IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
APRIL SESSION, 1995

FILED

November 14, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9412-CR-00445
Appellee	)	
	)	BLOUNT COUNTY
vs.	)	
	)	Hon. **D. KELLY THOMAS**, Judge
ROBERT B. RHODES,	)	
	)	(Vandalism)
Appellant	)	

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Robert Rhodes, appeals from a conviction in the Criminal Court of Blount County of one count of vandalism of property valued at between $1000 and $10,000. The trial judge sentenced the appellant to three years confinement as a Range I offender of a class D felony. The appellant now raises two issues for our review. First, the appellant contends that the trial court erred in failing to grant his motion for a new trial pursuant to Rule 33(f) of the Tennessee Rules of Criminal Procedure. Second, the appellant argues that the trial court erred in failing to consider probation as an alternative to total confinement.

After a review of the record, we affirm the judgment of the trial court.

I. Factual Background

In October 1993, the appellant was working as a part-time mechanic for Ray Gregory at Gregory's auto repair garage in Maryville. On October 27th, the appellant and Gregory got into a heated argument at the garage. The argument centered around the appellant's work performance and his repeated demands to borrow additional money from Gregory. Gregory testified at trial that the appellant "tried to pick a fight," however, Gregory avoided such an altercation as he was on parole at that time for an aggravated assault conviction. Gregory added that he then asked another employee, Glen Inman, to take the appellant home. As a result of this incident, the appellant was fired.

Later that night, after experiencing chest pains, Gregory went to a local

Kroger store to purchase antacid medication. As Gregory passed his garage, he noticed a blue car parked near his lot. Although he was suspicious, Gregory continued to the store. However, on his return trip, Gregory pulled into a car wash lot adjacent to his garage and again spotted the car. At this time, Gregory recognized the blue four-door Chevrolet Cavalier as the one he had sold to the appellant's live-in girlfriend, Sandra LaFoy. Gregory noticed a person in the car but could not identify the person as it was too dark. However, Gregory testified that he "saw Mr. Rhodes" outside the car. Specifically, he saw the appellant "between the Mustang and the Cadillac, and he was bending over. And he was making gestures like maybe he was cutting my tires." Gregory also saw the appellant "go down the top of the Mustang . . . with some kind of an object."

Due to his chest pains, Gregory went home. Gregory later testified that he "didn't want to go back there and confront the guy in the middle of the night with a knife." When he arrived home, Gregory fell asleep in a chair and did not awake until after one o'clock in the morning. At that time, he decided that he would "just go down in the morning and see what the damage was." The next morning, he proceeded to his garage to survey the damage. When he saw how extensive it was, he called the police. Sometime later, the appellant turned himself in.

At trial, Gregory testified that there was "no doubt in [his] mind" that it was the appellant he saw at his garage on the night in question. He also testified that he paid $50 to replace the tires on the Mustang and sold the Mustang for $650 less than he would have sold it for before the damage. Finally, Gregory testified that he paid $450 for a paint job and $200 for new tires on the Cadillac and sold it for $300 less than he would have sold it for before the damage. Testimony established that damages arising from the appellant's acts of vandalism totaled $1,650.00.

The only other witness for the state was Glen Inman, who also worked part-time for Gregory. Inman testified that on October 27th, the appellant and Gregory got into an argument which almost came to blows. Gregory asked Inman to take the appellant home as the appellant had no driver's license. Inman testified that on the way to the appellant's home, the appellant told him that he was going to "get even" with Gregory.

The appellant presented an alibi defense. Sandra LaFoy, the appellant's live-in girlfriend, testified that after the appellant came home on the 27th, they went to a friend's house and picked up a couch and chair, then came back to their apartment to unload it. According to LaFoy, the appellant was at home with her for the rest of the evening. Billy LaFoy, Ms. LaFoy's son who lived with her and the appellant at the time of the offense, corroborated Ms. LaFoy's testimony. The jury convicted the appellant of the indicted offense of vandalism of property valued at between $1000 and $10,000.

