IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1993 SESSION

FILED

February 23, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01C01-9304-CC-00131**
Appellee,	)	
	)	**MAURY COUNTY**
VS.	)	
	)	**The Honorable Charles Lee**
SHEILA ELAINE THOMAS,	)	**(Sitting by Interchange)**
	)	
Appellant.	)	**(11 Counts of Aggravated Burglary**
	)	**and 15 Counts of Theft of Property)**

FOR THE APPELLANT:

On Appeal Only
Thomas T. Woodall
Attorney at Law
203 Murrell Street
P.O. Box 1075
Dickson, TN 37056

At Trial Only
J. Daniel Freemon
Attorney at Law
327 West Gaines
P.O. Box 787
Lawrenceburg, TN 37801

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter

Clinton J. Morgan
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Donald W. Schwendimann
District Attorney General Pro Tem
P.O. Box 366
Hohenwald, TN 38462-0366

OPINION FILED: _____

AFFIRMED

JULIAN P. GUINN, SPECIAL JUDGE

O P I N I O N

This is an appeal as a matter of right from the appellant's convictions on 11 counts of aggravated burglary and 15 counts of theft, for which she was sentenced to an effective sentence of 24 years and six months in the Tennessee Department of Correction ("TDOC"). The appellant was originally charged with a 37-count indictment. The multiple charges were resolved as follows:

Count 1:	Aggravated burglary. Jury verdict of not guilty.
Count 2:	Theft of property valued at more than $500, but less than $1000. Class E felony. 6 months in the county jail/workhouse, no fine.
Count 3:	Aggravated burglary. Judgment of acquittal.
Count 4:	Theft of property valued at more than $1000. Judgment of acquittal.
Count 5:	Aggravated burglary. Jury verdict of not guilty.
Count 6:	Theft of property valued at more than $1000, Class D felony. 2 years, 4 months in TDOC, no fine.
Count 7:	Aggravated burglary, Class C felony. 3 years, 4 months in TDOC, $2000 fine.
Count 8:	Theft of property valued at more than $1000, Class D felony. 2 years, 6 months in TDOC, $2000 fine.
Count 9:	Aggravated burglary, Class C felony. 3 years, 6 months in TDOC, $3000 fine.
Count 10:	Theft of property valued at more than $1000, Class D felony. 2 years, 9 months in TDOC, $3000 fine.
Count 11:	Aggravated burglary, Class C felony. 3 years, 9 months in TDOC, $5000 fine.
Count 12:	Theft of property valued at more than $1000, Class D felony. 2 years, 9 months in TDOC, $5000 fine.
Count 13:	Aggravated burglary, Class C felony. 4 years in TDOC, $2000 fine.
Count 14:	Theft of property valued at more than $1000, Class D felony. 3 years in TDOC, $2000 fine.

Count 15: Aggravated burglary, Class C felony.
4 years in TDOC, $5000 fine.

Count 16: Theft of property valued at more than $1000, Class D felony.
3 years in TDOC, $5000 fine.

Count 17: Aggravated burglary.
Mistrial (jury unable to reach a unanimous verdict).

Count 18: Theft of property valued at more than $1000, Class D felony.
4 years in TDOC, $5000 fine.

Count 19: Aggravated burglary.
Judgment of Acquittal.

Count 20: Theft of property valued at more than $1000.
Judgment of Acquittal.

Count 21: Aggravated burglary, Class C felony.
5 years in TDOC, $7500 fine.

Count 22: Theft of property valued at more than $1000, Class D felony.
4 years in TDOC, $5000 fine.

Count 23: Aggravated burglary, Class C felony.
5 years in TDOC, $7500 fine.

Count 24: Theft of property valued at more than $1000, Class D felony.
4 years in TDOC, $5000 fine.

Count 25: Aggravated burglary, Class C felony.
5 years in TDOC, $9000 fine.

Count 26: Theft of property valued at more than $1000, Class D felony.
3 years, 6 months in TDOC, $5000 fine.

Count 27: Aggravated burglary, Class C felony.
6 years in TDOC, $7500 fine.

Count 28: Theft of property valued at more than $1000, Class D felony.
3 years, 9 months in TDOC, $5000 fine.

Count 29: Aggravated burglary.
Judgment of acquittal.

Count 30: Theft of property valued at more than $1000.
Judgment of acquittal.

Count 31: Aggravated burglary.
Jury verdict of not guilty.

Count 32: Theft of property valued at more than $1000, Class D felony.
3 years, 9 months in TDOC, $5000 fine.

Count 33: Aggravated burglary, Class C felony.
6 years in TDOC, $2500 fine.

Count 34: Theft of property valued at more than $1000, Class D felony.
3 years, 9 months in TDOC, $2000 fine.

Count 35: Aggravated burglary, Class C felony.
6 years in TDOC, $9000 fine.

Count 36: Theft of property valued at more than $1000, Class D felony.
3 years, 9 months in TDOC, $5000 fine.

Count 37: Theft of property valued at more than $500, but less than $1000.
Judgment of acquittal.

