IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY SESSION, 1999

FILED

November 29, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	**)**	**C.C.A. NO.**
	)	M1998 00257
CCA R3 CD		
Appellee,	**)**	
	)	
	)	**WILLIAMSON COUNTY**
VS.	**)**	
	)	**HON. TIMOTHY L. EASTER**
ANDREW LAY,	**)**	**JUDGE**
	)	
Appellant.	**)**	**(Direct Appeal - D.U.I.)**

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

On June 9, 1997, the Williamson County Grand Jury indicted Appellant Andrew Lay for driving under the influence of an intoxicant ("DUI"), third offense. After a jury trial on September 15, 1998, Appellant was convicted of DUI, third offense. That same day, Appellant received a sentence of eleven months and twenty-nine days, with all but 150 days suspended. Appellant challenges both his conviction and his sentence, raising the following issues:

1) whether the trial court erred when it refused to suppress Appellant's pretrial statements to police;
2) whether the trial court erred when it allowed a witness to read portions of an arrest report to the jury;
3) whether the State properly established the chain of custody for the results of Appellant's blood test;
4) whether the evidence was sufficient to support Appellant's conviction;
5) whether the prosecutor's opening statement was improper;
6) whether the prosecutor's closing argument was improper;
7) whether the trial court imposed an excessive sentence; and
8) whether the trial court failed to exercise its role as thirteenth juror.

After a review of the record, we affirm the judgment of the trial court.

I. FACTS

Officer Danny Stubbs testified that he was working as a police officer for Franklin, Tennessee, on September 29, 1996. Stubbs testified that at approximately 2:00 a.m., he observed Appellant driving on Franklin Road at a speed that was fourteen miles per hour over the speed limit. Shortly thereafter, Stubbs stopped Appellant's vehicle and immediately noticed the odor of alcohol. Stubbs also observed that Appellant had slurred speech and "watery eyes." When Stubbs asked Appellant how much he had to drink, Appellant replied that he had consumed two beers.

Officer Stubbs testified that he administered three field sobriety tests to Appellant: the finger to nose, the one leg stand, and the walk and turn. On the finger to nose test, Appellant was only able to touch his nose with his finger once out of three attempts.

Officer Stubbs testified that Appellant's performance of the walk and turn test was unsatisfactory. However, Stubbs testified that in order to go into any greater detail, he would need to look at his arrest report. Stubbs then read a portion of the arrest report that described Appellant's performance on the walk and turn test. After reading the description, Stubbs testified that in his opinion, Appellant had failed the test. Stubbs then read a portion of his report that described Appellant's performance on the one leg stand test.

Officer Stubbs testified that after Appellant failed all three field sobriety tests, he concluded that Appellant was too intoxicated to drive. Stubbs then confronted Appellant with his suspicion, and Appellant admitted that he had consumed ten beers since 9:00 p.m. and had not eaten anything all day. Appellant also admitted to Stubbs that he had too much to drink to be operating a motor vehicle.

Officer Stubbs testified that after Appellant agreed to have a blood sample taken, he was transported to the hospital. Stubbs observed the taking of the blood sample and then put the blood sample and a toxicology request form into a box. Stubbs then sealed the box and subsequently logged it into evidence. Stubbs testified that he wrote Appellant's name on the tube that contained the blood sample and on the accompanying toxicology request form before he put the items in the box.

Officer Stubbs testified that he filled out his report about an hour after the field sobriety tests were administered. Stubbs testified that he compiled the report by transferring the information he had collected in his notes to the report. Stubbs also testified that the report was complete and accurate. Stubbs further testified that although he remembered that Appellant's performance on the one leg stand was unsatisfactory, he could not remember the details of the performance.

Officer Jeff Rowe of the Franklin Police Department testified that he observed Appellant shortly after he had taken the field sobriety tests on September 29, 1996. Rowe heard Appellant tell Stubbs that he had consumed nine beers and that he probably should not have been driving. Rowe testified that after Appellant was transported to the hospital, he drove Appellant's passenger to her home.

John Harrison, a toxicologist for the Tennessee Bureau of Investigation ("TBI"), testified that he performed an analysis of Appellant's blood sample and the test results indicated that at the time the sample was taken, Appellant had a blood alcohol level of .18%.

