IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1999

FILED

February 25, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

CHARLES ROBERT SNEED,	)	**C.C.A. NO. 03C01-9905-CR-00184**
	)	
Appellant,	)	
	)	**HAMILTON COUNTY**
VS.	)	
	)	
STATE OF TENNESSEE,	)	**HON. STEPHEN M. BEVIL, JUDGE**
	)	
Appellee.	)	
	)	**(DUI—Third Offense)**

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

On April 16, 1997, the Hamilton County Grand Jury indicted the Defendant, Charles Robert Sneed, for driving under the influence. The indictment was later amended to add as a second count an allegation that the Defendant had four previous convictions for DUI. On May 28, 1998, a Hamilton County jury found him guilty of driving under the influence as a third or subsequent offender. The trial court sentenced the Defendant to eleven months, twenty-nine days incarceration at 100%, revoked his license for five years, and fined him $10,000 plus costs. Pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure, the Defendant now appeals his conviction and sentence. He presents three issues for our review: (1) whether the evidence presented at trial was sufficient to support his conviction; (2) whether the State made improper remarks during closing arguments, thereby depriving him of a fair trial; and (3) whether he was improperly sentenced. We affirm the judgment of the trial court.

On the evening of December 20, 1996, Hamilton County officers found the Defendant sitting in his damaged truck in the "breakdown" lane of Highway 27. Officer Mark King, who arrived first at the scene, described the weather that night as "harsh winter weather of a mixture of snow and ice" and stated that there were a number of abandoned vehicles on the side of the highway. King testified that he stopped at the Defendant's truck because the truck was parked "sideways" in the breakdown lane with its front end partially in the road. When he approached the Defendant's truck, the Defendant was sitting in the driver's seat with the key in the ignition, and King noted that radiator fluid had leaked out from the Defendant's truck onto the road due to an apparent collision with an abandoned truck in the breakdown lane. No one else was in the Defendant's truck or in the other vehicle in the breakdown lane, and Officer King testified that he did not see any pedestrians in the vicinity of the Defendant's vehicle.

King stated that upon approaching the Defendant, he smelled a strong odor of alcohol and noted that the Defendant's speech was slurred. He also stated that the Defendant appeared to be "kind of wobbly" and "was too unsteady to keep control of his upper body while in the truck." King reported that he asked the Defendant whether he had been drinking, and the Defendant responded that he had. King then turned the investigation over to Officer Randy Raulston, who was second to arrive at the scene.

Officer Randy Raulston confirmed King's testimony that it was snowing and very cold on the night of the Defendant's arrest. He stated that he was summoned to the Defendant's vehicle, and when he arrived, the Defendant was sitting alone in the driver's seat of his truck. Like King, Raulston testified that he did not see any pedestrians near the scene of the accident. Raulston reported that upon approaching the Defendant, he immediately noticed an odor of alcohol and that the Defendant's speech was slurred. Raulston concluded, "He was drunk, there was no doubt about that."

Raulston stated that he noted radiator fluid on the road from the Defendant's truck and testified that the Defendant's vehicle was "smashed" on the front side. He recalled that when he questioned the Defendant about how the accident had happened, the Defendant first responded that he was driving in the slow lane when the other vehicle, which was traveling in the fast lane, swerved into the slow lane. He explained that he attempted to dodge the other vehicle, but failed and struck it. He maintained that when the two trucks came to a stop on the side of the road, the driver of the other vehicle jumped out of the truck and ran from the scene.

Raulston then approached the abandoned vehicle. He noted that it had been hit in the rear and that it was coated with about an inch of ice and snow, as opposed to the Defendant's truck, which had accumulated no snow and ice. For

this reason, Raulston assumed that the abandoned vehicle had been stationary for some time and therefore again questioned the Defendant about the cause of the collision. Raulston testified that the Defendant next presented this account of the accident: The vehicle which he hit had apparently broken down on the side of the road, and immediately before the collision, the party who had been driving the vehicle was standing in the middle of the road "trying to waive [the Defendant] down." The Defendant swerved to miss the person in the road, causing him to hit the vehicle, and the person in the road then ran away. According to Raulston, the Defendant also presented a third explanation of how the collision occurred: The Defendant later told Raulston that a friend of his was driving his truck at the time of the collision. He stated that after the accident, the friend went to find help, leaving the Defendant sitting alone in his truck.

