IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

AUGUST SESSION, 1999

STATE OF TENNESSEE,	)	**C.C.A. NO. W1998-00582-CCA-R3-CD**
	)	
Appellee,	)	
	)	**MADISON COUNTY**
VS.	)	
	)	
MARK LEE BOONE,	)	**HON. FRANKLIN MURCHISON, JUDGE**
	)	
Appellant.	)	
	)	(Aggravated Vehicular Homicide)
	)	

ON APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF MADISON COUNTY

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

In January of 1998, the Defendant, Mark Lee Boone, was convicted of the following crimes: aggravated vehicular homicide; vehicular assault; fourth offense DUI; possession of marijuana; possession of drug paraphernalia; driving on a revoked license with two or more DUI convictions; and third offense driving on a revoked license. In addition to fining the Defendant for his crimes, the trial court sentenced him as a Range I standard offender to twenty-five years for the aggravated vehicular homicide; four years for the vehicular assault; eleven months and twenty-nine days for fourth offense DUI; eleven months and twenty-nine days for possession of marijuana; eleven months and twenty-nine days for possession of drug paraphernalia; eleven months and twenty-nine days for driving on a revoked license with two or more DUI convictions; and eleven months and twenty-nine days for third offense driving on a revoked license. All sentences were to be served concurrently, except for the Defendant's sentence for aggravated vehicular homicide, which was to run consecutive to the other sentences. The Defendant thus received an effective sentence of twenty-nine years. Pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure, he now appeals his convictions.

The Defendant presents two issues for our consideration on appeal: (1) whether the evidence presented at trial was sufficient to support his convictions; and (2) whether the trial court erred by failing to grant his motion for a new trial on the basis of newly discovered evidence. We affirm the judgment of the trial court.

All charges in this case stem from a single incident which occurred on November 9, 1996. On that date, James Sharp and his wife, Shirley Sharp, the victims, were returning home from a celebration in honor of Ms. Sharp's birthday. Mr. Sharp was driving their vehicle, a 1991 Oldsmobile, and had stopped at a

traffic light near Jackson, Tennessee at approximately midnight. Mr. Sharp testified that while waiting for the light to change, he noticed another vehicle approaching them at the intersection from the opposite direction. Mr. Sharp turned to his wife, who was riding in the passenger seat of their car, and when he glanced back, "all [he] could see was just blinding lights coming into . . . the windshield" of his vehicle. Confused by the lights and the "tremendous roar," Mr. Sharp first guessed that an airplane was crashing into his car. However, he realized shortly thereafter that the oncoming vehicle which he had noticed just moments before had jumped the median and was heading toward him "full throttle." Mr. Sharp testified that the driver of the vehicle "never let up on the accelerator" and hit his car head-on.

After the collision, Mr. Sharp realized that the steering column of his car had been knocked loose and that he was holding the disconnected steering wheel. His first thoughts were for his wife, who had been pinned on the floorboard between the dashboard and the seat of the car. Her head had hit the windshield. In addition to other injuries, she was bleeding profusely from lacerations to her head and face, her legs were broken, and she was struggling for breath. Although Mr. Sharp survived his injuries, Ms. Sharp died at the hospital.

After the crash, a woman who had witnessed the collision, Virginia Hurd, approached Mr. Sharp to try to help. Ambulances and law enforcement personnel arrived shortly thereafter. Officer Mabry of the Jackson Police Department was among those called to the scene of the accident. He stated that when he arrived, he saw the Sharps' car on the street and a red pick-up truck in a grassy area next to the road. The pick-up was on its side, and Officer Mabry observed a white male inside, later identified as the Defendant, who appeared to be unconscious. Mabry stated that he could see the Defendant breathing and noted that the Defendant was bleeding from his forehead. Mabry also testified that he noticed numerous broken beer bottles inside the truck. Officer Blankenship, also of the Jackson Police Department, who arrived at the scene with Officer Mabry, introduced photographs taken of the vehicles after the accident. He stated that there were no skidmarks from the Defendant's truck and "no sign of any attempt to brake at all."

