

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1996 SESSION

**FILED**  
**February 13, 1997**  
**Cecil Crowson, Jr.**  
Appellate Court Clerk

STATE OF TENNESSEE, )  
 )  
 APPELLEE, )  
 )  
 v. )  
 )  
 JONATHAN MOORE, )  
 )  
 APPELLANT. )

No. 03-C-01-9602-CR-00057  
Monroe County  
R. Steven Bebb, Judge  
(Aggravated Assault and  
Coercion of a Witness)

FOR THE APPELLANT:

Charles M. Corn  
District Public Defender  
P.O. Box 1453  
Cleveland, TN 37364-1453

FOR THE APPELLEE:

Charles W. Burson  
Attorney General & Reporter  
500 Charlotte Avenue  
Nashville, TN 37243-0497

Caroline R. Krivacka  
Assistant Attorney General  
450 James Robertson Parkway  
Nashville, TN 37243-0488

Jerry N. Estes  
District Attorney General  
203 East Madison Avenue  
Athens, TN 37371

Stephen D. Ward  
Assistant District Attorney General  
300 Tellico Street  
Madisonville, TN 37354-0793

Amy F. Armstrong  
Assistant District Attorney General  
203 East Madison Avenue  
Athens, TN 37371

OPINION FILED: \_\_\_\_\_

AFFIRMED IN PART; REVERSED IN PART AND DISMISSED

Joe B. Jones, Presiding Judge

# OPINION

The appellant, Jonathan Moore, was convicted of aggravated assault, a Class C felony, and coercion of a witness, a Class D felony, by a jury of his peers. The trial court found the appellant was a standard offender and imposed the following Range I sentences: (a) a fine of \$5,000 and confinement for three (3) years in the Department of Correction, and (b) a fine of \$3,000 and confinement for two (2) years in the Department of Correction. The sentences are to be served concurrently, but consecutively to an eight-year sentence for the possession of cocaine with intent to sell. After a thorough review of the record, the briefs submitted by the parties, and the authorities which govern the issues, it is the opinion of this Court the conviction for coercion of a witness should be affirmed, but the conviction for aggravated assault should be reversed and the prosecution against the appellant dismissed for the reasons set forth in this opinion.

Derrick Jimmerson, a former Sweetwater police officer, agreed to assist the Monroe County Sheriff's Department and the Drug Enforcement Agency by making the purchase of illicit drugs from drug dealers in the area. He specifically mentioned making a purchase of illicit drugs from the appellant and his uncle, James "Stink" Bradley. On January 26, 1993, Jimmerson purchased thirty-six (36) rocks of crack cocaine from the appellant and Bradley. Bradley was subsequently indicted by a federal grand jury. The appellant was indicted by the Monroe County grand jury for the same offense. The State of Tennessee provided Jimmerson's name during the discovery process.

People congregated in the parking lot of Jake's Place, a bar, which had gone out of business. On March 16, 1995, Jimmerson was visiting with friends in Jake's parking lot. The appellant arrived on his motorcycle. While Jimmerson was walking to the vehicle of his sister's boyfriend, the appellant spoke to Jimmerson. The appellant pulled a pistol. When Jimmerson saw the pistol, he ran to the vehicle and told his sister's boyfriend to leave immediately. Captain Patrick Upton, a Monroe County deputy sheriff, lived near Jake's. When he heard shots being fired in the vicinity of Jake's, he went outside. Upton saw a person leave Jake's parking lot on a motorcycle. He recognized the motorcycle as one very similar to a motorcycle owned by the appellant. He watched the motorcycle until

it turned into the appellant's driveway.

On May 7, 1995, Jimmerson was at the home of his parents. A motor vehicle passed the residence. Jimmerson heard gunfire. He told officers investigating the incident he had seen the vehicle previously; he described the vehicle in detail and told the officers the vehicle was owned by Kim Murr. The investigating officers discovered two projectiles struck the residence, and two projectiles struck a motor vehicle in front of the residence.

Sweetwater police officers and Captain Upton searched for the vehicle described by Jimmerson. Upton located the vehicle. Kim Murr, Pam Wells, Aaron Smith, and the appellant were in the vehicle. He searched the vehicle, but he did not find a weapon or evidence of someone inside the vehicle firing a weapon. Later, Captain Upton located the vehicle a second time. He had the occupants report to the Sweetwater Police Department. Three of the four occupants were interviewed. They were subsequently released. The next morning Captain Upton obtained warrants for the arrest of Smith and the appellant.