Raulston testified that when questioned about alcohol consumption, the Defendant stated that "he had some," and Raulston maintained that there was beer on the passenger-side floorboard of the truck. After the Defendant refused a breath test, Raulston arrested him for DUI. According to Raulston, on the way to the police station, the Defendant, who was "very, very mad and cussing," repeatedly told Raulston that he had no reason to arrest him because he was not drunk.

On cross-examination, Raulston admitted that he had written the wrong time on the implied consent form which the Defendant signed. He also admitted that he mistakenly checked a box on the accident report which indicated that the roads were dry and that the weather was clear on the night of the Defendant's arrest. However, he maintained that it was snowing that night and explained that he simply made a mistake by checking the wrong boxes. Finally, Raulston admitted that although his diagram of the accident on the accident report showed that the Defendant's truck was completely off the road, he recalled that the truck

was partially in the road; he explained that the drawing was not to scale and that he may have made a mistake.

Angie Beard, a friend of the Defendant's mother, testified for the defense. She stated that the Defendant's daughter, Sheryl Burns, was driving the Defendant's truck at the time of the accident. She recalled that she, the Defendant, and Burns were at the home of the Defendant's mother on the evening of December 20, 1996. She explained that they met at Ms. Sneed's home to discuss a stereo that she wished to sell and that the Defendant wished to buy as a Christmas present for Burns. Beard testified that she, the Defendant, and Burns left Ms. Sneed's home to drive to Beard's home at some point after 9:00 p.m. She stated that she followed the Defendant's truck in her own vehicle and claimed that on the way to her home, Burns was driving the Defendant's truck. She reported that Burns decided to drive because the Defendant was very drunk, and Beard stated that the Defendant and his daughter were arguing before they left Ms. Sneed's home. With regard to the cause of the accident, Beard testified, "maybe [Burns] had given it too much gas and she was going a little bit fast and I don't know what happened but the next think [sic] I knew they were into the back end of a parked truck on the side of the road."

According to Beard, after the accident, Burns and the Defendant argued, and Burns asked Beard to transport her to a phone so that she could call the police; Burns did not wish to remain at the scene because her driver's license had expired. Beard maintained that they left the Defendant in his truck and drove to get help, but after they had proceeded a short way down the road, they saw a police vehicle approaching the Defendant's truck and chose not to return. Beard stated that she dropped Burns off at her grandmother's house and then went to a friend's home. Beard testified that she did not contact the police immediately after the accident but that she did go to court for the Defendant's preliminary hearing to discuss the case with the authorities. She said that she gave a

statement to a person whom she believed was a District Attorney and then left the courtroom.

Sheryl Burns, the Defendant's daughter, also testified for the defense. Like Beard, she maintained that she was driving her father's truck at the time of the accident because her father was drunk. She admitted that she knew she was driving on an expired license. Burns stated that she and her father were arguing at the time of the accident. She recalled that her father was angry with her because she was "mouthing at him because he was drinking" and he thought she was "hotrodding" the truck. Burns claimed that her father caused the accident by "grabb[ing her] wrist or [her] hand or the steering wheel" to force her to pull the truck to the side of the road.

Burns testified that after the accident, she suggested to her father that they ride to a phone with Beard to call the police, but maintained that her father refused, stating, "I'm not leaving my truck sitting here." She therefore left with Beard because "at that time I didn't really care if he went to jail or not." However, when she saw police arrive at the scene of the accident, she decided not to return to the scene because her driver's license was expired and she was "scared." Finally, Burns claimed that in January, she "turned [her]self in" to the Chief of Police for Soddy Daisy, but the Chief of Police did not make a written record of the event "because [Burns had] known him so long." She maintained that although the Chief of Police apparently did not follow up on her report, "[h]e knew before he had to go to court what had happened."

