

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs May 6, 2014

STATE OF TENNESSEE v. ALLEN DALE SPICER

**Appeal from the Circuit Court for Fayette County
No. 12-CR-119 J. Weber McCraw, Judge**

No. W2013-01446-CCA-R3-CD - Filed October 2, 2014

The defendant, Allen Dale Spicer, was convicted by a Fayette County Circuit Court jury of aggravated assault with serious bodily injury, a Class C felony. See Tenn. Code Ann. § 39-13-102(a)(1)(A) (2010). The trial court sentenced the defendant as a Range II, multiple offender to ten years' confinement and ordered the sentence be served consecutively to the sentence in another case. On appeal, he contends that (1) the evidence is insufficient to support his conviction and (2) his sentence is excessive. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, J., joined. JOSEPH M. TIPTON, P.J., Not Participating.

David Stowers, Bolivar, Tennessee, and Coleman Garrett, Memphis, Tennessee (at trial); Andrea Sipes Lester, Jackson, Tennessee (on appeal), for the appellant, Allen Dale Spicer.

Robert E. Cooper, Jr., Attorney General and Reporter; Caitlin Smith, Assistant Attorney General; Michael Dunavant, District Attorney General; and Mark Davidson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

This case relates to an altercation involving Gary Kee, Paul Logan, and the defendant. At the trial, Fayette County Sheriff's Deputy Dale Phillips testified that he responded to an assault call on June 23, 2012. He went to the local hospital to speak to the victim, Kee, who was unable to be interviewed because he was "seriously injured" and undergoing a CT scan.

He and other deputies then went to the scene of the altercation, the defendant's house. Blood was in the carport, on the rear patio, and throughout the house. Beer cans were in the kitchen area. He said the defendant was detained by other deputies before he arrived. After he walked through the house, Deputy Phillips got the defendant out of the police car and talked to him. The defendant appeared to be intoxicated, and he took photographs of the defendant, which showed bloodstains on his right pants leg. The defendant did not appear to have any injuries to his face but had a swollen right hand.

Deputy Phillips testified that he visited the victim at the hospital the next day. The victim was unconscious, nonresponsive, and unable to communicate. His head was shaved, and a tube had been inserted on the side of his head. Deputy Phillips took photographs of the victim twenty-four hours after the assault, which were admitted as exhibits. The photographs showed the victim lying in a hospital bed with his eyes closed and tubes extended from his head and mouth. The photographs also showed blood in the victim's left ear and abrasions to his left foot.

Deputy Phillips testified that at the time of the trial, the victim was living at a nursing home. He said that he last saw the victim one week before the trial and that the victim was able to open his eyes and slightly move his neck. The victim was unable to communicate verbally but could blink his eyes, although Deputy Phillips did not think the victim recognized him as a police officer.

Deputy Phillips identified a photograph of the defendant's swollen right hand taken the day after the assault. He did not attempt to interview the defendant the night of the assault. He spoke to the defendant twenty-four hours later. The defendant told Deputy Phillips that he and the victim argued, that the victim slapped him, that the victim attempted to kiss him, and that he struck the victim three times, knocking out the victim. The defendant told the deputy that the assault occurred in the yard. The defendant mentioned an ongoing "incident" between the defendant, Mr. Logan, and the victim.

The defendant's handwritten statement was read to the jury. It stated:

I, Dale Spicer, was at home and Gary [Kee] and his girlfriend [Lisa] w[ere] there. Gary and Lisa w[ere] fighting the night before. My mom came over to my house and Gary was getting smart with her and then she left. Mike and Sherry w[ere] there. Gary and Lisa and I w[ere] in the house and I told Gary that he was gonna have to leave. He turned and slapped me in my face. Then we started fighting. I hit him 3 or 4 times. After that, Gary and Little Mike started fighting. Mike hit Gary and then kicked him in the head. After that, I helped Gary in the car and then they left.

Deputy Phillips testified that the defendant referred to Mr. Logan as Mike or Little Mike. He agreed the defendant did not include his knocking out the victim in his written statement. He said the defendant mentioned that the victim offended the defendant's mother and that they had been drinking alcohol. He said the victim had been staying at the defendant's house for a few days. He said the defendant only mentioned the victim's slapping the defendant, not hitting him. Regarding the defendant's swollen hand, the defendant told the deputy that his hand was swollen because he struck the victim. The defendant stated that the fight began in the living room, that he struck the victim, that the victim landed on the outside patio, that the victim was knocked unconscious, and that the victim did not have an opportunity to hit him. The defendant never claimed to have sustained injuries from the fight and bragged about the victim's inability to hit him.

Deputy Phillips testified that the defendant was about fifty pounds heavier and five to six inches taller than the victim. He said blood was found near the fireplace in the living room, on the living room and entryway walls, on the hallway carpet, and in the rear bedroom. He saw beer cans near the fire pit in the backyard. He identified multiple photographs of the blood and beer cans, which were received as exhibits. He said Mr. Logan and his wife, Sherry, were not at the scene when he arrived.