Smith entered a plea of guilty to the offenses in question. He testified as a prosecution witness. According to Smith, the appellant stated in the presence of Sean Mayock and Smith Jimmerson was back in town. Mayock bet Smith and the appellant they would not go to Jimmerson's residence and "shoot at [the] house or scare him in some way." Smith said: "Let's go."

Smith told Murr how to get to Jimmerson's residence. As they passed the residence, the appellant, armed with a .22 caliber automatic pistol,<sup>1</sup> and Smith, also armed with a .22 caliber automatic pistol, began firing. The appellant, who was seated in the back seat on the passenger's side, fired through the window at the residence. The shots were fired at Jimmerson's former bedroom. Smith fired from the driver's side of the back seat. He fired at the vehicle. Two projectiles struck the residence near Jimmerson's former bedroom, and two projectiles struck the vehicle in front of the residence. The appellant told Murr this was "the second driveby [shooting] [he] had been in."

The occupants traveled to Loudon immediately after the shooting incident. Smith removed the spent cartridges from the vehicle. They then went to the home of the appellant's aunt in Sweetwater so he could take a shower. Apparently, the weapons were

---

<sup>1</sup>Smith furnished the appellant with ammunition for the appellant's weapon on the afternoon of the date in question.

hidden at the aunt's residence. Captain Upton stopped the vehicle after the occupants had resumed riding through Sweetwater.

The defense presented Pam Wells as a witness. She was dating the appellant when the events in question occurred. She testified Smith was the only person to fire a weapon from the vehicle. According to Wells, Smith reached across Murr's child and the appellant and fired through the window on the appellant's side of the vehicle. The appellant supposedly sustained powder burns when Smith fired the pistol close to the appellant's neck.

**I.**

The appellant contends the evidence contained in the record is insufficient to support his convictions. He predicates this contention on the ground "the state relied upon unreliable testimony." He argues Smith's testimony was unreliable because he entered pleas of guilty and all but thirty-seven days of his sentences were suspended. In addition, his testimony was not credible because of the multiple conflicts found in his testimony. He further contends the state failed to establish an element of aggravated assault, namely, "a reasonable fear" of "imminent bodily injury."

**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.**

Before an accused can be convicted of coercing a witness, or potential witness, the State of Tennessee must prove beyond a reasonable doubt:

(a) The accused coerced, influenced, or attempted to influence, a witness, or prospective witness;

(b) The purpose of the accused's conduct was for the purpose of having the witness, or prospective witness, to:

(1) give false testimony;

(2) withhold truthful testimony, information, documents, or other things;

(3) elude legal process used to summon the witness to testify or supply evidence; or

(4) have the witness fail to appear for an official proceeding after having been served with a legal subpoena.

Tenn. Code Ann. § 39-16-507. In this case, the State of Tennessee established the elements of this crime beyond a reasonable doubt. Tenn. R. App. P. 13(e). See Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The appellant was aware Jimmerson was the informant who was directly responsible for the arrest and indictment of his uncle, "Stink" Bradley, as well as himself. He also knew Jimmerson was the pivotal witness in both prosecutions. While the proceedings surrounding the sale of the cocaine were recorded, the recording was not admissible without Jimmerson's testimony authenticating the audio recordings and identifying the voices contained in the audio recordings. It was the appellant who advised others Jimmerson had returned to Sweetwater. And the appellant participated in the "driveby" shooting. The shooting was intended to "scare" Jimmerson with the hope he would be intimidated and fearful to testify against Bradley or the appellant.

While the appellant sought to establish he did not participate in the shooting, the State of Tennessee established the appellant had participated in a similar shooting in the past. In addition, a trier of fact could draw the inference the appellant had undertaken a course of action to coerce Jimmerson. The brandishing of a weapon on March 16th at Jake's parking lot supports such an inference.

This issue is without merit.

**C.**

Before an accused can be convicted of aggravated assault in the context of this case, the State of Tennessee must prove beyond a reasonable doubt the accused:

(a) caused another person to "reasonably fear imminent bodily injury;" Tenn. Code Ann. § 39-13-101(a)(2);

(b) used a deadly weapon during the commission of the offense; Tenn. Code Ann. § 39-13-102(1)(B); and

(c) acted intentionally and knowingly, the mens rea for the offense; Tenn. Code Ann. § 39-13-101(a)(2).

