IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1996 SESSION

STATE OF TENNESSEE,	)	
	)	No. 02-C-01-9504-CC-00097
APPELLEE,	)	
	)	Obion County
v.	)	
	)	William B. Acree, Judge
STEVE JOHNSON,	)	
	)	(Robbery)
APPELLANT.	)	

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OPINION FILED: _____

REVERSED AND REMANDED FOR A NEW TRIAL

JOE B. JONES, PRESIDING JUDGE

O P I N I O N

The appellant, Steve Johnson, was convicted of robbery, a Class C felony, by a jury of his peers. The trial court found the appellant was a persistent offender and imposed a Range III sentence consisting of confinement for fifteen (15) years in the Department of Correction. In this Court, the appellant contends the evidence was insufficient to support his conviction, the trial court committed error by permitting the state to introduce (a) his prior felony convictions to impeach him, (b) evidence of flight, and (c) prior statements to question a prosecution witness. In addition, the appellant contends the sentence imposed by the trial court was excessive. After a thorough review of the record, the briefs submitted by the parties, and the authorities governing the issues, it is the opinion of the Court that the judgment of the trial court should be reversed and remanded for a new trial for the reasons set forth in this opinion.

On the evening of January 8, 1994, the victim, Royce Patterson, went to the Hot Spot bar in Union City. He shot two games of pool with the appellant. The victim did not know the appellant before the pool games. Keith Pettigrew was also inside the bar that night. Pettigrew left the bar first. He was subsequently seen looking through the windows of the bar.

The victim left the bar after the pool games. The appellant left the bar shortly after the victim. The victim went to a convenience store, made a few purchases, and began walking home. He was attacked a short distance from the bar by two men. He was knocked to the ground. The men took his wallet and ran away. The wallet contained approximately $300 in cash and two payroll checks in the amounts of $492.97 and $241.80. The victim subsequently called the police from the convenience store.

While a police officer was interviewing the victim inside the convenience store, the appellant entered the store. The victim informed the officer the appellant was one of the men who robbed him. He got a glimpse of the appellant while the robbery was in progress. He did not see the second man. The appellant was arrested and taken into custody. He was wearing a red sweatshirt with a hood under his coat. The victim had just advised the officers one of the men was wearing such a garment. The victim was positive about the identification. The victim also made a positive courtroom identification of the appellant as

one of the perpetrators of the robbery. The appellant was arrested and taken into custody. He was charged with public intoxication and robbery.

I.

The appellant contends the evidence contained in the record is insufficient, as a matter of law, to support a finding by a rational trier of fact that he was guilty of robbery beyond a reasonable doubt. He argues the State of Tennessee failed to establish he was one of the perpetrators of the robbery.

A.

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 by 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.

B.

In this case, the State of Tennessee proved beyond a reasonable doubt the appellant was one of the men who robbed the victim. The victim made a positive identification of the appellant on the night in question. He also made a positive identification of the appellant during the trial. The victim described one of the garments the appellant was wearing when he was arrested. In short, the evidence contained in the record is more than adequate to support a finding by a rational trier of fact the appellant was guilty of robbery beyond a reasonable doubt. Tenn. R. App. P. 13(e).

This issue is without merit.

II.

The appellant contends the trial court committed error of prejudicial dimensions by ruling the State of Tennessee could use his prior convictions to impeach him as a witness. He argues the conviction for aggravated assault should not have been used to impeach him due to its similarity to the crime of robbery. He also argues his convictions for theft, larceny, and receiving stolen property are also similar to the offense of robbery because robbery is an aggravated form of these offenses. He further argues the trial court should have barred the state from using his convictions for forgery because someone forged the

victim's name on the two payroll checks contained in the victim's wallet and cashed the checks. The state contends the trial court properly held all of the appellant's prior convictions could be used to impeach him if he testified in support of his defense.

The parties agreed the credibility of the prosecution and defense witnesses would be pivotal in determining the guilt of the appellant. The state advised the trial court it would prove the appellant was one of the men who robbed the victim. Defense counsel advised the court the appellant did not contest the fact the victim was robbed, but the appellant was not present when the perpetrators committed the robbery. In short, the sole issue was the identity of the appellant as one of the men who robbed the victim.

A.

