IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1999 SESSION

FILED

November 10, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	*	C.C.A. # 03CO1-9812-CC-00432
Appellee,	*	HAMBLEN COUNTY
VS.	*	Hon. James E. Beckner, Judge
RICKY ATKINS,	*	(Aggravated Assault and Theft
Appellant.	*	of Less than $500.00)

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OPINION FILED:_____

AFFIRMED

GARY R. WADE, PRESIDING JUDGE

OPINION

The defendant, Ricky Atkins, entered guilty pleas to two counts of theft of property less than $500.00. In a trial by jury, he was convicted of aggravated assault. The trial court imposed a Range II sentence of ten years for aggravated assault and sentences of eleven months and twenty-nine days on each of the theft convictions. All sentences are to be concurrently served. Fines totaled $5,000.00.

In this appeal of right, the defendant challenges the sufficiency of the evidence and claims that the sentence is excessive. We find no error and affirm the judgment of the trial court.

On May 29, 1998, Scottie Shelton, a sales clerk at the AJ Texaco Smokestack on Andrew Johnson Highway in Hamblen County, was on duty when the defendant and Joey France entered the store. As France asked several questions, Shelton observed the defendant "running out of the store with cartons of cigarettes." Shelton described the cigarette containers as "like suitcases" (sixteen cartons in all) on special "buy three, get one free...." At trial, Shelton testified that he followed the defendant around a corner of the building until the defendant, who displayed a knife with his left hand, threatened to kill him if he did not "back off." Shelton did as directed, walked back around the corner, and picked up an outside phone to call 911. As he did so, he asked a customer to tell the other sales clerk on duty to call the police. After making the 911 call, Shelton followed the defendant through a parking lot behind the store and over an embankment. He saw the defendant throw the cigarette containers across a fence and climb over the fence. At that point, the defendant looked back at Shelton and said, "If you want them, you can come and get them...." Instead of following the defendant, Shelton returned to the store.

On cross-examination, Shelton estimated that the defendant was between ten and twenty feet away when the threat was made. He testified that he saw the blade of the knife. Shelton stated the defendant paused to confront him for

approximately fifteen seconds before continuing with his departure from the scene.

Kay Bray, the general manager of the Smokestack, testified that she maintained twenty-four hours per day videotape cameras inside the store. She introduced as evidence a portion of the videotape of May 29, 1998, which corroborated the defendant's presence in the store. She estimated that the value of the stolen sixteen cartoons was $248.07.

Barbara Hopkins, the mother of the defendant, testified as a witness for the defense. She stated that the defendant was right-handed. The defendant, who acknowledged in the aggravated assault trial that he had entered guilty pleas to the theft of the cigarettes,[1] denied that he had a knife in his hand. He testified that he did not threaten to kill Shelton and had no intention of harming him. The defendant explained that he had a silver ring on his left hand. He also denied saying to Shelton after he had crossed a fence, "If you want these cigarettes, come and get them."

Initially, the defendant contends that the evidence is insufficient. He specifically argues that the state failed to establish that the victim was caused "to reasonably fear imminent bodily injury." Tenn. Code Ann. § 39-13-101(a)(2). He contends that the assault only becomes aggravated if there is definitive proof that the defendant "uses or displays a deadly weapon." Tenn. Code Ann. § 39-13-102(a)(1)(B).

On appeal, the state is entitled to the strongest legitimate view of the evidence and all inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the evidence are matters entrusted exclusively to the jury as triers of fact. Byrge v. State, 575 S.W.2d

[1]The theft convictions resulted from this May 29, 1998, incident and another incident which occurred one day earlier.

292, 295 (Tenn. Crim. App. 1978). The relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). This court may neither reweigh nor reevaluate the evidence nor may a court substitute its inferences for those drawn by the trier of act. Likas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). The evidence is sufficient when a rational trier of fact can conclude that the defendant is guilty beyond a reasonable doubt. Jackson v. Virginia, 434 U.S. 307 (1979). The defendant has the burden of demonstrating that the evidence is not sufficient, when there is a challenge to the sufficiency of the evidence. State v. Tuggle, 693 S.W.2d 913, 914 (Tenn. 1982).

An aggravated assault may be established when one intentionally or knowingly causes another to reasonably fear imminent bodily injury and uses or displays a weapon. Tenn. Code Ann. §§ 39-13-101, 102. Circumstantial evidence may be used to prove that the victim feared imminent bodily injury. State v. Tommy Arwood, Jr., No. 01C01-9505-CC-00159 (Tenn. Crim. App., at Nashville, May 24, 1996). In Arwood, the victim did not specifically state that the actions of the defendant caused fear of injury. Nevertheless, a panel of this court determined that circumstantial evidence established the fearfulness of the victim. It ruled that the jury was entitled to infer fear because the victim was unable to concentrate on the license number of the getaway vehicle and eventually reported the attack to the police. In Arwood, this court ruled that "turning to the police for help is ... consistent with having been made fearful" and that the evidence was thus sufficient to establish an assault.

