IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 03C01-9603-CC-00088**
	)	
Appellee,	)	
	)	
	)	**SULLIVAN COUNTY**
V.	)	
	)	**HON. R. JERRY BECK**
BRIAN KEITH COLLINS,	)	**JUDGE**
	)	
Appellant.	)	**(VIOLATION HABITUAL TRAFFIC**
	)	**OFFENSE; RESISTING ARREST)**

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF SULLIVAN COUNTY

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

The Appellant appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. At a jury trial, he was found guilty of Violation of an Habitual Traffic Offender Order, Resisting Arrest, and Vandalism under $500.00 in the Sullivan County Criminal Court. An assault charge was dismissed. The Appellant was sentenced to two years as a Range I Standard Offender with a fine of $2200.00 on the Habitual Traffic Offender charge which was run consecutive to a previous unrelated sentence. He was also sentenced to thirty days and a fine of $350.00 on the Vandalism under $500.00 and to thirty days and a fine of $700.00 for Resisting Arrest. The two thirty day sentences were run concurrently to each other and with the Habitual Traffic Offender sentence. We affirm the judgment of the trial court.

The Appellant argues four issues: (1) Whether there was sufficient evidence for the jury to find beyond a reasonable doubt that Appellant was the same party listed in the Habitual Traffic Offender Order; (2) whether there was sufficient evidence for the jury to find beyond a reasonable doubt that Appellant was the same party operating the motor vehicle on the date of the alleged offense; (3) whether there was sufficient evidence for the jury to find beyond a reasonable doubt that Appellant knowingly damaged the pants of the two officers; (4) whether the trial court erred in denying Appellant's motion for a mistrial after the district attorney general's statement to the jury that, "[I]f [the defense attorney] had any evidence to offer to you that this was not the the [sic] same person named in that indictment, you would have heard it."

During the early morning hours of August 9, 1994 a Kingsport police officer on patrol in a marked car passed a Dodge Colt coming towards him. For reasons unrelated to the case sub judice, the officer paid close attention to this car and made eye contact with the driver of the car. The driver of the car was the Appellant. There was also a female in the passenger's seat. The Appellant immediately pulled into a Conoco station upon passing the police car. The officer made a u-turn, never losing sight of the Dodge Colt, and requested back-up. When the Dodge stopped at the Conoco station, the officer observed the Appellant get out of the driver's side of the car. The female passenger stepped out of the car and got into the driver's side seat. At this time, a second officer arrived. Both officers approached the Appellant and asked for identification. It was then determined by checking with the dispatcher that the Appellant did not have a valid driver's license, and he was an habitual traffic offender. When the officers attempted to arrest the Appellant, he resisted. A physical fight then ensued between the two officers and the Appellant. During this fight, both of the officers' pants were ripped.

I.

The Appellant's first three issues deal with the sufficiency of the evidence. When an accused challenges the sufficiency of the evidence, this court must review the record to determine if the evidence adduced during the trial was sufficient "to support the findings by the trier of fact of guilt beyond a reasonable doubt." T.R.A.P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence or a combination of direct and

circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). 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 (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. Herrod, 754 S.W.2d 627, 632 (Tenn. Crim. App. 1988).

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. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). In State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973), the Tennessee Supreme Court stated, "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."

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, State v. Grace, 493 S.W.2d at 476, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict 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 and the inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt. State v. Matthews, 805 S.W.2d at 780.

A.

The Appellant first challenges the sufficiency of the evidence for the jury to find that the Appellant was the same party listed in the Habitual Traffic Offender Order. The Appellant contends that the State did not present sufficient evidence to prove that the Appellant listed as Brian Keith Collins is the same individual, Brian K. Collins, that is listed in the previous judgment. The previous judgment was signed "Brian Collins" as opposed to Brian K. Collins or Brian Keith Collins.

The Tennessee Supreme Court dealt with a similar case in Cumbo v. State, 205 Tenn. 260, 326 S.W.2d 454 (1959), in which an appellant argued that an indictment for an Habitual Criminal charge suffered from a fatal variance because the name for the previous convictions was not the same as that of the Habitual Criminal charge. The appellant in Cumbo had been convicted in North Carolina on two separate occasions as "Chas. Cumbo, alias Irvin Cumbo." Cumbo, 205 Tenn. at 262-63, 326 S.W.2d at 455-56. The Tennessee indictment read "Charles Irvin Cumbo, alias Charlie Ervin Cumbo." Cumbo, 205 Tenn. at 263, 326 S.W.2d at 455. The supreme court held that Chas. is a commonly known abbreviation of Charles and the fact that the North Carolina indictment

read "Chas. Cumbo, alias Irvin Cumbo" was actually corroborative of the Tennessee indictment. Cumbo, 205 Tenn. at 263, 326 S.W.2d at 455.