At the sentencing hearing, the appellant admitted that he had been released on bond for a pending rape charge when the current offense was committed. He was subsequently convicted of the rape charge and sentenced to nine years confinement. The appellant also admitted that he had two previous convictions for domestic violence and previous convictions for driving on a revoked license and public intoxication. The appellant's testimony also revealed that despite having a seventh grade education, he is unable to read or write and that he has worked part-time at various odd jobs involving motor vehicles since he was very young. He stated that he is disabled with a stomach disorder and receives social security disability benefits. The appellant further testified that he is undergoing treatment for alcoholism in prison and that he is taking medication and receiving counseling to control his temper. Sandra LaFoy, the appellant's

girlfriend, testified that the appellant had changed for the better since being incarcerated.

At the conclusion of the hearing, the trial court sentenced the appellant to three years confinement as a Range I offender. The trial court ordered the sentence to be served consecutively to the appellant's rape sentence, and denied probation. In denying probation, the trial court stated:

> I certainly can't say now that four years from now or three years from now or nine years from now that you would be an appropriate candidate to be released on probation. I have no way of knowing what kind of situation you're going to be in a year from now, much less three or four or nine.

The appellant subsequently filed a motion for a new trial, alleging the verdict of the jury was not supported by the weight of the evidence. The trial court denied this motion.

II. Rule 33(f)

The appellant contends that the trial court erred in failing to grant a new trial pursuant to Tenn. R. Crim. P. 33(f). Specifically, he argues that the testimony of Ray Gregory is not credible and should not be believed because: (1) "Gregory's behavior on the night in question is utterly incredible"; (2) "Gregory is a convicted felon"; and (3) "Gregory had an animus of ill will against the appellant." Moreover, the appellant argues that without the testimony of Gregory, "the state has not even a semblance of a case against the appellant."

Rule 33(f) provides that "[t]he trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence." This portion of the Rule is the modern equivalent to the common law "thirteenth juror rule," whereby the trial court was to weigh the evidence and grant a new

trial if the evidence preponderates against the weight of the verdict.[1] See generally Curran v. State, 157 Tenn. 7, 4 S.W.2d 957 (1928).

The Tennessee Supreme Court recently concluded that "Rule 33(f) imposes upon a trial judge the mandatory duty to serve as the thirteenth juror in every criminal case." State v. Carter, 896 S.W.2d 119, 122 (Tenn. 1995). Moreover, the approval by the trial judge of the jury's verdict as the thirteenth juror is a necessary prerequisite to imposition of a valid judgment. Id.; see also Messer v. State, 385 S.W.2d 98, 101 (Tenn. 1964); State v. Burlison, 868 S.W.2d 713, 719 (Tenn. Crim. App. 1993).

However, Rule 33(f) does not require the trial judge to make an explicit statement on the record. Rather, when a trial judge overrules a motion for new trial, as in the case before us, this court may presume that the trial judge has served as the thirteenth juror and approved the jury's verdict. Carter, 896 S.W.2d at 122. Thus, under such facts, a trial court's judgment may not be reversed unless the record contains statements by the trial judge expressing dissatisfaction or disagreement with the weight of the evidence or the jury's verdict, or statements indicating that the trial court absolved itself of its responsibility to act as the thirteenth juror. Id.; see also Helton v. State, 547 S.W.2d 564, 566 (Tenn. 1977); Messer, 385 S.W.2d at 98.

In the present case, the trial judge overruled the appellant's motion for new trial. Additionally, there is nothing in the record to suggest that the trial judge either disapproved of the jury's verdict or refused to consider the evidence as the thirteenth juror. Thus, the appellant is not entitled to relief on this ground.

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[1]The "thirteenth juror rule" was abandoned in this state in 1978, see State v. Cabbage, 571 S.W.2d 832 (Tenn. 1978), but was reinstated with the 1991 promulgation of subsection (f) of Tenn. R. Crim. P. 33. See State v. Barone, 852 S.W.2d 216 (Tenn. 1993).

Moreover, although the thirteenth juror rule has been reinstated in Tennessee, the appellant is mistaken as to this court's power to invoke the rule. This court does not have the independent authority to act as a thirteenth juror. Burlison, 868 S.W.2d at 718-19. 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. State v. Moss, No. 02C01-9404-CR-00072 (Tenn. Crim. App. at Jackson, Nov. 2, 1994). Where the trial court has approved the jury's verdict, this court may not substitute its judgment as to the weight of the evidence. (emphasis added) Burlison, 868 S.W.2d at 718-19. This court only has the power to review the sufficiency of the evidence under Tenn. R. App. P. 13(e) and Tenn. R. Crim. P. 36(a). Id. Therefore, we are without the authority to review the trial court's decision in this regard. Accordingly, the appellant's first issue is without merit.

