

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1999 SESSION

**FILED**  
December 29, 1999  
Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE, )  
 )  
 Appellee, )  
 )  
 vs. )  
 )  
 SCOTT WYATT and )  
 ANGELA THOMAS, )  
 )  
 Appellants. )

No.M199800470CCAR3CD  
Coffee County  
Hon. Gerald L. Ewell, Sr., Judge  
(Theft of Property Valued Under  
\$500)

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

**AFFIRMED**

**JAMES CURWOOD WITT, JR., JUDGE**

## OPINION

The defendants, Scott Wyatt and Angela Thomas, appeal their Coffee County Criminal Court convictions and their resulting sentences. A jury convicted the defendants of theft of property valued under \$500, a Class A misdemeanor. After a sentencing hearing, the trial court sentenced each defendant to serve eleven months, 29 days and pay a fine of \$60. Defendant Wyatt was ordered to serve 180 days in jail with the balance on probation. Defendant Thomas was ordered to serve 120 days in jail with the balance on probation. In this appeal the defendants raise the following issues:

1. whether the trial court erred by permitting defendant Wyatt to be impeached by burglary convictions more than ten years old;
2. whether the trial court erred by permitting defendant Thomas to be impeached by worthless check convictions; and
3. whether the trial court imposed excessive sentences.

Following a review of the record, the briefs of the parties, and the applicable law, we affirm the judgment of the trial court.

We conclude that the trial court did not abuse its discretion in finding the impeaching convictions admissible. Although both defendants complain of excessive sentences, we conclude that the trial court properly considered the sentencing factors.

The defendants, husband and wife, were both employees of the City of Tullahoma. Testimony at trial<sup>1</sup> indicated that defendant Wyatt, who was employed by the city's recreation department, did not work on November 25, 26, and 27, 1996. His time sheet for those days did not indicate that he worked, and

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<sup>1</sup>In lieu of a trial transcript of stenographic or other substantially verbatim recording of evidence or proceedings, a Statement of Evidence, which was approved by the trial court, provided the facts of this case. Also, the trial court detailed his findings for both defendants in a Sentencing Order.

fellow employees, who did work those days, testified that they did not see him working. The proof showed that defendant Thomas, as the city's record keeper, added eight hours for each of those days to defendant Wyatt's payroll calendar, and defendant Wyatt was paid for those days.

Defendant Wyatt testified in his defense, stating that he was called in to work on those days. He denied being paid for any time that he did not work. Defendant Thomas testified that she did not falsify any records to credit her husband for hours that he did not work.

On this evidence, the defendants were found guilty of theft of property valued under \$500. Each defendant was sentenced to serve eleven months, twenty-nine days and fined \$60. They were each ordered to pay restitution of \$100 to the city.

### **I. Impeachment of Defendant Wyatt**

Defendant Wyatt complains that his burglary convictions, which were more than ten years old, were improperly used for impeachment. In 1982, he was convicted of three counts of burglary. The state notified defendant Wyatt in writing the day before trial that it intended to use the convictions to impeach him if he testified. After the state attempted to impeach the defendant with the convictions, the trial court found in a jury-out hearing that the probative value of the convictions for the purpose of attacking credibility substantially outweighed their prejudicial effect.

Under Rule 609 the state may use a conviction in which more than ten years have elapsed between the date the accused was released from confinement and the commencement of the subject prosecution to impeach the testimony of an

accused in a criminal prosecution. Tenn. R. Evid. 609. However, the following conditions must be satisfied: (1) the conviction is for a crime punishable by death or imprisonment in excess of one year, or the conviction is for a misdemeanor which involved dishonesty or false statement; (2) defendant receives “sufficient advance notice of intent to use such evidence to provide [him] with a fair opportunity to contest the use of such evidence;” and (3) the trial court “determines in the interests of justice that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.” Tenn. R. Evid. 609. On appeal, a trial court's ruling under Rule 609 will not be reversed absent an abuse of discretion. See State v. Blanton, 926 S.W.2d 953, 960 (Tenn. Crim. App. 1996); Johnson v. State, 596 S.W.2d 97, 104 (Tenn. Crim. App. 1979).

