IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
February 24, 2009 Session

STATE OF TENNESSEE v. MICHAEL FLAMINI

Appeal from the Criminal Court for Knox County
No. 81913B Richard Baumgartner, Judge

No. E2008-00418-CCA-R3-CD - Filed May 26, 2009

A Knox County Criminal Court jury convicted the defendant, Michael Flamini, of two counts of aggravated robbery and one count of burglary. After merging the aggravated robbery convictions, the trial court imposed concurrent, Range II sentences of 14 years for aggravated robbery and three years for burglary. In this appeal, the defendant claims that the trial court erred in the jury selection process and by denying a defense motion for continuance, that the evidence was insufficient to support his conviction of burglary, and that the sentence violates the ruling in *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007). Because the evidence was insufficient to support the conviction of burglary, that conviction is reversed, and the charge is dismissed. The conviction of aggravated robbery and the trial court's judgment in all other respects is affirmed.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed in Part; Reversed and Dismissed in Part

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Gerald L. Gulley, Jr., Knoxville, Tennessee (on appeal); Michael Rothenberg, Sandy Springs, Georgia (at trial); and Steven Edward Sams, Knoxville, Tennessee (at trial), for the appellant, Michael Flamini.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Takisha Fitzgerald, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

The convictions in this case arose as part of a string of crimes committed by the defendant, Michael Flamini, and his co-defendant, David Kiersey. Charged in a 22-count indictment with various theft and robbery offenses, the pair was tried jointly by a Knox County Criminal Court jury. The jury convicted the defendant, charged in only four of the 22 counts, of the March 4, 2005

aggravated robbery of Sarah Rutledge and the burglary of the Pilot/Breadbox convenience store where she worked.

At trial, Ms. Rutledge testified that on March 4, 2005, she was working at the Pilot/Breadbox convenience store on Tazewell Pike in Knoxville when a man "walked in, came in the building. He had a gray T-shirt wrapped around his arm, and he pointed it, like there was a weapon in it, and basically told [her] to give him the money and to make it fast and hurry." Ms. Rutledge identified the man from a photographic lineup as the defendant. She stated that she believed the man had a weapon under the shirt "[b]ecause he pointed it and acted like it was a threatening movement." Ms. Rutledge gave the defendant the money from the cash register, and the defendant left.

During cross-examination, Ms. Rutledge stated that the defendant's hand was wrapped in the T-shirt when he entered the store and that he lifted it and "pointed it like . . . . kids playing gun." She testified that the Pilot/Breadbox was open to the public 24 hours a day and that the store kept no list of persons prohibited from entering. Ms. Rutledge agreed that "people just kind of walk in and out as they please."

Knoxville Police Department Officer Chris Bell, who investigated the robbery at the Tazewell Pike Pilot/Breadbox, recalled that the security camera video from the store showed "[a] white male, nothing covering his face, walk[] in with a grayish t-shirt over his right hand. He leaned up against the counter with the t-shirt pointed in her direction. Asked her for the money, and she gave him the money and he leaves the store." According to Officer Bell, shortly after the robbery, "there was a vehicle pursuit" on Tazewell Pike that "was terminated because of the recklessness of the pursuit" but not before officers "were able to obtain a tag number for the van." The van was registered to the defendant. Using the National Crime Information Center database, the officer obtained a photograph of the defendant and placed it into a photographic lineup that he showed to Ms. Rutledge. Officer Bell recalled that Ms. Rutledge "immediately" identified the defendant as the perpetrator of the March 4, 2005 robbery.

Officer Bell also participated in the interview of the defendant following his arrest. The defendant told Officer Bell that he did not "really know" why he had wrapped the t-shirt around his hand prior to entering the Pilot/Breadbox but admitted that it was "[m]aybe to make her think" he had a weapon. The defendant could not recall the exact amount of money taken during the robbery, but he told Officer Bell that he had used the money to purchase crack cocaine.