Contrary to the testimony of the officers who were involved in the Defendant's arrest, both Beard and Burns testified that although it was very cold on the night of December 20, 1996, it was not snowing or wet. After the completion of witness testimony, the defense introduced a report from the National Oceanic and Atmospheric Administration which reflected that in

Chattanooga during the twenty-four hour period surrounding the Defendant's arrest, there was no precipitation, and the skies were clear. The State countered that the report covered Chattanooga, not Soddy Daisy, which was closest to the highway where the Defendant was arrested. The State further argued that the report would have indicated snow only if the snow was of a depth of two inches or more.

I. SUFFICIENCY OF THE EVIDENCE

The Defendant first argues that the evidence was insufficient to support the jury's guilty verdict. He points to mistakes made by the officers who arrested him and asserts that their memories of the night were faulty. He also contends that the State failed to present sufficient evidence showing that the Defendant was ever in physical control of his truck on the night of the accident. He bases his argument on his claim that his truck was not operable at the time of his arrest.

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.

Reviewing the evidence in light most favorable to the State, we conclude that sufficient evidence was presented at trial from which the jury could have adduced the Defendant's guilt. Two officers testified that they found the Defendant sitting alone in the driver's seat of his truck with the key in the ignition. Both officers testified that the Defendant was clearly intoxicated, and one officer testified that the Defendant admitted to having been drinking. Furthermore, one officer testified that on the night of his arrest, the Defendant presented three conflicting explanations of how the accident occurred. Testimony by defense witnesses that the Defendant was not driving on the night of his arrest presented a classic question of fact for resolution by the jury. Upon review of the testimony presented at trial, the jury evidently concluded that the testimony of defense witnesses was not credible. We will not disturb this conclusion on appeal.

Moreover, we conclude that sufficient evidence was presented to support the conclusion that the Defendant was either driving or in physical control of his truck at the time of his arrest. The Defendant's truck need not have been operable to support the jury's finding of guilt. The statute under which the Defendant was convicted prohibits an intoxicated person from driving or being in "physical control" of a vehicle. Tenn. Code Ann. § 55-10-401(a). However, the vehicle in which a defendant who has committed the crime of DUI is found need not be "operable or capable of being driven when a law enforcement officer later arrives to arrest him." State v. David Lee Bellamy, No. 03C01-9612-CR-00476, 1998 WL 88426, *5 (Tenn. Crim. App., Knoxville, Mar. 3, 1998). Rather, our supreme court has adopted a "totality of the circumstances approach in

assessing the accused's physical control of an automobile for purposes of T.C.A. § 55-10-401(a) . . . ." State v. Lawrence, 849 S.W.2d 761, 765 (Tenn. 1993). After considering the circumstances of this case, we conclude that the evidence is sufficient to support a finding that the Defendant was in physical control of his vehicle at the time of his arrest.

II. CLOSING ARGUMENT

The Defendant next argues that the State made improper statements during closing arguments, thereby depriving him of a fair trial. Specifically, he points to the following comments: (1) "I think there was little or no credibility in the statements that the defendant made that night, but taking it in light of the testimony we've heard today from these two witnesses, I think it has even less credible [sic] . . . ." (2) "I think that the credible evidence or the credible testimony, aside from the people that want to help him, is that he was operating the vehicle . . . ." (3) "The story about wanting to go off and file a police report and make an accident report and let's go tell somebody, leaving an intoxicated man to protect his 1970-whatever truck on the road and then when the police arrived there to take this report she just decides to leave her father to get arrested and let him set [sic] for a year and a half and get prosecuted and I just don't believe it."