Defendant Wyatt does not contest that burglary is a felony punishable by more than one year of imprisonment. See Tenn. Code Ann. § 40-35-118 (1997) (burglary committed between 1982 and 1989 is classified, for sentencing purposes, as either a Class C, D, or E felony).

Defendant Wyatt contests the second condition, that the state did not give reasonable notice, because the notice was given the day before the trial began. Under subsection (a)(3) of Rule 609, “the State must give the accused reasonable written notice of the impeaching conviction before trial.” Under subsection (b) the notice requirements for impeaching a witness with convictions ten years old or older provide that the notice avail the adverse party “a fair opportunity to contest the use of such evidence.” Tenn. R. Evid. 609(b).

It is undisputed that defendant Wyatt received written notice before the trial began. Defendant Wyatt argues that one day's notice did not provide sufficient time to research the history of his 1982 convictions; however, he does not

even now state how more time would have allowed him to challenge the convictions. Absent any showing that the notice he received was unreasonable,<sup>2</sup> we are not convinced that the trial court abused its discretion in admitting the convictions.

The defendant also contests the third condition, that the probative value of the convictions does not substantially outweigh their prejudicial effect. In balancing whether the probative value of an impeaching conviction outweighs its unfair prejudicial effect, “a trial court should (a) ‘assess the similarity between the crime on trial and the crime underlying the impeaching conviction,’ and (b) ‘analyze the relevance the impeaching conviction has to the issue of credibility.’” State v. Mixon, 983 S.W.2d 661, 674 (Tenn. 1999) (quoting N. Cohen, D. Paine, and S. Sheppard, Tennessee Law of Evidence § 609.9 at p. 376 (3rd ed. 1995)); see also State v. Farmer, 841 S.W.2d 837, 839 (1992). The standard to be used by the trial court “is not whether there is any prejudice to the defendant by allowing the State to use the prior conviction for impeachment, but whether the possible prejudice is outweighed by the probative value of the evidence as to the defendant's credibility as a witness.” State v. Roberts, 943 S.W.2d 403, 408 (Tenn. Crim. App. 1996). Under evidence Rule 609(b), the trial court evaluates the proposed use of old convictions by determining whether the probative value, “supported by specific facts and circumstances, *substantially* outweighs its prejudicial effect.” Tenn. R. Evid. 609(b) (emphasis added).

In reviewing the trial court's determination, this court "does not reevaluate whether the probative value of the . . . prior convictions outweighs the

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<sup>2</sup>Nothing in the record suggests that defendant Wyatt requested a continuance after receiving the notice of impeaching convictions. We note that the defendant had the benefit of a jury-out hearing regarding the admissibility of the impeaching convictions. Nothing in the record suggests that he requested a recess or additional time before the hearing.

possible prejudicial effect it might have had. We only evaluate whether the trial judge abused his discretion . . . ." Roberts, 943 S.W.2d at 408; see also State v. Harris, 839 S.W.2d 54, 66 (Tenn. 1992). We conclude that the trial court did not abuse its discretion.

Defendant Wyatt argues that the crime of burglary is too similar in nature to the crime for which he was on trial because both crimes involve dishonesty. We do not agree that the crimes are similar. Using the defendant's logic, a defendant accused of a crime involving dishonesty would not be subject to impeachment through Rule 609 via prior convictions which involved dishonesty. See, e.g., State v. Tune, 872 S.W.2d 922, 927 (Tenn. Crim. App. 1993) (crimes involving dishonesty are highly probative of credibility). Rather, the true test of similarity is whether the danger of unfair prejudice is great because the crimes are identical or substantially the same. See State v. Mixon, 983 S.W.2d 661, 674-75 (Tenn. 1999) (impeaching conviction inadmissible because identical to crime for which defendant is being tried). The danger of impeaching with similar crimes is that it may improperly show a propensity to commit that type of crime. See, e.g., State v. Roberts, 703 S.W.2d 146, 147 (Tenn. 1986) (in aggravated assault case, could not show prior assault and battery conviction); Long v. State, 607 S.W.2d 482, 486 (Tenn. Crim. App. 1980) (in assault with intent to commit murder case, could not show prior second degree murder conviction).

