IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, l994

FILED

September 21, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE	)	
	)	NO. 03C0l-9405-CR-00l84
APPELLEE	)	
	)	BRADLEY COUNTY
	)	
V.	)	HON. MAYO L. MASHBURN, JUDGE
	)	
	)	(Aggravated Burglary)
WILLIAM F. BOWMAN and	)	
RICKY L. BOWMAN	)	
	)	
APPELLANTS	)	

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AFFIRMED AS MODIFIED

OPINION FILED:_____

JERRY SCOTT, PRESIDING JUDGE

O P I N I O N

The appellants, William F. Bowman and Ricky L. Bowman, appeal as a matter of right from a judgment entered in the Criminal Court of Bradley County. The jury returned a verdict of guilty against each appellant for the offense of aggravated burglary, a Class C felony. Each appellant was sentenced to a term of six years in the Tennessee Department of Correction as a Range I standard offender. Each was also ordered to pay a fine in the amount of $5,000.00 and restitution to the victim in the amount of $3,48l.00.

In this joint appeal, William Bowman presents three issues for review by this Court: (a) whether the evidence was sufficient for a rational trier of fact to find him guilty beyond a reasonable doubt; (b) whether the trial court erred in admitting photographs which depicted the gruesome injuries to the victim; and (c) whether the sentence imposed on him is excessive in light of the sentencing considerations codified at Tenn. Code Ann. § 40-35-103. Ricky Bowman raises the singular challenge of whether the evidence adduced against him was sufficient, since the jury rendered inconsistent verdicts against the three defendants and the state's proof was "unbelievable and contradictory."[1] We find no reversible error.

FACTS

At trial, Brenda Nichols, the wife of the victim, testified that in March of 1993 her family resided at an apartment located on Cedar Lane, in Cleveland, Tennessee, where William Bowman was her neighbor. On March 2l, the day that the incident occurred, she and her children were at her brother-in-law's house for a birthday party. However, as she and her family were leaving their home to go to the party, she noticed the two appellants and two other men drive

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[1]A third defendant, Walter Bowman was tried with these appellant/defendants and convicted of aggravated criminal trespassing, in violation of Tenn. Code Ann. § 39-l4-406(a). He did not appeal. The fourth assailant was apparently never identified.

up in an automobile and proceed into the apartment of William Bowman. She also testified that her family had never had a gun in their home.

Steve Nichols, the victim, testified that he knew William Bowman, who was his next door neighbor, and that he had seen Ricky Bowman prior to the offense. On the morning of March 21, 1993, after Mr. Nichols took his family to the birthday party, he went back to his apartment to change his shirt at about 11:00 or 11:30 a.m. When he arrived at the apartment, Ricky Bowman attempted to sell Mr. Nichols some pills, but Mr. Nichols refused to buy any. A short time later, as Mr. Nichols walked into his living room after changing his shirt, he heard the sound of breaking glass. The appellants and two other men were outside his apartment and were using baseball bats to break out the windows and beat in the front door. Mr. Nichols tried unsuccessfully to stop them at the front door, so he fled to a bedroom.

Eventually, the four men broke through the front door and then the bedroom door. They told Mr. Nichols that they wanted his money and wanted to sell him some pills. When he refused to surrender his wallet, all four men began to beat him with the ball bats, tire tools and chairs. They then drug him to the yard in front of the apartment and continued to beat him. At one point, they thrust his head through a passenger-side window of his automobile, after which they broke out the remaining windows of his automobile with clubs. Corroborative photographs which depicted Mr. Nichols' physical injuries, the damage to his automobile, and damages to his apartment were admitted into evidence.

John Daily, Jr., a detective employed by the Cleveland Police Department, testified that he interviewed Mr. Nichols at the hospital on the day of the incident. Not surprisingly, Mr. Nichols appeared to be "real agitated" and "angry" about the severe beating he sustained. However, Mr. Nichols was able

to successfully identify three of his attackers, including the appellants. Later that day, Mr. Daily interviewed William Bowman and Robert Sherman, an eyewitness to the offense. The next day, he interviewed Mr. Sherman's daughter who also witnessed a portion of the incident.