A prosecutor may not assert his personal opinion as to the credibility of a witness during argument. See State v. Beasley, 536 S.W.2d 328, 330 (Tenn. 1976); State v. West, 767 S.W.2d 387, 394 (Tenn. 1989). However, "[c]ourts have recognized that closing argument is a valuable privilege for both the State and the defense and have allowed wide latitude to counsel in arguing their cases to the jury." State v. Bigbee, 885 S.W.2d 797, 809 (Tenn. 1994). In order to prevail on a claim of this nature, a defendant must establish not only that the prosecutor made improper remarks, but that the remarks resulted in prejudice. See State v. Ashburn, 914 S.W.2d 108, 115 (Tenn. Crim. App. 1995).

Because the prosecutor's comments in this case reflect his personal opinion concerning the credibility of certain witnesses, we conclude the remarks were improper. However, after reviewing the entire record in this case, we further conclude that the Defendant has failed to establish prejudice as a result of the remarks. Considering the factors set forth in Judge v. State, 539 S.W.2d 340 (Tenn. Crim. App. 1976), which should be considered to determine whether improper remarks made during arguments affected the verdict to the prejudice of the defendant, and the record as a whole, we conclude that any error made by the State during closing arguments was harmless. Id. at 344; see also Bigbee, 885 S.W.2d at 809. This issue is therefore without merit.

III. SENTENCING

Finally, the Defendant argues that he was improperly sentenced. He contends that the trial court misapplied one enhancement factor, Tennessee Code Annotated § 40-35-114(13), and failed to apply appropriate mitigating factors. He claims that the trial court should have considered the following as mitigation factors: (1) that although he had been previously convicted of DUI, his prior offenses occurred "nearly a decade prior to the instant offense"; (2) that he did not drive following his prior DUI convictions until his driving privileges were restored; (3) that he obtained his commercial driver's license and was employed as an over-the-road truck driver at the time of this offense; and (4) that he was serving as caretaker for his bedridden mother at the time of this offense. The Defendant suggests that the trial court should have considered the foregoing under the catchall provision for mitigating factors. See Tenn. Code Ann. § 40-35-113(13).

When an accused challenges the length, range, or manner of service of a sentence, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative

showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

When conducting a de novo review of a sentence, this Court must consider: (a) the evidence, if any, received at the trial and sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement made by the defendant regarding sentencing; and (g) the potential or lack of potential for rehabilitation or treatment. State v. Thomas, 755 S.W.2d 838, 844 (Tenn. Crim. App. 1988); Tenn. Code Ann. §§ 40-35-102, -103, -210.

If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The State concedes, and we agree, that the trial court apparently misapplied enhancement factor (13) in this case. See Tenn. Code Ann. § 40-35-114(13). This factor may be applied only where the Defendant commits a felony while on release from a prior felony conviction. Id. At the time of his conviction herein, the Defendant was on probation for felony theft. Here, the Defendant was convicted of a misdemeanor, and therefore, enhancement factor (13) does not apply, and if the trial judge relied on this factor, he erred. Although the judge mentioned enhancement factor (13), he noted that the conviction was a misdemeanor.

However, the trial court also considered enhancement factor (1) in sentencing the Defendant: "The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range." Id. § 40-35-114(1). The record supports application of this enhancement factor. At the sentencing hearing, the trial judge reviewed the Defendant's criminal record, which revealed that the Defendant had been previously convicted of DUI, twice in 1989 and once in 1987; theft of property; reckless endangerment; aggravated assault; and feloniously selling Diazepam. The Defendant was also declared a habitual traffic offender in 1990. We believe that the Defendant's criminal history is more than sufficient to support application of enhancement factor (1). See id. Moreover, considering this record, we conclude that the trial judge did not err by not applying the mitigating factors suggested by the Defendant.

We therefore affirm the Defendant's sentence. We find no error by the trial court in applying no mitigating factors when sentencing the Defendant. Furthermore, although the trial court did apparently err by applying enhancement factor (13), we conclude that application of enhancement factor (1) was clearly supported by the record and is entitled to substantial weight. See id. § 40-35-114 (1), (13). We therefore affirm the Defendant's sentence.

The judgment of the trial court is according affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

_____
JOSEPH M. TIPTON, JUDGE

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JERRY L. SMITH, JUDGE