

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
NOVEMBER 1995 SESSION

FILED
March 22, 1996
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 APPELLEE,)
)
 v.)
)
 KEVIN E. ANDERSON,)
)
 APPELLANT.)

No. 01-C-01-9504-PB-00104
Davidson County
James R. Everett, Jr., Judge
(Vehicular Homicide and Leaving
the Scene of an Accident)

FOR THE APPELLANT:

F. Mitchell Gibson, Jr.
Attorney at Law
1416 Parkway Towers
404 James Robertson Parkway
Nashville, TN 37219

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter
450 James Robertson Parkway
Nashville, TN 37234-0497

John P. Cauley
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Victor S. Johnson, III
District Attorney General
222 Second Ave., North, Suite 500
Nashville, TN 37201

Bernard F. McEvoy
Asst. District Attorney General
222 Second Ave., North, Suite 500
Nashville, TN 37201

OPINION FILED: _____

AFFIRMED

Joe B. Jones, Presiding Judge

OPINION

The appellant, Kevin E. Anderson, was convicted of vehicular homicide, a Class C felony, and leaving the scene of an accident involving death, a Class E felony, by a jury of his peers. The trial court found that the appellant was a standard offender and imposed the following Range I sentences: (a) a fine of \$10,000 and confinement for six (6) years in the Davidson County Jail for vehicular homicide, and (b) a fine of \$1,000 and confinement for one (1) year in the Davidson County Workhouse for leaving the scene of an accident. The appellant is required to serve one (1) year in confinement with the balance of the sentence served on probation.

The appellant presents three issues for review. The first two issues are identical and constitute a single issue. The appellant contends that the evidence contained in the record is insufficient, as a matter of law, to support a finding by a reasonable trier of fact that he was guilty of these two offenses beyond a reasonable doubt. He also contends that the trial court committed error of prejudicial dimensions by refusing to grant him a new trial based upon newly discovered evidence.

The judgment of the trial court is affirmed.

A co-employee of the victim, Vincent A. Mussess, Jr., hosted a Christmas party at the Grand Central Station, a restaurant and lounge, on the evening of December 18, 1993. The victim and his wife attended the party. They arrived at approximately 8:30 p.m. The victim's wife became ill. She told the victim that she was leaving because she did not feel well, and it was agreed that the victim's wife would return to get the victim at 2:30 a.m., on the morning of December 19, 1993. However, the victim did not wait for his wife. He began walking along the shoulder of Interstate 24 towards Nashville.

Ironically, the appellant went to the Grand Central Station on the evening of December 18, 1993. He left with a former girlfriend, Joanne Bertoli, and a friend. The appellant drove the former girlfriend's motor vehicle. They took the friend home. While driving towards Nashville, the appellant struck the victim. The appellant did not stop.

There were three witnesses who saw the collision. According to the witnesses, the appellant veered to his right. Half of the vehicle was in the right lane of Interstate 24 and

the other half of the vehicle was on the shoulder of the road. The appellant struck the victim as the victim was walking along the shoulder of the road. The vehicle continued to straddle the white line that separated the right-hand lane and the shoulder for approximately 200 to 300 feet. One witness testified that the victim was approximately two feet from the white line as he walked along the shoulder. Another witnesses testified that the victim was approximately five feet from the white line when the impact occurred. The victim's body flew onto the hood of the appellant's vehicle with force. The impact caused a hole in the front windshield. The victim's body then slid to the ground on the shoulder of the road. Witnesses in two cars followed the red or maroon vehicle, obtained the license plate number, and called 911 to report the accident and the information that they had obtained.

The appellant was travelling at a speed of 60 miles per hour when he struck the victim. As a result, the victim sustained massive injuries. An autopsy revealed that the victim's spine had been severed at the base of the neck, his skull was fractured, and there was hemorrhaging in the area of the brain. The arteries that take the blood to the brain were completely severed, and the victim suffered several broken and fractured bones. The victim died as a result of these injuries. The injuries were consistent with the victim being struck from behind by a motor vehicle.

The damage to Bertoli's vehicle was extensive. There was damage to the right front of the vehicle, the hood, and the windshield. The impact was so severe that the paint on the hood of Bertoli's vehicle cracked and pieces of the paint were missing. The hood had also been struck by a portion of the motor.