On cross-examination, Deputy Phillips testified that the defendant went into custody without incident and that Mr. Logan was captured after fleeing a residence. He agreed Mr. Logan never called the police, although Mr. Logan claimed he attempted to protect the victim.

Deputy Phillips testified that the defendant's mother gave him Mr. Logan's shirt and hat and that the clothes did not contain blood, although blood was on the defendant's jeans. He spoke to Leona Duncan, the victim's girlfriend, at the emergency room, although he knew her as Lisa Duncan. He denied knowing her as Lisa Powell and taking photographs of her at the hospital. He said Mr. and Mrs. Logan each took photographs on their cell phones related to this case. He said he obtained their cell phones and found photographs of the victim.

Deputy Phillips testified that he had been to the defendant's house one month previously because the defendant had reported a theft. He said the blood he found on the night of the assault appeared to be fresh, although he did not take samples from the garage. He denied "blocking off" the crime scene, saying it was not needed because the scene was not open to the public and other people were not present.

Deputy Phillips testified that he also suspected Mr. Logan of assaulting the victim based on information he received from Ms. Duncan. He said the police were unable to find Mr. Logan on the night of the assault. He said only the defendant and two “younger folks” were at the defendant’s house when he arrived. The younger folks were looking for the defendant and were permitted to leave because they were not involved in the present case. Mr. Logan was arrested about one week after the assault.

Deputy Phillips did not recall if the defendant told him the victim attempted to kiss him but agreed the defendant’s statement did not mention it. He agreed the defendant did not say he kicked the victim. He said that the assault occurred between 3:00 and 5:00 p.m. and that he was dispatched to the hospital at 8:42 p.m. He said the hospital was about seven or eight miles from the defendant’s house. He denied finding blood along the defendant’s long driveway.

Deputy Phillips testified that he took a photograph of Ms. Duncan’s left leg the day after the assault when she gave her statement to the police. He agreed the photograph showed bruises on her leg.

On redirect examination, Deputy Phillips testified that Mr. Logan was charged with aggravated assault and that the arrest was based on the defendant’s statement and other evidence gathered during his investigation. He agreed Mr. Logan pleaded guilty to aggravated assault and was serving his sentence. He said the blood found at the scene was not analyzed because it appeared to be fresh. He did not believe the blood came from the defendant or Mr. Logan because they did not have injuries that would have caused bleeding. He said that Ms. Duncan was not considered a suspect in the assault and that her bruises were old. He agreed he did not know what clothes Mr. Logan wore at the time of the assault.

Leona Duncan testified that, at the time of the assault, she and the victim were living together at the defendant’s house. She said that on the night before the assault, she and the victim argued but resolved the dispute and went to sleep. She said that the next morning, she and the victim ran errands and returned to the defendant’s house. She said that the victim received a telephone call about a job painting bridges. She said the victim lived with the defendant because he had been in trouble with the law and was not permitted to live with his father.

Ms. Duncan testified that between 10:00 and 11:30 a.m., Mr. Logan arrived at the defendant’s house with a bottle of whiskey. She told the victim she was going to leave if he started drinking. She said that the victim promised he would not drink the whiskey and that she took a nap. She said the defendant dragged her out of bed around 3:00 p.m. and told her, “If you want to see your man alive, you better come . . . out here.” She saw the victim lying

on the ground outside, unconscious and covered in blood. She said that she screamed and asked the defendant and Mr. Logan what they had done and that they “were laughing and carrying on.” She lifted the victim, who awoke enough to help her get him upright. She placed the victim in the swing and cleaned his face. The victim asked her to take him to his father’s house. She gathered their belongings, placed them in the car, and when she returned to the victim, the defendant was standing over the victim and hitting him. She said she screamed for the defendant to stop. She said the defendant stopped hitting him and laughed. She said that she entered the house to get additional belongings and that when she returned the defendant was standing over the victim and hitting him again. She attempted to grab the victim, but the defendant grabbed her and said, “If you don’t leave here, I’m going to kill you, too.” She said she ran to her car and left without the victim. She denied the victim was conscious when she left.

Ms. Duncan testified that she called Lisa Kelley, who had been at the defendant’s house earlier. After she talked to Ms. Kelley, she returned to the defendant’s house and threatened to call the police, if “they” did not allow her to get the victim and leave. She said that the victim was inside the house when she arrived and that Mrs. Logan was there. The defendant told her, “Well, I’ll show you how to drag a dead deer,” and grabbed the victim’s feet and dragged him out of the house. She said the victim’s head hit the exterior concrete steps as the defendant dragged him. She said the defendant stated, “I’ll get him to come to,” and poured water on the victim, who remained unconscious. She said the defendant claimed he was going to drown the victim. She said Mr. and Mrs. Logan helped her place the victim in her car.