II. MOTION TO SUPPRESS

Appellant contends that the trial court erred when it denied his motion to suppress the statements that he made to Officer Stubbs. We conclude that Appellant has waived this issue.

Although the record contains Appellant's motion to suppress, the record does not contain the order that denied the motion. More importantly, although Appellant refers in his brief to testimony that was given during the suppression hearing, the record does not contain the videotape of the hearing nor does it contain a transcript of the videotape. Thus, it is not possible for us to review this issue. It is the duty of the party seeking appellate review to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues raised by the party. State v. Ballard, 855 S.W.2d 557, 560–61 (Tenn. 1993); State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988). When the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, this Court is precluded from considering the issue. State v. Matthews, 805 S.W.2d 776, 784 (Tenn. Crim. App. 1990). Therefore, this issue is waived.

III. READING OF THE REPORT

Appellant contends that the trial court erred when it allowed Officer Stubbs to read portions of his arrest report to the jury. We agree that the trial court did not follow the proper procedures to admit this evidence but conclude that this error was harmless.

Under Rule 803(5) of the Tennessee Rules of Evidence:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Tenn. R. Evid. 803(5). In order to utilize Rule 803(5)'s recorded recollection exception to the rule prohibiting the admission of hearsay testimony, a party must (1) provide a memorandum or record; (2) about a matter that the witness once had knowledge of; (3) establish that the witness now has insufficient recollection to testify fully and accurately; (4) that the statement was made or adopted by the witness; (5) while fresh in the witness' memory, and; (6) that the record accurately reflects the witness' knowledge. See State v. Mathis, 969 S.W.2d 418, 421–22 (Tenn. Crim. App.1997).

In this case, the trial court did not require the State to show that Rule 803(5)'s requirements were satisfied before it allowed Officer Stubbs to read the portions of his arrest report that described Appellant's performance on the walk and turn and the one leg stand tests. However, we conclude that this was harmless error because the record clearly shows that the requirements were satisfied. First, the report was a memorandum that described Appellant's performance of the field sobriety tests. Second, it is obvious that Stubbs once had a memory of Appellant's performance on the field sobriety tests since he was the one who administered the tests and observed Appellant's performance. Third, Stubbs clearly testified that he was unable to describe Appellant's performance on the walk and turn test in any detail without looking at his report. Similarly, Stubbs testified that although he remembered that Appellant's performance of the one leg stand test had been unsatisfactory, he could not remember the details of the performance. Fourth, Stubbs clearly testified that he had prepared the arrest report himself by transferring the descriptions of how Appellant performed on the tests from his notes to the report. Fifth, Stubbs stated that he filled out his report about an hour after the field sobriety tests were administered. Sixth, Stubbs testified that the report was complete and accurate. Thus, it is clear that the requirements of Rule 803(5) were satisfied. Therefore, although the trial court acted prematurely when it allowed Stubbs to read portions of the report before the State established that Rule 803(5)'s requirements were satisfied, the procedural error was harmless under the circumstances. See id. (holding that trial court's premature action of

allowing the reading of the witness' recorded statement was harmless because the record showed that the requirements of Rule 803(5) were satisfied). This issue has no merit.

IV. CHAIN OF CUSTODY

Appellant contends that the results of the blood test conducted by the TBI were inadmissible because the State failed to establish a chain of custody for the evidence. We must disagree.

Before tangible evidence may be introduced, the party offering the evidence must either call a witness who is able to identify the evidence or must establish an unbroken chain of custody. State v. Holloman, 835 S.W.2d 42, 46 (Tenn. Crim. App. 1992). "However, the failure to call all of the witnesses who handled the evidence does not necessarily preclude its admission into evidence." State v. Holbrooks, 983 S.W.2d 697, 701 (Tenn. Crim. App. 1998). Indeed, "[t]he identity of tangible evidence need not be proven beyond all possibility of doubt, and all possibility of tampering need not be excluded." Id. Rather, "[i]t is sufficient if the facts establish a reasonable assurance of the identity of the evidence." State v. Woods, 806 S.W.2d 205, 212 (Tenn. Crim. App. 1990). "Whether the required chain of custody has been sufficiently established to justify the admission of evidence is a matter committed to the sound discretion of the trial court, and the court's determination will not be overturned in the absence of a clearly mistaken exercise of that discretion." Holloman, 835 S.W.2d at 46.

