

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY 1999 SESSION

STATE OF TENNESSEE,

Appellee,

v.

TERRY HAWN,

Appellant.

* C.C.A. NO. 01C01-9808-CR-00325
* No. M1998-00744-CCA-R3-CD
* OVERTON COUNTY

* Hon. Leon Burns, Jr., Judge

* (Aggravated Burglary, Theft Over One-
* Thousand Dollars, Conspiracy)

*

FILED

January 28, 2000

**Cecil Crowson, Jr.
Appellate Court Clerk**

For Appellant:

John E. Appman
P.O. Box 99
Jamestown, TN 38556

For Appellee:

Paul G. Summers
Attorney General and Reporter
450 James Robertson Parkway
Nashville, TN 37243-0493

Marvin E. Clements
Assistant Attorney General
425 Fifth Avenue North
Nashville, TN 37243-0493

Owen G. Burnett
Assistant District Attorney General
P.O. Box 706
Livingston, TN 38570

OPINION FILED: _____

AFFIRMED

NORMA MCGEE OGLE, JUDGE

OPINION

On June 18, 1996, the appellant, Terry Hawn, was convicted by a jury in the Overton County Criminal Court of aggravated burglary, theft over \$1,000,

conspiracy to commit aggravated burglary, and conspiracy to commit theft over \$1,000.¹ On January 9, 1997, the trial court sentenced the appellant as a career offender to fifteen years incarceration for the aggravated burglary conviction, twelve years incarceration for the theft over \$1,000 conviction, twelve years incarceration for the conspiracy to commit aggravated burglary conviction, and six years incarceration for the conspiracy to commit theft over \$1,000 conviction. The trial court ordered that the aggravated burglary sentence be served consecutively to the theft over \$1,000 sentence. Additionally, the trial court ordered that the two conspiracy sentences be served concurrently to all other sentences for an effective sentence of twenty-seven years in the Tennessee Department of Correction.

In this appeal as of right, the appellant presents the following issue for our review: Whether the evidence is sufficient to sustain the appellant's convictions of aggravated burglary, theft over \$1,000, conspiracy to commit aggravated burglary, and conspiracy to commit theft over \$1,000.² Following a review of the record and the parties' briefs, we affirm the judgment of the trial court.

I. Factual Background

Gerald Windle testified on behalf of the State that on April 28, 1995, at approximately 9:00 p.m., he and his daughter returned to his residence at 267 Norrod Road in Rickman, Tennessee. As Windle backed his car into the driveway, he saw two people run out of his house through the french doors adjacent to the patio. Windle noticed that one of the intruders was carrying several guns. Windle got out of the car, told his daughter to lie down in the car, and locked the car door. Windle then retrieved a pistol from another car in the driveway and pursued the two intruders, but was unable to apprehend them.

¹Shirley Double, the appellant's co-defendant at trial, was also convicted of the same offenses and this court has affirmed her conviction on appeal. See State v. Double, No. 01C01-9704-CR-00156, 1998 WL 754942 (Tenn. Crim. App. at Nashville, October 19, 1998).

²In the appellant's statement of issues in his brief, he also raises the issue of consecutive sentencing. However, this issue is waived for failure to present an argument on it, failure to cite to the record, or refer to authority. Tenn. R. Ct. Crim. App. R. 10(b).

When Windle and his daughter entered the house, he noted that the house was “in shambles.” Three guns had been taken from the gun cabinet and the contents of the cabinet were scattered on the floor. Moreover, the couch and some chairs were turned upside down, drawers in the bedroom were pulled out, and a box of ammunition was pulled from under his bed. As his daughter was calling 911, Windle went back outside toward the rear of the house where he apprehended a co-defendant, Shirley Double. He told her to lie on the ground and had his daughter hold the gun on her until the police arrived.

Windle went back into the house and retrieved a gun from his night stand. As he started outside, he heard his daughter shout that a white pickup truck was backing up the driveway. He ran outside and saw the white pickup truck in the driveway. He remembered meeting the same white pickup truck as he and his daughter turned onto Norrod Road. The truck had caught their attention because it was traveling unusually slow. Windle stopped the truck, directed the female driver to get out of the truck, and held her at gunpoint until the police arrived. Once the police arrived, they found three guns and two calculators in a ditch near the house.

