonstrate the impropriety of the sentence. State v. Wilkerson, 905 S.W.2d 933, 934 (Tenn. 1995).

Our review of the appellant’s sentence requires an analysis of (1) the evidence, if any, received at trial and at the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offenses; (5) any mitigating or enhancement factors; (6) any statements made by the appellant on his own behalf; and (7) the appellant’s potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-102, -103, and -210 (1997).

The presumptive sentence for Class B, C, D, and E felonies is the minimum sentence in the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210 (1997). If the trial court finds that there are enhancement or mitigating factors, the court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the

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<sup>2</sup>The appellant failed to raise any sentencing issues in his motion for new trial. However, we recognize that issues regarding sentencing are ordinarily not required to be preserved through their presentation in a motion for new trial. State v. Draper, 800 S.W.2d 489, 497 (Tenn. Crim. App. 1990).

enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors. Id. The weight given to any existing factor is left to the trial court's discretion so long as the trial court complies with the purposes and principles of sentencing and the court's findings are adequately supported by the record. State v. Shropshire, 874 S.W.2d 634, 642 (Tenn. Crim. App. 1993). See also State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

In light of the sentencing proceedings and the trial court's consideration of sentencing principles and all relevant facts and circumstances, we apply a presumption of correctness in conducting our de novo review of the appellant's sentence. Tenn. Code Ann. § 40-35-401(d) (1997).

First, the appellant argues that the trial court erred by sentencing him as a persistent Range III offender. See Tenn. Code Ann. § 40-35-107 (1997). The appellant argues that the State has failed to prove by a preponderance of the evidence that he is a professional criminal.

The State argues that this issue is waived. During the sentencing hearing, the trial court asked the appellant if he would contest the appellant's prior convictions with regard to range determination. In response, the appellant's counsel stated:

. . . there's two convictions on the same day as well as the fact that the date of the event was also the same day. So there's four convictions but there is really two incidents. Then there's another theft case and a burglary type case. *So we'd stipulate that he is, in fact, a Range III person.*

(Emphasis added). The Tennessee Rules of Appellate Procedure state:

[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available

to prevent or nullify the harmful effect of an error.

Tenn. R. App. P. 36(a). Therefore, any complaint as to the appellant's range determination is waived in light of the appellant's stipulation to a Range III sentence.

Notwithstanding waiver of this issue, the record, including the presentence report, supports the trial court's classification of the appellant as a persistent Range III offender for the present offenses. A persistent offender is a defendant who has received any combination of five or more prior felony convictions within the conviction class or higher, or within the next two lower felony classes. . . . Tenn. Code Ann. § 40-35-107 (1997). The record reflects that the appellant's prior felony convictions include two convictions of burglary of a building, both class D felonies, one conviction of burglary, a class D felony, one conviction of theft of property over \$1,000, a class D felony, and one conviction of aggravated burglary, a class C felony. Therefore, in light of these prior felony convictions, the trial court properly classified the appellant as a persistent Range III offender.

The appellant also argues that the trial court imposed an excessive sentence. In the instant case, the appellant was convicted as a persistent Range III offender of aggravated burglary, a class C felony. Tenn. Code Ann. § 39-14-403 (1997). The sentencing range applicable to the appellant for this offense was ten to fifteen years. Tenn. Code Ann. § 40-35-112(c)(3) (1997). The appellant received a mid-range sentence of thirteen years.

The appellant was also convicted as a persistent Range III offender of theft of property over \$1,000, a class D felony. Tenn. Code Ann. § 39-14-103 (1997). The sentencing range applicable to the appellant for this offense was eight to twelve years. Tenn. Code Ann. § 40-35-112(c)(4). The appellant received a mid-

range sentence of ten years.

Finally, the appellant was convicted as a persistent Range III offender of evading arrest, a class E felony. Tenn. Code Ann. § 39-16-603 (1997). The sentencing range applicable to this offense was four to six years. Tenn. Code Ann. § 40-35-112(c)(5). The appellant received a mid-range sentence of five years.

In determining the appellant's sentence for each of the three convictions, the trial court properly found one enhancement factor: the appellant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range. See Tenn. Code Ann. § 40-35-114 (1997). Furthermore, the trial court properly found an additional enhancement factor applicable to the aggravated burglary and evading arrest convictions: the appellant had no hesitation about committing a crime when the risk to human life was high. See Tenn. Code Ann. § 40-35-114(10) (1997). The appellant did not submit and the trial court did not find any mitigating factors. In weighing the enhancement factors, the trial court placed great weight on the appellant's extensive criminal history and placed some weight on the appellant's lack of hesitation about committing a crime when the risk to human life was high.

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As stated previously, the weight to be given to each factor is left to the sound discretion of the trial court. The record reflects that the trial court correctly considered the sentencing principles and all relevant facts and circumstances. In light of the appellant's extensive criminal record and the risk to human life, mid-range sentences were appropriate in this case. This issue is without merit.

The appellant also argues that the trial court erred by ordering the

aggravated burglary sentence to be served consecutively to the theft sentence. Specifically, the appellant argues that the record does not support the trial court's finding that he is a dangerous offender. Moreover, the appellant also argues that the aggregate sentence is not reasonably related to the severity of the offenses and is not necessary to protect the public from further criminal activity of the appellant. State v. Wilkerson, 905 S.W.2d 933, 937 (Tenn. 1995). The appellant's argument is misplaced.

Tenn. Code Ann. § 40-35-115(a) (1997) provides that a trial court may impose consecutive sentencing only upon the determination that a defendant meets one of the criteria listed therein. Moreover, when a defendant is classified as a dangerous offender, a court must further find that the defendant's sentence reasonably relates to the severity of the offenses committed and is necessary in order to protect the public from further criminal conduct by the appellant, Wilkerson 905 S.W.2d at 938. See also State v. Lane, 3 S.W.3d 456, 460-61 (Tenn. 1999) (holding Wilkerson factors were limited to sentencing "dangerous offenders").

In this case, we note that the trial court did not find that the appellant was a dangerous offender but found that the appellant qualifies for consecutive sentencing as a ". . . professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood," and as ". . . an offender whose record of criminal activity is extensive." Tenn. Code Ann. § 40-35-115(b)(1), and (2) (1997). In support of the appellant's qualification for consecutive sentencing as a professional criminal, the trial court noted that the appellant dropped out of school and has a sporadic employment record coupled with an extensive criminal record consisting primarily of theft and burglary offenses. In support of the appellant's qualification for consecutive sentencing as an offender

whose record of criminal activity is extensive, the trial court noted that the appellant's "criminal history is extensive in his adult life, consisting primarily of theft and burglary type offenses." Again, the record reflects that the trial court did not find that the appellant was a dangerous offender, and, therefore, the trial court was not required to apply the Wilkerson factors. State v. Lane, 3 S.W.3d at 460-61. Applying a presumption of correctness, we conclude that the record supports the trial court's sentencing determination.

Accordingly, the judgment of the trial court is affirmed.

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Norma McGee Ogle, Judge

CONCUR:

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John H. Peay, Judge

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Alan E. Glenn, Judge