Mr. Sharp and the Defendant were both transported to the hospital in the same ambulance. Sharp testified that the Defendant was placed in the ambulance first, and when the emergency medical technicians opened the door for him to enter, he "could hardly breathe for the smell of alcohol." Officer Blankenship reported that he spoke with the Defendant at the hospital and noted a "strong odor of an alcoholic beverage coming from his person" and that the Defendant's speech was slurred. Blood alcohol content tests revealed that the Defendant had a blood alcohol content of 0.14% when his blood was drawn at the hospital after the accident. In addition, Officer Blankenship reported that he obtained a package of "rolling papers" and two clear bags of a leafy, green substance from the Defendant's pocket at the hospital. Analysis of the substance confirmed that it was marijuana. At the hospital, lacerations to the Defendant's face and head were sutured, and according to the physician who treated the Defendant on the night of the accident, the relatively minor lacerations were the Defendant's only injuries.

Officer Mark Peddy of the Jackson Police Department testified that he was in the Defendant's presence for several hours on the night of the accident. He recalled that while at the hospital, the Defendant told him that he and two friends had been to Tremors, a nightclub in Jackson. Peddy testified that the Defendant "did not know where [his friends] were at that time. He did not know how he had gotten to be where he was. . . . [H]e . . . did not even remember leaving Tremors."

At trial, the Defendant presented a different story. He claimed that he and his two friends, Tim Jones and Chris Herbison, left Tremors together in his truck. He admitted that he had smoked marijuana that evening and that they had all been drinking heavily, but insisted that they were not "totally" intoxicated when they left the club. He also claimed that Herbison had stopped drinking at Tremors so that he could be the "designated driver." The Defendant reported that at the time of the accident, the three of them were headed to the Doll House, another club, and that Herbison was driving. He maintained that he was riding in the passenger seat of his truck. He claimed that when they approached the intersection where the accident occurred, Herbison was driving too fast, and he warned Herbison to "[s]low down." The Defendant testified that upon impact, he was knocked unconscious. He reported that after the accident, Jones and Herbison ran from the vehicle, leaving him to face charges for the crime. Although he admitted that he had been found unconscious in the driver's seat of the truck, he explained that Jones and Herbison had caused him to slide into that position as they exited the truck, which was lying on its side.

Both Tim Jones and Chris Herbison testified at trial. Both testified that they and the Defendant began drinking on the afternoon of the accident at the Defendant's home in McKenzie, Tennessee. They left McKenzie in the Defendant's truck to go to Tremors in Jackson. On the way, they stopped at a

bar owned by the Defendant's mother and purchased beer to drink. In addition, they each testified that both Herbison and the Defendant smoked marijuana while driving to Jackson.

According to Jones, the Defendant was already intoxicated when they arrived at Tremors. They all continued to drink at the club, and Jones maintained that he and Herbison decided not to ride home with the Defendant because of the Defendant's intoxication and his poor driving habits on the way to Jackson. Herbison testified that while at Tremors, the Defendant "got into a heated argument, and [a bouncer] escorted him out the door." When asked about this incident, the Defendant denied that he had been escorted from the club. However, another patron of Tremors, Elizabeth Anderson, testified that she had also seen the Defendant being escorted from the club by a bouncer.

Herbison described the Defendant as "highly intoxicated" at the time he left Tremors. Herbison testified that he walked outside with the Defendant, told the Defendant to wait for him to find Jones so that the three of them could find a motel room for the night, and went back inside. He collected Jones and went

back outside, but, according to Herbison, the Defendant had already gone by that time.

Herbison testified that after the Defendant's departure, he and Jones went back inside the club and later spoke with another friend about a ride home. However, when they realized that they wanted to leave before those offering them a ride, Jones and Herbison left the bar and walked to a nearby Econo Lodge at approximately 2:00 a.m. Jones testified that they spent the night at the motel, called a friend, Diane Maynord the following morning, and asked her to pick them up.

Diane Maynord verified this account, stating that she received a collect call from Jones on November 10, 1996 and that she transported Jones and Herbison home from the Econo Lodge. The State introduced her phone records, which included a charge for a collect call from Jackson on that date. In addition, P.B. Patel, the Econo Lodge manager, introduced documents from his motel which verified that Anthony Herbison had rented a room with another individual on November 9, 1996. He also verified that the number listed on Maynord's phone records was that of the motel.