Burglary is a crime involving entering property, such as a home, building, or automobile, with the intent to commit a felony, theft, or assault. Tenn. Code Ann. § 39-14-402 (1997). In the case at bar, defendant Wyatt is accused of theft by obtaining compensation for time not worked. The underlying conduct of the one offense is dissimilar to the other.

In the case at bar, defendant Wyatt denied the crime of theft despite the testimony of the state's witnesses to the contrary. Therefore, the defendant's credibility as a witness was a critical issue. It is well established that burglary is a crime involving dishonesty and is generally admissible to impeach credibility. See, e.g., State v. Dishman, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995); State v. Crane, 780 S.W.2d 375, 377 (Tenn. Crim. App. 1989). Accordingly, it was within the trial court's discretion to allow the state to use the defendant's prior convictions to impeach his credibility as a witness. See Roberts, 943 S.W.2d at 408-09 (finding no abuse of discretion in impeachment by prior, similar convictions for breaking and entering into a business with intent to commit larceny, grand larceny, and transporting stolen property in a trial for burglary, attempted theft of motor vehicles, and possession of burglarious instruments).

Based upon the principles discussed above, we find that defendant Wyatt's prior convictions for burglary were highly probative because (1) they involved dishonesty and (2) his credibility was an important issue in the case. The probative value of the evidence of the impeaching crimes substantially outweighed the prejudicial effect. The trial court acted within its discretion in admitting the defendant's 1982 convictions for burglary.

## **II. Impeachment of Defendant Thomas**

Defendant Thomas complains that her 1996 convictions for passing worthless checks were improperly used for impeachment. She claims that she thought that she had sufficient money in the accounts to cover the worthless checks. She pleaded guilty to passing the checks.

The record on appeal does not reflect that Thomas objected to the state's use of bad check convictions for impeachment purposes. Accordingly, the issue is waived. Tenn. R. Evid. 103(a)(1); Tenn. R. App. P. 36(a); State v. Robinson, 971 S.W.2d 30, 42-44 (Tenn. Crim. App. 1997).

We note that, even though this issue is disposed of via waiver, (1) the crimes of passing worthless checks are misdemeanors involving dishonesty, State v. Shelby A. Driver, No. 85-177-111 (Tenn. Crim. App., Nashville, Nov. 13, 1986), (2) the defendant received reasonable written notice of the proposed impeachment, see supra section I, (3) Thomas' credibility was an issue, and (4) the probative effect of the impeachment evidence outweighed the prejudicial effect. See Shelby A. Driver. As we found in the case of defendant Wyatt, we would have found no abuse of discretion in Thomas' case, had the trial court allowed the evidence after evaluating it under Rule 609. Of course, the trial court never had the opportunity to make this determination; hence, the issue is waived. See Tenn. R. App. P. 36(a).

### **III. Sentencing**

The defendants complain that the terms of confinement imposed were excessive and that the trial court did not seriously consider the jury's recommendation of leniency. The jury wrote on the verdict form that the jury "advise[d] that the defendants be required to get financial counseling [sic]." Also, the jury fixed each defendant's fine at \$60. The trial court noted that this seemed "to indicate to the Court that they do not consider these offenses as serious as could be thought by some."

When an accused challenges the length or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review on the record with

a presumption that the determinations made by the court are correct. Tenn. Code Ann. § 40-35-401(d) (1997).

Misdemeanor sentences must be specific and in accordance with the principles, purpose, and goals of the Criminal Sentencing Reform Act of 1989. Tenn. Code Ann. §§ 40-35-103, 104, 117, 302 (1997); State v. Palmer, 902 S.W.2d 391, 393 (Tenn. 1995). The misdemeanor offender must be sentenced to an authorized determinant sentence with a percentage of that sentence designated for eligibility for rehabilitative programs. Tenn. Code Ann. § 40-35-302 (1997). In determining the percentage of the sentence, the court must consider enhancement and mitigating factors as well as the legislative purposes and principles related to the sentencing. Tenn. Code Ann. § 40-35-302(d) (1997); Palmer, 902 S.W.2d at 393-94.

