IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1995 SESSION

FILED

August 22, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	}	C.C.A.# 01C01-9411-CC-00375
	}	
APPELLEE,	}	WILLIAMSON COUNTY
	}	
VS.	}	Hon. Cornelia A. Clark
	}	
WILLIAM D. PEWITT,	}	(Assault and Coercion of a
	}	Witness)
APPELLANT.	}	

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OPINION FILED: _____

AFFIRMED

Rex Henry Ogle, Special Judge

OPINION

The defendant, William D. Pewitt, was indicted on two counts of assault and two counts of coercion of a witness. He was then convicted of one count of assault and one count of coercion of a witness in the Circuit Court for Williamson County. The trial court imposed concurrent sentences of eleven months, twenty-nine days in the county jail for assault and four years in the Tennessee Department of Correction for coercion.

On appeal, the defendant contends that the evidence presented was insufficient to convict him of either offense, and that the sentences imposed were excessive. Finding no error, we affirm.

The defendant, William D. Pewitt, and the victim, Terry Kelly, had been friends for approximately four years and worked together baling hay. After work, on August 11, 1992, the defendant and the victim left in the victim's truck. The defendant was driving because the victim had gotten sick from working all day in the heat. The two stopped briefly at the home of the defendant's girlfriend, Jennie Hilliard. After leaving Ms. Hilliard's, Officer Danny Gally pulled the vehicle over for speeding, determined that the defendant was intoxicated, and charged the defendant with DUI. The victim was charged with DUI by consent because the vehicle was his. According to the victim, he and the defendant no longer worked together after this incident nor did they remain friends.

The victim testified that on April 26, 1993, he was talking to his wife on a pay telephone in front of Leiper's Fork Grocery, when the defendant drove up, pulling his vehicle very close to the victim. The victim told his wife that the defendant had just pulled in and that he needed to hang up. Although the defendant had others in the car with him, only he got out. He approached the driver's side of the victim's vehicle and told him that he knew the victim was "going to get on the stand and tell a lie," referring to the trial of his DUI charge. He wanted the victim to say that he was not drunk and that he had not had anything to drink on the day of his arrest for DUI, but the victim testified that he had seen

him drink that day. The defendant told the victim that if he had to serve any time in jail that "it would be trouble for the victim." The defendant proceeded to slam the victim's head against the post of his car, jarring his teeth loose and injuring his jaw. The victim did not seek medical attention and did not report the incident to the police until seventeen days later because he "figured there was nothing the law could do."

On cross-examination, the victim admitted that the defendant had paid his bond so that he could get out of jail. He also admitted that, at the defendant's DUI trial, he would have testified that Officer Gally could not have been correct in stating that the defendant had been driving seventy-eight miles per hour, because his 1968 Ford pickup truck would not go any faster than sixty-five miles per hour. He had, however, seen the defendant drink between three and five beers before his arrest and stated that he would have testified truthfully to that fact. The victim admitted that a substantial time had passed between the time of the defendant's arrest and his attempt to get the victim to lie at trial. He denied having told the defendant's girlfriend that he would see to it that the defendant went back to jail and claimed that the state had promised him no leniency on his DUI by consent charge in exchange for his testimony in this trial.

Ms. Hilliard, who was no longer dating the defendant, also testified at trial. She claimed that when the defendant and the victim arrived at her home on the evening of the defendant's arrest for DUI, that it was the victim, not the defendant, who was driving. She claimed that the she could tell that the defendant had not been drinking because she kissed him and could not detect any alcohol. Ms. Hilliard said that the two sat with her on her front porch for about twenty minutes and then left to go into town, with the victim again driving. She left with her children and a cousin almost immediately because she intended to meet the defendant and the victim in town, but had to stop before entering the main road to put her children in car seats. Ms. Hilliard testified she saw that the defendant and the victim had been pulled over, but did not stop. She saw the defendant standing by the driver's side of the victim's truck and did not know why the men would have stopped to change drivers. She also related that approximately two to three months before trial, the

victim had told her that he would not stop until the defendant "went back to the pen."

Dale Humphrey, Sr., who had known the defendant for fifteen years, was with the defendant at Leiper's Fork Grocery when he allegedly assaulted the victim. He claimed that they were in his truck, not the defendant's car, and that he was driving. He also stated that, although the defendant got out and talked to the victim for about five minutes, no violence occurred. Mr. Humphrey said that after the defendant finished talking with the victim, he went into the grocery store to get some beer and that the victim was still in the parking lot when they left.