In this case, Officer Stubbs testified that he personally observed medical personnel take the blood sample from Appellant. Stubbs also testified that he then took the tube that contained the blood sample, wrote Appellant's name on it, placed it in a box with a toxicology request form that also had Appellant's name on it, and sealed the box. Stubbs

testified that he subsequently logged the box containing the blood sample and the request form into evidence.

Tony Maples testified that he was a former police officer who maintained the evidence room of the Franklin Police Department during September and October of 1996. Maples testified that according to police department procedure, a blood sample would not be accepted unless it was sealed and once it was submitted the seal would not be broken. Maples also testified that this procedure was followed in this case. Maples testified that he received the blood sample in this case on September 30 and transported the blood sample to the TBI lab on October 10.

The T.B.I. toxicologist, John Harrison, testified that the blood sample in this case was brought to the TBI lab by Maples on October 10, 1996, and was given to evidence technician Pam Houston. Harrison testified that he took possession of the blood sample and request form from Houston on October 14, 1996. Harrison also testified that Appellant's blood sample had Appellant's name written on the tube and was in a sealed box along with a request for analysis form that also had Appellant's name on it. Harrison further testified that he checked the unique laboratory number that was assigned to the blood sample and request form.

Appellant first complains that a good chain of custody was not established because evidence technician Houston did not testify. However, the testimony of Maples and Harrison about when the evidence was taken to the T.B.I. lab and the procedures followed there was sufficient to establish Houston's link in the chain. See id. (Holding that unavailable witness' link in chain of custody sufficiently established through testimony of other witnesses.) Second, the appellant complains the evidence may have been the subject of tampering. There is, however, absolutely nothing in this record to suggest that this was the case.

In summary, we conclude that the trial court properly exercised its discretion in determining that a sufficient chain of custody had been established to warrant the admission into evidence the results of the appellant's blood-alcohol test.

V. SUFFICIENCY OF THE EVIDENCE

Appellant contends that the evidence was insufficient to support his conviction. We disagree.

When an appellant challenges the sufficiency of the evidence, this Court is obliged to review that challenge according to certain well-settled principles. A verdict of guilty by the jury, approved by the trial judge, accredits the testimony of the State's witnesses and resolves all conflicts in the testimony in favor of the State. State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994). Although an accused is originally cloaked with a presumption of innocence, a jury verdict removes this presumption and replaces it with one of guilt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with Appellant to demonstrate the insufficiency of the convicting evidence. Id. On appeal, "the [S]tate is entitled to the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." Id. Where the sufficiency of the evidence is contested on appeal, the relevant question for the reviewing court is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). In conducting our evaluation of the convicting evidence, this Court is precluded from reweighing or reconsidering the evidence. State v. Morgan, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996). Moreover, this Court may not substitute its own inferences "for those drawn by the trier of fact from circumstantial evidence." State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Finally, Rule 13(e) of the Tennessee Rules of Appellate Procedure provides, "findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact beyond a reasonable doubt."

In order to establish that Appellant was guilty of the offense that he was charged with committing, the State had to prove beyond a reasonable doubt that Appellant drove a vehicle on a public road while he was under the influence of an intoxicant. See Tenn. Code Ann. § 55-10-401(a)(1) (1998). We conclude that when the evidence in this case is

viewed in the light most favorable to the State, as it must be, the evidence was clearly sufficient to support Appellant's conviction.[1]

Officer Stubbs testified that when he stopped Appellant for speeding, he smelled the odor of alcohol and observed that Appellant had slurred speech and watery eyes. Stubbs also testified that Appellant failed all three field sobriety tests that were administered to him because he was unable to touch his nose with his finger, he was unable to walk in a straight line, and he was unable to stand on one leg for the prescribed period. Stubbs further testified that Appellant eventually admitted that he had consumed ten beers on an empty stomach and that he had too much to drink to be operating a motor vehicle. Officer Rowe similarly testified that he heard Appellant state that he had consumed nine beers and admit that he probably should not have been driving. Further, the TBI lab report indicated that Appellant had a blood alcohol level of .18% shortly after he was arrested. This evidence was clearly sufficient for a rational jury to conclude beyond a reasonable doubt that Appellant had driven a vehicle on a public road while he was under the influence of alcohol.