The trial court retains the authority to place the defendant on probation either immediately or after a period of periodic or continuous confinement. Tenn. Code Ann. § 40-35-302(e) (1997). The trial court has a wide latitude of flexibility. The legislature has encouraged courts to consider public or private agencies for probation supervision prior to directing supervision by the Department of Correction. Tenn. Code Ann. § 40-35-302(f) (1997). The misdemeanant, unlike the felon, is not entitled to the presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829 (Tenn. Crim. App. 1994).

The misdemeanor sentencing statute provides that the percentage of the sentence to be served in confinement before the defendant is eligible for rehabilitative programs shall not exceed 75 percent. Tenn. Code Ann. § 40-35-302(d) (1997). Further, the statute provides, "If no percentage is expressed in the judgment, the percentage shall be considered zero percent (0%)." Id. When

this court has been faced with a transcript of the sentencing hearing clearly indicating the trial court's intention that the defendant's percentage is not zero percent, however, we have deferred to the trial court's express pronouncement as reflected in the transcript. See, e.g., State v. David W. Frazee, No. 02C01-9809-CC-00291, slip op. at 6-7 (Tenn. Crim. App., Jackson, Oct. 25, 1999); State v. Dion Andres Russell, No. 03C01-9803-CR-0092, slip op. at 15 (Tenn. Crim. App., Knoxville, Apr. 7, 1999); State v. Rickey Hailey, No. 02C01-9705-CR-00198, slip op. at 6 (Tenn. Crim. App., Jackson, May 14, 1998); State v. Roscoe C. Smith, No. 01C01-9502-CR-00031, slip op. at 3 (Tenn. Crim. App., Nashville, Oct. 12, 1995).

The trial court found two enhancement factors. First, both defendants have a history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range. Tenn. Code Ann. § 40-35-114(1) (1997).<sup>3</sup> Second, the defendants, as city employees, abused a position of public trust. Tenn. Code Ann. § 40-35-114(15) (1997).

As mitigating factors, the trial court found that the defendants' conduct did not cause or threaten serious bodily injury, Tenn. Code Ann. § 40-35-113(1) (1997), and that the defendants may have been motivated by a desire to provide necessities for their family. Tenn. Code Ann. § 40-35-113(7) (1997).

We find no fault with the sentences in this case. The trial court found that the sentences imposed were the least severe measures necessary to achieve

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<sup>3</sup>Defendant Wyatt was convicted of three counts of burglary in 1982, forgery and passing bad checks in Arizona, passing a worthless check in 1993 for which he received a suspended sentence, and driving on a revoked license, amended to no driver's license in 1997. Additionally, the trial court noted that defendant Wyatt had several worthless check charges which were dismissed after he made restitution. Defendant Thomas was convicted and sentenced to probation for seven counts of passing worthless checks in 1996, and she was fired from her last employer for taking money from petty cash.

the purposes for which the sentences were imposed. See Tenn. Code Ann. § 40-35-103(4) (1997). Although the trial court did not make, and was not required to make, factual findings to support his conclusion that confinement was necessary to avoid depreciating the seriousness of the offenses,<sup>4</sup> see Tenn. Code Ann. § 40-35-103(1)(B) (1997), we conclude that confinement is warranted in this case based on the sentencing considerations of Code section 40-35-103(1) (1997). Defendant Wyatt has a long history of criminal conduct, dating back to 1982, and defendant Thomas has, within a shorter time span, accumulated seven convictions and been fired for stealing on a previous occasion. See Tenn. Code Ann. § 40-35-103(1)(A) (1997). Also, both defendants have had measures less restrictive than confinement which have been unsuccessful in deterring the defendants from continued criminal conduct. See Tenn. Code Ann. § 40-35-103(1)(C) (1997); see also Tenn. Code Ann. § 40-35-103(5) (potential for rehabilitation).