Counts 2, 6, 7, 8, 9, and 10 were ordered to be served concurrently, but consecutively with counts 11 through 18, which were ordered to be served concurrently, but consecutively with counts 21 through 26, which were ordered to be served concurrently, but consecutively with counts 27, 28, 32, 33, and 34, which were ordered to be served concurrently, but consecutively with counts 35 and 36, which were ordered to be served concurrently. The total effective sentence was 24 years and six months in the Tennessee Department of Correction.

In this appeal, the appellant presents five issues for review:

1. Whether the trial court erred in denying the appellant's motion to suppress evidence seized pursuant to a search warrant executed February 19, 1991.

2. Whether the trial court erred in denying the appellant a new trial based upon newly discovered evidence of co-defendant Joey Dodson recanting his testimony at the appellant's trial.

3. Whether the trial court erred in denying the appellant's motion to sever the offenses for trial.

4. Whether the trial court erred in imposing consecutive sentences and whether the sentences were excessive.

5. Whether the evidence was sufficient to support the convictions.

Having found no reversible error, we affirm the appellant's convictions and sentence.

General Background

The appellant and co-defendant Joey Dodson met while working at a factory in Columbia, Tennessee. At the time, the appellant was married, but separated from her husband, and had two school-age children. Several months after meeting, the appellant and her children moved in with Dodson. After they were both laid off work at the factory, Dodson and the appellant moved to another duplex, which was leased in Dodson's name.

Between December 1990 and February 1991, the appellant and Dodson burglarized various homes and sold the stolen items to pay their living expenses while they were unemployed. Dodson testified that he and the appellant had no legitimate income during this time. He further testified that the appellant was with him when he burglarized the Maury County houses and that she was the only other person who participated. They always drove the appellant's maroon Pontiac Grand Am since Dodson did not own a car. Dodson testified that when burglarizing the homes, that he was looking for items that would be easy to sell, whereas, the appellant was looking for women's and children's clothing and toys. They always took steps to prevent leaving any fingerprints in the houses they entered. Dodson, who had more "contacts," sold the stolen property to various people.

While Dodson and the appellant were in jail awaiting trial, the appellant sent Dodson several letters. Portions of one letter were read to the jury in which the appellant asked Dodson to "take the fall." Dodson admitted under cross-examination that he was prepared to "take the rap" for the charged, but changed his mind when he realized that the appellant "wasn't going to be there when [he] got out."

Dodson pled guilty to several counts of aggravated burglary and theft of property and received an effective sentence of 10 years in the Tennessee Department of Correction. His plea was in exchange for his truthful testimony at the appellant's trial.

Count 2

On November 15, 1990, the home of Buddy Baldwin in Maury County, Tennessee, was entered without his consent. The lock on the sliding glass door off the bedroom was broken and pried open. Old coins, three or four pair of blue jeans, some alarm clocks, and some small tokens were taken. Mr. Baldwin identified some of his coins, some paper foreign currency, and an alarm clock on February 20, 1991 that had been recovered by the sheriff. Mr. Baldwin estimated that the total value of the property taken was $600. Dodson testified that the appellant was with him when he burglarized Mr. Baldwin's house and that she participated in entering and taking property from the house. Based on this proof, the jury found the appellant guilty of theft of property valued at more than $500, but less than $1000.

Count 6

On December 6, 1990, the home of Randy and Renae Lovell[1] in Maury County, Tennessee, was entered without their consent. A window in the bedroom door had been broken and the door was pushed open. Numerous items of personal property, such as jewelry, guns, electronic equipment, and a set of four brand new wheels and tires, were taken from the home, with a total value of $7500 or $7600. In February 1991, the Lovells recovered an oval mirror and some jewelry at the sheriff's department. Dodson testified that the appellant was with him when he entered the Lovells' home and that she participated in entering and removing property from the house. Based on this proof, the jury found the appellant guilty of theft of property valued at more than $1000.

Counts 7 & 8

The home of Tom and Linda Moore in Maury County, Tennessee, which is

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[1] Where there are discrepancies between the transcript and the indictments as to the spelling of the victims' names, the Court has followed the spelling in the indictments.

located in an isolated area, was entered without their consent on the morning of December 10, 1990. The screen on the front window was gone and the window was open. The back door was also open. The items of personal property taken from the home were valued at $2600. In February 1991, the Moores recovered personal items from the sheriff's department and from the appellant's residence. Dodson testified that the appellant was with him when he burglarized the Moores' house and that she participated in entering and removing property from the house. Based on this proof, the jury found the appellant guilty of aggravated burglary and theft of property valued at more than $1000.

Counts 9 & 10

On December 12, 1990, the home of David and Diane White in Maury County, Tennessee, was entered without their consent. The Whites' have only one visible neighbor from their house. The storm door at the back of the house was broken, and a glass pane in the wooden door was broken. It appeared that the door had then been unlocked from the inside. Upon entering the house that evening, Mr. White found a bobby pin on the edge of the carpet. Personal property valued at $5000 was found to be missing from the Whites' home. In February 1991, the Whites recovered some of their personal property from the sheriff's department and from the residence of the appellant. Dodson testified that the appellant was with him when he burglarized the Whites' home and that she participated in entering and removing property from the house. Based on this evidence, the jury found the appellant guilty of aggravated burglary and theft of property valued at more than $1000.

