

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

NOVEMBER 1995 SESSION

**FILED**

**March 13, 1996**

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

STATE OF TENNESSEE, )  
 )  
 Appellee )  
 )  
 V. )  
 )  
 ESTENICO SLAYTON, )  
 )  
 Appellant )

NO. 02C01-9505-CC-00149

DYER COUNTY

HON. J. STEVEN STAFFORD  
JUDGE

(Aggravated Robbery)

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

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Estenico Slayton, was convicted by a Dyer County jury of aggravated robbery and sentenced to nine years imprisonment in the Tennessee Department of Corrections. On appeal, he presents the following two (2) issues for our review.

- (1) Whether the evidence was sufficient at trial to support the conviction for aggravated robbery;
- (2) Whether the nine-year sentence imposed by the trial court is warranted under the Sentencing Reform Act of 1989.

### **FACTUAL BACKGROUND**

On October 31, 1993, at approximately 8:30 or 9:00 p.m., two men wearing ski masks and brandishing a small shiny pistol entered Gatlin's Grocery Store in Dyersburg, Tennessee. One of the men held the gun to seventeen-year-old Jeremy Gatlin's head as the other man stole approximately \$500 out of the store's cash register. After taking the money, the two men ran out of the store and across the street. Neither Jeremy Gatlin nor Jennifer Crews, the cashier, saw where the two men went after they crossed the street. Shortly thereafter, Terry Sollis saw two men run away from Gatlin's Grocery and get into a car that had stopped on the road. He was not able to see the face of the driver. Mr. Sollis told the police that the car looked like a gold Nova. A few days after the robbery, Mr. Sollis rode around with the police in an attempt to identify the car that had picked up the two men. He identified a gold Oldsmobile Omega that was parked at the home of the appellant's girlfriend as the same car he had seen the two (2) men get into on the evening of the Gatlin Grocery robbery. The police later determined that the Omega was co-owned by the appellant and Thomas Parks. Investigator Don Newell testified that an Omega has the same body shape as a Nova.

Eventually the appellant, Thomas Parks, Jonathan Webb, and Tamiko Johnson were charged with the aggravated robbery of Gatlin's Grocery. Additionally,

Tamiko Johnson was charged with being an accessory after the fact to the crime. Subsequent to the indictments, Thomas Parks and Jonathan Webb pleaded guilty to the armed robbery and told authorities that Estenico Slayton had been the driver of the getaway vehicle, a gold Oldsmobile Omega. Tamiko Johnson was found guilty of being an accessory after the fact to the armed robbery.

Thomas Parks proved to be a most uncooperative witness for the State, as the bulk of his testimony was that he could not recall any of the events pertinent to the trial. However, the prosecutor did manage to elicit from Mr. Parks that he and the appellant bought a 1977 gold Oldsmobile Omega the day before the robbery. Mr. Parks identified the appellant as "Nico Slayton" and as the same Estenico Slayton with whom he purchased the car. The State introduced into evidence the Bill of Sale on the Oldsmobile which showed that Mr. Parks and Mr. Slayton were indeed the purchasers of the car. However, at trial, Mr. Parks stated that he could not recall anything about the Halloween robbery as he was "highly intoxicated" at the time of the robbery and at the time he gave his statement to the police. Mr. Parks testified on cross-examination that he could not recall whether or not the appellant drove the car on the night of the robbery. In the statement he gave to police, Mr. Parks identified a man by the name of "Nico" as having been the driver of the getaway car after the robbery. At the time he gave his statement he said he could not recall the last name of the man he was referring to as "Nico."

Jonathan Webb also testified on behalf of the State. His testimony was that he was one of the two men who went into Gatlin's Grocery and committed the armed robbery. He admitted that he was reluctant to testify against the appellant in this case. However, he testified that he and his accomplices got the gun used in the robbery from Tamiko Johnson earlier in the day. He further testified that the gun shown to him at trial by the prosecutor looked like the gun which he and Mr. Parks used to commit the robbery. Later, however, Mr. Webb testified that he got the gun used in the

robbery from the appellant just prior to robbing the grocery store. Mr. Webb testified that although the appellant did not know exactly what he and Mr. Parks were doing in the grocery store, he did know of the plan to rob the store. Further, Mr. Webb confirmed that the appellant was the driver of the getaway car. Mr. Webb also testified that he, Mr. Parks, and the appellant were intoxicated on the evening of the robbery. He testified that he gave some of the proceeds of the robbery to the appellant. Finally, Mr. Webb agreed that after the robbery he, Thomas Parks, and the appellant all went to the Dyersburg Comfort Inn, and that the appellant went in and got the room for them.

The State introduced a receipt from the Comfort Inn in Dyersburg which was dated the same day as the robbery and which had the appellant's name and driver's license number recorded on it. A hotel clerk from the Comfort Inn testified that the customary practice at the hotel was for the guest to fill out that information. The appellant's first name was misspelled on the hotel receipt. Instead of "Estenico Slayton " the name on the hotel receipt was "Estenieo Slayton." However, the driver's license number on the receipt matched the appellant's driver's license number.