In this case, the State of Tennessee failed to prove this offense beyond a reasonable doubt.

The indictment returned by the Monroe County grand jury alleged that Aaron Smith and the appellant did "unlawfully, intentionally and knowingly by the use of a deadly weapon, to-wit: a gun, cause Derrick Jimmerson to reasonably fear imminent bodily injury." The indictment was subsequently amended. A line was drawn through "Derrick." The name of "Mary Helen" was written over the word "Derrick."

The State of Tennessee did not call a witness by the name of "Mary Helen Jimmerson." Derrick Jimmerson's sister, Mary Sue Jimmerson, testified as a prosecution witness. She identified herself as "Mary Sue Jimmerson." She arrived at the residence approximately fifteen minutes prior to the shooting. Derrick Jimmerson's mother is also named Mary. It is unknown if her middle name is Helen.

The record is devoid of evidence establishing the appellant committed the offense of aggravated assault against a person named Mary Helen Jimmerson. Consequently, the judgment in the aggravated assault prosecution must be reversed, and the prosecution dismissed. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978).

## II.

The appellant contends the trial court committed error of prejudicial dimensions by permitting the State of Tennessee to introduce evidence of (a) the appellant's sale of rock cocaine to Derrick Jimmerson, (b) the appellant's display of a weapon on March 16, 1995, in the parking lot of Jake's Place, and (c) the appellant's admission to Kim Murr that he had participated in a previous "driveby" shooting. He argues this evidence embraced proof of other crimes to establish the appellant's propensity to commit crimes. In the alternative, he argues the prejudicial effect of this evidence far outweighed its probative value. Tenn. R. Evid. 404.

### A.

The appellant concedes in his brief that the sale of the cocaine by the appellant "could establish a motive to intimidate Derreck [sic] Jimmerson." He argues the State of Tennessee "could have established a motive by introducing evidence that Mr. Jimmerson purchased [the] cocaine from [James "Stink" Bradley]." The appellant reasons the use of this evidence would have prevented the prejudice resulting from his participation in the sale. In short, the appellant wants to dictate to the State of Tennessee how to try its case. Moreover, the appellant overlooks this evidence was necessary to establish an element of the offense.

Before an accused can be convicted of coercing or intimidating a witness or potential witness, the State of Tennessee must prove beyond a reasonable doubt the victim was either a witness or potential witness. Tenn. Code Ann. § 39-16-507(a). Therefore, it was crucial for the state to establish Derrick Jimmerson was either a witness or a potential witness.

The State of Tennessee was required to introduce evidence the appellant and Bradley sold the cocaine to Jimmerson. This evidence established Jimmerson was a witness or potential witness. Jimmerson was alone when he purchased the cocaine.



While the sale was recorded on audio tape, the tape could not be introduced into evidence without Jimmerson identifying the tape and the voices on the tape. In short, Jimmerson was an essential witness -- the State of Tennessee could not establish its case against the appellant without Jimmerson's testimony.

The appellant fails to recognize "Stink" Bradley was indicted by a federal grand jury, not a Monroe County grand jury. The appellant was indicted by a Monroe County grand jury. It defies logic to argue the only evidence regarding the sale of cocaine should connect Bradley, not him, to the sale of the cocaine.

The trial court properly ruled this evidence was admissible.

## **B.**

The appellant next argues the trial court abused its discretion by permitting the State of Tennessee to establish the prior confrontation with Jimmerson and his participation in a prior "driveby" shooting. This Court is of the opinion the trial court did not abuse its discretion by ruling the State of Tennessee could introduce this evidence during the trial.

The appellant denied he participated in the shooting at the Jimmerson residence. He also denied he knew in advance Smith was going to fire his pistol at the residence and motor vehicle. In other words, the appellant was surprised when Smith drew his weapon and began firing at the residence. He presented Pam Wells, his girlfriend when the events in question occurred. She supported this defense. Wells testified Smith leaned across the backseat of the vehicle and fired through the window immediately next to the appellant.

This evidence was admissible to establish an absence of a mistake regarding the appellant's participation in the shooting incident at the Jimmerson residence. The prior confrontation was probative of a previous effort to intimidate Jimmerson due to his status as a witness. This is also true of the evidence pertaining to the appellant's prior participation in a "driveby" shooting.

---

JOE B. JONES, PRESIDING JUDGE

CONCUR:

---

PAUL G. SUMMERS, JUDGE

---

JOHN K. BYERS, SENIOR JUDGE