Ms. Duncan testified that the victim woke after they left. She told the victim to squeeze her hand if he could hear her, and the victim squeezed her hand. The victim could speak slightly, and he told her to drive to his mother’s house, but his mother’s door was locked and they left. She said the victim continued to go in and out of consciousness and told her to drive him to Kenneth Grooms’s house. She said that they could not stay at Mr. Grooms’s house and that she drove to the hospital, although the victim did not want to go to the hospital because he had an outstanding violation of probation warrant. She said the victim was nonresponsive when they arrived at the hospital.

Ms. Duncan testified that the defendant’s hands were bloody from hitting the victim. She agreed she, the victim, and the defendant drank alcohol that day. She said that she previously obtained a restraining order against the victim for domestic-related reasons and that at the time of the assault, the order was active. She feared the victim would have been arrested for violating the order if she told the police she was with him. She agreed she initially did not tell the police that she was with the victim on the night of the attack but said she contacted the police and told them the truth.

Ms. Duncan testified that she did not see Mr. Logan hit the victim but that he laughed at the victim and shoved the victim with his boot once. She identified photographs of the victim's injuries.

Ms. Duncan testified that she last saw the victim on December 24, 2012, and that a tear ran down the victim's face when he saw her. She said the victim could not talk but was able to squeeze her hand to communicate. She said that she worked as a nurse in the Army and that she thought the victim only had a concussion after checking his vital signs.

On cross-examination, Ms. Duncan testified that her nickname was "Lisa" and that Powell was her maiden name. The defendant and his mother knew her maiden name was Powell. She admitted she had been previously convicted of thirty-five counts of passing worthless checks and said she "took that charge" for her brother and sister-in-law. She said that her brother took her checkbook and wrote checks illegally and that she "took the charges" because her brother had previous convictions. She also admitted she had a prior conviction for theft of property valued at more than \$1000 but less than \$10,000.

Ms. Duncan testified that she no longer saw the victim because the victim's parents did not want her around the victim. She said she was interviewed three times by the police. She recalled Deputy Phillips' taking photographs of her leg. She identified a photograph of a bruise caused by the defendant's grabbing her on the day of the assault. She said the defendant grabbed her by her hair.

Ms. Duncan said that she spoke to Ms. Logan about testifying at the trial but did not discuss her testimony. She agreed Mr. Logan kicked the victim once but denied Ms. Logan asked her to "lessen Mr. Logan's role" and to change the substance of her testimony. She agreed she drank alcohol that day but disagreed she was not supposed to drink when taking her lupus medication. She denied arguing with the victim on the day of the assault or not knowing what happened that day. She recalled seeing Donna Stokes at the defendant's house but did not recall when. She did not see Mr. Logan take the victim's photograph.

Sherry Logan testified that Mr. Logan was her husband and that Mr. Logan left their house to go to the defendant's house sometime the morning of the assault. She said that she went to sleep after he left, that she woke up sometime that afternoon, and that she had missed a telephone call from Mr. Logan at 5:00 p.m. She said Mr. Logan wanted her to pick him up at the defendant's house, and she left to go get him. When she arrived, the defendant motioned for her. She entered the house and saw Ms. Duncan, who was upset and asked for help to get the victim to the car. She and Ms. Duncan attempted to carry the victim to the car, but the defendant pushed them away, picked up the victim's feet, and dragged him. She said the victim's head hit the concrete steps. She screamed and yelled for the defendant to

stop. She said the defendant stopped and poured cold water on the victim. She told Ms. Duncan to get the car, and when she was gone, the defendant pulled the victim to the grass. She said Mr. Logan helped her and Ms. Duncan place the victim on his side in the car to prevent his choking. She and Mr. Logan left after Ms. Duncan and the victim left.

Ms. Logan testified that the victim was nonresponsive and not moving when she arrived. She identified a photograph she took of the victim and said she wanted to show the defendant the next day what he had done. She said she was unsure if the defendant would remember or admit to hitting the victim. She said everyone but her had been drinking. Mr. Logan and the defendant were intoxicated, but she was unsure if Ms. Duncan was intoxicated or upset from what was happening. She noted Ms. Duncan asked for a beer before leaving and said she might have wanted it to calm her nerves.

Ms. Logan testified that although she asked Mr. Logan what happened, she told him “never mind” because she did not want to know. Mr. Logan, though, told her that every time the victim attempted to get up, the defendant hit him and that Mr. Logan told the victim to stay down so the defendant would not hit him. She saw the defendant’s hand was bloody, swollen, and had a few cuts. She said that Mr. Logan had injuries to his hands but that the injuries were inflicted before the assault.

Ms. Logan testified that she and Ms. Duncan talked about Ms. Duncan’s talking to Mr. Logan’s attorney and helping his defense because Ms. Duncan knew Mr. Logan did not injure the victim. She denied talking to her about the substance of her testimony.