The State of Tennessee gave the appellant notice pursuant to Rule 609, Tennessee Rules of Evidence, it would use the prior convictions to impeach him if he testified in support of his defense. The notice included the following prior convictions: aggravated assault, six counts of forgery, receiving stolen property, and theft of property under $500. The parties agreed one count of forgery had been dismissed, and this conviction was stricken from the notice.

The trial court, noting the importance of credibility of the witnesses, ruled the state could use all of the prior convictions to impeach the appellant if he opted to testify in support of his defense. The trial court specifically found the probative value of these prior convictions "outweigh[ed] any prejudicial effect that it might have." The trial court gave the appellant the option of permitting the state to ask if he had committed the designated offense or restrict the state's inquiry to the fact he had committed a specific class of the offense, i.e., a Class C, Class D, or Class E felony. Defense counsel advised the trial court the appellant wanted the state to ask him if he committed a specific crime as opposed to the class of the offenses.

B.

The State of Tennessee may use a prior conviction to impeach an accused if the conviction meets the criteria established by Rule 609, Tennessee Rules of Evidence. The criteria established by Rule 609 are: (a) the conviction was for a crime punishable by death or imprisonment in excess of one (1) year or a misdemeanor conviction involving dishonesty or a false statement; (b) less than ten (10) years has elapsed between the date the accused was released from confinement and the commencement of the prosecution; (c) the State of Tennessee must give reasonable written notice of the particular convictions it intends to use to impeach the accused prior to trial; and (d) the trial court must find the probative value of each conviction on the issue of credibility outweighs its unfair prejudicial effect. State v. Farmer, 841 S.W.2d 837, 839 (Tenn. Crim. App.), per. app. denied (Tenn. 1992).

In this case, the first three requirements, (a) through (c), have been satisfied, and the appellant does not contest these prerequisites. The only issue which this Court must resolve is whether the probative value of the felonies and misdemeanor in question outweigh their prejudicial effect.

C.

In determining whether the probative value of a prior conviction to be used to impeach an accused outweighs the unfair prejudicial effect on the issues to be resolved by the jury, the trial court should (a) "assess the similarity between the crime on trial and the crime underlying the impeaching conviction," and (b) "analyze the relevance the impeaching conviction has to the issue of credibility." N. Cohen, D. Paine, and S. Sheppeard, Tennessee Law of Evidence, § 609.9 at p. 376 (3rd ed. 1995); see Farmer, 841 S.W.2d at 839. When this analysis is applied to the appellant's prior convictions in the context of this case, it is clear the trial court did not abuse its discretion in ruling the convictions for forgery, receiving stolen property, petit larceny, and theft could be used to impeach the appellant if he opted to testify in support of his defense. All of these crimes involve dishonesty and are particularly relevant to the issue of credibility. State v. Martin, 642 S.W.2d 720, 724 n.1 (Tenn. 1982)(concealing stolen property); State v. Crane, 780

S.W.2d 375, 377 (Tenn. Crim. App. 1989), cert. denied, 495 U.S. 906, 110 S.Ct. 1928, 109 L.Ed.2d 291 (1990)(concealing stolen property); Price v. State, 589 S.W.2d 929, 931-32 (Tenn. Crim. App.), cert. denied, (Tenn. 1979)(larceny); State v. Andrew Walton, Shelby County No. 02-C-01-9109-CR-00205 (Tenn. Crim. App., Jackson, August 12, 1992)(larceny and theft); State v. Dan Anderson, Sullivan County No. 929 (Tenn. Crim. App., Knoxville, April 1, 1991), per. app. dismissed (Tenn. 1991)(forgery); State v. Andrew Otey, Roy Waters, and Anna Waters, Williamson County No. 01-C-01-9002-CC-00046 (Tenn. Crim. App., Nashville, December 20, 1990)(forgery); State v. Thomas Dupree, Greene County No. 263 (Tenn. Crim. App., Knoxville, July 29, 1987)(forgery); see State v. Butler, 626 S.W.2d 6 (Tenn. 1981).

The trial court should have ruled the conviction for aggravated assault could not be used to impeach the appellant in the context of this case. This crime has minuscule relevance for impeachment purposes. See Farmer, 841 S.W.2d at 839-40. However, the error was harmless in this case. Tenn. R. App. P. 36(b).

This issue is without merit.

III.

The appellant contends the trial court committed error of prejudicial dimensions by permitting the State of Tennessee to introduce evidence of flight. He argues the evidence introduced during the trial did not constitute evidence of flight.

A.