Windle testified that the three guns and two calculators found in the ditch were stolen from his house on April 28, 1995. Windle further testified to the value of the items as follows: an 835 Mossberg three and one-half inch Magnum gun valued at five hundred dollars; a .50 caliber Thompson Center muzzle-loader with a four-power Leupold scope valued at four hundred dollars; a 700 Remington 22-550 with a six and one-half times twenty Leupold scope valued at \$1,200; a Texas Instruments calculator valued at one hundred dollars; and a Unisonic calculator valued at approximately twenty dollars. The estimated total value of the property taken from Windle’s home was approximately \$2,300. Finally, Windle stated that neither the appellant or his co-defendant had permission to be on his property.

Captain Greg Phillips, a police investigator with the Overton County

Sheriff's Department, responded to a call at Windle's residence on April 28, 1995. When he arrived, he observed Windle and his daughter standing over the two female intruders who were lying on the ground. Windle informed Phillips that one intruder, who he described as a shirtless white male, had escaped. Phillips then advised Deputy Frank Dial and Deputy Michael Lee Hamilton to look nearby for a suspect matching that description. Shortly thereafter, the officers informed Phillips that they had arrested a suspect a short distance from the scene. Phillips proceeded to the site of the arrest and observed the shirtless appellant. Phillips then returned to Windle's residence to investigate the crime scene. The police took the appellant and Double to the police station where both made statements.

Phillips obtained separate signed statements from Double and the appellant at the Overton County sheriff's department after he administered Miranda rights.³ Double's signed statement reads as follows:

4-28-95, 10:30 or 11:00 o'clock Shirley Double, Patricia Cromer, we were in a white truck. Pulled up to the house. Patricia Cromer driver. Patricia said, 'Jerry Hyder lives here.' I got out of the truck. I knocked on the door. I heard a crash. I ran when I heard it. That's when I fell. Hurt my left leg. I know what I am doing and I don't want a lawyer at this time. This is a true statement.

The appellant's signed statement, written by Deputy Hamilton at the request of the appellant, reads as follows:

At approximately 10:30 p.m. on 4-28-95 Terry Hawn, Shirley Double, and Patricia Cromer come from Crossville through Monterey toward Livingston. Terry said, 'Turn on Norrod Road.' Patricia was driving the truck. We drove on Norrod Road and looked for a house I thought nobody was home. Terry got out of the truck and went up to the house while Patricia stayed in the truck at the road. Terry went to all sides of house to see if anyone was home. Terry shoved door open with his shoulder. Terry went in home to the living room and got three guns out of the gun cabinet. Terry laid guns on the floor. Terry exited the home with Terry carrying three guns. Terry came out of home and saw a car backing up the driveway and turned left to run. Terry fell down steep embankment dropping guns. Terry then ran down the yard to Highway 84. This is a true statement and I asked

³Double's and the appellant's statements were read to the jury. In order to avoid a Bruton problem with co-conspirator's statements, the trial court redacted Double's statement to eliminate any incriminating references to the appellant. Likewise, the appellant's statement was redacted to eliminate any incriminating references to Double except those agreed to by Double's counsel.

the officers to write this statement for me.

Phillips also checked the license plate of the white pickup truck and discovered that the truck was registered to the appellant and his wife.

Deputy Frank Dial and Deputy Michael Lee Hamilton, police officers with the Overton County Sheriff's Department, responded to the burglary call at the Windle residence. While en route, Phillips informed them to look for a shirtless white male in the area. They drove about one mile on Norrod Road until they reached the Highway 84 intersection. Hamilton spotted a male fitting the appellant's description. Hamilton pursued the suspect on foot and then apprehended him. At trial, Hamilton identified the appellant as the man he apprehended.

Shirley Double, the appellant's co-defendant at trial, testified on her own behalf. Double explained that she became addicted to pain medication following a motorcycle accident in 1992. On the night of the burglary, she had taken pain medications and was using marijuana regularly. According to Double's testimony, she believed that the appellant, Patricia Cromer, and she were going to Jerry Hyder's house to buy drugs. When they arrived, Double got out of the truck and knocked on the door. When no one responded, she walked back toward the road and noticed that Cromer had driven away in the truck and she was unable to find the appellant. At that point, Windle arrived and began firing his pistol, and Double fell to the ground to avoid being shot. Double maintained that she did not enter the Windle residence, did not go there intending to commit a burglary, did not know a burglary was planned, and did not steal anything from the house.