On cross-examination, Ms. Logan testified that she had not been drinking on the day of the assault. She denied calling the police. She said Mr. Logan did not change clothes when they arrived home because he was too drunk. She said Mr. Logan had been at the defendant’s house all day. She said she talked to the police around 3:00 a.m. after the assault and provided Mr. Logan’s attorney additional information afterward. She said he told her that he would give the information to the police.

Ms. Logan testified that she told the police Mr. Logan was at home asleep at the time she gave her statement. She denied the police wanted to talk to Mr. Logan at that time. She said that when she woke, Mr. Logan was gone. She agreed she had spoken with Ms. Stokes but denied asking her for Mr. Logan’s clothes. She said she asked Ms. Stokes if she knew where Mr. Logan’s shirt and hat were because Mr. Logan was wearing neither item when she picked him up.

On redirect examination, Ms. Logan testified that she did not ask anyone to hide Mr. Logan’s clothes. She denied returning to the defendant’s house after the assault.

Paul Logan testified that he was in jail awaiting sentencing in connection with the present case and that he had not been promised anything in exchange for his testimony. He said he went to the defendant's home on June 23, 2012, around 10:00 a.m. When he arrived, the victim and his girlfriend were there, although he did not know them well. They drank beer and whiskey and talked on the back patio. He said the victim was in good health and was able to walk and talk. He said that they were having a good time but that "everybody got to arguing." He said that the victim and his girlfriend argued the previous day and that they started arguing again. The defendant told them to stop arguing or leave, and then the defendant and the victim started arguing and fighting. The defendant slapped and hit the victim. He said the defendant was "quite a big bigger" than the victim, who was unable to fight back.

Mr. Logan testified that the defendant struck the victim multiple times and knocked him down. The victim attempted to get up, but the defendant continued hitting him. Mr. Logan denied taking a photograph of the victim with his cell phone. He thought the defendant took the photograph. He identified a photograph of the victim lying in the defendant's backyard. He said the defendant inflicted the victim's injuries but admitted kicking the victim in the face when the victim was inside the house. When asked why he kicked the victim, he said he was drunk and had no reason for his actions.

Mr. Logan testified that he did not see any injuries to the defendant and denied that he saw the victim hit the defendant. He said that at one point, the victim walked inside the house and that the fight continued. He said that he told the defendant that he had hit the victim enough but that the defendant did not listen. The victim's girlfriend was sleeping when the fight occurred, but he thought the defendant woke her up. He said that the defendant dragged the victim out of the house and that he did not recall helping place the victim in the car. He thought the defendant threw the victim in the car. He left after the victim and his girlfriend left.

Mr. Logan testified that he learned the next day that the police were looking for him, that he left his house, and that he did not turn himself in to the police because he had "other charges." He said that although he started to run from the police, he stopped and walked toward the police officer who was chasing him. He agreed he pleaded guilty to aggravated assault.

On cross-examination, Mr. Logan testified that he was not sure when he would be sentenced but assumed after the defendant's trial. He denied that the outcome of the defendant's trial affected his sentence. He thought he spoke to the prosecutor, who requested that he testify at the trial. He denied he expected to be rewarded for his testimony.

Mr. Logan testified that his wife visited every weekend and that they did not talk about the case that much, although they discussed their testimony. He acknowledged that he and his wife went to a local bar the night before the assault and drank alcohol until the early morning hours. He said he called the defendant that night but denied asking the defendant to come to the bar to help him because he was involved in an altercation.

Mr. Logan testified that the fight started on the back patio, that the defendant struck the victim first, that the victim did not attempt to fight back, and that they continued to argue. They returned to the house and continued to argue. He said that when he entered the house, he saw the defendant hitting the victim in the ribs with his knee. He said the victim was on his knees at the time. He denied seeing the victim hit the defendant. He said that after he kicked the victim in the head, the victim fell to the floor but got back up. He said that the defendant continued to strike the victim and that the defendant ultimately dragged the unconscious victim outside.

On redirect examination, Mr. Logan testified that when he used the term “fight,” he meant that the victim was getting “beat up.” He said the defendant slapped him once “on the side” after the victim and his girlfriend left. He said the defendant slapped him because the defendant thought he had sympathy for the victim. He said he was afraid of the defendant.

Dr. William Eugene Burch testified that he was the medical director at NHC Nursing Home and that the victim was his patient. When the victim arrived at the hospital after the assault, he had multiple head traumas that caused bleeding and swelling to his brain. He said that the swelling caused pressure on the victim’s brain, that a portion of his skull was removed to relieve the pressure for a period of time, and that the portion of the skull was reinserted after the swelling subsided. He said the victim’s injuries were consistent with his head striking concrete multiple times. He denied that the injuries were consistent with falling down stairs and said that the head injuries were “high energy,” meaning the victim suffered a blow to the head or “something with force behind it.” He said that the victim suffered a “high mechanism injury” to his head and that he was struck with great force. The swelling and bruising around the victim’s eyes and the bleeding inside his ears were indicative of a base or skull fracture, and the injuries caused extreme physical pain. The victim also had abrasions to his chest, and the abrasions and injuries to his head were consistent with a beating.