III. Sentencing

The appellant next contends that the sentencing court erred in refusing to consider the appellant for probation. Under the provisions of the 1989 Sentencing Act, a defendant sentenced to an actual term of eight years or less and not convicted of certain designated crimes is automatically eligible for probation. Tenn. Code Ann. § 40-35-303(a) (1994 Supp.). Thus, the sentencing court must consider probation as a sentencing alternative for eligible defendants. Tenn. Code Ann. § 40-35-303(b). In this case, the appellant was sentenced to three years as a Range I offender of a class D felony, and thus the sentencing court was required to consider probation as a sentencing alternative. See Tenn. Code Ann. § 40-35-102(5-6). The record indicates that the sentencing court failed to do so because the appellant would not be eligible to be released until he had served his sentence for rape. The sentencing court opined that as the appellant would be required to serve a number of years in prison before release,

it would be impossible to know the appellant's situation at the expiration of his rape sentence. Although there may be some practical merit to the sentencing court's position, it is contrary to the requirements of the Sentencing Act which requires sentencing consideration to be contemporaneous with the sentencing hearing. Accordingly, we find that the sentencing court erred in failing to consider probation as a sentencing alternative in this case.

When reviewing sentencing issues, including the denial of probation, this court conducts a *de novo* review with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d) (1990). This presumption only applies when the record reflects 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). As we have previously determined, the trial court failed to consider probation due to the appellant's current rape sentence. Accordingly, the presumption does not apply.

The appellant seeks review only for the alternative sentence of probation. The defendant has the burden of establishing suitability for full probation, even if the defendant is entitled to the statutory presumption of alternative sentencing. Tenn. Code Ann. § 40-35-303(b); State v. Bingham, No. 03C01-9404-CR-00127 (Tenn. Crim. App. at Knoxville, Feb. 14, 1995). In order to meet this burden, the defendant must demonstrate that probation will "subserve the ends of justice and the best interest of both the public and the defendant." State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990).

When deciding a defendant's suitability for full probation, the sentencing court should consider, but is not bound, by the following criteria: (1) "the nature and [circumstances] of the criminal conduct involved" Tenn. Code Ann. § 40-35-210 (b)(4) (1990 Repl.); (2) "the defendant's potential or lack of potential for

rehabilitation, including the risk that during the period of probation the defendant will commit another crime" Tenn. Code An.. § 40-35-103(5) (1990 Repl.); (3) "whether a sentence of full probation would unduly depreciate the seriousness of the offense" Tenn. Code Ann. § 40-35-103(1)(B) (1990 Repl.); and (4) "whether a sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes" Tenn. Code Ann. § 40-35-103(1)(B) (1990 Repl.). Bingham, No. 03C01-9404-CR-00127.

The record reflects that on the date of the sentencing hearing, the appellant was 26 years of age and was serving a nine year sentence for rape in the state penitentiary. The appellant was on release status when he committed the current offense. The appellant is an alcoholic who admits to having an uncontrollable temper. His criminal history reveals four misdemeanor convictions, including two convictions for domestic violence and one felony conviction for rape. The appellant's employment history is meager at best; the appellant has never been gainfully employed during his adult life except for "odd jobs" involving the painting and repair of automobiles. Under these circumstances, we conclude that the appellant is not entitled to probation. See Tenn. Code Ann. §40-35-103(1)(A) (confinement where long history of criminal conduct); Tenn. Code Ann. § 40-35-103(1)(C) (confinement where measures less restrictive have been recently applied unsuccessfully to the defendant.) Additionally, even though he is now receiving help for his alcohol addiction and other problems relating to his temperament, the appellant failed to present evidence of past attempts to seek rehabilitative help. Tenn. Code Ann. § 40-35-103(5). In fact, it is hard to believe that the appellant would ever had sought such help but for his confinement by the state. In sum, the appellant has failed to establish his suitability for probation, as such the appellant has failed to carry his burden. See State v. Dykes, 803 S.W.2d 250, 260 (Tenn. Crim. App. 1990).

Having determined that both of the appellant's issues are without merit, the judgment of the trial court is affirmed.

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David G. Hayes, Judge

CONCUR:

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David H. Welles, Judge

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John A. Turnbull, Special Judge