Counts 11 & 12

On the afternoon of December 13, 1990, the home of Andy and Sue North in Maury County, Tennessee, was entered without their consent. The glass in the french

doors was broken, and drawers and closets throughout the house were left open. Several items of property were missing from the home, including some handmade dolls. The estimated value of the stolen property was $2600. In February 1991, Mrs. North identified some of their missing property at the sheriff's department and at the appellant's residence. In the children's bedroom at the appellant's residence, Mrs. North found three of the dolls. Dodson testified that the appellant was with him when he burglarized the Norths' home and that she participated in entering and removing property from the house. Based on this proof, the jury found the appellant guilty of aggravated burglary and theft of property valued at more than $1000.

Counts 13 & 14

During the day, on December 14, 1990, the home of Tim and Linda Mobbs in Maury County, Tennessee, was entered without their consent. The house, which is in an isolated area, has no other houses in view. A small window in the front door had been broken. The personal property missing from the home was valued at $5000. In February 1991, Mrs. Mobbs found some of their property at the sheriff's department and at the appellant's residence. Mrs. Mobbs testified that she saw pictures of people opening Christmas gifts around a tree and that she recognized the packages and the contents as being her family's gifts. Dodson testified that the appellant was with him when he burglarized the Mobbs' house and that she participated in entering and removing property from the house. Based on this evidence, the jury found the appellant guilty of aggravated burglary and theft of property valued at more than $1000.

Counts 15 & 16

On December 14, 1990, the home of Ray and Debora Holcolm in Maury County, Tennessee, was entered without their permission. The home is in an isolated area

where neighbors cannot see the house. Upon arriving home that afternoon, Mrs. Holcolm found the glass in the back door broken and the door ajar. Items of personal property, valued at $5000, were missing. In February 1991, the Holcolms recovered a VCR, which they identified by the serial number, at the sheriff's department. At the appellant's residence, Mrs. Holcolm also recovered a teddy bear with her daughter's hair tie on it. Dodson testified that the appellant was with him when he burglarized the Holcolms' house and that she participated in entering and removing property from the house. Based on this proof, the jury found the appellant guilty of aggravated burglary and theft of property valued at more than $1000.

Count 18

Sometime before 1:00 p.m., on December 18, 1990, the home of Larry and Patsy Meadors, located in Maury County, Tennessee, was entered without their consent. A window at the rear of the house had been broken and the screen had been pushed in. There were two sets of muddy footprints on the carpet that appeared to have been made by "sneaker-type" shoes. The house had been ransacked and numerous items of personal property were missing. Mrs. Meadors valued the property at $8000. In February 1991, the Meadors recovered some of their property at the sheriff's department. Their son's name was written in indelible ink on the Nintendo games recovered at the sheriff's department. Mrs. Meadors also found some of her make-up in the bathroom at the appellant's residence. She testified that it was an unusual brand of make-up that had been purchased out-of-state. Dodson testified that the appellant was with him when he burglarized the Meadors' house and that she participated in entering and removing property from the house. Based on this evidence, the jury found the appellant guilty of aggravated burglary and theft of property valued at more than $1000.

Count 21 & 22

On January 11, 1991, the home of Mike and Debra Morton in Maury County,

Tennessee, which is partially hidden from the neighbors by trees, was entered without their consent. Upon returning home that afternoon, Mr. Morton found tire tracks in the backyard. He then found that a glass pane in the french door to the kitchen was broken, however the dead bolt was still locked. The glass atrium door was also broken out, and the drapes were completely pulled across the three atrium doors. Many items of personal property, valued at $12,679.98, were missing. In February 1991, the Mortons recovered personal property at the sheriff's department and at the appellant's residence. Included in the items recovered were 127 articles of children's clothing, some handmade by Mrs. Morton, including two items of clothing with her daughter's name appliqued on them. The rest of the clothes had been marked by Mr. Morton's dry cleaning business. Mrs. Morton testified that they dry cleaned most of their clothes. Dodson testified that the appellant was with him when he burglarized the Mortons' house and that she participated in entering and removing property from the house. Based on this proof, the jury found the appellant guilty of aggravated burglary and theft of property valued at more than $1000.

Counts 23 & 24

On January 11, 1991, the home of Paul and Louise Lanius in Maury County was entered without their consent. There was dried mud on top of the kitchen counter underneath an unlocked window, and the basement door from the garage to the house was open. Mr. Lanius testified that he found oil on the floor of the garage that was not from any of their vehicles. The numerous items of property taken from the home were valued at $13,000. The Laniuses recovered property from the sheriff's department and from the appellant's residence. Among the things recovered from the appellant's residence was a prescription drug belonging to Mrs. Lanius. Dodson testified that the appellant was with him when he burglarized the Laniuses' home and that she participated in entering and removing property from the house. Based on this proof, the jury found the appellant guilty of aggravated theft and theft of property valued at more than $1000.

Counts 25 & 26

On January 18, 1991, the home of Danny and Shelia Owen in Maury County, Tennessee, was entered without their consent. There are no visible neighbors near the Owens' house. Late in the afternoon, the Owens discovered that the full-length glass kitchen door was shattered. Several items of personal property, valued at $23,000, were taken from the home. In February 1991, the Owens recovered some property at the sheriff's department, including one computer, and some property at the appellant's residence. Dodson testified that the appellant was with him when he burglarized the Owens' home and that she participated in entering and removing property from the house. Based on the evidence presented, the jury found the appellant guilty of aggravated burglary and theft of property valued at more than $1000.