Dr. Burch testified that the victim was in a permanent vegetative state, although his eyes were open. The victim did not respond, and although his eyes moved toward someone periodically, “no purposeful” eye movement existed. He denied the victim interacted in any fashion and said he received his nutrition through a feeding tube in his stomach. Dr. Burch

did not expect the victim's condition to change but said the victim would probably develop a fatal infection.

On cross-examination, Dr. Burch testified that the victim's injuries were consistent with being kicked and less consistent with his being dragged down stairs. He did not know if the victim was tested for narcotics or alcohol at the time of the assault or if any deformity to the victim's ribs existed. On redirect examination, he stated that the victim's injuries could not have been caused by a single kick.

Franklin Kee, the victim's father, testified that the victim was age thirty-two and in good health on the day of the assault. He said the victim came to his house that morning around 11:30, ate lunch, and left around 1:30 p.m. He said the victim told him about a new job. He said he had known the defendant since the defendant was a child. The defendant and the victim were friends at times. He said the victim told him that he was going to the defendant's house for a cookout and asked if he could have tomatoes from his garden. He gave the victim some tomatoes and said the victim left. The next time he saw the victim was at the hospital, but he never spoke to him again. He said the victim lived at a nursing home because he was "like a vegetable."

Tommy Copeland testified for the defense that the defendant previously lived with his neighbor. He said that on June 22, the defendant and the victim worked in front of his house on a flower bed for his wife. He said he paid the defendant for their work. He denied seeing what occurred on June 23, although he saw the defendant and the victim that day.

The defendant testified that he had known the victim his entire life and that they were friends "on and off" and argued sometimes. The victim had been at his house for about three or four days at the time of the assault. He hired the victim to help paint bridges in Memphis. He helped the victim find work because the victim was living at his house and running from Fayette County police.

The defendant testified that he had known Mr. Logan for about four years, that Mr. Logan worked for him previously, and that they were friends. He said they drank beer together. He said that Mr. Logan called him around 11:30 p.m. or midnight on the night before the assault, that Mr. Logan wanted him to come to a bar where Mr. Logan was "having problems" with Brandon Joyner, who stabbed Mr. Logan's aunt. Mr. Logan wanted him to "help . . . whoop" Mr. Joyner. He said he had been drinking and refused to leave home.

The defendant testified that the next day, Mr. Logan came to his house around 10:00 a.m. As he and Mr. Logan drank and talked, the victim and his girlfriend began arguing

again. He said that the victim and his girlfriend had argued the previous day and that he told them they had to stop arguing or leave his house. The victim's girlfriend attempted to leave, and the victim "jumped on the side of the car" to prevent her leaving. The victim hung onto the car while his girlfriend drove around and eventually let go. He said that the victim walked to where he and Mr. Logan were sitting, that he and Mr. Logan laughed at the victim, and that the victim slapped him.

The defendant testified that he and Mr. Logan were sitting on coolers on the back patio when the victim slapped him. He stood up and slapped the victim. He said that the victim ran toward him, that he hit the victim with his fist, and that the victim fell down. He said the victim got up a few minutes later and came toward him again while he and Mr. Logan were inside the house. He hit the victim once or twice, and the victim fell to the floor. He said the victim fell inside the house, was "pretty dazed," and was bleeding from his mouth and nose. He said they all had been drinking heavily. He said that the victim attempted to get up and that the victim and Mr. Logan began arguing. He said Mr. Logan stated, "You like whooping on women. Why don't you whoop me," and hit the victim several times with his hands. He said that the victim was able to get to his knees and that Mr. Logan kicked the victim in the head. He said the victim fell unconscious to the floor. He said he grabbed the victim by the foot and dragged him outside to prevent blood from getting on the carpet. He denied dragging the victim down steps but said there was a three-inch ledge. He said the victim's girlfriend was present when he dragged the victim outside.

The defendant testified that Ms. Logan took a photograph of the victim when he was lying on the floor inside the house. He said Ms. Logan arrived at the end of the fight. The victim's girlfriend pulled her car around, and they placed the victim in her car and told her to take him to the hospital. When asked who hit the victim the most, he said that he hit the victim three or four times and that Mr. Logan hit the victim three or four times and kicked him once. He denied intending to inflict permanent damage to the victim. He admitted having previous theft and burglary convictions.

