IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE
Appellee

Coffee Circuit No. 26,023F
C.C.A. No. 01-C01-9504-CC-00115

vs.

Hon. Gerald L. Ewell, Sr. Judge

RICHARD LEE ANTHONY,
Appellant

(Aggravated Robbery &
Aggravated Burglary)

ROBERT S. PETERS, Swafford, Peters & Priest, Winchester
Attorney for Appellant

CHARLES W. BURSON, Attorney General and Reporter, Nashville.
WILLIAM DAVID BRIDGERS, Assistant Attorney General
Attorneys for Appellee

AFFIRMED

Opinion Filed:

TOMLIN, Sr.J.

Richard Lee Anthony ("defendant") appeals his conviction in the Circuit Court of Coffee County for aggravated robbery and aggravated burglary. The trial court imposed sentences of 20 years and 10 years, respectively, to be served consecutively. Defendant has presented three issues for our consideration: (1) whether the evidence was sufficient to support the verdict; (2) whether the trial court erred by admitting certain evidence under the excited utterance exception to the hearsay rule; and (3) whether the trial court erred in imposing consecutive sentences for the two offenses. We find no error and affirm.

The proof in this case is as follows: For a few weeks prior to March 18, 1993, defendant and his friend Jesse Charles "Chuckie" Crouch had discussed the probability of robbing someone or some business. One day Chuckie was in the store/pool hall of Gene Hennessee, who made the unfortunate mistake of showing Chuckie a wad of bills that he kept on his person. Chuckie advised defendant that Hennessee was a likely target for their plans. On March 18, 1993 defendant and Chuckie waited in Chuckie's vehicle outside the Hennessee home in the early hours of the morning. Chuckie was aware of the fact that Mrs. Hennessee's employment required her to leave

home every morning at approximately 3:15 a.m. When they observed her leaving, defendant exited Chuckie's vehicle and proceeded to enter the Hennesse's house. Defendant wore a blue toboggan, cut in the front, covering his face and he was armed with a baseball bat. Upon entering the premises, defendant found Hennessee in the bedroom. When Hennessee attempted to get up, defendant threatened him with the bat. Defendant removed Hennessee's wallet from his pants which were lying at the foot of the bed and took approximately $10,000 from his wallet. When he left defendant again warned Hennessee not to get up, threatening him again with the bat.

Shortly after defendant left the house, Hennessee drove to the home of his son, Billy who lived approximately three-fourths of a mile away. Hennessee, who had a heart condition, was excited and nervous and there described to his son the robbery and what took place. Billy Hennessee testified that his father was still visibly nervous and shaking considerably as a result of the incident. Hennessee called Deputy Sheriff Robert Argraves of the Coffee County Sheriff's Department to report the incident. His father then described the incident in detail to him. Gene Hennessee stated that when the robber came into the bedroom, he raised up slightly, whereupon the man told him to lay back down or he would hurt him, so he laid back down. After taking his billfold and the money, the robber told Gene Hennessee "old man don't get up too fast, I might hurt you," and then he left.

Shortly after the investigation was underway, officers had occasion to stop the vehicle of Chuckie Crouch, who permitted them to search it. Under the front seat, they found cash in excess of $4,000.00. After giving Chuckie his Miranda rights, he was interrogated and readily confessed to his role in the robbery, at the same time implicating defendant. When defendant was apprehended at his home he was found to be in possession of cash in excess of $4,000.00 as well, as did defendant's wife, who was in no way involved in the robbery, but who had been given $500.00 by her husband.

In a jury trial, defendant was convicted of one count of aggravated burglary and one count of aggravated robbery. The trial court found defendant to be a Range II offender and sentenced him to 20 years for aggravated robbery and 10 years for aggravated burglary. The trial judge in

addition ordered that the sentences be served consecutively after finding that defendant was an offender with extensive criminal activity and that his behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high.

I. SUFFICIENCY OF THE EVIDENCE

In determining the sufficiency of the evidence in a case such as this, our standard of review on appeal is whether after viewing the evidence in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319-20 (1979); State v. Shelton, 851 S.W.2d 134, 138 (Tenn. 1993); T.R.A.P. 13(e). A conviction by a jury removes the presumption of innocence and raises a presumption of guilt on appeal. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). The defendant has the burden of overcoming this presumption on appeal.. State v. Brown, 551 S.W.2d 329, 330 (Tenn. 1977). It is not the function of this court to reweigh the evidence presented at a criminal trial. A jury verdict approved by the trial judge accredits the testimony of the state's witnesses and resolves all conflicts in testimony in favor of the theory of the state. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073 (1984).

A person commits aggravated burglary by entering the habitation of another without the consent of the owner with an intent to commit a felony or theft. T.C.A. §§ 39-14-402 & -403 (1991). After viewing the evidence as to this offense in a light most favorable to the state, we are of the opinion that any trier of fact could have found defendant guilty of aggravated burglary beyond a reasonable doubt.

A person comitts robbery by "the intentional or knowing theft of property from the person of another by violence or by putting the person in fear." T.C.A. § 39-13-402 (1991). Aggravated robbery is robbery "accomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon." T.C.A. § 39-13-402 (1991) The record reflects that defendant utilized a baseball bat to threaten and create fear in Gene Hennessee. Defendant's contention that he cannot be convicted of robbery because Hennessee was

not in "actual possession of the wallet" is without merit. The requirement of "theft from the person of another" is satisfied by the showing that the property was taken in the victim's presence. See, e.g., State v. Howard, 693 S.W.2d 365, 368 (Tenn. Crim. App. 1985). We also hold that any rational trier of fact could have found the essential elements of aggravated robbery committed by defendant beyond a reasonable doubt.

