

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1998 SESSION

**FILED**

September 16, 1998

Cecil W. Crowson  
Appellate Court Clerk

STATE OF TENNESSEE, )  
 )  
 Appellee, )  
 )  
 VS. )  
 )  
 LARRY GENE UNDERHILL, )  
 )  
 Appellant. )

NO. 01C01-9707-CC-00308

HICKMAN COUNTY

HON. CORNELIA A. CLARK,  
JUDGE

(Aggravated Burglary, Aggravated  
Assault, Resisting Arrest)

FOR THE APPELLANT:

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

**AFFIRMED**

**LEE MOORE,**  
**SPECIAL JUDGE**

## **OPINION**

The defendant, Larry Gene Underhill, appeals as of right his convictions by a Hickman County jury for two (2) counts of aggravated assault and one (1) count each of aggravated burglary and resisting arrest. Pursuant to a sentencing agreement, the defendant received an effective sentence of ten (10) years. On appeal, he contends the evidence was insufficient to support his convictions, and that the trial court erred by failing to exclude a prior conviction for impeachment purposes. The judgment of the trial court is AFFIRMED.

## **FACTS**

The defendant was an acquaintance of the victims, Gary Cole and Carol Liehr, for several months. On the date in question, the defendant appeared at Cole's home uninvited. The victims testified the defendant had a beer in his hand and appeared to be intoxicated. The defendant made some "inappropriate" remarks, and Cole asked him to leave. The defendant became upset and left.

Liehr asked Cole to lock the doors as she was afraid the defendant would return. Shortly thereafter, the defendant reappeared with a shotgun. The defendant kicked in a door and entered the house. Cole, who had armed himself with a weapon, confronted the defendant. Liehr went into another room and called 9-1-1. The defendant aimed his weapon at Cole and told him he would not live through the night. Cole eventually lowered his weapon, yet the defendant refused to do the same. The defendant subsequently observed Liehr using the telephone. He pointed his weapon at her and told her he would kill her if she did not hang up the phone. The defendant then left the house and drove away.

Hickman County Sheriff's Deputy Darrell Jackson testified that he and Deputy Gary Turner responded to the call at Cole's residence. He stated that one of the doors to the house appeared to have been kicked open. The officers went to the defendant's house to await notification by the dispatch that warrants had been issued for the defendant's arrest. When the warrants were issued, the deputies knocked on the defendant's door and informed him that he was under arrest. The defendant refused to accompany the officers and stated he would fight them because they did not have the warrants in their possession. A struggle ensued, culminating in Deputy Jackson spraying the defendant with a chemical spray. Deputy Turner corroborated the testimony of Deputy Jackson.

The defense presented no proof at trial.

### **SUFFICIENCY OF THE EVIDENCE**

Where sufficiency of the evidence is challenged, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or crimes 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 (1979); State v. Abrams, 935 S.W.2d 399, 401 (Tenn. 1996). The weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury as the triers of fact. State v. Brewer, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996); State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984).

#### **A.**

The defendant was convicted of aggravated assault upon Cole and Liehr. These convictions required the jury to find the defendant intentionally or knowingly displayed a deadly weapon, causing the victims to reasonably fear

imminent bodily injury. Tenn. Code Ann. § 39-13-102. The jury heard the testimony of the victims that the defendant first pointed the shotgun at Cole and threatened to kill him, then pointed the weapon at Liehr and threatened to kill her as well.

The defendant was also convicted of aggravated burglary. This offense requires the jury find the defendant, without permission, entered Cole's home with the intention of committing an aggravated assault. Tenn. Code Ann. § 39-14-403. The jury heard the testimony of Cole and Liehr that the defendant kicked in a locked door to gain entry into Cole's house. The jury also heard the testimony of the deputies that the door appeared to have been kicked open.

The defendant asserts that he was wrongly convicted of the offenses above because he was unable to form the requisite intent due to voluntary intoxication. Voluntary intoxication itself is not a defense to these offenses, but evidence of intoxication may be introduced to negate a culpable mental state. Tenn. Code Ann. § 39-11-503(a). Here the trial court properly charged the jury as to the relevance of voluntary intoxication. Whether a defendant is too intoxicated to form the requisite mental state is a question for the jury. State v. Brooks, 909 S.W.2d 854, 859 (Tenn. Crim. App. 1995). The jury obviously concluded the defendant was not so intoxicated as to be unable to form the required mental state for these offenses. The actions of the defendant returning to Cole's residence with a shotgun, kicking open the door to gain entry, aiming the gun at the victims, and threatening to kill them justify the jury's finding.

This issue is without merit.

**B.**

The defendant was further convicted of intentionally preventing or

obstructing known law enforcement officers from effecting his arrest by using force against a law enforcement officer. Tenn. Code Ann. § 39-16-602. The deputies testified that the defendant refused to cooperate and had to be sprayed with a chemical agent after a physical altercation.

The defendant contends that there is insufficient evidence to find that the defendant employed force in resisting the officers. “Force” means compulsion by physical power or violence and is to be broadly construed. Tenn. Code Ann. § 39-11-106(a)(12). The officers testified that they were forced to “rassle” with the defendant and ultimately spray him with a chemical agent in order to effect the arrest. The evidence is sufficient to support the jury’s finding.

This issue is without merit.

### **IMPEACHMENT WITH PRIOR CONVICTIONS**

The defendant contends the trial court abused its discretion by ruling the state could use a prior federal bank robbery conviction for impeachment purposes if he decided to testify. The defendant asserts the prejudicial effect of this conviction with its connotation of violence outweighed any probative value.

When the state wishes to impeach a defendant with evidence of a prior conviction of a crime, it must comply with Tenn. R. Evid. 609(a)(3). This rule allows the defendant to obtain a ruling prior to testifying on the admissibility of the conviction and provides that the defendant need not actually testify at trial to later challenge the trial court’s ruling. However, the defendant must make an offer of proof as to the proposed trial testimony so that the appellate court can assess the impact of the trial court’s ruling. State v. Baxter, 938 S.W.2d 697, 703 (Tenn. Crim. App. 1996); see *generally* Cohen, Sheppard & Paine, Tennessee Law of Evidence, § 609.9 (3d ed. 1995).

The defendant failed to make an offer of proof as to his proposed testimony. We are, therefore, precluded from assessing any prejudice resulting from the trial court's ruling.

Further, bank robbery is a crime involving dishonesty. Prior crimes involving dishonesty are relevant to credibility. See Tenn. R. Evid. 609(a)(2). The mere fact that it also involves violence does not necessarily dictate its inadmissibility. See State v. Blanton, 926 S.W.2d 953, 960 (Tenn. Crim. App. 1996). We find no abuse of discretion in the trial court's authorizing this prior conviction for impeachment.<sup>1</sup>

This issue is without merit.

### **CONCLUSION**

After a careful review of the record, we find no reversible error. Accordingly, the judgment of the trial court is AFFIRMED.

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<sup>1</sup> We need not reach the issue of whether the defendant would have been required to establish in a jury-out hearing that he did not testify as a result of the unfavorable ruling. See State v. Abraham Galmore, C.C.A. No. 02C01-9607-CR-00230, Shelby County (Tenn. Crim. App. filed September 9, 1997, at Jackson).

**LEE MOORE, SPECIAL JUDGE**

**CONCUR:**

**JOE G. RILEY, JUDGE**

**CURWOOD WITT, JUDGE**