IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE 1995 SESSION

STATE OF TENNESSEE	)	NO. 02C01-9501-CC-00025
	)	
Appellee	)	MADISON COUNTY
	)	
V.	)	HON. ROBERT CORLEW
	)	CHANCELLOR
CHARLES LEE WHITE,	)	
	)	(Public Intoxication; Criminal
Appellant	)	Impersonation)
	)	
	)	

FOR THE APPELLANT:

John E. Herbison
2016 Eighth Avenue South
Nashville, Tennessee 37204
(Appeal Only)

George Morton Googe
District Public Defender

Joseph L. Patterson
Assistant Public Defender
225 West Baltimore
Jackson, Tennessee 38301
(Trial Only)

FOR THE APPELLEE:

Charles W. Burson
Attorney General and Reporter
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

Michael J. Fahey, II
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

James G. Woodall
District Attorney General

Lawrence Nicola
Assistant District Attorney General
Lowell Thomas State Office Bldg.
Jackson, Tennessee 38301

OPINION FILED: _____

AFFIRMED
William M. Barker, Judge

OPINION

This is an appeal as of right by the appellant, Charles Lee White, from a judgment of conviction entered by the Circuit Court of Madison County. The appellant was charged with public intoxication, criminal impersonation, and possession of a deadly weapon with the intent to go armed. The jury found the appellant guilty of public intoxication and criminal impersonation, but not guilty of the crime of possession of a deadly weapon with the intent to go armed. The trial court sentenced the appellant to thirty (30) days with all but ten days suspended and a ten ($10.00) dollar fine for public intoxication and six (6) months with all but ten days suspended and a ten ($10.00) dollar fine for criminal impersonation. The sentences were ordered to run concurrently.

The appellant presents the following arguments in support of his appeal from his convictions and sentences.

(1) The evidence is insufficient to support the conviction;

(2) The trial court erred when it gave a "missing witness" instruction to the jury;

(3) The trial court erred when it charged alternative means of commission of the offenses of public intoxication and criminal impersonation;

(4) The trial court erroneously admitted evidence of the defendant's prior conviction for impeachment purposes; and

(5) The trial court erred when it ordered the appellant to serve ten (10) days in jail instead of suspending the entire sentence.

We affirm the convictions and the sentences received by the appellant.

As is often the case, the State's version of the facts is substantially different from the appellant's version of what happened. According to the State, on July 10, 1993, Officer Mark Dent of the Jackson Police Department approached and drove around a silver Plymouth Reliance which had stopped in the road on Preston Street.

As the officer proceeded around the vehicle he observed in his rearview mirror the appellant exit the passenger side of the vehicle apparently to engage in an

argument with a man standing on the opposite side of the car. The officer saw the defendant make "menacing gestures" and saw him wave a stick towards the gentleman and characterized the exchange as "heated." Upon witnessing the exchange the officer turned his vehicle around in order to return to where the appellant and the car were stopped. Before the officer was able to return to the Preston Street location of the car, the appellant reentered the vehicle and the car proceeded down Middleton Street. The person with whom the appellant was apparently engaging in this heated argument had disappeared and his identity was never discovered. As he approached the vehicle, the officer called for backup officers to assist him on the scene.

Shortly after the officer pulled the car over, a backup unit arrived. Officer Dent approached the appellant on the passenger side of the vehicle while another officer, Officer Knolton, approached the driver side of the vehicle. Upon questioning by the police officer, the appellant gave several false names to the officer, including Charles Brown and Freddie Taylor. The officer observed that the defendant's speech was slurred, his eyes were red, and that there was a strong odor of alcohol about his person. The appellant was, according to the officer, quite unsteady on his feet and had to lean against the car in order to stay upright. The officer described the appellant's manner as uncooperative during the entire incident leading to his arrest. The officer ran a check on the false names given to him by the appellant which came back as “not on file.” The driver of the car apparently provided the officers with the appellant's true identity which was later discovered on a piece of identification in the appellant's wallet.

The appellant denied that he ever got out of his vehicle just prior to being pulled over by Officer Dent, that he never engaged in an argument with anyone on Preston Street, and that he was not intoxicated on the day in question. Further, he categorically denied that he ever gave Officer Dent false names.

SUFFICIENCY OF THE EVIDENCE

The appellant contends that neither conviction was supported by evidence sufficient to find him guilty beyond a reasonable doubt.