Steve Ross of the Cleveland Police Department was the first officer at the scene after the beating. He testified that he was unable to interview Mr. Nichols at that time because Mr. Nichols' speech was too slurred to be understood. He was able, however, to question William Bowman, who came out of his apartment while Mr. Ross was there. Based upon Mr. Bowman's responses, especially his statement that it was Mr. Nichols' fault, Mr. Ross took him into custody. Mr. Ross then searched the Nichols' residence because he was told something about a gun by William Bowman. The search did not reveal the presence of any firearm or illegal drugs. He also observed that the windows of the Nichols' automobile were broken out.

Robert Sherman, a missionary who lived near the Nichols, testified that he and Mr. Nichols were "very good friends". On the day of the incident, he heard glass breaking outside, but did not know the source of the sound. When he went to investigate, he observed William Bowman throwing a rock through the window of the Nichols' apartment. He saw Ricky Bowman pushing on the front door of the apartment with his shoulder; then the others joined him and the door "busted" open. Mr. Sherman then went to get his shoes and went outside. He saw tremendous blows being wielded "on the side of the (Nichols') car." As he ran over to the Nichols' apartment, he saw Mr. Nichols "lying just face down in a pool of blood" with fragments of a chair "busted over" him. The attackers fled when Mr. Sherman arrived. The appellants were the only assailants that Mr. Sherman could identify.

Elizabeth Sherman, the twelve-year-old daughter of Mr. Sherman, testified that she observed four men beating Mr. Nichols. She saw these men "bashing out the windows" of the apartment and "trying to shove down the door." She observed one of the men break out an apartment window with a broom or mop handle and saw one of the men break out the car windows with a chair. She identified the appellants as two of the attackers.

Joshua Sherman, the eleven-year-old son of Mr. Sherman, testified that he observed four men with sticks breaking windows and beating on the front door of the Nichols' apartment. He witnessed the four men break through the front door and enter the apartment. He also saw one of the men use a chair to break out the windows on the Nichols' car. The appellants were the only attackers he could identify. He had played with William Bowman's son and had seen Ricky Bowman at William Bowman's apartment.

Jerry Wallace testified that in March of 1993 he was living in the same apartment complex as Mr. Nichols and William Bowman. He testified that he observed three people beating on the front door of Mr. Nichols' apartment. He observed that one of the men had a baseball bat, but could not tell about the others. He recognized the appellants as being two of the men beating on the door.[2] He called 9ll and then moved his wife's car to a position where it blocked the driveway in an attempt to prevent the attackers from leaving before the police arrived.

In their defense, the appellants presented testimony through several witnesses to the effect that Mr. Nichols went to William Bowman's apartment on the day of the offense and threatened both appellants and others with a gun over some bad marijuana he had bought from a "dude" at Mr. Bowman's apartment. In addition, William Bowman testified that while he was outside the

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[2]He also identified Walter Bowman, the nonappealing co-defendant.

Nichols' apartment Mr. Nichols struck him with a "ball bat or a table leg" through a window. He then, mono a mono, took the ball bat from Mr. Nichols and gave him "one good whooping."

DISCUSSION

First, both appellants challenge the sufficiency of the evidence adduced at trial. The principles which govern appellate review of a conviction by a jury are settled. This Court must review the record to determine if the evidence adduced at trial was sufficient "to support the finding of the trier of fact of guilt beyond a reasonable doubt." Rule l3(e), Tenn. R. App. P. This rule is applicable to determinations of guilt predicated upon direct evidence, circumstantial evidence, or a combination thereof. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

Where the sufficiency of the evidence is at issue, the relevant question on appeal is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have determined that the essential elements of the crime were established beyond a reasonable doubt. Rule l3(e), Tenn. R. App. P.; Jackson v. Virginia, 443 U.S. 307, 314-324, 99 S. Ct. 2781, 2786-2792, 61 L. Ed. 2d 560 (1979).

Initially, both appellants contend that the evidence was legally insufficient because the jury rendered inconsistent verdicts concerning the two appellants and the third defendant. At the conclusion of the trial, the jury found both appellants guilty of aggravated burglary, but found the third defendant guilty of the lesser offense of aggravated criminal trespass. The appellants argue that these "inconsistent" verdicts are evidence that the jury was unable to resolve conflicts in the testimony of the witnesses. We disagree, and find, contrary to the appellants' contention, that the verdicts depict that the jury successfully analyzed the evidence and rendered verdicts accordingly. Moreover, the

appellants have failed to cite any authority in support of their argument. Such omissions constitute waiver of the issue. See Tenn. Ct. Crim. App. R. 10(b); State v. Killebrew, 760 S.W.2d 228, 231-32 (Tenn. Crim. App. 1988).