Appellant essentially contends that the evidence was insufficient because Officer Stubbs was simply not believable. At the same time, however, Appellant contends that the fact that he was not intoxicated was proven by Stubbs' testimony that, besides the fact that he was speeding, Appellant's driving appeared to be safe. However, "[t]he credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the evidence are matters entrusted exclusively to the jury as the triers of fact." State v. Cribbs, 967 S.W.2d 773, 793 (Tenn. 1998). The jury obviously found that Stubbs was credible and that Appellant was under the influence of an intoxicant and his driving was thereby impaired, even though Stubbs only saw Appellant commit one traffic violation during the time that he followed him. This issue has no merit.

VI. PROSECUTOR'S OPENING STATEMENT

[1]We note that Appellant has only challenged the sufficiency of the evidence as it relates to a conviction for DUI and has not specifically challenged the sufficiency of the evidence that enhanced his conviction from DUI to DUI, third offense.

Appellant contends that he is entitled to a new trial because the prosecutor's opening statement was improper. We disagree.

During his opening statement, the prosecutor stated that the evidence would show that on the night of the offense, Appellant had consumed nine or ten beers and that Appellant had a blood alcohol level of .18%. The prosecutor then stated,

> Now ladies and gentlemen, I don't know exactly what the defense will bring up. I'm sure that they will try and attack the blood test. I understand that they have an expert which I believe is being paid $1,000.00 per day to be here. He will no doubt question the results of the test. How he will question them I do not know. Because, based on pretrial discovery, he has no reports—no results to introduce to you as evidence about the testing that he ran.

At this point, Appellant objected and requested a curative instruction on the ground that the prosecutor was not supposed to address the defense proof during the opening argument. The trial court overruled the objection on the basis that the prosecutor was merely stating what he believed that the evidence would show. The prosecutor then continued with his opening statement and said, "anyway, ladies and gentlemen, you will hear from that expert who will be paid $1,000.00 a day and who has no reports."

The test to be applied in reviewing a claim of prosecutorial misconduct is "whether the improper conduct could have affected the verdict to the prejudice of the defendant." Harrington v. State, 215 Tenn. 338, 340, 385 S.W.2d 758, 759 (1965); State v. Belser, 945 S.W.2d 776, 783 (Tenn. Crim. App. 1996). The factors to assist in that determination are set out in Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976), as adopted by the Tennessee Supreme Court in State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984): (1) the conduct complained of, viewed in light of the facts and circumstances of the case; (2) the curative measures undertaken by the Court and the prosecutor; (3) the intent of the prosecutor in making the improper statement; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case.

Assuming arguendo that the prosecutor's statements were improper, we conclude that any error was harmless.[2] First, the prosecutor's reference to the defense expert, viewed in context and in light of the facts and circumstances of the case, was not so inflammatory as to prejudice the jury against Appellant. Although the statements indicated that the defense expert would not be able to support an attack on the blood test results with any reports of his own, the statements did not directly challenge the credibility of the expert or insinuate that the expert had a motive to be untruthful. Second, although the trial court did not give any curative instructions in response to the prosecutor's statements, the trial court had already instructed the jury that what the attorneys say is not evidence and anything they say that is not supported by the evidence should be ignored. Third, when the prosecutor's statements are considered in context, it appears that the prosecutor's motive was simply to point out that the State had test results which indicated that Appellant's blood alcohol level had been over the presumptive limit and the defense had no tests results of its own. Fourth, the cumulative effect of any error in the prosecutor's opening statement and any other errors was not so great as to affect the verdict. Fifth, the State's proof of Appellant's guilt was overwhelming. Considering these factors, particularly the strength of the State's case, we conclude that the prosecutor's statements were not so inflammatory as to affect the verdict to Appellant's detriment. This issue has no merit.

VII. PROSECUTOR'S CLOSING ARGUMENT

Appellant contends that he is entitled to a new trial because the prosecutor's closing argument was improper. Again, we must disagree.

The record indicates that during the prosecutor's closing argument, he stated that "[Defense counsel] has been able to offer you no evidence whatsoever to rebut what the

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[2] Initially, we note that Appellant's claim that he never intended to call an expert witness is not supported by the record. First, the record contains a motion filed August 22, 1997, in which Appellant asked for a continuance because "Defendant's expert witness, Dr. James Woodford, is unable to appear for trial on September 30, 1997, due to a previous commitment in Atlanta, Georgia." In addition, when the trial court conducted a hearing on the day of trial to determine whether the testimony of the defense expert should be limited in regard to certain matters, defense counsel argued the merits of the issue and never gave any indication that the expert would not be called to testify. Thus, the prosecutor clearly had every reason to suspect that the defense expert would testify at trial.