I. Jury Selection

The defendant first contends that the trial court erred "when it failed to order the production of a new jury panel after the original panel lacked enough jurors . . . , when it added jurors who had been rejected from another court's jury panel . . . , and when it did not allow the defendant to have additional peremptory challenges or challenges for cause." He also claims that his "due process rights were violated when he was denied access to the list of juror names and to the jury questionnaire after requesting access to same." The State submits that the defendant waived our

consideration of these issues by failing to lodge a contemporaneous objection to the procedure utilized by the trial court. We agree with the State.

A. Juror Selection Process

The defendant asserts that the process utilized by the trial court to secure the jury in this case violated those statutes governing jury selection as well as the Rules of Criminal Procedure. The record establishes that on the first day of trial the trial court noted that some of the individuals summoned for that day's venire had not arrived as scheduled and that, because trials were scheduled to begin that day in the other two divisions, selecting a jury could be problematic. Indeed, by the end of the day, with no panel members remaining, only 11 jurors had been seated. At that point, the trial court stated its intention to keep the 11 seated jurors and select the remaining juror and alternate from those panel members who arrived the following day. Defense counsel then made the following statement:

> You had said at the beginning of jury selection that if we so decided that we didn't want to go to trial, we should use all nine of our strikes, and that would be the end of it. So we've done that, and it may have altered the way we might have picked our jury. So I wanted to put it on the record that it would be our position that we start over with a completely new panel tomorrow, or at such time as a completely new panel is coming.

The trial court responded,

> Well, if indeed, your intent was to not go to trial, I think that that's an improper motive for you to have with regard to picking a jury. I think we've given you the opportunity to strike the people that you felt should not be on this case. We've given you nine full strikes. I intend to pick a jury from the remaining pool tomorrow morning.

On the following morning, the trial court repeated its intention to choose the remaining juror and alternate from the panel members that had arrived that morning. The court reiterated that the defendant had used all of his allotted challenges and noted, "This is no different than having recessed for an hour at lunch and come back and had additional jurors to continue the selection process." The trial court then placed the names of six additional panel members into a bowl and drew two at random. The voir dire continued without further interruption.

The record is clear that, despite his brief protestation regarding the fact that the trial would continue as scheduled, the defendant did not actually object to the jury selection process employed by the trial court. The defendant made no reference to either the Code or the rules of procedure when making his notation for the record. Further, he did not argue, as he does on appeal, that waiting for more panel members to arrive violated any rule regarding jury selection. He stated simply that he had exercised all of his peremptory challenges in a bid to delay the trial and that the trial court's actions had interfered with his plan. In consequence, the defendant has waived our

consideration of this issue. *See* Tenn. R. App. P. 36(a); *see State v. Killebrew*, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988) (waiver applies when the defendant fails to make a contemporaneous objection); *see also State v. Adkisson*, 899 S.W.2d 626, 635 (Tenn. Crim. App. 1994) (holding that a "party cannot assert a new or different theory to support the objection in the motion for a new trial or in the appellate court"); *State v. Aucoin*, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988) (holding that a party cannot object on one ground at trial and assert new basis on appeal); *State v. Jenkins*, 733 S.W.2d 528, 532 (Tenn. Crim. App. 1987); *State v. Rhoden*, 739 S.W.2d 6, 11-12, 18 (Tenn. Crim. App. 1987). This court will not consider a theory raised for the first time on appeal. *See Adkisson*, 899 S.W.2d at 635; *State v. Matthews*, 805 S.W.2d 776, 781 (Tenn. Crim. App. 1990); *Aucoin*, 756 S.W.2d at 715; *State v. Dobbins*, 754 S.W.2d 637, 641 (Tenn. Crim. App. 1988); *State v. Brock*, 678 S.W.2d 486, 490 (Tenn. Crim. App. 1984); *see also* Tenn. R. Evid. 103(a)(1).

The defendant also complains on appeal that the trial court erred by using "jurors who had been rejected from another court's jury panel" to complete the petit jury in this case. Again, the defendant waived our consideration of this issue by failing to lodge an objection to this procedure. Moreover, nothing in the record supports the defendant's claim that "rejected" jurors were used to complete the jury.