Witnesses to the accident also countered the Defendant's testimony. Harry Jenkins testified that on November 9, 1996 at approximately midnight, he stopped at the intersection where the accident occurred. As he stopped, he noticed the Defendant's truck approaching the intersection. He stated that because the Defendant was driving at a high speed and it appeared that he was not going to stop, he paused at the intersection. As the truck passed him, he noted that there was only one male inside the vehicle. The truck crossed the median, struck the victims' car, and "flipped." Jenkins stated that the driver never reduced his speed. After the collision, Jenkins approached both the victims' car and the Defendant's truck to offer help. Jenkins insisted that he found only the

Defendant inside the truck, which was littered with beer bottles and smelled strongly of alcohol.

Charles Hurd and his wife, Virginia Hurd, were approaching the intersection where the accident occurred when they witnessed the collision between the Defendant's truck and the victims' car. Both testified that the Defendant was speeding and that he did not attempt to brake before hitting the victims' car. After the collision, the Hurds immediately approached the vehicles, shined the headlights of their vehicle on those involved in the accident, and attempted to help the victims and the Defendant. Both Mr. and Mrs. Hurd testified that only the Defendant, who was briefly knocked unconscious, was in his truck after the accident. Although the Hurds stopped at the site of the accident immediately after the collision and remained there until medical and law enforcement personnel arrived, neither Mr. nor Mrs. Hurd saw any individuals emerge from the Defendant's truck and flee the scene of the accident.

Officer Urig, an accident reconstructionist with the Jackson Police Department, also testified at trial. He stated that the Defendant's truck and the victims' car made contact passenger side to passenger side. Urig testified that based upon the damage he observed to both vehicles at the scene, the passenger seat of the Defendant's truck was not "a survivable position" in the accident. He maintained that the minimum rate of speed at which the truck was traveling at the time of the accident was sixty miles per hour and that "there was no braking of any kind from the truck." With regard to evidence at the scene, he explained that although officers could have possibly obtained fingerprint samples from the dashboard of the Defendant's truck, retrieved blood samples from the vehicles, and determined who owned a leather jacket found inside the Defendant's vehicle, they chose not to do so because "in [his] opinion, there was only one person involved."

The Defendant's mother, Judy Sawyer, testified for the defense. She introduced an audio tape on which she recorded a conversation she had had with Tim Jones' wife, Michelle Jones. During the conversation, Ms. Jones stated, "I just told him I thought he was sitting in jail for something his best friend did. Then, Timmy turned around and said, 'Look who's sitting in jail for it.'" Later in the conversation, Sawyer asked Ms. Jones, "So you really think he was driving then?" to which Ms. Jones responded, "I think. John said that he noticed that his hands and his arms and his face being pretty scratched up, and Jeanie said that she did too." Sawyer testified that she could not identify John or Jeanie, but explained that the tape showed Ms. Jones' belief that her husband had been driving the Defendant's truck at the time of the accident. In support of this assertion, Sawyer pointed to Ms. Jones' comments about her husband's cuts and his behavior after the accident, specifically, that he was "laughing and making fun because he wasn't in jail."

Michelle Jones also testified at trial and was questioned about her conversation with Ms. Sawyer. She stated that at the time of the accident, she and her husband were separated, and she had not spoken with him for five months. She did not recall telling Ms. Sawyer that her husband was allowing the Defendant to "sit . . . in jail" for his own act, but she admitted that she had wondered if Mr. Jones had been involved.

Tim Jones testified that he had a cut on his cheek on the night of the accident which he had received at work. Both Herbison and Cindy Boone, the Defendant's wife, reported having noticed the cut that night. Jones explained that he and Herbison worked for West Tennessee Siding and Trim putting up vinyl siding and often had cuts and scratches on their hands and faces. At trial, Herbison showed the jury cuts on his hands which he claimed to have recently received while working.