State has put forth." Appellant contends that this statement was improper because it was a comment on his invocation of his Fifth Amendment right not to testify.

The record indicates that Appellant did not object when the prosecutor made this statement. By failing to make a contemporaneous objection, Appellant waived this issue. See State v. Farmer, 927 S.W.2d 582, 591 (Tenn. Crim. App. 1995); Tenn. R. App. P. 36(a). Appellant attempts to circumvent his failure to make a contemporaneous objection by arguing that the prosecutor's statement was plain error under Rule 52(b) of the Tennessee Rules of Criminal Procedure, which states:

> An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice.

Tenn. R. Crim. P. 52(b).

In State v. Adkisson, this Court stated that the language of Rule 52(b) "makes it clear that appellate courts are to use it 'sparingly' in recognizing errors that have not been raised by the parties . . . The plain error rule is not a run-of-the-mill remedy." 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994). This Court then set out five factors to determine whether an error is plain error:

> a) the record must clearly establish what occurred in the trial court;
> b) a clear and unequivocal rule of law must have been breached;
> c) a substantial right of the accused must have been adversely affected;
> d) the accused did not waive the issue for tactical reasons; and
> e) consideration of the error is "necessary to do substantial justice."

Id. at 641–42. The prosecutor's statement during closing argument does not satisfy this test. The record establishes what happened in the trial court, and it is doubtful that Appellant's failure to make a contemporaneous objection was a tactical ploy, but none of the other factors is applicable. No unequivocal rule of law was breached nor was a substantial right of Appellant adversely affected by the prosecutor's comment. Contrary to Appellant's assertions, the statement does not make any reference to Appellant's decision not to testify. As previously stated by this Court, mere argument by the State that its proof is unrefuted or uncontradicted is generally not an improper comment upon a

defendant's failure to testify. State v. Rice, 638 S.W.2d 424, 427 (Tenn. Crim. App. 1982); see also State v. Copeland, 983 S.W.2d 703, 709 (Tenn. Crim. App. 1998) (noting that the prosecutor may properly comment on the fact that the proof is uncontradicted). Moreover, even if the prosecutor's comment could be considered as some vague reference to Appellant's failure to testify, the trial court clearly instructed the jury that:

> The defendant has not taken the stand to testify as a witness, but you shall place no significance on this fact. The defendant is presumed innocent and the burden is on the State to prove his guilt beyond a reasonable doubt. He is not required to take the stand in his own behalf and his failure to do so cannot be considered for any purpose against him, nor can any inference be drawn from such fact.

Finally, it is clear that consideration of this alleged error is not necessary to do substantial justice. Thus, this issue has no merit.

VIII. LENGTH OF SENTENCE

Appellant contends that the trial court imposed an excessive sentence when it ordered him to serve 150 days of his sentence in jail. We disagree.

This Court's review of the sentence imposed by the trial court is de novo with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d) (1997). This presumption is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The burden is upon the appealing party to show that the sentence is improper. Tenn. Code Ann. § 40-35-401(d) (1997) (Sentencing Commission Comments). Ordinarily, a trial court is required to make specific findings on the record with regard to sentencing determinations. See Tenn. Code Ann. §§ 40-35-209(c), 40-35-210(f) (1997 & Supp. 1998). However, with regard to misdemeanor sentencing, the Tennessee Supreme Court has stated that review of misdemeanor sentencing is de novo with a presumption of correctness even if the trial court did not make specific findings of fact on the record because "a trial court need only consider the principles of sentencing and enhancement and mitigating factors in order to comply with the legislative mandates of the misdemeanor sentencing statute." State v. Troutman, 979 S.W.2d 271, 274 (Tenn. 1998).

Misdemeanor sentencing is controlled by Tennessee Code Annotated section 40-35-302, which provides that the trial court shall impose a specific sentence consistent with the purposes and principles of the 1989 Criminal Sentencing Reform Act. See State v. Palmer, 902 S.W.2d 391, 392 (Tenn. 1995). A defendant convicted of a misdemeanor, unlike a defendant convicted of a felony, is not entitled to a presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). Misdemeanor sentences do not contain ranges of punishments, and a misdemeanor defendant may be sentenced to the maximum term provided for the offense as long as the sentence imposed is consistent with the purposes of the sentencing act. Palmer, 902 S.W.2d at 393.