Counts 27 & 28

On January 24, 1991, the home of Earl and Vicky Alligood in Maury County, Tennessee, was entered without their consent. When Mrs. Alligood arrived home that afternoon, she discovered that the back door was unlocked. As she proceeded into the living room, she discovered that the bay window was broken. There was a large footprint in the garden next to the window. Several items of personal property were missing from the house. The Alligoods estimated that the value of the stolen property was $7000. In February 1991, the Alligoods recovered some property at the sheriff's department.

Mr. L.V. Rubert, the Alligoods' neighbor, testified that on the day of the burglary, he saw a red or maroon Pontiac Grand Am pull up in the Alligoods' driveway around 3:00 p.m. The driver, a white male, got out of the car and went behind the house. The driver then came back around to the car. Rubert left the window after it appeared that the car was leaving. When Rubert came back to the window, he saw the car pass by three times. The passenger was a white female. He finally decided that they were waiting for someone to come home and stopped watching.

Dodson testified that the appellant was with him when he burglarized the

Alligoods' home and that she participated in entering and removing property from the house. Based on this proof, the jury found the appellant guilty of aggravated burglary and theft of property valued at more than $1000.

Count 31 & 32

On February 6, 1991, the home of Jerry and Melinda Sands in Maury County, Tennessee, was entered without their consent. A glass pane in the back door had been knocked out. Many items, mostly electronic equipment, were missing from the house. The estimated value of the property was $6000. Later that month, the Sands recovered several items from the sheriff's department. Dodson testified that the appellant was with him when he burglarized the Sands' home and that she participated in entering and removing property from the house. Based on this proof, the jury found the appellant guilty of aggravated burglary and theft of property valued at more than $1000.

Count 33 & 34

On February 14, 1991, the home of Frank and Sharon Cole in Maury County, Tennessee, was entered without their consent. The front door was open when Mrs. Cole returned home from work. There was no sign of forced entry, but she testified that the door may have been left unlocked. Neighbors cannot see the front door of the house. A few items were missing from the home, valued at $1700. Within a week, Mrs. Cole recovered a ceramic urn from the sheriff's department. Dodson testified that he could not remember burglarizing the Cole's house, but that the appellant was with him during every burglary and that she participated in entering and removing property at all the houses. Based on this proof, the jury found the appellant guilty of aggravated burglary and theft of property valued at more than $1000.

Count 35 & 36

On February 14, 1991, the home of Richard and Jennie Jewell in Maury County, Tennessee, was entered without their consent. When Mr. Jewell returned home around 2:30 p.m., he discovered a gap under the garage door. He also discovered that the walk-in door to the garage was open and that the upstairs door from the basement was knocked in. The value of the various items taken from the home was estimated at $3500. Dodson testified that the appellant was with him when he burglarized the Jewells' home and that she participated in entering and removing property from the house. Based on this proof, the jury found the appellant guilty of theft of property valued at more than $1000.

Defense

The appellant's husband, Steve Thomas, testified that although he was separated from the appellant during the time period of the burglaries and thefts, he gave the appellant $50 to $100 a week for living expenses. Even after Thomas found out that the appellant was living with Dodson sometime in November of 1990, he continued to give her money to pay her bills. Thomas testified that the appellant came to his apartment in Franklin, Tennessee, on Tuesdays and Thursdays to clean and wash his clothes. On Tuesdays, he and the appellant would often pick up the children after school and do something together. On Thursdays, the appellant usually stayed until noon when Thomas would go back to work. Thomas testified that the two children had lots of clothes and toys. The appellant and Thomas were reconciled in May or June of 1991. Since then, Thomas testified, Dodson has tried to break them up.

Peggy Walters, director of the Maury County Senior Citizens Center testified that the appellant worked for her at the center from 8:00 a.m. to noon on January 7, 8, and 9, 1991. Various family members testified on behalf of the appellant, offering alibi proof and evidence that the appellant received financial support from family members to meet the living expenses of her and her children. The appellant's mother, brother, and step-father also testified that Dodson had tried to resume his relationship with the appellant

since being released on bond. They also testified that Dodson had made threats when the appellant refused to see him.

Sufficiency of the Evidence

First, we consider the appellant's contention that the evidence was insufficient to support the multiple convictions. Specifically, the appellant contends that the evidence was insufficient to corroborate the testimony of co-defendant Dodson, who testified that the appellant participated in entering and removing property from each house. Having reviewed the proof, we find that Dodson's testimony was sufficiently corroborated and that the evidence supports the jury's verdict.

A guilty verdict, approved by the trial court, 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). When the sufficiency of the evidence is challenged, the relevant question is whether, after a consideration of the evidence in the light most favorable to the state, a 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), cert. denied, 465 U.S. 1073, 104 S.Ct. 1429, 79 L.Ed.2d 753 (1984); T.R.A.P. 13(e).