The appellant was arrested on Saturday evening, January 8, 1994. A Union City police officer notified the General Sessions judge of the arrest on Sunday morning, January 9, 1994. The General Sessions judge arraigned the appellant around noon on January 9th.

The judge advised the appellant of "his rights," the nature of the offense, and the appellant's right to be represented by counsel. The judge advised the appellant not to make any statements regarding his guilt. Counsel was appointed to represent the appellant, bond was set, and the preliminary hearing was scheduled for January 13, 1994. The appellant was given a form which contained the date and time of the preliminary hearing and the attorney who would be representing him. A mittimus was issued, and the appellant was confined to the Obion County Jail.

Eventually, the Obion County sheriff, concerned about jail overcrowding, told the jailer to release the appellant. It is uncertain whether this occurred on Sunday afternoon or Monday morning, January 10, 1994. The appellant was given his property and released from jail without giving bond to secure his attendance at the preliminary hearing.

The Union City police officers investigating the robbery went to the jail to interview the appellant. They were interested in determining the name of the second perpetrator. The officers discovered the appellant had been released. The officers began searching for the appellant. He could not be found in Obion County. The officers decided to wait until the preliminary hearing to talk to the appellant. The appellant failed to appear for the preliminary hearing on January 13th and a bench warrant was issued for his arrest.

The Obion County Sheriff's Department and the Union City Police Department began looking for the appellant. The officers of both agencies were notified the appellant had a warrant outstanding and he was to be arrested if found. Officers called the appellant's residence and talked to the appellant's friends. Other measures were taken to locate the appellant. The appellant could not be found in Obion County.

The appellant was arrested in Cobb County, Georgia in February of 1994. The Cobb County officers made a N.C.I.C. check to determine if the appellant was wanted.

They discovered the appellant was wanted by the Obion County authorities. The appellant was returned to Obion County and appeared before the General Sessions Court in May of 1994.

B.

It is a well-established rule of law that any ex post facto attempt to avoid prosecution is relevant to the determination of an accused's guilt. See Marable v. State, 203 Tenn. 440, 456-57, 313 S.W.2d 451, 459 (1958). This rule has existed for at least 150 years. See Tyner v. State, 24 Tenn. 383 (1844). The enactment of the Tennessee Rules of Evidence did not affect this rule. N. Cohen, D. Paine, and S. Sheppeard, Tennessee Law of Evidence, § 401.8 at p. 94 (3d ed. 1995).

An attempt to avoid apprehension or prosecution is relevant because it tends to "show guilt, consciousness of guilt, or knowledge." Buckingham v. State, 540 S.W.2d 660, 665 (Tenn. Crim. App. 1976), cert. denied, 429 U.S. 1049, 97 S.Ct. 739, 50 L.Ed.2d 764 (1976); Mitchell v. State, 3 Tenn. Crim. App. 153, 161, 458 S.W.2d 630, 633 (1970), cert. denied, (Tenn. 1970). This evidence may be considered by the trier of fact "as one of a series of circumstances from which guilt may be inferred." State v. Braggs, 604 S.W.2d 883, 886 (Tenn. Crim. App.), per. app. denied (Tenn. 1980); see State v. Harris, 839 S.W.2d 54, 74 (Tenn. 1992), cert. denied, _____ U.S. _____, 113 S.Ct. 1368, 122 L.Ed. 746 (1993); State v. Zagorski, 701 S.W.2d 808, 813 (Tenn. 1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3309, 92 L.Ed.2d 722 (1986); Hill v. State, 3 Tenn. Crim. App. 331, 334, 461 S.W.2d 50, 52 (1970), cert. denied, (Tenn. 1970); Rogers v. State, 2 Tenn. Crim. App. 491, 501, 455 S.W.2d 182, 186 (1970), cert. denied, (Tenn. 1970). Evidence of flight is not conclusive. The accused is permitted to introduce evidence to rebut by "credible explanation" the fact he or she fled to avoid apprehension or prosecution. Brown v. State, 4 Tenn. Crim. App. 381, 385, 472 S.W.2d 230, 232 (1971), cert. denied, (Tenn. 1971).