On cross-examination, the defendant testified that he was previously convicted of conspiracy to commit aggravated burglary and that his theft conviction involved property valued over \$10,000. He agreed he could not deny the victim was assaulted and said he hit the victim, knocked him down, dragged him, and made him bleed. He agreed he told the police that the victim "never had a chance to hit" him because he knocked out the victim and that he knocked the victim onto the patio. He said the victim and Mr. Logan did not fight long. He denied knocking the victim unconscious inside the house.

The defendant testified that the victim weighed 168 pounds and that he weighed 215 pounds. He agreed that the victim only slapped him once and that his hand was swollen after

the assault. He said he dragged the victim about ten feet. He agreed the victim was healthy before the assault and that he was a “vegetable” after the assault.

Upon this evidence, the defendant was convicted of aggravated assault. The trial court sentenced him as a Range II, multiple offender to ten years’ confinement. This appeal followed.

ANALYSIS

I. Sufficiency of the Evidence

The defendant contends that the evidence is insufficient to support his conviction. He argues that although the record is unclear if the jury considered Mr. Logan as an accomplice, insufficient corroborating evidence independent from Mr. Logan’s testimony exists to support his conviction. He also argues that insufficient evidence exists to support his conviction regardless of whether the jury considered Mr. Logan as an accomplice. The State responds that the evidence is sufficient. We conclude that the jury could have inferred Mr. Logan was an accomplice but that the evidence is sufficient.

Our standard of review when the sufficiency of the evidence is questioned on appeal 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 beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We do not reweigh the evidence but presume that the trier of fact has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the State. See *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984); *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Questions about witness credibility are resolved by the jury. See *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997).

“A crime may be established by direct evidence, circumstantial evidence, or a combination of the two.” *State v. Sutton*, 166 S.W.3d 686, 691 (Tenn. 2005) (quoting *State v. Hall*, 976 S.W.2d 121, 140 (Tenn. 1998)). Circumstantial evidence alone may be sufficient to support a conviction. *State v. Richmond*, 7 S.W.3d 90, 91 (Tenn. Crim. App. 1999); *State v. Buttrey*, 756 S.W.2d 718, 721 (Tenn. Crim. App. 1988). The standard of proof is the same, whether the evidence is direct or circumstantial. *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011). Likewise, appellate review of the convicting evidence “‘is the same whether the conviction is based upon direct or circumstantial evidence.’” *Id.* (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

Relevant to this appeal, “[a] person commits aggravated assault who intentionally or knowingly commits an assault . . . and causes serious bodily injury to another[.]” Tenn. Code Ann. § 39-13-102(a)(1)(A) (2010). “A person commits assault who intentionally, knowingly or recklessly causes bodily injury to another.” Id. § 39-13-101(a)(1). Serious bodily injury is defined as bodily injury involving a substantial risk of death, protracted unconsciousness, extreme physical pain, protracted or obvious disfigurement, protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty.” Id. § 39-11-106(a)(34).

“An accomplice is defined as a person who knowingly, voluntarily and with common intent unites with the principal offender in the commission of the crime.” *State v. Anderson*, 985 S.W.2d 9, 16 (Tenn. Crim. App. 1997) (citing *State v. Perkinson*, 867 S.W.2d 1, 7 (Tenn. Crim. App. 1991)). Our supreme court has stated that “a conviction may not be based solely upon the uncorroborated testimony of an accomplice.” *State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 2001) (citing *State v. Bigbee*, 885 S.W.2d 797, 803 (Tenn. 1994) (citations omitted)); see *Sherrill v. State*, 321 S.W.2d 811, 814 (1959). This means

there must be some fact testified to, entirely independent of the accomplice’s testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant’s identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction, it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. It is not necessary that the corroboration extend to every part of the accomplice’s evidence.

Bigbee, 885 S.W.2d at 803 (quoting *State v. Gaylor*, 862 S.W.2d 546, 552 (Tenn. Crim. App. 1992) (citations omitted)); see *Shaw*, 37 S.W.3d at 903 (citations omitted). The jury determines “the degree of evidence necessary to corroborate the testimony of an accomplice, and it is sufficient ‘if there is some other evidence fairly tending to connect the defendant with the commission of the crime.’” *State v. Anderson*, 985 S.W.2d 9, 16 (Tenn. Crim. App. 1997) (quoting *Clapp v. State*, 30 S.W. 214, 217 (Tenn. 1895)).

The record reflects that although Mr. Logan kicked the victim in the head during the altercation, no direct evidence exists showing that Mr. Logan knowingly, voluntarily, and with common intent united with the defendant to assault the victim. See *Anderson*, 985 S.W.2d at 16. Mr. Logan testified that the defendant struck the victim multiple times, knocked down the victim, and knocked the victim unconscious. He said that when the victim

attempted to get up, the defendant continued to hit the victim. When asked why he kicked the victim, Mr. Logan said he was drunk and had no reason for his actions. The defendant, though, testified that after the victim attempted to get up, the victim and Mr. Logan began arguing. The defendant said Mr. Logan stated, "You like whooping on women. Why don't you whoop me," and hit the victim several times with his hands. The defendant said that the victim was able to get to his knees and that Mr. Logan kicked the victim in the head. We note that when Leona Duncan saw the victim, she screamed and asked the defendant and Mr. Logan, who "were laughing and carrying on," what they had done to the victim. The evidence shows that a common assault existed and that the jury could have inferred a similar intent. In any event, the State presented sufficient evidence independent of Mr. Logan's testimony.