II. THE "EXCITED UTTERANCE" EXCEPTION

The trial court permitted Billy Hennessee to testify as to the statements made to him by his father immediately after the robbery, and to permit the jury to consider this testimony for the truth of the matter asserted. The decision to admit or exclude evidence is left to the discretion of the trial court and that decision will not be disturbed unless that discretion has been arbitrarily exercised. State v. Davis, 872 S.W.2d 950, 955 (Tenn. Crim. App. 1993). Tennessee Rule of Evidence 803(2) creates an exception to the hearsay rule for an "excited utterance," which is therein defined as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Tenn. R. Evid. 803(2). In State v. Smith, 857 S.W.2d 1 (Tenn.), cert. denied, 114 S. Ct. 561 (1993), our supreme court stated the test for determining when a statement is admissible as an excited utterance:

> [t]he ultimate test is spontaneity and logical relation to the main event and where an act or declaration springs out of the transaction while the parties are still laboring under the excitement and strain of the circumstances and at a time so near as to preclude the idea of deliberation and fabrication.

Id. at 9; see also Neil P. Cohen et al., Tennessee Law of Evidence § 803(2).2, at 412-13 (2d ed. 1990).

Defendant contends that there was a sufficient amount of time between the robbery itself and Hennessee's arrival at his son's house to render Gene Hennessee statements inadmissible and thus falling outside of the excited utterance exception. We disagree. In State v. Winfrey, No. 0-2-C01-9210-CC-00235, 1994 WL 53642 (Tenn. Crim. App. Feb. 23, 1994) this court held that statements made by a rape victim one to two hours after she had been

attacked were admissible because at the time the statements were made she was still upset and nervous as a result of the attack. Id. at *2. The record in the case before us shows that Gene Hennessee immediately drove to his son's house some three-quarters of a mile away after the robbery. The record reflects that robbery occurred at around 3:15 a.m. and that Billy Hennessee called Deputy Sheriff Argraves at around 3:50 a.m. Billy Hennessee testified that his father was still visibly nervous and shaking at the time he arrived at his home. We find this issue to be without merit.

III. CONSECUTIVE SENTENCING

T.C.A. § 40-35-115 (1990) provides in relevant part that the trial court may order sentences for multiple convictions served consecutively to one another if the court finds by preponderance of the evidence one of the seven enumerated factors justifying consecutive sentencing. In the case involved, the trial court found that consecutive sentences were appropriate because defendant's record of criminal activity was extensive and that defendant is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high.

Defendant contends that the record does not support the trial court findings that he is a dangerous offender as defined by the statute just cited.

In State v. Jones, 883 S.W.2d 597, 599-600 (Tenn. 1994), our supreme court outlined the procedure for reviewing sentencing on appeal:

> To facilitate meaningful appellate review, the Act provides that the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. § 40-35-210(f) (1990). . . . Where the trial court has complied with these provisions of the statute, the sentence is reviewed de novo with a presumption of correctness. T.C.A. § 40-35-401(d) (1990).

Defendant's contention is completely contrary to the record. The Pre-Sentence Report prepared by the Tennessee Department of Correction reveals that defendant had nine prior

criminal convictions dating back to 1988, including one conviction for concealing stolen property with a value in excess of $200, one conviction for aggravated burglary, one conviction for conspiracy to commit aggravated robbery, two convictions for assault, two convictions for public intoxication, and one conviction for the possession of marijuana. This record is sufficient to support a finding that the defendant's criminal activity has been extensive. See also State v. Chrisman, 885 S.W.2d 834, 839 (Tenn. Crim. App. 1994). Because only one of the enumerated factors in T.C.A. § 40-35-115(b) must be found by a preponderance of the evidence in order to impose consecutive sentencing, we need not address the matter of the trial court finding defendant to be a dangerous offender under T.C.A. § 40-35-115(b)(4). See also Manning v. State, 883 S.W.2d 635, 641 (Tenn. Crim. App. 1994).

Defendant also contends that because his conviction arose out of the same criminal event, consecutive sentencing was inappropriate, relying upon State v. Anthony, 817 S.W.2d 299 (Tenn. 1991). Defendant's reliance upon Anthony is misplaced. The opinion in Anthony makes no mention of consecutive sentencing. Furthermore, to the extent that defendant contends that his conviction for aggravated burglary cannot be sustained because that act was merely incidental to the commission of aggravated robbery, this issue is without merit as well. State v. Stephenson, 878 S.W.2d 530 (Tenn. 1994)

In order to convict defendant of aggravated burglary, the state must prove that defendant (1) entered Hennessee's house, (2) without his consent, (3) with the intent to commit a felony or theft. T.C.A. §§ 39-13-401 & -402 (1991). However, to convict defendant of aggravated robbery, the state must prove that defendant (1) intentionally or knowingly stole the property of Hennesse, (2) by violence or putting him in fear, and (3) accomplished same with a deadly weapon. T.C.A. §§ 39-13-401 & -402 (1991). The elements of the two offenses involved in this case before us are not such that proving one offense necessarily proves the elements for the other, nor is neither offense a lesser included offense of the other. See Howard v. State, 578 S.W.2d 83, 85 (Tenn. 1979). We find this issue to be without merit.

For the above state reasons, the judgment of the trial court is affirmed in all respects.

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TOMLIN, Sr. J

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WADE, J. (CONCURS)

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WELLES, J. (CONCURS)