As a general rule, the flight of an accused occurs shortly after the commission of the crime. See State v. Rhoden, 739 S.W.2d 6, 15 (Tenn. Crim. App.), per. app. denied (Tenn. 1987). However, the application of this rule is not limited by time or the stage of the prosecution. Craig v. State, 2 Tenn. Crim. App. 510, 516, 455 S.W.2d 190, 193 (1970),

cert. denied, (Tenn. 1970)(accused escaped five days after commission of crime when taken to the courtroom for a preliminary hearing); see State v. Townsend, 688 S.W.2d 842, 844 (Tenn. Crim. App. 1984), per. app. denied (Tenn. 1985)(escaped from jail after arrest); Buckingham, 540 S.W.2d at 665 (accused escaped from custody while awaiting trial); State v. Taylor, 661 S.W.2d 695, 698 (Tenn. Crim. App.), per. app. denied (Tenn. 1983)(accused attempted to escape from the booking room shortly after his arrest).

Flight evidence is multi-dimensional. It may occur when the accused leaves the state shortly after committing the offense, Zagorski, 701 S.W.2d at 813; Rhoden, 739 S.W.2d at 15; Ledune v. State, 589 S.W.2d 936, 940 (Tenn. Crim. App. 1979). It also may occur when the accused leaves the county where the offense occurred and travels to another county after learning he is going to be arrested for the crime, State v. Goodman, 643 S.W.2d 375, 381-82 (Tenn. Crim. App.), per. app. denied (Tenn. 1982), or hides from the police to avoid being arrested within the county where the crime occurred. State v. Braggs, 604 S.W.2d at 886; Rogers, 2 Tenn. Crim. App. at 501, 455 S.W.2d at 186. Also relevant is the accused's resisting arrest when officers attempted to take him into custody, Zagorski, 701 S.W.2d at 813, attempts to escape, Taylor, 661 S.W.2d at 698; Chapple v. State, 528 S.W.2d 62, 63 (Tenn. Crim. App.), cert. denied, (Tenn. 1975), escapes from the courtroom incident to a preliminary hearing, Craig, 2 Tenn. Crim. App. at 515-16, 455 S.W.2d at 193, or escapes from jail while awaiting trial, Townsend, 688 S.W.2d at 844; Buckingham, 540 S.W.2d at 665.

Before an instruction on flight is warranted, the evidence must establish (a) the accused engaged in ex post facto conduct and (b) the purpose of the conduct was to avoid prosecution. State v. Whittenmeir, 725 S.W.2d 686, 689 (Tenn. Crim. App. 1986), per. app. denied (Tenn. 1987); N. Cohen, D. Paine, and S. Sheppeard, Tennessee Law of Evidence § 401.8, p. 96 (3d ed. 1995). This may be established by direct or circumstantial evidence.

When the state presents sufficient evidence to establish flight, the state is entitled to have an instruction included in the charge setting forth the law of flight. See State v. Howell, 868 S.W.2d 238, 254-55 (Tenn. 1993), _____ U.S. _____, 114 S.Ct. 1339, 127 L.Ed.2d 687 (1994); Harris, 839 S.W.2d at 74. The giving of such an instruction does not

invade the province of the jury. Hill, 3 Tenn. Crim. App. at 334, 461 S.W.2d at 52.

C.

The evidence in this case made a prima facie case of flight. The appellant was released from jail; he could not be found in Obion County after his release from custody or after he failed to appear for the preliminary hearing. The appellant was aware of the date, time, and place of the preliminary hearing. The appellant was located in the State of Georgia approximately one month after the failure to appear.

This case is similar to State v. Dowell, 705 S.W.2d 138, 142 (Tenn. Crim. App.), per. app. denied, (Tenn. 1985). In Dowell, the officers attempted to locate Dowell, but she could not be found in the county where she lived and the crime occurred. This Court held the state was entitled to an instruction on flight based on these facts.

This issue is without merit.

IV.

The appellant contends the trial court committed error of prejudicial dimensions by permitting the State of Tennessee to use the prior inconsistent statements made by Ken Henry, a prosecution witness, to impeach Henry as a witness. He argues the State of Tennessee knew Henry had repudiated the two statements prior to trial. The appellant predicates this argument upon the case of Mays v. State, 495 S.W.2d 833 (Tenn. Crim. App. 1972), per. app. denied (Tenn. 1973).

Henry was confined to the Obion County Jail after being convicted for "some [bad] checks charge[s]." The appellant and Henry were confined in the same cell block. Henry gave officers two separate statements. The first statement was given on May 24, 1994. The second statement was given on July 1, 1994. Henry told the officers in both statements the appellant admitted to him that he, the appellant, had robbed the victim. The statements gave details on what had occurred, including the robbery was committed along with a second person.