In Jones v. State, 733 S.W.2d 517 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1987), an appellant challenged his habitual criminal conviction because of the difference of names on previous convictions outside of Tennessee. The appellant's prior convictions were under the names Jesse Lewis Jones, Jesse L. Jones, and Jessie Lewis Jones. Jones, 733 S.W.2d at 520. The question was "whether Jesse L. Jones is the same name as Jessie Lewis Jones and Jessie L. Jones for the purposes of the "same name" provision of the statute." When addressing the question of the letter "L" this court stated that "[t]he letter 'L' is the initial for the name 'Lewis,'" and held that the prior judgments were sufficient to prove habitual criminal status. Jones, 733 S.W.2d at 520. We agree with the previous decision in this court, and conclude that the letter "K" is the initial for the name "Keith."

We find that there is sufficient evidence for the jury to find that Brian Keith Collins is the same person as the Brian K. Collins in the previous judgments. 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. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). First, it is feasible that a rational trier of fact would conclude that the initial "K." in Brian K. Collins stands for Keith. In addition, the judgment was entered in Sullivan County, the same county where the incident in question occurred. Also, the convictions that support the Habitual Traffic Offender judgment occurred in Sullivan County.

We find that there is sufficient circumstantial evidence for a rational trier of fact to conclude that Brian Keith Collins is Brian K. Collins.

This issue has no merit.

B.

The Appellant's second issue is whether there was sufficient evidence for the jury to find beyond a reasonable doubt that the Appellant was the same party operating the vehicle at the time of the offense. At trial, the first officer testified that he made eye contact with the Appellant as they passed each other, and then he observed the Appellant get out of the car on the driver's side. He also testified that the female passenger told him at the scene that she had been at work and the Appellant came to pick her up. 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. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). We conclude that this is sufficient evidence to prove that the Appellant was the driver of the car.

This issue has no merit.

C.

The Appellant's third issue is whether there was sufficient evidence for the jury to find beyond a reasonable doubt that the Appellant knowingly damaged the

pants of the two officers. "A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." Tenn. Code Ann. § 39-11-302(b).

The Appellant argues that any damage to the officers' pants was caused accidentally and not knowingly. However, the definition of "knowingly" does not require an individual to purposefully cause a result, but rather that he "be aware that the conduct is reasonably certain to cause a result." Tenn. Code Ann. § 39-11-302(b). We believe that an individual would be aware that a struggle during which people fell to the ground would be reasonably certain to tear clothing. Therefore, we find that there is sufficient evidence for a rational trier of fact to find that the Appellant knowingly caused the damage and is guilty of Vandalism under $500.00.

This issue has no merit.

II.

The Appellant's final issue is whether the trial court erred in denying the Appellant's motion for a mistrial following a statement made by the district attorney general. During closing argument, the district attorney general stated, "[I]f [the defense attorney] had any evidence to offer to you that this was not the the [sic] same person named in that indictment, you would have heard it." At this

point, the defense attorney objected. The trial court sustained the objection and directed the jury to disregard the statement. The defense attorney then asked for a mistrial. The trial court then conducted a bench conference, which evolved into a jury-out hearing. The trial court refused to grant the request for a mistrial stating that there was no manifest necessity. When the jury was brought in, the trial court instructed them with these words:

> Ladies and gentlemen, the last sentence by the District Attorney just before the objection, I am going to ask you all, and tell you, and instruct you all to disregard that statement, and not consider it in any manner. Can all of you all do this, everybody raise their hand that can do that. Okay. Each juror has raised their right hand.

The decision of whether or not to enter a mistrial rests with the sound discretion of the trial court. This court will not interfere with the trial court's decision absent a clear abuse of discretion on the record. State v. McPherson, 882 S.W.2d 365, 370 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1994). The Appellant's issue is similar to the issue of improper comments on a defendant's failure to testify when he has a right not to testify. In the line of cases dealing with this issue, this court has stated that "[m]ere argument by the State that proof on a certain point is unrefuted or uncontradicted is not an improper comment upon a defendant's failure to testify." State v. Coury, 697 S.W.2d 373, 378 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1985). In State v. Thomas E. Medders, No. 02C01-9407-CR-00139, Shelby County (Tenn. Crim. App., Jackson, filed July 19, 1995), perm. to appeal denied (Tenn. 1996), the prosecutor made a statement in his closing argument concerning the defendant's flight from the scene, "'No proof offered, no circumstances of the case to show why they didn't stay there. . . . No evidence, no explanation as to

why he didn't stay there-- why the three of them didn't stay there.'" Medders, No. 02C091-9407-CR-00139, slip. op. This court held that the prosecutor's comment on the lack of evidence was not reversible error.

In the case sub judice, we do not find an abuse of discretion on the trial court's part in not granting the mistrial. First, as noted above, comments similar to the district attorney general's have been held to not violate the defendant's rights. Second, we find that there was sufficient evidence to support this conviction, and the district attorney's statement, while improper, did not affect the outcome of the trial. Third, the trial court made an immediate instruction, and then asked the jury if they all could follow his instruction to disregard the statement. All the jurors answered that they could follow the instruction.

Therefore, we find that the trial court properly denied the Appellant's request for a mistrial. This issue is without merit.

We affirm the decision of the trial court.

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THOMAS T. WOODALL, JUDGE

CONCUR:

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DAVID H. WELLES, JUDGE

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DAVID G. HAYES, JUDGE