II. Analysis

Sufficiency of the Evidence

The appellant contends that the evidence is not sufficient to sustain his convictions of aggravated burglary, theft over \$1,000, conspiracy to commit aggravated burglary, and conspiracy to commit theft over \$1,000.

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. 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).

In the instant case, the appellant was convicted of aggravated burglary pursuant to Tenn. Code Ann. § 39-14-403 (1991). Aggravated burglary is burglary of a habitation as defined in Tenn. Code Ann. §§ 39-14-401 and 39-14-402. Under Tenn. Code Ann. § 39-14-402 (1991), a person commits burglary who

without the effective consent of the property owner (1) enters a building . . . with the intent to commit a felony or theft; (2) Remains concealed, with the intent to commit a felony or theft in a building; (3) Enters a building and commits or attempts to commit a felony or theft; . . .

Under Tenn. Code Ann. § 39-14-401 (1991), a habitation is

any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons . . .

The appellant was also convicted of theft over \$1,000 pursuant to Tenn. Code Ann. § 39-14-103 (1991). Theft of property occurs when

A person . . . with intent to deprive the owner of property . . . knowingly obtains or exercises control over the property without the owner's effective consent.

Tenn. Code Ann. § 39-14-103. Tenn. Code Ann. § 39-14-105 (1991) grades the theft offense according to the value of the stolen property.

Finally, the appellant was convicted of conspiracy to commit aggravated burglary and conspiracy to commit theft over \$1,000 pursuant to Tenn. Code Ann. § 39-12-103 (1997). The statute provides in pertinent part:

(a) The offense of conspiracy is committed if two (2) or more people, each having the culpable mental state required for the offense which is the object of the conspiracy and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct which constitutes such offense.

(d) No person may be convicted of conspiracy to commit an offense unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by the person or by another with whom the person conspired.

Tenn. Code Ann. § 39-12-103. "A conspiracy requires knowing involvement." State v. Shropshire, 874 S.W.2d 634, 641 (Tenn. Crim. App. 1993). The conspiracy need not be manifested by formal words or an express agreement. Shropshire, 874 S.W.2d at 641; State v. Gaylor, 862 S.W.2d 546, 553 (Tenn. Crim. App. 1992); State v. Cook, 749 S.W.2d 42, 44 (Tenn. Crim. App. 1987). The existence of the conspiracy may be established by circumstantial evidence and by the conduct of the parties in executing the object of their agreement. Shropshire, 874 S.W.2d at 641; Cook, 749 S.W.2d at 44.

Viewing the evidence in the light most favorable to the State, we conclude that the State adduced ample evidence to convict the appellant of the aggravated burglary and theft over \$1,000. The State presented proof that the appellant and Double entered a habitation without the permission of the owner and with the intent to commit a theft inside the residence. The appellant admitted in his statement that he entered Windle's house and carried three guns out of the house. Moreover, Windle observed an intruder running from his house with guns in his arms. The police discovered the stolen property outside the house and apprehended the appellant approximately a mile from the Windle residence. 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). Additionally, Windle testified that the value of the stolen property exceeded \$1,000. Therefore, the evidence is sufficient for a rational juror to conclude beyond a reasonable doubt that the appellant committed the aggravated burglary and theft.

We also conclude that the State adduced ample evidence to convict the appellant of conspiracy to commit aggravated burglary and conspiracy to commit theft over \$1,000. The appellant admitted in his statement that Double, Cromer, and he were driving around looking for an unoccupied house to burglarize. Once they found a suitable house, Cromer stayed in the truck while the appellant and Double proceeded to burglarize the house. Windle observed the truck prior to his arrival at the house and a short time later in his driveway. Police later discovered that the truck was registered to the appellant and his wife. Moreover, the record reflects that Cromer was acting as the getaway driver for the appellant and Double in the aggravated burglary and theft. From the facts, the jury could rationally conclude that an agreement existed. Furthermore, the appellant carried guns out of the house, thus committing an overt act in furtherance of the conspiracy. Therefore, the evidence is sufficient for a rational juror to conclude beyond a reasonable doubt that the appellant committed the conspiracy offenses.

Accordingly, the judgment of the trial court is affirmed.

Norma McGee Ogle, Judge

CONCUR:

Jerry L. Smith, Judge

Thomas T. Woodall, Judge