The defense also called Stacy Freeman, who was present at the Defendant's home on November 10, 1996. She recalled that while she was at the Defendant's home, Diane Maynord, Tim Jones, and Chris Herbison stopped by to pick up Jones' truck, which he had left at the Defendant's house the night before. She testified that when they arrived, she and Jones engaged in the following conversation: "I said, 'Do you know that [the Defendant is] in the hospital?' And [Jones] said, 'From what?' I said, 'Y'all killed a woman last night.'" Freeman claimed that Jones responded by asking, "And you mean that woman's dead?" When questioned about this incident, Jones denied having ever made such a statement.

I. SUFFICIENCY OF THE EVIDENCE

The Defendant first argues that the evidence presented at trial was insufficient to support his convictions. Specifically, he challenges his convictions for aggravated vehicular homicide, DUI, and driving on a revoked license. He contends that the State did not prove his guilt beyond a reasonable doubt. As he did at trial, he contends in his brief that at the time of the collision, he was not driving his truck and that Tim Jones and Chris Herbison were also in the vehicle. He claims that both Jones and Herbison extricated themselves from the truck after the accident and fled the scene. Much of the Defendant's argument in this regard is based on his claim that the State's witnesses were not credible.

Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). In addition, because conviction by a trier of fact destroys the presumption of innocence and imposes a presumption of guilt, a convicted criminal defendant bears the burden of showing that the evidence was insufficient. McBee v. State, 372 S.W.2d 173, 176 (Tenn. 1963); see also State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992) (citing State v.

Grace, 493 S.W.2d 474, 476 (Tenn. 1976), and State v. Brown, 551 S.W.2d 329, 331 (Tenn. 1977)); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Holt v. State, 357 S.W.2d 57, 61 (Tenn. 1962).

In its review of the evidence, an appellate court must afford the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." Tuggle, 639 S.W.2d at 914 (citing State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978)). The court may not "re-weigh or re-evaluate the evidence" in the record below. Evans, 838 S.W.2d at 191 (citing Cabbage, 571 S.W.2d at 836). Likewise, should the reviewing court find particular conflicts in the trial testimony, the court must resolve them in favor of the jury verdict or trial court judgment. Tuggle, 639 S.W.2d at 914.

Contrary to the Defendant's assertions, the State presented ample evidence from which the jury could have adduced the Defendant's guilt. Witnesses to the collision testified that the Defendant was the only individual in his truck both before the accident and immediately afterwards. Police officers found only the Defendant, who was unconscious, in his truck upon their arrival at the scene. One officer testified that when he spoke with the Defendant at the hospital after the crash, the Defendant admitted that he did not know where his friends were and could not even remember leaving the nightclub where they had been earlier in the evening. An accident reconstructionist testified that the passenger seat of the Defendant's truck, where he claimed to be riding at the time of the accident, was not a survivable position.

Furthermore, patrons of Tremors reported seeing the Defendant leave the establishment alone. Tim Jones and Chris Herbison reported that they were not with the Defendant at the time of the accident and instead spent the night at a motel in Jackson. This was verified by both the manager of the motel and the woman who drove them home the following morning.

In fact, the only evidence that the Defendant presented to support his contentions consisted of a recorded conversation between his mother and Michelle Jones, in which Jones questioned whether her husband may have been driving at the time of the accident, and the testimony of Stacy Freeman, who claimed that after she reported the accident to Tim Jones, he asked her whether "that woman [was] dead," a statement which Jones denied ever making. Any question as to the Defendant's guilt raised by this evidence and questions of witness credibility were appropriately presented to the jury for resolution. Questions of this nature are questions of fact and are traditionally resolved by the jury. The jury considered both the Defendant's version of the accident and that presented by the State and apparently concluded that the Defendant's testimony was not credible. Because we may not "re-weigh or re-evaluate the evidence" in the record, we will not disturb this finding on appeal. See Evans, 838 S.W.2d at 191 (citing Cabbage, 571 S.W.2d at 836). This issue is therefore without merit.