A defendant cannot be convicted on the uncorroborated testimony of an accomplice. See State v. McKnight, 900 S.W.2d 36, 47 (Tenn. Crim. App. 1994); Prince v. State, 529 S.W.2d 729, 732 (Tenn. Crim. App. 1975). In Sherrill v. State, 204 Tenn. (8 McCanless) 427, 321 S.W.2d 811 (1959), our Supreme Court said:

> The rule of corroboration as applied and used in this State is that there must be some evidence independent of the testimony of the accomplice. The

> corroborating evidence must connect, or tend to connect the defendant with the commission of the crime charged; and, furthermore, the tendency of the corroborative evidence to connect the defendant must be independent of any testimony of the accomplice. The corroborative evidence must of its own force, independently of the accomplice's testimony, tend to connect the defendant with the commission of the crime.

Id. at 435, 321 S.W.2d at 815. The Court went on to hold that "corroborative evidence need not be direct evidence, but the rule of corroboration is satisfied even though the evidence is entirely circumstantial." Id. To be corroborative, the evidence need not be adequate in and of itself to convict. McKinney v. State, 552 S.W.2d 787, 789 (Tenn. Crim. App. 1977). Only slight circumstances are required to furnish the necessary corroboration. Garton v. State, 206 Tenn. (10 McCanless) 79, 87, 332 S.W.2d 169, 175 (1960). It is sufficient to meet the requirements of the legal standard if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. Sherrill v. State, 204 Tenn. at 435, 321 S.W.2d 815. The sufficiency of the corroboration is a jury determination. The jury may consider all the evidence and draw whatever reasonable inferences may exist. This Court may not substitute its judgment for that of the fact finder. State v. Copeland, 677 S.W.2d 471, 475 (Tenn. Crim. App. 1984).

The appellant argues that mere evidence of her residing in Dodson's house, which was leased in his name, is insufficient to corroborate Dodson's testimony. We find the evidence presented corroborated Dodson's testimony that the appellant was with him when he burglarized the houses in Maury County and that the appellant participated in removing property from the homes. The proof showed that the appellant and her two daughters lived with Dodson in the same house where the stolen property was subsequently found during the execution of the search warrant. There was testimony that the stolen items of property found at the residence were not confined to an area solely in the control of Dodson. Instead, stolen property was found throughout the entire house, including many items in the room of the appellant's children.

Possession of recently stolen goods gives rise to an inference that the possessor stole them, and it is sufficient to corroborate an accomplice's testimony. See

State v. Hamilton, 628 S.W.2d 742, 746 (Tenn. Crim. App. 1981). In the present case, the stolen property being in the appellant's residence was overwhelming corroboration of Dodson's testimony. See State v. Cordell, 645 S.W.2d 763, 765 (Tenn. Crim. App. 1982). This issue is without merit.

Search Warrant

In another issue, the appellant contends that the trial court erred in denying her motion to suppress evidence seized pursuant to a search warrant executed on February 19, 1991. The appellant submits that the affidavit in support of the search warrant did not have sufficient information to satisfy the "veracity" prong of the tests enunciated in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), and adopted by our Supreme Court in State v. Jacumin, 778 S.W.2d 430 (Tenn. 1989). Specifically, the appellant argues that a neutral and detached magistrate who read the affidavit would not know from the four corners of the affidavit whether the unknown informant merely saw various items which were not uniquely and specifically identified and could be found in any home, or whether the informant might have seen a unique and specific stolen item identified by a serial number, marking, or an initial. Moreover, the appellant submits that from the affidavit it is unclear as to what items from the list were observed at the appellant's residence by the unknown informant and whether the informant had given reliable information to the affiant or other police officers in the past.

The affidavit upon which the search warrant was based, states in part that the affiant:

> received information from a citizen who does not have any criminal record known to affiant or any arrest record known to affiant, that said citizen has seen located on the above-described residence several items whose general description match the description of the property described in the hereto attached and adopted "EXHIBIT 1," and this observation has been made within the past 2 weeks. Furthermore, the said citizen has also informed

> affiant that the said Joey Dotson [sic] told the said citizen that the said items which the citizen observed were stolen.

Attached to the affidavit as "Exhibit 1," was a handwritten list of personal property.

On appeal, a trial court's findings of fact on a motion to suppress are conclusive unless the evidence preponderates against those findings. State v. Woods, 806 S.W.2d 205, 208 (Tenn. Crim. App. 1990), cert. denied, 502 U.S. 1079, 112 S.Ct. 986, 117 L.Ed.2d 148 (1992); State v. Johnson, 717 S.W.2d 298, 304-05 (Tenn. Crim. App. 1986). In this case, we find that the trial court properly denied the motion to suppress the evidence for the reasons stated below.

In State v. Jacumin, 778 S.W.2d 430 436, our Supreme Court rejected the totality of circumstances approach adopted by the United States Supreme Court in Illinois v. Gates, 463 U.S. 1237, 104 S.Ct. 33, 77 L.Ed.2d 1453 (1983), for determining probable cause in affidavits based on informant allegations. The Court held that under the Tennessee Constitution, probable cause would be determined by the Aguilar-Spinelli two-prong test which requires the establishment of the basis of knowledge and the veracity of those supplying hearsay information. Essential to the Aguilar-Spinelli standard for measuring probable cause is the recitation of sufficient underlying facts and circumstances in the affidavit to enable the issuing magistrate "to perform his detached function and not serve merely as a rubber stamp for the police." U.S. v. Ventresca, 380 U.S. 102, 109, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965). Probable cause to support the issuance of a search warrant must appear in the affidavit without inquiry as to probable cause known by the issuing magistrate or possessed by the affiant. State v. Moon, 841 S.W.2d 336, 338 (Tenn. Crim. App. 1992).