B. Peremptory Challenges

The defendant contends that the trial court should have provided him with additional peremptory challenges after "adding additional jurors to the panel." The State asserts that because the six potential jurors questioned on the second day of trial "were not new or replacements" the defendant was not entitled to additional challenges. We agree with the State.

As indicated above, the trial court noted that some of the panel members had not arrived as scheduled on the first day of trial, meaning that the pool was smaller than expected. In addition, trials were scheduled to begin in all three divisions of the criminal court on that same day, creating a drain on the already diminutive venire pool. On the following day, six additional potential jurors were available for voir dire who had not been available on the previous day. As the trial court explained, they "were not replacement jurors" and were not "rejected jurors. These were just jurors who at a given hour on a given day were not available." Tennessee Code Annotated section 22-2-308 provides the procedure to be followed when "the required number of jurors cannot be obtained from the venire." T.C.A. § 22-2-308(a)(2) (1994) (repealed 2008). Here, the record clearly establishes that the names of the six jurors were included in the venire summoned on the first day of trial to be divided among the three criminal court divisions. In consequence, the procedure provided in Code section 22-2-308 is inapplicable.

Moreover, the record establishes the defendant admitted exercising his peremptory challenges for the sole purpose of delaying the trial. The trial court cannot be faulted for defense counsel's improper actions in attempting to use voir dire as a delay tactic. The defendant is not entitled to relief on this issue.

C. Access to Jury List and Questionnaire

The defendant complains that his "due process rights were violated when he was denied access to the list of juror names and to the jury questionnaire after requesting access to same." Citing Tennessee Rule of Criminal Procedure 24 and Tennessee Code Annotated section 22-2-306, the defendant claims that "personnel from the Clerk's Office" impermissibly denied him access to the jury questionnaire and list of potential jurors. The State contends that the defendant has waived this issue by failing to lodge a contemporaneous objection. We agree with the State.

Although the defendant claims a constitutional due process violation, he cites no authority in support of his claimed constitutional deprivation. Moreover, the record establishes that the defendant did not raise the issue in a timely manner in the trial court. Rather than addressing the issue in the trial court prior to the trial, the defendant raised the issue for the first time in his motion for new trial. Because he has failed to support his argument with citation to appropriate authorities, *see* Tenn. R. App. P. 27(a)(7); Tenn. R. Ct. Crim. App. 10(b), and because he failed to make a timely objection, *see* Tenn. R. App. P. 36(a); *Killebrew*, 760 S.W.2d at 235, the defendant has waived our consideration of this issue.

Moreover, the defendant does not even attempt to establish any prejudice from the alleged untimely revelation of the jury list and questionnaire and, as a result, is not entitled to relief. "Generally, before a criminal defendant may successfully challenge an indictment or venire because of improper jury selection procedures, he must show that he was prejudiced or that the improper procedures resulted from purposeful discrimination or fraud." *State v. Stephens*, 264 S.W.3d 719, 731 (Tenn. Crim. App. 2007) (citing *State v. Coleman*, 865 S.W.2d 455, 458 (Tenn. 1993); *State v. Elrod*, 721 S.W.2d 820, 822 (Tenn. Crim. App. 1986); Tenn. R. Crim. P. 52(a)). Also, because the defendant has failed to establish any deviation from the statutory requirements, he has likewise failed to demonstrate that a showing of prejudice is not necessary due to a deviation that was "flagrant, unreasonable, and unnecessary." *State v. Lynn*, 924 S.W.2d 892, 894 (Tenn. 1996).

II. Continuance

The defendant next contends that the trial court erred by denying his motion for continuance following the retention of substitute counsel. The State asserts that the defendant is not entitled to relief because he has failed to demonstrate prejudice as a result of the denial. Again, we agree with the State.