One reason the appellants have cited no authority for their position is that none exists. It "has always been an exclusive privilege and prerogative of the jury" to render inconsistent verdicts and it is not the duty of appellate courts to "unravel the ratiocinations of the jury's collective logic." Jackson v. State, 477 S.W.2d 2l3, 2l6 (Tenn.Crim.App. l97l), citing numerous cases from the United States Supreme Court and the Fifth and Sixth Circuits. Stated differently, there is no requirement that the verdicts against two or more criminal defendants "demonstrate rational consistency." Pulley v. State, 506 S.W.2d l64, l69 (Tenn.Crim.App. l973). See also United States v. Dotterweich, 320 U.S. 277, 279, 64 S.Ct. l34, l35, 88 L.Ed.48 (l943); United States v. Crooks, 766 F.2d 7, l0 (lst Cir. l985); United States v. Horowitz, 756 F.2d l400, l406 (9th Cir. l985); Parker v. Mooneyham, 349 S.E.2d l82, l83-84 (Ga. l986); People v. Caldwell, 68l P.2d 274, 28l n.5 (Cal. l984).

William Bowman further contends that the State's proof was unbelievable and contradictory concerning whether he actually entered the apartment and whether he had the requisite intent to commit a "felony or theft therein." Tenn. Code Ann. §§ 39-l4-402(a)(l), 403(a). At trial, the victim testified that while the men were outside his apartment, one of the men stuck his head through a front window and stated, "We're gonna come in and f--- you up and take your money." The victim further testified that William Bowman was one of the men who broke through his door and beat him in an attempt to steal his wallet. The fact that defense witnesses contradicted this testimony is of no consequence whatsoever because this court will not, indeed cannot, reevaluate the weight or credibility of the witnesses' testimony as these are matters entrusted exclusively to the jury as the finders of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State

v. Wright, 836 S.W.2d 130, 134 (Tenn. Crim. App. 1992). The jury's verdict of guilty, which was approved by the trial court, accredits the testimony of the State's witnesses and resolves all conflicts in favor of the theory of the State. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978). These principles are buttressed by the rule that, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Moreover, concerning the evidence of his intent to steal, it has been long established that a jury may infer a criminal defendant's intent from the surrounding facts and circumstances. State v. Lowery, 667 S.W.2d 52, 57 (Tenn. 1984); Hall v. State, 490 S.W.2d 495, 496 (Tenn. 1973); Burns v. State, 591 S.W.2d 780, 784 (Tenn. Crim. App. 1979). Indeed, the actions of a defendant constitute circumstantial evidence of his intent. State v. Holland, 860 S.W.2d 53, 59 (Tenn. Crim. App. 1993); State v. Barker, 642 S.W.2d 735, 737 (Tenn. Crim. App. 1982). In Holland, this Court stated that "[i]ntent may, and necessarily must in most cases, be inferred from the facts; as from the fact that a felony is actually committed or attempted . . . ." 860 S.W.2d at 59 n. 14 (quoting Justin Miller, Criminal Law § 108, at 338 (1934)).

Each of the issues challenging the sufficiency of the evidence raised by the appellants is wholly without merit.

In a second issue, William Bowman asserts that the trial court erred by admitting as evidence several photographs which depicted the injuries of the victim. He argues that the probative value of the evidence was outweighed by the grave prejudice he suffered by their admission. We disagree.

Though he was convicted of aggravated burglary, William Bowman was charged with the offense of especially aggravated burglary, in violation of Tenn. Code Ann. § 39-14-404(a). An element of that offense is that the victim suffered serious bodily injury. Tenn. Code Ann. § 39-l4-404(a)(2). It is manifest that the probative value of the photographs was great in light of the fact that they were some of the best evidence available to prove an essential element of the charged offense, and photographs are, by their nature, a type of evidence which is objective in nature. On the other hand, the de minimis nature of the prejudice, if any, suffered by the appellant was most aptly illustrated by the fact that the jury did not convict him of especially aggravated burglary. Instead, the jury convicted him of aggravated burglary, an offense which is supported by the proof irrespective of the beating sustained by the victim.[3] Therefore, we conclude that William Bowman suffered no prejudice whatsoever.

As William Bowman concedes in his brief, the admissibility of photographs rests within the sound discretion of the trial judge, State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978), whose decision will not be reversed absent "a clear showing of an abuse of that discretion." State v. Harris, 839 S.W.2d 54, 73 (Tenn. 1992). There was no abuse here, as the probative value of the photographs clearly outweighed any prejudicial effect, since, as noted previously, he suffered no prejudice at all.