An offense may be proven by circumstantial evidence alone. Price v. State, 589 S.W.2d 929, 931 (Tenn. Crim. App. 1979); State v. Ball, 973 S.W.2d 288 (Tenn. Crim. App. 1998). Our scope of review is the same when the conviction is based upon circumstantial evidence as it is when it is based upon direct evidence. State v. Brown, 551 S.W.2d 329, 331 (Tenn. 1977); Farmer v. State, 343 S.W.2d

895, 897 (1961). The jury is entitled to make reasonable inferences from the facts and circumstances and discard any countervailing evidence. See e.g., Hill v. State, 4 Tenn. Crim. App. 325, 470 S.W.2d 853 (1971).

Here, the jury accredited the testimony of the victim, Scottie Shelton. There was testimony that when he followed the defendant outside the store and around a corner, the defendant turned to face the victim, displayed a weapon, and threatened his life. At that point, the defendant was as little as ten feet away. He "backed off" as directed. In response, the victim turned, retreated around a corner of the store, and proceeded to the front door. He dialed 911, the universal number for emergency assistance, and asked for the other sales clerk to call the police. The victim declined the invitation by the defendant to cross the fence and "Come and get [the cigarettes]." Under those circumstances, the jury was entitled to infer that the victim "reasonably fear[ed] imminent bodily injury" as required by the statute. Perhaps because the defendant had a prior felony record for which he was impeached on cross-examination by the state, the jury rejected altogether his claims that he had no knife, made no threats, and said nothing to frighten the victim away. In our view, the evidence is sufficient.

Next, the defendant contends that his Range II sentence, the maximum of ten years, is excessive. While conceding that he is Range II, multiple offender with a thirty-five percent release eligibility pursuant to Tenn. Code Ann. § 40-35-106(a)(1), the defendant argues that the sentence should have been near the minimum of six years. The trial court found no mitigating factors, rejecting the defendant's claim that his conduct neither caused nor threatened serious bodily injury or otherwise caused harm. Tenn. Code Ann. § 40-35-113(1). The trial court concluded that there were two enhancement factors applicable: (1) that the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, Tenn. Code Ann. § 40-35-114(1); and (2) that the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community. Tenn.

Code Ann. § 40-35-114(8).

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). This presumption 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); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and 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 offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

Initially, it is permissible to enhance a sentence based upon prior criminal convictions or behavior so long as the conditions are "in addition to those necessary to establish the appropriate range." Tenn. Code Ann. § 40-35-114(1). The defendant had been previously convicted of two aggravated assaults and one theft over $1,000.00. Those crimes placed him in the multiple offender, Range II category. Tenn. Code Ann. § 40-35-106(a)(1). The presentencing report establishes that the defendant also has a long history of criminal conduct in addition to those utilized to establish the range. By our count, the defendant has had at least thirty-five prior court appearances from 1990 through 1998 which resulted in one or

more convictions on each occasion. Many of the convictions resulted in jail terms. The nature of the prior offenses ranged from several instances of public intoxication and driving under the influence of alcohol to theft, destruction of private property, escape, assault, possession of drugs, and inhaling paint. The defendant, now twenty-eight years of age and single, was expelled from high school after completing the ninth grade. He did obtain a graduate equivalent diploma while in prison but has a history of alcohol abuse and an unenviable employment history. The defendant was on probation at the time of this offense. In 1992, his parole on a different sentence was revoked. Since that time, there are between six and eight probation violations on his record.

Confinement is often necessary to protect society and to restrain those who have long histories of criminal conduct, especially when less restrictive measures than confinement have been unsuccessful; also, the lack of potential for rehabilitation is an important consideration in determining the length of the term. Tenn. Code Ann. § 40-35-103(1)(A), (C); Tenn. Code Ann. § 40-35-103(5). Here, the trial court found each of the two enhancement factors to be "extremely weighty, as strong as I have ever seen in sentencing in the 22 years I've been on the bench." In our view, the record supports that conclusion. The maximum sentence is warranted under these circumstances.

Accordingly, the judgment is affirmed.

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Gary R. Wade, Presiding Judge

CONCUR:

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Jerry L. Smith, Judge

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James Curwood Witt, Jr., Judge