The appellant moved the trial court in limine to prevent the state from using the two statements to impeach Henry. According to defense counsel, Henry contacted him the day prior to trial and stated "he didn't know anything about the case." Henry also approached the District Attorney General and asked that he not be called as a witness. Henry stated he was afraid either he or his family would be hurt if he testified against the appellant. The District Attorney General refused to discuss the matter with Henry. Henry then saw one of the officers who was present when he gave one of the statements. He told the officer he knew nothing about the case.

The next morning Henry approached the same officer and advised him he had no knowledge about the case. The officer played the audio recording of the statement for Henry. After listening to the tape, Henry told the officer the appellant did not tell him about the robbery. He claimed the information came from Keith Pettigrew, the appellant's co-conspirator in the perpetration of the robbery. In short, the state knew before trial Henry intended to repudiate his statements.

A jury-out hearing was conducted after defense counsel interposed an objection to the use of the statements. Henry admitted making the two statements, but he testified the appellant did not tell him about the robbery. The trial court ruled the District Attorney General could use the prior inconsistent statements to impeach Henry.

Henry told the jury he made the statements, but the information contained in the statements was inaccurate. He stated he did not get the information from the appellant. The District Attorney General then used the statements to question Henry.

The District Attorney General asked Henry if he told an officer the appellant stated "he had robbed a man and taken some checks and cash." Henry admitted he told this to the officer. Henry was then asked if the appellant told him "he had changed clothes and . . . took the glasses off" after the robbery. Henry admitted he gave the officer such information. The District Attorney General then asked Henry if the appellant told him "there was someone else with him [during the robbery]." Henry stated he made such a statement to the officer. All of this information was contained in the first statement.

The District Attorney General then questioned Henry about the content of the second statement. He asked Henry if he heard the appellant "say from his mouth that he

had robbed a man and taken checks and cash." Henry testified he made that statement to the officer.

It was developed during direct and cross-examination Henry made the statements, but the statements were inaccurate because Henry did not hear the appellant make these statements. When asked why he made these statements, Henry stated he and the appellant had problems while confined in the Obion County Jail. They argued the entire time. Giving these statements was a means of retaliation or revenge for the appellant's conduct.

It appears the District Attorney General researched the issue during the noon hour. He then approached the trial court about striking Henry's testimony. The trial court related what had transpired. A short colloquy occurred between counsel and the court. The trial court struck Henry's testimony. The trial court instructed the jury in part:

> [Y]ou are not to consider the testimony of Mr. Henry in any respect whatsoever. You are not to consider the prior statements about which he was questioned, either as evidence to impeach his testimony or for any other purpose.

This Court must decide if it was error for the District Attorney General to question Henry regarding the content of his statements, and, if error, was it harmless error or prejudicial error warranting a reversal.

In Mays v. State, 495 S.W.2d 833 (Tenn. Crim. App. 1972), cert. denied, (Tenn. 1973), the State of Tennessee knew in advance of trial that two prosecution witnesses would repudiate the statements given to the police during the investigative stage of the proceedings. The state called the two witnesses. When the witnesses in fact declared they were unaware of any facts indicating the appellants committed the arson, the state used the witnesses' prior statements to question them. The statements contained information which implicated some of the defendants. This Court, holding the procedure constituted reversible error, stated:

> [T]he witnesses professed to know nothing about the crime, were merely reluctant to give testimony, testified to nothing prejudicial to the State. Under these circumstances there was nothing to impeach. Impeachment was calculated to and did serve only one purpose which was to put before the jury the out of court statements. . . . We think, it was error to permit

> the State to impeach the witnesses and introduce their out of court statements.

495 S.W.2d at 837.

The rule announced in Mays was not affected by the Tennessee Rule of Evidence. See N. Cohen, D. Paine and S. Sheppeard, Tennessee Law of Evidence, § 613.1 at 405-06 (3d ed. 1995); State v. Roy L. Payne, Washington County No. 03-C-01-9202-CR-00045 (Tenn. Crim. App., Knoxville, February 2, 1993). In Payne, Carder, a co-defendant confessed her guilt to the police. She admitted selling cocaine, and she implicated the appellant in the transaction. The trial court suppressed the statement. During the trial, the charges against Carder were dismissed and she was granted immunity to testify as a prosecution witness. Before calling Carder to the witness stand, the state was advised she would repudiate her confession -- she would deny she ever sold or delivered cocaine. When Carder was called as a witness, she did in fact repudiate the statements of guilt contained in the confession. The state used her confession to examine her. In holding this was reversible error, this Court said:

> After close review we must agree with the defendant's argument. The State was indeed on notice that Ms. Carder intended to reverse her expected testimony and not cooperate. From this record it appears that the State called her to the stand for the primary purpose of impeaching her by introducing her prior statement and improperly placing it before the jury, an action sufficient to warrant reversible. . . . While a party may now impeach his or her own witness under the new rules, such impeachment cannot be a mere ruse to introduce highly prejudicial and improper testimony.
>
> Although there was other significant evidence against the defendant, the error here was of such a prejudicial nature that no charge to the jury to ignore the substantive value could have been effective. . . .

In this case, the trial court struck Henry's testimony and gave the instruction hereinabove set forth. The question posed is: did the striking of the testimony and the subsequent instruction cure the prejudicial damage inflicted by presenting Henry and the use of the statements to question him?

This Court is of the opinion the striking of Henry's testimony and the curative instruction were insufficient to overcome the serious prejudicial effect of putting the out of

court statements made by Henry in front of the jury. Considering the record as a whole, the error involved a substantial right which affected the verdict of the jury. Moreover, such errors result in prejudice to the judicial process. Tenn. R. App. P 36(b); Mays, supra; Payne, supra.

V.

The trial court found the existence of three statutory factors to enhance the appellant's sentence: (a) previous history of criminal behavior, Tenn. Code Ann. § 30-35-114(1), (b) leader in the commission of the offense, Tenn. Code Ann. § 40-35-114(2), and (c) history of unwillingness to comply with conditions of sentence involving release in the community, Tenn. Code Ann. § 40-35-114(8). The trial court found no mitigating factors. The appellant contends the trial court erred by applying factor (2) to enhance his sentence. He further contends the trial court erred by failing to find he did not threaten serious bodily injury or inflict serious bodily injury, Tenn. Code Ann. § 40-35-113(1).

When an accused challenges the length and manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken 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). The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993). However, this Court is required to give great weight to the trial court's determination of controverted facts as the trial court's determination is based upon the witnesses' demeanor, appearance, and inflection in their voices.

In conducting a de novo review of a sentence, this Court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the

principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancing factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-103 and -210; State v. Scott, 735 S.W.2d 825, 829 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).

When the accused is the appellant, the accused has the burden of establishing that the sentence imposed by the trial court was erroneous. Sentencing Commission Comments to Tenn. Code Ann. § 40-35-401; Ashby, 823 S.W.2d at 169; Butler, 900 S.W.2d at 311. Thus, this Court will undertake a review of the record, based upon the foregoing guidelines, to determine if the appellant has established the sentence imposed by the trial court was erroneous.

The appellant contends he could not be the leader in the offense because the proof shows at most he was an equal participant in the crime. Equal participation in a crime does not, by itself, preclude the use of Tenn. Code Ann. § 40-35-114(2) to enhance a sentence. State v. Hicks, 868 S.W.2d 729, 731 (Tenn. Crim. App. 1993); State v. Angele Franklin, Sevier County No. 03-C-01-9402-CR-00061 (Tenn. Crim. App., Knoxville, September 27, 1995), per. app. denied (Tenn. 1996); State v. James Teague, Sevier County No. 03-C-01-9102-CR-00060 (Tenn. Crim. App., Knoxville, February 19, 1992), per. app. denied (Tenn. 1992). The trial court found the appellant was a leader in the offense because he initiated contact with the victim and engaged the victim in a game of pool before committing the crime. While the trial court found this factor to be met, it stated: "[t]he court does not place a great deal of emphasis on this enhancement factor."

The appellant also contends the trial court failed to consider a mitigating factor established by the record. He argues the appellant did not threaten serious bodily injury and the victim did not suffer serious bodily injury, Tenn. Code Ann. § 40-35-113(1). According to the appellant, this factor should mitigate the sentence in this case. The appellant overlooks the fact the crime was accomplished by the use of physical force and intimidation, and the victim actually suffered injury. The victim sustained abrasions on both knees when he was thrown to the sidewalk. Thus, the trial court properly rejected this

factor.

This issue is without merit.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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JERRY L. SMITH, JUDGE