Where the affiant received information from a "citizen informant," the affidavit is not subject to the same degree of scrutiny as where the information was received from a "confidential informant." In State v. Melson, 638 S.W.2d 342 (Tenn. 1982), cert. denied, 459 U.S. 1137, 103 S.Ct. 770, 74 L.Ed.2d 983 (1983), the Tennessee Supreme Court

adopted a different test for "citizen informants." In such cases, "[t]he principle to be applied is that the magistrate must have a "'substantial basis' for crediting the hearsay." 638 S.W.2d at 355 (citations omitted). The Court in Melson, further indicated that a search warrant, based upon a statement of the citizen informant, is adequate when the information supplied by the affidavit intrinsically accredits the informant. Id. Since there is a presumption of reliability, the affiant is not under any obligation to establish that the source is credible or that the information is reliable. Id. at 356.

Such a distinction is justified in that often a confidential informant provides the information in exchange for some concession or payment. Whereas, an ordinary citizen is more likely motivated by a concern for society or his own safety, thus, the information carries an indicia of reliability. State v. Smith, 867 S.W.2d 343, 347 (Tenn. Crim. App. 1993) (citing State v. Paszek, 50 Wis.2d 619, 184 N.W.2d. 836, 842-43 (1971)).

In arguing that the Aguilar-Spinelli tests apply to this case, the appellant contends that the status of the unknown informant as a "citizen informant" is insufficient. We disagree.

In State v. Smith, 867 S.W.2d 343, 348, this Court held that the affidavit in a search warrant should provide enough information about the informant so that the magistrate can determine which test should be applied:

> It is incumbent, we think, upon whoever seeks a search warrant to include in the affidavit whether the informational source, named or confidential, qualifies as a citizen informant. Otherwise, the issuing magistrate would not know which standard, Jacumin or Melson, to apply. Whether the affidavit describes the status of the source directly, by implication, or by inference, is immaterial; it must, however, be apparent before the less stringent Melson standard can be used to test the validity of the warrant.

Id. at 348.

In the present case, the search warrant, inclusive of the four corners of the

instrument, contains sufficient information to identify the source of the information as a citizen informant. By the affiant's statement that the informant is "a citizen who does not have any criminal record known to affiant or any arrest record known to affiant" indicates that the officer checked to see if the informant had any kind of criminal record. Thus, since the informant was a citizen, rather than a confidential informant, the tests enunciated in Aguilar and Spinelli do not apply. Furthermore, under the less stringent Melson standard, the affidavit is sufficient to support the warrant. Accordingly, we find that the trial court properly denied the appellant's motion to suppress. This issue is without merit.

Newly Discovered Evidence

In her next issue, the appellant contends that the trial court erred in denying her motion for new trial based on newly discovered evidence. Specifically, the appellant asserts that the trial court should have granted a new trial based Dodson's recantation of his testimony at the appellant's trial.

At trial, Dodson testified that he had pled guilty to the numerous counts of aggravated burglary and theft and had received a ten-year sentence in the Tennessee Department of Correction. He further testified that the appellant was with him during the burglaries in Maury County, that she participated in removing property from the houses, and that no one else was with them during the burglaries.

At the sentencing hearing, Dodson testified that some of his testimony at trial was false. Specifically, he testified that the appellant had not influenced him or talked him into doing the burglaries. The appellant introduced into evidence a letter from Dodson to her attorney, postmarked August 21, 1992. In the handwritten letter, Dodson stated:

> I have lied about Sheila Thomas when we went to the Grand jury. I said she was with me and she helped me when I broke in the houses. I know I have perjury myself. But when I said all that stuff I was scared and I didn't want to take the fall by my-self. And if I couldn't have Sheila Thomas I didn't want anyone to have her, cause I really loved her. Now that I have sat and thought about it. I know I was wrong for what I did. So if there is anything

> that you can do for her to show her innocence I will. Including testifying truthfully for her.

Based on this information, the appellant requested that the trial court grant her a new trial.

The criteria for determining whether a defendant should be granted a new trial based on newly discovered evidence is: (1) did the defendant act with reasonable diligence to discover the evidence; (2) is the newly discovered evidence material; and (3) will introducing the evidence likely change the result if accepted by the jury. State v. Goswick, 656 S.W.2d 355, 358-59 (Tenn. 1983). Where it appears that the new evidence can have no other effect than to discredit the testimony of a witness, contradict a witness' statements, or impeach a witness, the trial court should not grant a new trial unless the testimony of the witness who is sought to be impeached was so important to the issue and the evidence impeaching the witness is so strong and convincing that a different result at trial would necessarily follow. State v. Rogers, 703 S.W.2d 166, 169 (Tenn. Crim. App. 1985) (citing Rosenthal v. State, 200 Tenn. (4 McCanless) 178, 186, 292 S.W.2d 1, 4-5, cert. denied, 352 U.S. 934, 77 S.Ct. 222, 1 L.Ed.2d 160 (1956)).