The defendant's first argument is that the jury verdict was not supported by the weight and sufficiency of the evidence. As a result, reasonable triers of fact could not have found beyond a reasonable doubt that the defendant was guilty of coercion of a witness or assault. We disagree.

On appeal, the state is entitled to the strongest legitimate view of the evidence and all inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073 (1984); T.R.A.P. 13(e). A verdict of guilt rendered by the trier of fact and approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory. State v. Smith, 868 S.W.2d 561, 568-69 (Tenn. 1983). A verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt. Id. This presumption shifts the burden of proof to the defendant, to prove to the appellate court that the evidence is insufficient to support the verdict returned by the trier

of fact. State v. Smith, 751 S.W.2d 851 (Tenn. Crim. App. 1988).

The defendant claims that the victim's testimony should not be believed because the victim failed to go to the hospital as a result of his alleged injuries, the victim failed to file a police report for seventeen days, and the defendant had no incentive to coerce the victim because he wanted the victim to testify truthfully.

The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as triers of fact. Byrge, 575 S.W.2d at 295. The jury chose to accredit the testimony of the victim and rejected the claims of the defendant. It was entitled to do so. Because a rational trier of fact could have found the essential elements of the crime, the evidence was legally sufficient to support a conviction. See Jackson v. Virginia, 443 U.S. 307 (1979). The defendant is thus asking us to re-evaluate the credibility of the witnesses. This we cannot do. Therefore, this issue is without merit.

The defendant's second argument is that the trial court misapplied mitigating and enhancing factors in sentencing the defendant. As a result, the defendant contends that his sentence must be reduced.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. T.C.A. § 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). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. In the case at hand, since the trial court has affirmatively shown in the record that it considered the sentencing principles and all relevant facts and circumstances in sentencing the defendant, we review the sentence imposed by the trial court de novo with a presumption

of correctness.

The defendant first argues that the enhancement factor in T.C.A. § 40-35-114(1), "the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range," was misapplied. The defendant argues that since his felony conviction was almost 10 years old and his other convictions were mostly alcohol-related misdemeanors, that this enhancement factor should not have been applied. This argument is meritless.

The State presented as evidence a certified copy of the defendant's aggravated assault conviction and the defendant testified that he had previously been convicted of cocaine possession, driving under the influence on several occasions, driving with a revoked license, and marijuana possession. It appears clear that the intent of the Legislature in adopting this factor is to increase the sentences of repeat offenders like the defendant. Therefore, based on the defendant's extensive criminal record, the trial court properly applied this enhancement factor.

The defendant next argues that the enhancement factor in T.C.A. § 40-35-114(8), "the defendant has a previous unwillingness to comply with the conditions of a sentence involving release into the community," was also misapplied. Once again, the defendant's argument is meritless. The testimony of Probation Officer Joe Bilbry attested to the fact that the defendant's previous probation had been revoked because the defendant failed to serve the number of weekends required, failed to report his arrest to the probation officer, and failed to pay the necessary fines and costs. This proof supports the trial court's application of this enhancement factor.

Thirdly, the defendant argues that the enhancement factor in T.C.A. § 40-35-114(11), "the felony resulted in death or bodily injury or involved the threat of death or bodily injury to another person and the defendant has previously been convicted of a felony that resulted in death or bodily injury," was also inappropriately used because it was never

proven that the defendant inflicted bodily injury on someone as a result of a past conviction. This argument is also meritless. Here, the defendant was convicted of assault (an offense involving bodily injury) and had a prior conviction of aggravated assault in which the defendant testified that the victim in the aggravated assault had to go to the hospital from the resulting injuries. Therefore, it is clear from the proof that the enhancement factor was appropriately applied.[1]

The defendant next argues that the trial court should have applied two mitigating factors. First, the defendant claims that the trial court should have applied the mitigating factor in T.C.A. § 40-35-113(1) which states "the defendant's criminal conduct neither caused nor threatened serious bodily injury." The defendant's claim is meritless. Regardless of whether the defendant's injuries from being slammed into a pole are serious enough to constitute serious bodily injury, the defendant's threat that if he was convicted of the DUI charge "it would be trouble for the victim" suffices to meet the threat of serious bodily harm provision. Thus, the trial court correctly refused to consider this mitigating factor.