In his final issue, William Bowman contends that the trial court erred by imposing an excessive sentence of six years. He insists that the two enhancement factors found by the trial court, the applicability of which he does not contest, do not justify the sentence imposed in light of the sentencing considerations set forth in Tenn. Code Ann. § 40-35-103.[4]

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[3]Aggravated burglary is simply "burglary of a habitation." Tenn. Code Ann. § 39-l4-403(a).

[4]Tenn. Code Ann. § 40-35-103 provides:

To implement the purposes of this chapter, the following principles apply:

In examining the propriety of a sentence rendered against a criminal defendant, this court must conduct a de novo review based on the record, with a presumption that the determinations of the trial court were correct. Tenn. Code Ann. § 40-35-401(d).[5] Therefore, if our review reveals that the trial court imposed a lawful sentence pursuant to the Tennessee Criminal Sentencing Reform Act of 1989, after having given proper consideration and weight to the relevant sentencing factors under the Act, and the sentence is based on findings of fact which are adequately supported by the record, then we must not disturb the sentence imposed by the trial court. State v. Fletcher, 805 S.W.2d 785, 789

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(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;

(2) The sentence imposed should be no greater than that deserved for the offense committed;

(3) Inequalities in sentences that are unrelated to a purpose of this chapter should be avoided;

(4) The sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed;

(5) The potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed. The length of a term of probation may reflect the length of a treatment or rehabilitation program in which participation is a condition of the sentence; and

(6) Trial judges are encouraged to use alternatives to incarceration that include requirements of reparation, victim compensation and/or community service.

[5]This presumption is conditioned upon an 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). Review of the record reveals that the presumption applies in this case.

(Tenn. Crim. App. 1991). Furthermore, the appellant has the burden of establishing that the sentence rendered by the trial court was erroneous. Sentencing Commission Comments to Tenn. Code Ann. § 40-35-401(d); State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); State v. Anderson, 880 S.W.2d 720, 727 (Tenn. Crim. App. 1994).

In discussing the underlying basis for the appellant's sentence, the trial court stated:

> I'm obligated by law to impose upon you a specific sentence. And in doing so, I have to take into consideration the presence of any mitigating factors and the presence of any enhancement factors, and I've done that in your case. And I do not find any mitigating factors in your case. However, I find certain enhancement factors. I find that at the time of this offense, you were on probation. I also find that you have an extensive history of criminal convictions or criminal behavior, I believe spread out over a period of about 12 or 13 years, totaling, I may be wrong by one or two here, but totaling 21 prior convictions.

The trial court thereafter ordered William Bowman to serve six years, the maximum sentence.

The weight to be given to enhancement factors resides within the sound discretion of the trial court. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). Accordingly, where one or more enhancement factors apply, but no mitigating factors exist, the trial court may properly set a defendant's sentence above the minimum sentence. Tenn. Code Ann. § 40-35-210(d). Furthermore, when reviewing the weight assigned to an enhancement factor, the statutory presumption of correctness, codified at Tenn. Code Ann. § 40-35-401(d), limits this Court's review. See State v. Stewart, No. 01-C-01-9012-CR-00342,1991 WL 165821, at *3 (Tenn. Crim App. Aug. 30, 1991).

Having carefully considered the foregoing authorities, as well as the sentence imposed by the trial court in light of Tenn. Code Ann. § 40-35-103, we find the sentence imposed to be entirely proper for this appellant for this offense. The issue challenging the sentence has no merit.

Although not raised by either appellant, there is plain error in the sentences meted out to these appellants. Rule 52(b), Tenn. R. Crim. P. The trial judge ordered them to each--jointly and severally with each other and with the nonappealing co-defendant-- pay restitution to the victim in the amount of $3,48l.00. At the same time, he ordered them to serve their terms in the penitentiary. The power to order a defendant to pay restitution in a criminal case is "as a condition of probation." Tenn. Code Ann. § 40-35-304(a). There is no authority to order restitution by one being sentenced to the penitentiary. Therefore, the judgments as to both appellants are modified by striking the provision for restitution.

Finding no merit to any issue, except the provision for restitution, the judgment is affirmed as modified.

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JERRY SCOTT, PRESIDING JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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JOSEPH M. TIPTON, JUDGE