"[T]he granting or denying of a continuance is a matter which addresses itself to the sound discretion of the trial judge." *Moorehead v. State*, 219 Tenn. 271, 274-75, 409 S.W.2d 357, 358 (1966) (citing *Bass v. State*, 191 Tenn. 259, 231 S.W.2d 707 (1950)). An abuse of discretion is demonstrated by showing that the failure to grant a continuance denied the defendant a fair trial or that it could be reasonably concluded that a different result would have followed had the continuance been granted. *State v. Hines*, 919 S.W.2d 573, 579 (Tenn. 1995) (citing *State v. Wooden*, 658 S.W.2d 553, 558 (Tenn. Crim. App. 1983)). "The burden rests upon the party seeking the continuance to show how the court's action was prejudicial. The only test is whether the defendant has been deprived of his rights and an injustice done." *State v. Goodman*, 643 S.W.2d

375, 378 (Tenn. Crim. App. 1982) (citing *Baxter v. State*, 503 S.W.2d 226, 228 (Tenn. Crim. App. 1973)).

We need not tarry long over the defendant's claim for two reasons. First, during his initial appearance before the trial court, newly retained trial counsel, a member of the Georgia bar and unlicensed in Tennessee, requested *pro hac vice* admission and "the courtesy of a continuance." He insisted, however, that "if need be, we would be ready." Counsel expressly stated that he desired a continuance but that one was not necessary. Appellate relief is generally not available when a party is "responsible for an error" or has "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of any error." Tenn. R. App. P. 36(a). Also, the defendant has failed to allege any specific prejudice and most certainly has established none. In consequence, he is not entitled to relief on this issue.

III. Sufficiency of the Evidence

The defendant asserts that the evidence adduced at trial was insufficient to support his conviction of burglary. He claims that because the Pilot/Breadbox was open to the public 24 hours a day, the State failed to establish that he lacked the owner's effective consent to enter. During oral argument, the State conceded the insufficiency of the evidence of burglary.

We review the defendant's claim mindful that our standard of review is whether, after considering 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. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *Winters*, 137 S.W.3d at 654.

When examining the sufficiency of the evidence, this court should neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Id.* at 655. Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, this court must afford the State the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id.*

"A person commits burglary who, without the effective consent of the property owner . . . [e]nters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault." T.C.A. § 39-14-402(a)(1) (2003). Our Code defines effective consent as follows:

> "Effective consent" means assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when:
>
> (A) Induced by deception or coercion;
>
> (B) Given by a person the defendant knows is not authorized to act as an agent;
>
> (C) Given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter; or
>
> (D) Given solely to detect the commission of an offense;

Id. § 39-11-106(9).

In this case, the property in question was a convenience store and gas station open to the public 24 hours a day. Ms. Rutledge testified that the store did not maintain a list of prohibited persons and that "people just kind of walk in and out as they please." Clearly, the defendant possessed the property owner's consent to enter the store. That he intended to commit a robbery therein does not, in any way, alter that consent. *See id.* The record establishes that the defendant sought dismissal of the burglary charge on this exact basis, and after the prosecutor asserted that the defendant's intent to commit robbery revoked the owner's consent, the trial court denied the motion. The court should have granted the motion because the prosecutor's position was wholly untenable. *See State v. Ferguson*, 229 S.W.3d 312, 316 (Tenn. Crim. App. 2007) (holding in similar circumstances that "nothing in the record would permit the trier of fact to find that the owner did not effectively consent to the entry of the [d]efendant"). In response to a jury question during deliberation, the trial court stated the elements of burglary as "[n]umber one, that the defendant entered a building; and number two, that the defendant committed the felony of aggravated robbery." This ignored the statutory definition of "effective consent." If the statute were read in the manner suggested by the prosecutor, every felony committed within a building or habitation would also constitute burglary. Our legislature did not intend such a result. *See id.*

Because the evidence established that the defendant entered the Pilot/Breadbox with the consent of the owner, the evidence was insufficient to support his conviction of burglary. Accordingly, that conviction is reversed, and the charge is dismissed.