When the appellant and Joanne Bertoli, the owner of the vehicle, reached Bertoli's residence in Rutherford County, she called the Rutherford County Sheriff's Department to report that vandals had caused damage to her vehicle. The deputy sheriff responding to the call heard that the Metro Police Department was looking for a vehicle that had a Rutherford County license plate. The number of the plate was given, and the name of Joanne Bertoli, registered owner, was also furnished. The deputy checked the plate on her vehicle and discovered that the plate matched the one being sought by the Metro Police Department. He also learned that two Metro Police officers were coming to

Rutherford County to interview Bertoli and the appellant.

The deputy sheriff who responded to Bertoli's call testified that there was a strong odor of an alcoholic beverage on the appellant's breath. He described the appellant's eyes as being bloodshot and glassy. The officer opined that the appellant was under the influence when he had contact with him at 4:25 a.m., on the morning of December 19, 1993. A blood specimen was taken from the appellant at 6:43 a.m. The tests performed on the blood established a blood-alcohol content of .05%. A pathologist testified that the appellant's blood alcohol content was between .09% and .14% when the appellant struck the victim.

The appellant testified in support of his defense. According to the appellant, he drank two and one-half beers on the night in question. He was the designated driver. He denied being under the influence of alcohol. He also denied driving on the shoulder of the road. He remarked that he drove Bertoli's vehicle inside the lines dividing the highway, and he observed all traffic laws. He admitted that the motor vehicle he was driving was hit by something, but he did not realize that someone had been killed until the next day. He admitted that damage to Bertoli's vehicle was extensive. When he passed the accident scene and saw the police on his way to Rutherford County, he thought the police were investigating another matter. He opined that someone threw something at the vehicle he was driving.

Two witnesses testified that the appellant was not under the influence. Bertoli, who was in the vehicle when the impact occurred, testified that she was asleep and did not see what happened. Later, when she awoke after the impact she repeatedly asked the appellant what he struck to cause the extensive damage to her vehicle. The appellant told her he did not know what he hit.

I.

When an accused challenges the sufficiency of the convicting evidence, this Court must review the record to determine if the evidence adduced at trial is sufficient "to support the finding of the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App.), per. app. denied (Tenn. 1990).

In determining the sufficiency of the convicting evidence, this Court does not reweigh or reevaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App.), per. app. denied (Tenn. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859, cert. denied, 352 U.S. 845, 77 S.Ct. 39, 1 L.Ed.2d 49 (1956). To the contrary, this Court is required to afford the State of Tennessee 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. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d at 835. In State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973), our Supreme Court said: "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State."

Since a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused, as the appellant, has the burden in this Court of illustrating why the evidence is insufficient to support the verdicts returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record are insufficient, as a matter of law, for a rational trier of fact to find that the accused is guilty beyond a reasonable doubt. Tuggle, 639 S.W.2d at 914.

The evidence of the appellant's guilt is overwhelming. In other words, the evidence is clearly sufficient to support the finding of the jury that the appellant was guilty of vehicular homicide and leaving the scene of an accident involving death beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 673 (1979). The evidence established that the appellant was driving a motor vehicle, while under the influence of an intoxicant, and the victim was killed as a direct and proximate result of his operating the motor vehicle while under the influence. He also left the scene of the collision. It is undisputed the victim died at the situs of the impact.

This issue is without merit.

II.

The appellant sought a new trial on the strength of an affidavit given by Robert Price. The affiant stated that he was travelling on Interstate 24 between 1:50 a.m. and 2:00 a.m. He saw the victim in the middle of the roadway on his hands and knees. He stopped to render aid to the victim. However, he considered the victim too intoxicated to help. Price learned the next day that the victim had been killed. When the affiant learned from a newspaper that the appellant had been convicted, the affiant contacted defense counsel and advised counsel what he had experienced. The affidavit is attached to the motion for a new trial.

This Court cannot consider this issue. The transcript of the hearing on the motion for a new trial is not part of the record transmitted to this Court. As a result, this Court cannot determine whether the trial court considered the motion, and, if the trial court did consider the affidavit, the reasons the trial court gave for refusing to grant a new trial on this ground. Also, the record does not reflect whether the motion was introduced as evidence, or whether Price testified in person at the hearing. In any event, the affidavit in the "technical record" is not marked as an exhibit, and a review of the trial exhibits does not reveal a copy of the affidavit, which was marked as an exhibit. Therefore, this Court must conclusively presume that the ruling of the trial court was correct.

JOE B. JONES, PRESIDING JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

JOSEPH H. WALKER, III, SPECIAL JUDGE