The appellant first contends that there was a material variance between the indictment and the evidence adduced at trial on the charge of criminal impersonation. The appellant's claim is that the indictment alleged that he misrepresented himself to "officers" of the Jackson Police Department, but that the proof showed that he misrepresented himself to only one officer, not two or more. In support of his argument, the appellant cites State v. Keel, 882 S.W.2d 410 (Tenn. Crim. App. 1994). The rule of law announced in Keel is that when there is a material variance between the evidence adduced at trial and the elements of the offense alleged in the charging instrument, the proof is insufficient as a matter of law to support the offense alleged in the charging instrument, and the accused is therefore entitled to have the conviction reversed and the prosecution dismissed. Id. at 416. However, it is clear that in this case there was no material variance between the indictment and the proof. The appellant was certainly on notice that he was charged with the crime of criminal impersonation to an officer of the Jackson Police Department. The proof at trial established that he did in fact falsely represent himself to Officer Dent of the Jackson Police Department. Accordingly, this issue is without merit.

Even if there was no material variance between the indictment and the proof at trial on the criminal impersonation charge, the appellant claims that the evidence was insufficient to support the conviction.

It is well settled that the complaining party has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the jury. The Court will not disturb a verdict of guilty for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). In evaluating a challenge to the sufficiency of the convicting evidence, this Court will

review the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). We do not reweigh or reevaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

As previously stated, the appellant strongly contests Officer Dent's version of the facts. It is well settled that questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

Tennessee Code Annotated section 39-16-301(a)(1) provides that:

> A person commits criminal impersonation who, with intent to injure or defraud another person...assumes a false identity.

The appellant claims that there is no evidence whatever that he intended by the use of a false name to injure or defraud an officer of the Jackson Police Department. Intent may be inferred by a jury from all the facts and surrounding circumstances of the case. Burns v. State, 591 S.W.2d 780, 784 (Tenn. Crim. App. 1979). In this case the jury heard that in response to a request for his name by an officer of the Jackson Police Department, the appellant identified himself as someone other than who he was. The officer then called in the names given to him by the appellant. The jury was entitled to conclude that the appellant intended to misrepresent his identity to the officer. That the officer quickly discerned that the appellant was in fact giving false information to him does not in any way vitiate the criminal intent which the appellant certainly had when he gave a false name to the

officer. State v. Billy Gene Carrigan, No. 01-C-01-9203-CC-00094 (Tenn. Crim. App. at Nashville, November 5, 1992) perm. to appeal denied (1993). Although there was no evidence that the appellant intended to "injure" Officer Dent, the evidence clearly supports the jury's finding that the appellant intended to "defraud" him.

The appellant also complains that the evidence was insufficient to convict him of public intoxication. Tennessee Code Annotated section 39-17-310(a) provides that:

> A person commits the offense of public intoxication who appears in a public place under the influence of a controlled substance or any other intoxicating substance to the degree that:
>
> (1) The offender may be endangered;
> (2) There is endangerment to other persons or property; or
> (3) The offender unreasonably annoys people in the vicinity.

There was sufficient circumstantial evidence to establish that the appellant was intoxicated. See State v. Morgan, 692 S.W.2d 428, 430 (Tenn. Crim. App. 1985). The officer testified that there was a strong odor of alcohol emanating from the appellant, that his speech was slurred, he had difficulty standing, and he was somewhat belligerent. There is no dispute but that he was sitting in a car on a public street at the time the officer pulled the car over in which he was riding. See State v. Lawson, 776 S.W.2d 139, 141 (Tenn. Crim. App. 1989) (an individual seated in a car on a public road appears in a public place). The evidence also firmly established that the appellant was potentially a danger to himself or possibly others, as the police officer testified that earlier he had gotten out of the car on a public street and engaged in a heated debate with another individual. Additionally, in State v. James Shannon Stanley, No. 01C01-9206-CC-00183 (Tenn. Crim. App., at Nashville, January 28, 1993), this Court found an intoxicated passenger in a vehicle in which the driver was arrested for D.U.I., was properly charged with public intoxication because had he been allowed to leave, he would have been a danger to himself. Further we stated that had the defendant in Stanley been given the keys and elected to drive away, he would be a danger to other persons and property as well. Id. Such were the facts in the case at

bar. The appellant's companion who was driving the vehicle was arrested and charged with D.U.I. Accordingly, we find that the evidence was sufficient to support the jury's determination that the appellant was guilty of public intoxication beyond a reasonable doubt.

JURY INSTRUCTIONS

The appellant contends that in charging the jury, the trial court made two (2) errors which require a reversal of the conviction in this case. First, the appellant contends that the trial court should not have given a "missing witness" instruction as there was no factual predicate for such an instruction. The trial court gave the jury the following instruction:

> When it is within the power of the State or the defendant to produce a witness who possesses particular knowledge concerning facts essential to that party's contentions and who is available to one side at the exclusion of the other, and the party to whom the witness is available fails to call such witness, an inference arises that the testimony of such witness would have been unfavorable to the side that should have called or produced such witness. Whether there was such a witness or whether such an inference has arisen is for you to decide, and if so, you are to determine what weight it shall be given.