IV. Sentencing

Finally, the defendant complains that the trial court violated the ruling in *State v. Gomez*, 239 S.W.3d 733, 740 (Tenn. 2007), when it enhanced his sentence on the basis of his

previous unwillingness to comply with a sentence involving release into the community. The State agrees that the trial court erred by enhancing the sentence on the basis of this enhancement factor, which was not found by the jury or admitted by the defendant, but asserts that "the defendant's lengthy criminal history is more than sufficient to justify the two-year enhancement" imposed by the trial court. We agree with the State.

On June 24, 2004, the United States Supreme Court released its opinion in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), holding that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Id.* at 301, 124 S. Ct. at 2536 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)). The "statutory maximum" to which a trial court may sentence a defendant is not the maximum sentence after application of appropriate enhancement factors, other than the fact of a prior conviction, but the "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303, 124 S. Ct. at 2537 (emphasis omitted). Under *Blakely*, then, the "statutory maximum" sentence which may be imposed is the presumptive sentence applicable to the offense. *See id.*, 124 S. Ct. at 2537. The presumptive sentence may be exceeded without the participation of a jury only when the defendant has a prior conviction and/or when an otherwise applicable enhancement factor was reflected in the jury's verdict or was admitted by the defendant.

The defendant committed the conviction offense on March 4, 2005. At the time of sentencing in this case, August 24, 2006, the Tennessee Supreme Court had held that the Tennessee Criminal Sentencing Reform Act of 1989, pursuant to which Gomez was sentenced, did not run afoul of the Sixth Amendment right to jury trial as interpreted in *Blakely*. *See State v. Gomez*, 163 S.W.3d 632, 654-61 (Tenn. 2005) (*Gomez I*), *vacated and remanded*, *Gomez v. Tennessee*, 549 U.S. 1190, 127 S. Ct. 1209 (2007). On January 22, 2007, the United States Supreme Court released its decision in *Cunningham v. California*, 549 U.S. 270, 127 S. Ct. 856 (2007), holding that California's sentencing scheme, which had numerous similarities to Tennessee's sentencing scheme, did not survive Sixth Amendment scrutiny intact under *Blakely*. Following on the heels of *Cunningham*, on February 20, 2007, the United States Supreme Court vacated *Gomez I* and remanded that case for reconsideration in light of *Cunningham*, *see Gomez v. Tennessee*, 549 U.S. 1190, 127 S. Ct. 1209 (2007).

On remand in *Gomez*, the Tennessee Supreme Court applied the principles of *Blakely* and *Cunningham* to determine that Tennessee's pre-2005 sentencing code violated Gomez' right to jury trial. *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007) (*Gomez II*). The *Gomez II* court held that the trial court had committed plain error on constitutional grounds in applying factors for being a leader in the commission of the offenses and in possessing or employing a firearm to enhance sentences. *Id*. at 743.

That the defendant did not raise the *Blakely* issue prior to his appeal deprives him of plenary review; however, this court may consider plain error upon the record under Rule 52(b) of the Tennessee Rules of Criminal Procedure. *State v. Ogle*, 666 S.W.2d 58, 60 (Tenn. 1984). Before

an error may be so recognized, however, it "must be 'plain' and it must affect a 'substantial right' of the accused." *State v. Adkisson*, 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994). The word "plain" is "synonymous with 'clear' or, equivalently, 'obvious.'" *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777 (1993). "Rule 52(b) [of the Federal Rules of Criminal Procedure] leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id*. at 732 (citations omitted).

In *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000), our supreme court adopted the standard announced by this court in *Adkisson*. There, we defined "substantial right" as a right of "'fundamental proportions in the indictment process, a right to the proof of every element of the offense, and is constitutional in nature.'" *Adkisson*, 899 S.W.2d at 639 (citation omitted). Our supreme court also adopted *Adkisson*'s five factor test for determining whether an error should be recognized as plain:

> "(a) the record must clearly establish what occurred in the trial court;
> (b) a clear and unequivocal rule of law must have been breached;
> (c) a substantial right of the accused must have been adversely affected;
> (d) the accused did not waive the issue for tactical reasons; and
> (e) consideration of the error is 'necessary to do substantial justice.'"