In the light most favorable to the State, three witnesses testified regarding the defendant's conduct. Leona Duncan testified that after the defendant woke her and she saw the victim, she screamed and asked the defendant and Mr. Logan what they had done. She said they "were laughing and carrying on." She gathered their belongings and placed them in the car. When she returned to help the victim to the car, she saw the defendant standing over the victim and hitting him. She screamed for the defendant to stop, and the defendant stopped and laughed. She entered the house to get additional belongings and said the defendant was standing over and hitting the victim again when she returned. Ms. Duncan said the defendant told her, "Well, I'll show you how to drag a dead deer," grabbed the victim's feet, and dragged him out of the house. She said the victim's head hit the exterior concrete steps as the defendant dragged him. Ms. Duncan said the defendant's hands were bloody from hitting the victim.

Sherry Logan testified that when she arrived at the defendant's house, she saw Ms. Duncan who was upset and asked for help to get the victim to the car. As Ms. Logan and Ms. Duncan attempted to carry the victim to the car, the defendant pushed them away, picked up the victim's feet, and dragged him. She said the victim's head hit the concrete steps.

Mr. Logan testified that the victim and Ms. Duncan began arguing, that the defendant told them to stop arguing or leave, and that somehow the defendant and the victim started arguing. Mr. Logan saw the defendant slap and hit the victim, who was unable to fight back. He said the defendant struck the victim first. He saw the defendant strike the victim multiple times, knock down the victim, and knock the victim unconscious. He said the defendant continued to hit the victim when he attempted to get up and dragged the victim out of the house. He said he saw the defendant hitting the victim in the ribs with his knee when the victim was on his knees. We conclude that the evidence is sufficient and that the defendant is not entitled to relief on this basis.

II. Sentencing

The defendant contends that his sentence is excessive. He argues that the trial court improperly applied enhancement factor (2) regarding the defendant's leading role in the assault and that the court failed to consider his ongoing problems with alcohol as a contributing factor leading to the assault. The State responds that the trial court properly sentenced the defendant. We agree with the State.

At the sentencing hearing, the presentence report was received as an exhibit. The report shows previous convictions dating from 1992 to 2012 for violating the driver's license law, theft of property valued at \$500 or less, conspiracy to commit aggravated burglary, theft of property valued between \$10,000 and \$60,000, contempt of court, attempt to commit aggravated sexual battery, domestic violence, three speeding violations, reckless endangerment involving the use of a deadly weapon, violating the seat belt law, burglary, and vandalism. The report shows that the defendant was on probation at the time of the present offense.

The presentence report shows that the defendant had an eleventh-grade education. The report reflects that notes from his previous probation officer showed that the defendant had a problem with alcohol and was intoxicated during a home visit in November 2011. The defendant was unemployed at the time of his arrest but reported previous employment in the construction industry.

Franklin Kee, the victim's father, submitted a victim impact statement. He discussed the victim's injuries and vegetative state and said the victim was a cheerful person and a friend to everyone. He requested the defendant and Mr. Logan each receive a ten-year sentence without probation and parole.

Charlie Pardue testified that the defendant's mother lived in his neighborhood and that he had known him since the defendant was about ten years old. He said that he previously hired the defendant to perform odd jobs, that the defendant did excellent work, and that he had recommended the defendant to other people. He denied knowing the details of the present case but said he wanted the trial court to know that he supported the defendant.

On cross-examination, Mr. Pardue testified that he heard the defendant was in a fight and had a temper but that he had never seen the defendant's temper. He said he also heard that the defendant got "a little out of line" when drinking too much alcohol. He denied knowing the defendant was previously convicted of theft, aggravated burglary, attempted aggravated sexual battery, domestic violence, reckless endangerment, and vandalism and knowing the defendant was a registered sexual offender. He said that had he known the

defendant's criminal history, he probably would have told people about it and allowed them to make their own decision about whether to hire the defendant. He did not know the victim in the present case was in a vegetative state until the sentencing hearing. On redirect examination, he stated that the defendant never took anything from his house and never gave him any trouble.

Donna Stokes, the defendant's mother, testified that she loved and supported her son. She asked the court to place the defendant "closer" because of her health conditions related to her back. She said some days she was unable to walk. She said the defendant provided care to her and her mother. She said that she knew the victim was in a vegetative state and that her heart went out to his family.