The defendant also claims that the trial court erred by not applying the mitigating factor in T.C.A. § 40-35-113(13) which states that "any other factor consistent with the purposes of this chapter" may be considered. The defendant claims that his fiancee and her children are dependent on his income. The case of State v. Claybrooks recognizes that providing for one's children is a mitigating factor under the "catch all" category in T.C.A. § 40-35-113 (13). State v. Claybrooks, 910 S.W.2d 868, 873 (Tenn. Crim. App. 1994). But, in this case, the evidence shows that at the time of the hearing, the defendant was unemployed and did not have a mode of transportation, thus, making his

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[1] Although not raised, there also exists a concern with this factor because the offense of assault includes the element of either causing bodily harm or threatening bodily harm. An enhancement factor which is an "essential element" of the offense may not be used to enhance the defendant's sentence. The test for "essential element" is "whether the same proof necessary to establish [the] enhancement factor would also establish an element of the offense." State v. Bingham, 910 S.W.2d 448, 452 (Tenn. Crim. App. 1995). The case of State v. Bunn addressed this issue with respect to an aggravated assault conviction and concluded that since "the definition of the enhancement factor includes an additional provision, i.e., that the defendant has a previous conviction of a felony that resulted in either death or bodily injury," which is not an element of aggravated assault, the enhancement factor was appropriately applied. State v. Bunn, No. 01C01-9311-CC-00401, 1994 WL 658551, at *3 (Tenn. Crim. App. Nov. 22, 1994). Since a previous conviction is not an element of assault, this enhancement factor was also appropriately used in this case.

prospects for employment improbable. Therefore, as in the case of State v. Smith, No. 02C01-9201-CR-00017, 1993 WL 15173 (Tenn. Crim. App. Jan. 27, 1993) (in which the defendant's unsteady work history made mitigating factor (13) inapplicable), the trial court was correct in not applying this mitigating factor.

In conclusion, it is clear that the trial court correctly applied and weighed the requisite enhancement and mitigating factors. Therefore, the sentence is affirmed.

Finally, the defendant argues that the trial court erred in not granting him a sentence of probation. The defendant argues that the trial court failed to apply the presumption of alternative sentencing as statutorily required. See T.C.A. § 40-35-102(b). As with the other arguments of the defendant, this argument is without merit.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, and -210; State v. Smith, 735 S.W.2d 859, 862 (Tenn. Crim. App. 1987).

Among the factors applicable to the defendant's application for probation are the circumstances of the offense, the defendant's criminal record, social history and present condition, and the deterrent effect upon and best interest of the defendant and the public. State v. Grear, 568 S.W.2d 285, 286-87 (Tenn. 1978).

Especially mitigated or standard offenders convicted of Class C, D, or E felonies are presumed to be favorable candidates "for alternative sentencing options in the absence of evidence to the contrary." T.C.A. § 40-35-102(6). The trial court must presume that the defendant is subject to alternative sentencing, unless the court is presented with

evidence sufficient to overcome the presumption. State v. Ashby, 823 S.W.2d 166, 167-69 (Tenn. 1991). In the case at hand, the trial court was presented with more than enough evidence to conclude that the defendant should not receive a sentence of probation.

First, the trial court found that the defendant had been granted probation in the past but had failed to successfully complete his requirements either time. In the case of State v. Fletcher, this Court held that "if the record reflects multiple or recent unsuccessful application of sentencing measures not including confinement, then confinement may be appropriate." State v. Fletcher, 805 S.W.2d 785,787-788 (Tenn. Crim. App. 1991). In addition, in the case at hand, the trial court found that it would be unlikely that the defendant could meet the probation requirements this time because of his unsteady employment and lack of transportation.

Second, the trial court found that both personal and general deterrence concerns weighed strongly in favor of confinement over probation. Deterrence is a valid consideration in evaluating the appropriateness of probation. State v. Byrd, 861 S.W.2d 377, 380 (Tenn. Crim. App 1993). In terms of personal deterrence, this Court stated in Fletcher that "if a defendant has a long history of criminal conduct, then personal deterrence by confinement may be necessary to protect society from that defendant." Fletcher, 805 S.W.2d at 787. In the case at hand, as mentioned above, the defendant has a long history of criminal activity, and it appears that confinement is necessary to protect society from the defendant. In addition, due to the serious nature of the offense (coercion of a witness) and the need to protect the integrity of our judicial system, the trial court properly determined that there exists a strong incentive to deter this type of conduct.

As a result of these findings the trial court concluded that this evidence outweighed the defendant's rehabilitative capabilities. We agree. Therefore, under de novo review with a presumption that the trial court is correct, we affirm the trial court's denial of probation.

Finding all of the defendant's issues to be without merit, the defendant's convictions and sentences are affirmed.

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REX HENRY OGLE, SPECIAL JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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JOHN H. PEAY, JUDGE