The determination of the trial court as to the credibility of a recanting witness or other newly discovered evidence is reviewed under the abuse of discretion standard. See Jones v. State, 519 S.W.2d 398, 400 (Tenn. Crim. App. 1974). At the sentencing hearing, the trial court found "Mr. Dodson not to be a credible witness at this hearing." The trial court had the opportunity to observe the witness both at the trial and at the sentencing hearing. Having read this record carefully and having examined Dodson's letter which was entered as an exhibit, we conclude there was no abuse of discretion on the part of the trial court in denying the motion for new trial on the basis of this new evidence. The trial court was fully justified in finding Dodson not to be a credible witness. Dodson's testimony at the sentencing hearing and the letter he sent defense counsel were far from being so strong and convincing that a different result at trial would necessarily follow. See State v. Arnold, 719 S.W.2d 543, 550 (Tenn. Crim. App. 1986).

Severance of Offenses

In another issue, the appellant contends that the trial court erred in denying her pre-trial motion to sever the thirty-seven count indictment. Specifically, the appellant asserts that the evidence does not support a finding of a common scheme or plan and furthermore, that the evidence of all of the cases on trial would not have been admissible upon the trial of all the others.

Under Tenn. R. Crim. P. 14(b)(1), a defendant has a right to have the offenses severed "unless the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others." Both portions of the rule must be satisfied to avoid severance: there must be a common scheme or plan and the evidence of one offense must be admissible at trial of the others.

In determining whether or not to grant a severance, the trial court must look at "the facts and circumstances involved in the various crimes that are charged." State v. Morris, 788 S.W.2d 820, 822 (Tenn. Crim. App. 1990). The decision to grant a severance is left to the sound discretion of the trial court, State v. Furlough, 797 S.W.2d 631, 642 (Tenn. Crim. App. 1990), and will not be disturbed unless the defendant is unfairly or unduly prejudiced. See Hunter v. State, 222 Tenn. (26 McCanless) 672, 681, 440 S.W.2d 1, 6 (1969); Woodruff v. State, 164 Tenn. (11 Smith) 530, 538-39, 51 S.W.2d 843, 845 (1932); State v. Wiseman, 643 S.W.2d 354, 362 (Tenn. Crim. App. 1982). It is the responsibility of the appellant to show that she was clearly prejudiced by the trial court's refusal to sever the offenses. See State v. Hodgkinson, 778 S.W.2d 54, 61 (Tenn. Crim. App. 1989).

In the instant case, the appellant has not produced any evidence that she was "clearly prejudiced." In fact, her acquittal on three counts of aggravated burglary and the declaration of a mistrial in another count of aggravated burglary, due to the jury's inability to reach a unanimous verdict, reflects that the jury carefully considered each count

individually. This supports a finding of lack of prejudice.

Moreover, the proof showed a common scheme or plan. First, the appellant and Dodson deliberately planned to commit a series of burglaries in order to get money to pay their bills after losing their jobs and having no other source of income. The burglaries, which occurred within a three-month period, followed a set pattern in that they were all committed during the daytime, isolated houses were carefully selected, a back window or door was usually broken into, and Dodson and the appellant entered the houses together. Moreover, similar items were taken from the houses, and the property taken was either sold or stored at the residence of Dodson and the appellant.

Because we find that the trial court did not abuse its discretion, this Court will not disturb the trial court's decision to deny the appellant's motion to sever.

Sentencing

Finally, the appellant challenges the sentence imposed by the trial court. First, the appellant contends that her sentence is excessive. We disagree.

At the sentencing hearing, the state introduced evidence of the appellant's two federal felony convictions, one for theft of mail and the other for forgery of a United States Treasury check, and introduced the pre-sentence report which showed that the appellant had nine pending criminal charges in Williamson County.

The appellant presented testimony indicating that she is the youngest of five children and that she has two sisters and two brothers. The appellant's parents divorced when the appellant was three-years-old, and the children were raised by the mother. The appellant dropped out of school in the seventh grade, but received her G.E.D. The appellant got married when she was 16-years-old, and at the time of the hearing, she had two children, who were seven and twelve. The appellant's mother testified that she was

a good mother and a good housekeeper. Dodson testified that he lied about the appellant's involvement in the crimes and that the appellant was a good mother.

Based on the proof, the trial court sentenced the appellant as a Range I, standard offender. The trial court found that the appellant had a history of criminal convictions or criminal behavior, T.C.A. § 40-35-114(1), and that the appellant was the leader in the commission of the offense, in that she and Dodson used her car to perpetrate the burglaries and thefts and that in at least several instances, the appellant instructed Dodson as to how the feat could be accomplished, T.C.A. § 40-35-114(2). The trial court also found that the appellant had a previous history of unwillingness to comply with the conditions of a sentence involving release in the community, T.C.A. § 40-35-114(8), and that the offenses were committed while the appellant was on probation, T.C.A. § 40-35-114(13), however, it held that only one of these factors could be used. With regards to Counts 18, 22, and 24, the trial court found that the property taken was particularly great, T.C.A. § 40-35-114(6). In those counts, there was testimony that the value of the property taken was $8,000, $12,680, and $13,000, respectively.[2]

As mitigating circumstances, the trial court found that the appellant's criminal conduct neither caused nor threatened serious bodily injury. T.C.A. § 40-35-113(1).