In order for a jury instruction on the missing witness rule to be proper, the missing witness must have knowledge of material facts, must have a relationship with the defendant or the State which would naturally incline the witness to favor the defendant or the State, and the witness must have been available to the process of the court. State v. Baker, 785 S.W.2d 132, 135 (Tenn. Crim. App. 1989).

The controversy over this issue apparently arose when the appellant testified that a walking stick was owned by a witness by the name of "Mallard" or "Ballard." The State's theory was that the appellant used the walking stick as a club. This claim supported the allegation that the appellant was carrying a deadly weapon with the intent to go armed. The State contends that the absence of this witness justified the missing witness instruction. However, we cannot see how the testimony of this witness as to his ownership of the stick had any effect whatsoever on the jury's ability

to determine the material issues in dispute. Whether the appellant owned the stick or whether someone else owned the stick cannot be regarded as a material issue in this case. Accordingly, the absence of this witness does not support the instruction given by the court concerning the missing witness. However, since the witness's testimony would have concerned the charge of carrying a deadly weapon with the intent to go armed, and since the appellant was acquitted of that charge, the trial court's error in this regard was harmless beyond a reasonable doubt.

The appellant's second contention with regard to error committed by the trial court when charging the jury is that the court erroneously charged alternative means of commission of the offenses of public intoxication and criminal impersonation, including means of commission not alleged in the indictment, without giving a corresponding instruction that the jury must unanimously agree on the means of commission of the offense in order to convict the appellant.

We hold that this issue has been waived as a result of the failure of defense counsel to make a contemporaneous objection at the trial level. State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988); T.R.A.P. 36 (a). Furthermore, the appellant failed to include this issue in his new trial motion. T.R.A.P. 3 (e); See State v. Clinton, 754 S.W.2d 100, 103 (Tenn. Crim. App. 1988). Accordingly, we decline to address the merits of this issue.

PRIOR CONVICTION

Next, the appellant complains that the trial court improperly allowed the State to impeach the appellant on cross-examination with evidence of a prior felony conviction for setting fire with the intent to burn.

The appellant's contention is that the trial court erroneously applied the balancing test from Rule 403 of the Tennessee Rules of Evidence rather than the balancing test of Rule 609. The appellant failed to make a contemporaneous objection to this error. Furthermore, the appellant failed to include this issue in his new trial motion. This issue has, therefore, been waived. State v. Killebrew, 760

S.W.2d 228, 235 (Tenn. Crim. App. 1988); T.R.A.P. 36 (a); T.R.A.P. 3 (e); See State v. Clinton, 754 S.W.2d 100, 103 (Tenn. Crim. App. 1988). Accordingly, we decline to address the merits of this issue.

SENTENCE

Finally, the appellant argues that the trial court erred by ordering that he serve (10) days in jail.

When a challenge is made to the length of sentence, this Court is to conduct a de novo review with a presumption of correctness afforded the trial court's determinations. Tenn. Code Ann. § 40-35-401 (d) (1990 Repl.). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

We note that although none was required, the trial court held a sentencing hearing. Tenn. Code Ann. § 40-35-302 (a) (1994 Supp.). Although Tennessee Code Annotated section 41-21-236(f)(4) allows a trial court to set the actual service of the sentence at one hundred per cent when imposing a misdemeanor sentence, in this case the trial court ordered both sentences to be suspended after the service of only ten days in jail. The appellant's complaint is that he should not have been required to serve any actual confinement. As the State correctly points out, unlike felons, misdemeanents are not entitled of the presumption of a minimum sentence. State v. Karl Christopher Davis, No. 01C01-9202-CC-00062 (Tenn. Crim. App., at Nashville, March 17, 1993).

However, even in misdemeanor sentencing trial courts are required to consider the sentencing principles of the Sentencing Reform Act as well as all the relevant facts and circumstances of the individual case. State v. Ashby 823 S.W.2d 166, 169 (Tenn. 1991). After a full review of the record in this case and in light of the particular circumstances of this case we affirm the sentence imposed by the trial court. The appellant has a prior history of a felony conviction on his record and given the

nature of the offenses involved we conclude that ordering the appellant to spend ten (10) days in jail is consistent with the principles of the Sentencing reform Act of 1989. This issue is, therefore, without merit.

Accordingly, the judgment of the trial court is affirmed.

_____
William M. Barker, Judge

CONCUR BY:

_____
Paul G. Summers, Judge

_____
Mary Beth Leibowitz, Special Judge