Although the appellant did not testify on his own behalf, he did present the testimony of others. Tamiko Johnson, the appellant's former girlfriend, testified that the appellant was with her at her home during the entire evening of the robbery except for a forty-five minute period during which she visited her mother's home. Crystal Maze was to be another alibi witness for the appellant. However, she testified that she did not see the appellant on the evening of the robbery. She further testified that she was either mistaken or lying when she told the appellant's lawyer, prior to trial, that she had seen the appellant at Tamiko Johnson's house on the evening of the robbery.

#### **SUFFICIENCY OF THE EVIDENCE**

Where the sufficiency of the evidence is challenged, the relevant question for this court is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); T.R.A.P. 13(e).

A guilty verdict, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves any conflicts in favor of the State's theory. State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978). On appeal, the State is entitled to the strongest legitimate view of the evidence and to all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978). A verdict against the defendant removes the presumption of innocence and replaces it with a presumption of guilt on appeal. State v. Grace, 493 S.W.2d 474 (Tenn. 1973). The defendant has the burden of overcoming the presumption of guilt. State v. Brown, 551 S.W.2d 329 (Tenn. 1977).

The appellant claims that the State failed to prove the elements of the offense beyond a reasonable doubt. The appellant also claims that because the incriminating testimony against him came entirely from his accomplices, the State was required to provide corroborating evidence before a verdict of guilt could lawfully be returned against him. The appellant is correct. The law of this s

tate will not allow a conviction to stand upon the uncorroborated testimony of an accomplice. See State v. Henley, 489 S.W.2d 53,56 (Tenn. Crim. App. 1972).

There is no question that an aggravated robbery did occur on the evening of October 31, 1994, and that the robbery was directly committed by Thomas Parks and Jonathan Webb. The question with regard to the appellant's conviction is whether there was sufficient proof to find him guilty of the aggravated robbery under the criminal responsibility statute. In order to be convicted under the statute, the State

was required to prove that in aiding his accomplices in the aggravated robbery, the appellant acted "with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense . . . ." See Tenn. Code Ann. § 39-11-402(2) (1991 Repl.). The appellant claims that the State did not establish that the appellant knew of the robbery before it occurred. Although there was conflicting testimony from the State's witnesses on what the appellant knew and when he knew it, there was sufficient testimony which, if believed by the jury, proved that the appellant knew in advance of the plot to rob Gatlin's Grocery.

Accomplice Thomas Parks identified the appellant in court as a participant in the robbery and as the co-owner of the vehicle used to facilitate the getaway after the robbery. Jonathan Webb, another accomplice, testified that the appellant shared in the proceeds of the armed robbery. Mr. Webb further testified that although the appellant did not know the specifics of how the robbery would be carried out, he knew that it was going to occur.

While we agree that the evidence of corroboration in this case was not overwhelming, we hold that there was sufficient independent evidence which corroborated the testimony of the accomplices and which implicated the appellant in the aggravated robbery of Gatlin's Grocery. There were two (2) facts testified to by the appellant's accomplices that were sufficiently corroborated by other, independent proof which implicated the appellant in the robbery. Jonathan Webb testified that after the robbery, he, Mr. Parks, and the appellant fled to the Comfort Inn off the main highway in Dyersburg. The State corroborated this testimony with evidence, introduced through the hotel's clerk, of a hotel receipt from that Comfort Inn dated the same evening of the robbery and which contained the appellant's name, albeit misspelled, and his driver's license number. Further, Thomas Parks testified that he and the appellant purchased a gold 1977 Oldsmobile Omega the day before the robbery. The Bill of Sale corroborated that testimony. The getaway vehicle described

by Terry Sollis and later identified by Mr. Sollis was the same 1977 gold Oldsmobile Omega which was co-owned by the appellant and which had been purchased the day before the robbery.

While these two facts taken together could not alone sufficiently support the conviction in this case, they are corroboration of the accomplices' testimony sufficient to allow the jury to accredit the accomplice testimony which would support the conviction in this case. See State v. Henley, at 56.

Viewed in the light most favorable to the State we conclude that there was sufficient evidence to support the conclusion that the appellant knowingly participated in the aggravated robbery of the Gatlin Grocery.

### **SENTENCING**

The appellant's second contention is that the nine-year sentence imposed by the trial court was excessive. The sentencing range for a Range I, Class B felony is eight (8) to twelve (12) years. Tenn. Code Ann. § 40-35-112 (1990 Repl.). Although we have determined that the trial court erred in applying certain enhancement factors, we hold that the sentence is an appropriate one in this case.

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) (1990 Repl.). 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). The Sentencing Commission Comments provide that the burden is on the appellant 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 appellant in his own behalf; and (7) appellant's potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-103 (1990 Repl.); Tenn. Code Ann. § 40-35-210 (1995 Supp.); State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

The trial court determined that the appellant should serve a term of imprisonment of nine (9) years without the possibility of probation or alternative sentencing based upon its application of the following enhancement factors:

- (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
- (3) The offense involved more than one (1) victim;
- (10) The defendant had no hesitation about committing a crime when the risk to human life was high;
- (16) The crime was committed under circumstances under which the potential for bodily injury to a victim was great.