Smith, 24 S.W.3d at 282 (quoting *Adkisson*, 899 S.W.2d at 641-42). "[A]ll five factors must be established by the record before [a reviewing court] will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *Id.* at 283. Our supreme court also observed that "the 'plain error must [have been] of such a great magnitude that it probably changed the outcome of the trial.'" *Id.* (quoting *Adkisson*, 899 S.W.2d at 642) (internal quotation marks omitted).

Looking first at the adequacy of the record, we have before us the trial court record, including the presentence report and the transcripts of the trial and of the sentencing hearing, from all of which we can glean that the trial court enhanced the defendant's sentence for aggravated robbery from the presumptive sentence of 12 years to 14 years. The enhancement was based on the application of factor (2), that the defendant had a history of criminal convictions in addition to those necessary to establish the appropriate range, and factor (9), that the defendant failed to comply with the conditions of a sentence involving release into the community. *See* T.C.A. § 40-35-114(2), (9) (2003).

The issue at stake is the defendant's Sixth Amendment right to have a jury determine the factors that enhance his sentence beyond the presumptive sentence. In *Gomez II*, our supreme court determined that Gomez' sentence enhancement violated a clear and unequivocal rule of law for purposes of noticing plain error. As in *Gomez II*, the *Blakely* claim in the present case implicates a clear and unequivocal rule of law.

Looking next to whether the claimed violation of the Sixth Amendment adversely affected a substantial right of the defendant, the trial court utilized an enhancement factor that involved factual determinations of the "type . . . prohibited by *Apprendi*." *Gomez II*, 239 S.W.3d at 743. Thus, as in *Gomez II*, the enhancement of the sentence adversely affected a substantial right of the defendant.

"The fourth consideration for plain error review is whether the record indicates that the [d]efendant[] waived [his] Sixth Amendment claims for tactical reasons." *Id.* at 741. As in *Gomez II*, "the record in this case is silent and does not establish that the [d]efendant[] made a tactical decision to waive [his] Sixth Amendment claims." *See id.* at 742. Thus, the record evinces no basis in tactics or strategy for rejecting plain error review.

Finally, we examine the need for assuring substantial justice as a basis for noticing plain error. In *Gomez II*, our supreme court, in examining whether substantial justice had been availed or withheld, looked at the relative impact on sentence enhancement of Gomez' prior criminal record vis-a-vis the other, *Blakely*-infirm factors. The court commented that, as a reviewing appellate court, it was authorized to "[a]ffirm, reduce, vacate or set aside the sentence imposed," *id.* at 743 (quoting T.C.A. § 40-35-401(c) (2006)), suggesting that the court, if it could, would look at what sentence it would impose using the *Blakely*-compliant enhancement factor of prior criminal record to determine whether the trial court's use of other factors deprived the defendant of "substantial justice." In *Gomez II*, however, the court determined that the record of "criminal histories [was] not sufficiently well-developed [to allow a] determin[ation of] the proper sentences based on this enhancement factor alone." *Id.* at 743. In that situation, the *Gomez II* court apparently reasoned, the appellate court could not bring an appropriate, *Blakely*-compliant sentence into focus, and accordingly, the court held that, to ensure substantial justice, it must remand the case to the trial court for a "resentencing hearing at which the trial court will have an opportunity both to determine the full scope of the [d]efendants' criminal histories and to consider whether imposition of the maximum sentence on all convictions is appropriate." *Id.*

In this case, the record establishes that the 45-year-old defendant had 10 prior convictions with listed dispositions, eight more than the two required to place him into Range II. In our view, the defendant's extensive history of criminal convictions, dating back more than 20 years, was sufficient to justify the two-year enhancement imposed in this case. As such, plain error is not present and a remand for resentencing is unnecessary in this case.

V. Conclusion

Because the evidence is insufficient to support the defendant's conviction of burglary, that conviction is reversed, and the charge is dismissed. The trial court erroneously utilized enhancement factor (9) to increase the defendant's sentence but the remaining *Blakely*-compliant factor justifies the 14-year sentence in this case.

JAMES CURWOOD WITT, JR., JUDGE