The trial court considered the presentence report, the victim impact statement, the evidence presented at the trial and sentencing hearing, the principles of sentencing, and the arguments of counsel in determining the defendant's sentence. The court stated that it looked "extremely strongly" to the nature and characteristics of the conduct involved. The court found that the defendant was a Range II, multiple offender.

Regarding enhancement factors, the court found that factors (1), (2), and (13)(C) applied. See Tenn. Code Ann. § 40-35-114(1), (2), (13)(C) (2010). The court found that the defendant had numerous previous convictions. See id. § 40-35-114(1) ("The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range[.]"). The court found that the defendant "threw the first blow," was the leading aggressor, and initiated the assault, although Mr. Logan was a co-defendant. See id. § 40-35-114(2) ("The defendant was a leader in the commission of an offense involving two (2) or more criminal actors[.]"). The court found that at the time of the present offense, the defendant was on probation in case number 6086. See id. § 40-35-114(13)(C) ("At the time the felony was committed, . . . the defendant [was] [r]eleased on probation[.]").

Regarding mitigation, the trial court stated that the defendant only offered that he "perhaps assisted the authorities" in identifying the co-defendant. See Tenn. Code. Ann. § 40-35-113(9) (2010) ("The defendant assisted the authorities in uncovering offenses committed by other persons or in detecting or apprehending other persons who had committed the offenses[.]"). The court found that the enhancement factors far outweighed the mitigation.

Regarding consecutive sentences, the trial court found that the defendant had a lengthy and extensive criminal history spanning his adult life and that the defendant was a professional criminal who knowingly devoted much of his life to criminal conduct. The

court found that based on the defendant's criminal history and the facts of the present case, the defendant was a dangerous offender whose behavior indicated little or no regard for human life.

Regarding manner of service, the court found that the defendant's physical and social history contained in the presentence report did not make him a favorable candidate for probation. The court said the circumstances and nature of the offense made this the worse beating it had seen and noted the victim would spend the remainder of his life in a nursing home. The court found that little likelihood existed that the defendant could be rehabilitated. The court noted that the defendant was released on probation at the time of the present offense and that it was unlikely the defendant would abide by the conditions of release. The court found that confinement was necessary to protect the public from the defendant's future criminal conduct. The court, likewise, found that less restrictive measures had been applied unsuccessfully to the defendant, noting the defendant was on probation at the time of the offense, and that probation would depreciate the seriousness of the assault. The court also found that confinement was necessary to provide an effective deterrent because of the extent of the victim's injuries.

The trial court sentenced the defendant to ten years and ordered his sentence to be served consecutively to his sentence in case number 6086. The court noted the beating was needless, unnecessary, and the worst it had seen.

The length of a sentence "within the appropriate statutory range [is] to be reviewed under an abuse of discretion standard with a 'presumption of reasonableness.'" State v. Bise, 380 S.W.3d 682, 708 (Tenn. 2012). In determining the proper sentence, the trial court must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee, (7) any statement that the defendant made on his own behalf, and (8) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; see State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991); State v. Moss, 727 S.W.2d 229, 236 (Tenn. 1986).

Generally, challenges to a trial court's application of enhancement and mitigating factors are reviewed under an abuse of discretion standard. Bise, 380 S.W.3d at 706. We must apply "a presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act." Id. at 707. "[A] trial court's misapplication of an enhancement or mitigating factor does not invalidate the sentence imposed unless the trial court wholly departed from the 1989 Act, as amended

in 2005.” Id. at 706. “So long as there are other reasons consistent with the purposes and principles of sentencing, as provided by statute, a sentence imposed by the trial court within the appropriate range should be upheld.” Id.

Regarding the trial court’s application of enhancement factor (2), the record reflects Mr. Logan testified that the defendant struck the victim first, although the defendant claimed the victim slapped him first. The record supports the trial court’s finding that the defendant threw the first blow, that he initiated the assault, and that he was the first aggressor. The evidence shows that the defendant was present for the entire assault, slapped the victim first, and beat the victim until he was bleeding and in and out of consciousness. It was not until they were inside the house that Mr. Logan hit and kicked the victim in the head. Ms. Duncan screamed when she first saw the victim and asked what the defendant and Mr. Logan had done to him. She testified they “were laughing and carrying on.” The record does not preponderate against the court’s findings, and we conclude the court did not abuse its discretion by applying this factor.

Regarding the trial court’s failure to consider the excessive alcohol consumption by the parties as a contributing factor leading to the assault, the record does not show that the defendant requested the court’s consideration of this fact. The court noted that the only mitigation evidence presented at the sentencing hearing was that the defendant might have assisted the police in determining Mr. Logan’s whereabouts. In any event, the court noted the alcohol consumption by the parties during the sentencing hearing. The sentence is within the appropriate statutory range and is supported by the record. The court did not abuse its discretion, and the defendant is not entitled to relief.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgment of the trial court.

ALAN E. GLENN, JUDGE