II. NEWLY DISCOVERED EVIDENCE

The Defendant next contends that the trial court erred by denying his motion for a new trial based upon newly discovered evidence. At the hearing on the motion for a new trial, two new witnesses testified. Victor Trailer, who was incarcerated with the Defendant, testified that in November 1996, he saw the aftermath of an accident and two white males "walking at a rapid speed" away from the area in which the accident had occurred. He could recall neither the exact date nor the time of day or night when he saw the accident. He stated that "it seemed like it was getting dusky-dark" or "it might have been a cloudy day or something," although he could not be sure. He was also unable to identify what types of vehicles had been involved in the collision. Trailer explained that he did not previously report his knowledge to police because he was "into criminal activity" at that time.

Henry Wilson, who was also incarcerated at the same facility where the

Defendant was housed, testified that he too saw the aftermath of the accident at issue in this case. He stated that he saw two Caucasian males standing "at the truck" on November 9, 1996, but he could not be sure whether they were in the truck. In his signed affidavit, he stated, "it was about 11:30 p.m. or twelve o'clock, but it was two people that were running from the truck." However, at the hearing on the motion for a new trial, he denied ever seeing the two people "running from the truck." Wilson claimed that the individuals did not appear to be police officers, but he stated that the two appeared to be "looking at the truck and the car like they were checking the damage or something." He claimed that he did not stop because he assumed no one was hurt since two individuals were standing near the wreck. Wilson could not describe the vehicles involved in the accident, but he did state that the truck which he saw was lying on its side.

"The decision to grant or deny a new trial on the basis of newly discovered evidence is a matter which rests within the sound discretion of the trial court." State v. Goswick, 656 S.W.2d 355, 358 (Tenn. 1983). Thus, our standard of review is abuse of discretion. State v. Meade, 942 S.W.2d 561, 565 (Tenn. Crim. App. 1996). "In seeking a new trial on the basis of newly discovered evidence, the defendant must first establish (1) reasonable diligence in attempting to discover the evidence; (2) the materiality of the evidence; and (3) that the evidence would likely change the result of the trial." Id.; Goswick, 656 S.W.2d at 358-60.

In denying the Defendant's motion for a new trial, the trial judge stated,

> Now, these two witnesses – Mr. Trailer and Mr. Wilson – first of all, their testimony is not credible. Second of all, had they testified and had that very testimony that they gave been given to the jury, there is not a remote chance that it would have changed that verdict.
>
> Let's take Mr. Trailer first. Mr. Trailer thinks it happened about dusk – at the end of the day. He is far off on the time. It happened at 11:30 or twelve o'clock. He's not sure. He can't give other testimony about the description of the vehicles or what happened or anything else. He didn't stop. He didn't come forward with this testimony until months and months after the accident.
>
> Now, Mr. Wilson got the time exactly right – just practically,

> but Mr. Wilson's testimony would be very damaging to the defendant because he said he saw two white males some period of time after the accident, and he doesn't even know when the accident occurred, but it had already happened. And they were just kind of hanging around – as if they were involved in it – looking around. That's entirely inconsistent with Mr. Boone's theory that they got out of there some way and ran away. Had that been the case, you can't stack up Mr. Wilson's testimony with the idea that these two men got out of that truck and ran away. So even if the testimony were to have been given by Trailer and Wilson, no way would that have changed the outcome of the case. And Mr. Trailer's testimony was simply that he saw two white males walking in the area – and – walking fast. And that doesn't prove anything. Like Mr. Trailer said himself, "I didn't have much to tell about it," and he didn't.
>
> So the testimony of these witnesses beyond a reasonable doubt would not have effected [sic] the outcome of the trial.

We must agree. The Defendant was faced with a great deal of damning evidence, including testimony by eyewitnesses to the accident who stated that he was driving his vehicle alone at the time of the collision. The eyewitnesses further testified that they never saw any individuals emerge from the Defendant's truck or flee the scene of the accident, despite the fact that the eyewitnesses approached the Defendant's truck and victims' car immediately after the crash and then remained at the scene for some time. At the very least, it is extremely doubtful that the new evidence presented at the hearing on the motion for new trial would have had any effect on the outcome of the trial. We therefore find no abuse of discretion on the part of the trial court in denying the Defendant's motion for a new trial.

Accordingly, the judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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JERRY L. SMITH, JUDGE

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JAMES CURWOOD WITT, JR., JUDGE