In this case, Appellant was convicted of third offense DUI, which is a Class A misdemeanor. See Tenn. Code Ann. § 55-10-403(m) (1998). Our legislature has provided that a defendant convicted of third offense DUI "shall be confined . . . for not less than one hundred twenty (120) days nor more than eleven (11) months and twenty-nine (29) days." Tenn. Code Ann. § 55-10-403(a)(1) (1998). Furthermore, "all persons sentenced under subsection (a) shall, in addition to the service of at least the minimum sentence, be required to serve the difference between the time actually served and the maximum sentence on probation." Tenn. Code Ann. § 55-10-403(c) (1998). Thus, the length of a defendant's sentence for third offense DUI is eleven months, twenty nine days. See generally, Troutman, 979 S.W.2d at 273. In effect, the DUI statute mandates a maximum sentence for a DUI conviction with the only function of the trial court being to determine what period above the minimum period of incarceration established by statute, if any, is to be served in confinement. See id.

In determining that Appellant should serve 150 days of his sentence in jail, the trial court emphasized the fact that in addition to having a blood alcohol level of .18% in this case, Appellant had a blood alcohol level of .21% in one of the previous cases that resulted in a DUI conviction. The trial court noted that in both cases, Appellant had driven a vehicle when his blood alcohol level was well above the .10% presumptive limit.[3]

[3]Tennessee Code Annotated section 55-10-408 provides, in relevant part, that evidence that a defendant had a blood alcohol level of .10% or more creates a presumption that the defendant's ability to drive was sufficiently impaired to constitute the offense of DUI. Tenn. Code Ann. § 55-10-408(a) (1998).

We conclude that, upon de novo review in observance of the less stringent standards attached to misdemeanor sentencing, the trial court's order that Appellant serve 150 days of his sentence in jail was neither arbitrary nor an abuse of discretion. As noted by the trial court, Appellant had a blood alcohol level that was well above the presumptive limit when he committed the offense in this case. More importantly, the record indicates that Appellant committed the offense in this case by driving even when he recognized that he was too intoxicated to do so safely. In light of Appellant's own admissions, it is clear that despite his recognition that he should not be driving, Appellant ignored the danger he posed to others and elected to drive. In addition, Appellant's decision to drive when he recognized that he was intoxicated showed no regard for the safety of his passenger. Under these circumstances, we conclude that the sentence imposed by the trial court is entirely appropriate. This issue has no merit.

IX. THIRTEENTH JUROR

Appellant contends that the trial court failed to exercise its role as thirteenth juror. We disagree.

Rule 33(f) of the Tennessee Rules of Criminal Procedure provides that "[t]he trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence." This portion of the Rule is the modern equivalent to the "thirteenth juror rule," whereby the trial court must weigh the evidence and grant a new trial if the evidence preponderates against the weight of the verdict. State v. Blanton, 926 S.W.2d 953, 958 (Tenn. Crim. App. 1996). The Tennessee Supreme Court has held that "Rule 33(f) imposes upon a trial judge the mandatory duty to serve as the thirteenth juror in every criminal case." State v. Carter, 896 S.W.2d 119, 122 (Tenn. 1995). Moreover, the approval by the trial judge of the jury's verdict as the thirteenth juror is a necessary prerequisite to the imposition of a valid judgment. Id. However, "Rule 33(f) does not require the trial judge to make an explicit statement on the record." Id. "Instead, when the

trial judge simply overrules a motion for new trial, an appellate court may presume that the trial judge has served as the thirteenth juror and approved the jury's verdict." Id.

In this case, the trial court stated at the conclusion of the hearing on Appellant's motion for a new trial that it had reviewed the motion and was "convinced that there was sufficient proof for the jury to return the verdict that it returned." Because the trial court denied the motion for a new trial, we presume that it exercised its role as the thirteenth juror. See id. Appellant has offered nothing that convinces us that the presumption does not apply in this case. This issue has no merit.

Accordingly, the judgment of the trial court is AFFIRMED.

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JERRY L. SMITH, JUDGE

CONCUR:

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THOMAS T. WOODALL, JUDGE

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NORMA MCGEE OGLE, JUDGE