The defendants argue that the trial court did not seriously consider the nature and character of the offense and their potential for rehabilitation. We disagree. The trial court found that as city employees, the defendants violated their positions of trust. Also, the defendants' extensive criminal histories betray their claim that they have potential for rehabilitation.

The defendants also argue that they should have received a lesser sentence because the jury imposed a minimal fine, the trial court recognized that the jury thought the offense was not serious, and the jury advised that the

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<sup>4</sup>Unlike felony sentencing, the trial court does not have an affirmative duty to state in the record, either orally or in writing, which enhancement and mitigating factors it found and its findings of fact. Tenn. Code Ann. § 40-35-209(c) (1997); § 40-35-210(f) (Supp. 1998); § 40-35-302(d)(1997); State v. Troutman, 979 S.W.2d 271, 274 (Tenn. 1998). However, in the case at bar the trial court, in its sentencing order, addressed sentencing considerations and made several findings of fact.

defendants receive financial counseling. However, it is the duty of the trial court to determine and impose sentence, not the jury. See Tenn. Code Ann. § 40-35-203 (1997).

The defendants have neither demonstrated their suitability for full probation nor shown that their sentences are improper.

We note that the trial court did not specify a percentage of the sentence to be served in confinement as required by statute. The trial court imposed split confinement and incarcerated defendant Wyatt for 180 days and defendant Thomas for 120 days, and each was to spend the remainder of his or her eleven month, twenty-nine day sentence on probation. The trial court did not specify any percentage of service in either its written sentencing order or on the standard judgment form. However, the trial court's clear intent as reflected in the sentencing order was that the defendant Wyatt actually serve 180 days, or 50 percent, of his sentence in confinement and that defendant Thomas actually serve 120 days, or 33 percent, of her sentence in confinement.

“Even though the probation that the trial court awarded and that is authorized by Code subsection 40-35-302(e) does not equate to eligibility for rehabilitative programs that is described in subsection (d), we discern that the trial court’s intent was to ‘fix a percentage of the *sentence*’ by expressing the confinement time in terms of [days] rather than a numerical percentage.” David W. Frazee, slip op. at 7 (emphasis in original). This interpretation assures the confinement which the trial judge expressly articulated. Of course, “[t]he grant of probation after the [stated confinement period] is served renders the eligibility for rehabilitative services superfluous,” id., but in this case we believe the interpretation comports with the trial court’s intent.

In David W. Frazee, we pointed out that this court “can more precisely fathom the trial court’s intent” on the issue of the minimum time of actual confinement to be served in misdemeanors if the trial court will “squarely and expressly address[] the section 40-35-302(d) percentage issue.” Id. The statutory “percentage” relates to the time to be served “in actual confinement” prior to “consideration for work release, furlough, trusty status and related rehabilitative programs.” Tenn. Code Ann. § 40-35-302(d) (1997). “Upon service of that percentage, the administrative agency governing the rehabilitative programs determines which among the lawful programs available is appropriate [,but] the trial court retains the authority to place the defendant on probation either immediately or after a term of periodic or continuous confinement.” David W. Frazee, slip op. at 4. Section 40-35-302 contemplates that trial courts will treat separately the issues of “percentage” and probation. The trial court should state the percentage that applies and insert the figure into the appropriate percentage blank on the standard judgment form. Terms of probation should likewise be stated and reflected on the judgment form. Trial courts which express the term of probation but omit the percentage run the risk of the appellate court applying a zero percentage, see Tenn. Code Ann. § 40-35-302(d) (1997), with the result that the defendant may avoid any confinement through furlough or other “rehabilitative” programs, despite the court’s attempt to allow probation only after a stated period of time is served in confinement.

In consideration of the foregoing and the record as a whole, the judgment of conviction is affirmed.

JAMES CURWOOD WITT, JR., JUDGE

CONCUR:

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JOE G. RILEY, JUDGE

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THOMAS T. WOODALL, JUDGE