In counts 18, 22, 24, 27, 33, and 35, the trial court sentenced the appellant to the maximum possible Range I sentence. The appellant submits that she should not have received the maximum sentence for these counts.

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. T.C.A. § 40-35-401(d) (1990 Repl.). This presumption is "conditioned upon the affirmative showing in the record that the trial

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[2] This enhancement factor could also have been applied in count 25, where the testimony indicated that the value of stolen property was $23,000.

court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of establishing that the sentence is inappropriate remains on the appellant. Id.

In conducting our review, this Court must consider all of the evidence, the pre-sentence report, the sentencing principles, the enhancing and mitigating factors, the argument of counsel, the statements of the appellant, the nature and characteristics of the offense, and the potential for rehabilitation. State v. Moss, 727 S.W.2d 229, 238-39 (Tenn. 1986).

Here, the trial court found three enhancement factors applied to all counts and four enhancement factors applied to counts 18, 22, and 24. The trial court also found that one mitigating factor applied to all counts. As to counts 18, 22, and 24, we find that the trial court properly sentenced the appellant to the maximum sentence due to the additional applicable enhancement factor. We find that these four enhancement factors clearly outweighed the one mitigating circumstance.

As to counts 27, 33, and 35, the trial court found the same amount of enhancing factors applied as it did to all the other counts in which it did not impose the maximum sentence. Unless a court attaches different weight to the enhancement factors applied to one offense in comparison to another offense, the same factors cannot support a maximum sentence on one offense and a lesser sentence on another. In other words, unless the trial court articulates a justification for weighing the enhancement or mitigating factors differently for the offenses, the sentence for each must be lower, middle, or upper range sentences. Here, the trial court indicated that he gave more weight to the criminal history aggravating factor, T.C.A. § 40-35-114(1), in the later aggravated burglary counts because the offenses occurred toward the end of the appellant's crime spree. We find that in weighing the enhancement and mitigating factors, it was proper to consider that the appellant had already committed eleven thefts and eight burglaries in Maury County at the time she committed the crimes for which she was convicted in counts 27, 33, and 35.

Therefore, we find that the appellant's sentences are not excessive. This issue has no merit.

Finally, the appellant argues that the trial court erred by ordering that certain sentences be served consecutively.

Before the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In Gray, our Supreme Court ruled that aggravating circumstances must be present before placement in any one of the classifications. Subsequently, in State v. Taylor, 739 S.W.2d 227, 230 (Tenn. 1987), the Court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. The 1989 Act is, in essence, the codification of the holdings in Gray and Taylor. Consecutive sentencing may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria exists:

> (1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The 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;
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
>
> (6) The defendant is sentenced for an offense committed while on probation; or

(7) The defendant is sentenced for criminal contempt.

T.C.A. § 40-35-115(b).

Despite the applicability of one of the preceding factors to a particular defendant, "consecutive sentences should not routinely be imposed...and that the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved." State v. Taylor, 739 S.W.2d at 230. While this section permits consecutive sentencing, the trial court has other available options, such as increasing the length of the sentence within the appropriate range depending on the presence of enhancement factors.

Here, the trial court found that consecutive sentences were necessary due to the appellant's extensive criminal history and because the crimes were committed while the appellant was on probation. T.C.A. § 40-35-115(b)(2) and (6). The trial court went on to state that consecutive sentencing was necessary to protect society from the appellant due to the fact that she had little or no rehabilitative qualities.

The appellant contends that T.C.A. § 40-35-115(b)(6) only authorizes a sentence for an offense to be served consecutively to the conviction for which a defendant was on probation, not for consecutive sentences of multiple offenses committed while on probation. The appellant cites no authority for this proposition, and it is contrary to the plain language of the statute. The appellant correctly submits that it was improper for the trial court to consider the need to protect society and the appellant's lack of rehabilitative qualities in ordering that the appellant's sentences be served consecutively. Statutory mitigating and enhancement factors are not involved in the determination of whether or not sentences should be served consecutively or concurrently. See State v. Baker, 751 S.W.2d 154, 166-67 (Tenn. Crim. App. 1987). However, in light of the applicable statutory factors, we find that any error was harmless.

Consecutive sentences are authorized where the trial court finds one or more of the criteria set forth in T.C.A. § 40-35-115(b). Here, the trial court appropriately found that the appellant has an extensive history of criminal activity and that the present crimes were committed while she was on probation. T.C.A. § 40-35-115(b)(2) and (6). In addition, as pointed out by the state, the proof also supports a finding that the appellant is a professional criminal who has knowingly devoted herself to criminal acts as a major source of livelihood. T.C.A. § 40-35-115(b)(1). For a three-month period, Dodson and the appellant committed multiple burglaries and thefts while they had no other source of income.

Accordingly, we find that the trial court properly ordered that some of the appellant's sentences be served consecutively.

Conclusion

Having reviewed the issues raised by the appellant and having found them to be without merit, we affirm the rulings of the trial court. Accordingly, the appellant's convictions and sentences are affirmed.

_____
JULIAN P. GUINN, SPECIAL JUDGE

CONCUR:

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JERRY SCOTT, JUDGE

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JOE B. JONES, JUDGE