Tenn. Code Ann. § 40-35-114 (1995 Supp.).

Although the appellant argues only that the trial court erred in applying enhancement factor ten (10) in this case, we hold that the trial court incorrectly applied enhancement factors ten (10) and sixteen (16).

As a preliminary matter we note that although a presentence report was prepared and considered by the trial court in determining an appropriate sentence in this case, neither the State nor the appellant introduced the presentence report into evidence. This Court is required to consider the contents of the presentence report. Tenn. Code Ann. § 40-35-210(b)(2) (1995 Supp.). Where a presentence report relied on by the trial court is not part of the record on appeal, "...we presume that the trial court's factual findings are supported by the full record and are, therefore, correct." State v. Allen Gary Lord, alias, Gary Allen Lord, No. 03C01-9312-CR-00391 (Tenn.



Crim. App., at Knoxville, August 17, 1995), perm. to appeal denied (Tenn. 1995) (emphasis in original). Additionally, we have thoroughly reviewed the transcript of the sentencing hearing and have determined that the appellant himself admitted to a felony drug conviction and "other convictions" that he had from Memphis. The record reveals that the appellant admitted at least two prior criminal convictions. We therefore find nothing in the record which tends to overcome the presumption that the trial court's findings relative to the appellant's prior criminal history are correct. Accordingly, we find that the trial court's application of factor one (1) in this case was not erroneous.

The proof clearly established that there was more than one victim in this case. Accordingly, enhancement factor three (3) was appropriately applied in this case.

However, neither factor ten (10) nor factor sixteen (16) should have been used to enhance the sentence in this case. This Court has previously held that enhancement factor ten (10) (no hesitation about committing a crime when the risk to human life was high) is an essential element of the crime of aggravated robbery. State v. Claybrooks, 910 S.W.2d 868, 872 (Tenn. Crim. App. 1994). In Claybrooks, this Court stated,

To the extent that every armed robbery includes a high risk to human life, it must be assumed that the legislature did not contemplate the application of this enhancement factor. Otherwise the presumed minimum sentence of eight years for aggravated robbery would never apply because a court would always find the existence of this factor.

Id. Accordingly, it was error to apply enhancement factor ten (10) to this case.

Likewise, in Claybrooks, this court held that "[t]he offense of aggravated robbery necessarily entails . . . a potential for great bodily harm." Id. at 873. Because of the absence of any proof in the record that there was potential for great bodily harm over and above that necessarily present in the case of any aggravated robbery, enhancement factor sixteen (16) should not have been applied in this case. Id.; See also State v. Clifford Atkins and George Wesley Short, Nos. 03C01-9302-CR-00058,

03C01-9302-CR-00059 (Tenn. Crim. App., at Knoxville, March 3, 1994); State v. Norris Basil Williams, No. 02C01-9401-CC-00006 (Tenn. Crim. App., at Jackson, January 11, 1995).

In addition to his argument that the trial court erred in enhancing the sentence, the appellant argues that the trial court's refusal to recognize any mitigating factors was error and urges this Court to recognize the existence of three mitigating factors. We hold that the trial court correctly concluded that no mitigating factors applied in this case.

The appellant first contends that his conduct neither caused nor threatened serious bodily injury pursuant to Tennessee Code Annotated section 40-35-113(1). The appellant was convicted of aggravated robbery. To argue that his conduct neither caused nor threatened serious bodily injury totally ignores the fact that the appellant's accomplices held a gun to the head of a seventeen-year-old boy in a grocery store. Obviously, there was a potential for serious bodily injury.

The appellant also contends that mitigating factor number four (4) should apply because he played a minor role in the commission of the offense. Tenn. Code Ann. § 40-35-113(4)(1990 Repl.). He argues that because he was found guilty of aggravated robbery under the criminal responsibility statute, he necessarily played a minor role in the offense. The appellant misapprehends the criminal responsibility statute. That statute does not provide for a lessor degree of culpability than if he were the sole criminal actor. We do not consider driving the getaway car to be minor in the context of this robbery.

Finally, the appellant argues that he committed the offense under such unusual circumstances that it is unlikely that his conduct manifested a sustained intent to violate the law. Tenn. Code Ann. § 40-35-113(11) (1990 Repl.). The appellant has failed to establish any circumstances surrounding the commission of

this offense which would show that he lacked a sustained intent to violate the law. Accordingly, the trial court properly rejected mitigating factor eleven (11).

Although we conclude that the trial court committed error in applying two enhancement factors in this case, we find that the two remaining enhancement factors were properly applied and standing alone support the imposition of a nine (9) year sentence for this Range I, Class B offender. See State v. Randy Lee Carver, No. 03C01-9301-CR-00027 (Tenn. Crim. App., at Knoxville, January 9, 1995), perm. to appeal denied (Tenn. 1995).

Accordingly, the judgment of the trial court is affirmed.

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WILLIAM M. BARKER, JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

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DAVID H. WELLES, JUDGE