IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JULY 1996 SESSION

FILED

February 12, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
APPELLEE,	)	
	)	No. 03-C-01-9601-CR-00022
	)	
	)	Knox County
v.	)	
	)	Richard R. Baumgartner, Judge
	)	
	)	(Robbery)
RANDY EUGENE FAUBION,	)	
	)	
APPELLANT.	)	

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OPINION FILED:_____

AFFIRMED

Joe B. Jones, Presiding Judge

O P I N I O N

The appellant, Randy Eugene Faubion, was convicted of robbery, a Class C felony, by a jury of his peers. The trial court, finding the appellant was a standard offender, imposed a Range I sentence consisting of confinement in the Department of Correction for six (6) years. In this Court, the appellant contends (a) the evidence was insufficient, as a matter of law, to support his conviction, and the trial court committed error of prejudicial dimensions by (b) instructing the jury on the lesser included offense of robbery, (c) permitting the State of Tennessee to elicit that threats were made to a prosecution witness during re-direct examination, and (d) imposing the maximum sentence. After a thorough review of the record, the briefs of the parties, and the authorities governing the issues presented for review, it is the opinion of this Court the judgment of the trial court should be affirmed.

During the early morning hours of August 18, 1994, the victim, Laszlo Tarr, and his girlfriend went to the Ken-Jo Market to purchase groceries. While the victim's girlfriend went inside the store to purchase groceries, the victim walked down an alley behind the store to urinate. He was followed by several individuals who had been sitting on a retaining wall near the store. While in the alley, the appellant heard one of the individuals say: "Let's do it." Someone then hit the victim on the right side of the face with his fist. The blow caused the victim to fall to the pavement. Another individual struck him with a branch that was approximately three inches in diameter and four feet long. Another person kicked him. The appellant apparently removed the victim's wallet from his back pocket while he was on the ground. The victim asked the men to leave his wallet because it contained his Veterans Administration outpatient card. The appellant removed $30.00 from the wallet, turned toward the victim, and threw the wallet in the grass near the victim.

The victim was bleeding from his nose and mouth. He made his way to his vehicle in front of the store. The Knoxville Police Department was notified of the robbery. While an officer was investigating the robbery, he was informed two of the suspects had just exited a motor vehicle across the street from the market. The officer advised the two men to stop. They ran away. The officer pursued on foot. Another officer arrested the appellant. He was subsequently taken to the market. The victim identified the appellant

as the person who had his wallet, removed the money, and tossed the wallet in the grass. An officer also arrested the appellant's brother, Donnie Ray Faubion, a co-defendant. The victim identified Donnie Ray Faubion as the person who initially struck him.

The victim did not think he was seriously injured. Later, he sought medical assistance at a local hospital for injuries he sustained during the robbery.

I.

The appellant contends the evidence is insufficient, as a matter of law, to support a finding by a rational trier of fact that he was guilty of robbery beyond a reasonable doubt. The argument advanced in support of this issue is predicated exclusively upon the credibility of the witnesses.

A.

When an accused challenges the sufficiency of the convicting evidence, this Court must review the record to determine if the evidence adduced at trial is sufficient "to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App.), per. app. denied (Tenn. 1990).

In determining the sufficiency of the convicting evidence, this Court does not reweigh or reevaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App.), per. app. denied (Tenn. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859, cert. denied, 352 U.S. 845, 77 S.Ct. 39, 1 L.Ed.2d 49 (1956). To the contrary, this Court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d at 835. In State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973), our Supreme Court said: "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State."

Since a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused, as the appellant, has the burden in this Court of illustrating why the evidence is insufficient to support the verdicts returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record are insufficient, as a matter of law, for a rational trier of fact to find that the accused is guilty beyond a reasonable doubt. Tuggle, 639 S.W.2d at 914.

B.

Before an accused can be convicted of simple robbery, the State of Tennessee must prove beyond a reasonable doubt (a) the accused knowingly or intentionally, (b) took property from the person of the victim, and (c) the theft of the property was accomplished by violence or putting the victim in fear. Tenn. Code Ann. § 39-13-401. The State of Tennessee established the elements of this crime beyond a reasonable doubt.

As previously stated, the victim was struck with a fist. The blow knocked him to the ground. He was then kicked and struck with a tree limb. His wallet was taken from his back pocket. The appellant removed $30.00 from his wallet and threw the wallet in the grass near the victim. The victim testified he was in fear of his life. The violent acts of the appellant and his brother caused the victim to seek medical assistance at a local hospital.

The jury, as the trier of fact, resolved the question of credibility of the witnesses. The verdict establishes the jury determined the State of Tennessee's witnesses were credible and believed their testimony. This Court does not have the authority to reevaluate the credibility of the witnesses as the appellant seems to suggest.

This issue is without merit.

II.

While counsel for the appellant was cross-examining Helen B. Harbin, a prosecution witness, the following colloquy took place:

> Q. You and I have had conversations about this [incident]?
>
> A. Yeah, I have, and I've been threatened and hit and I don't need it. There's no sense [to] it.
>
> Q. I understand that. But you haven't been threatened by me, have you?
>
> A. No.

During re-direct examination, the assistant district attorney general broached the subject. It was revealed the person responsible for the threats and hitting the witness was the appellant's girlfriend. While the appellant was present and driving the motor vehicle, he did not threaten the witness or hit her. The trial court advised the assistant district attorney general he could not delve into the subject matter any further.

Both defendants objected and moved the trial court for a mistrial. The trial court denied the motions for mistrials, but the court did give a curative instruction. The court told the jury:

> Ladies and gentlemen, there is one matter. . .I want to discuss with you very briefly before we go to the next witness.
>
> During Miss Harbin's testimony as you will recall she made some comments about an alleged threat apparently made to her by a third party. The law in regard to threats is that -- as it applies to third persons, is that a threat by a third person against a witness is relevant only if the defendant is linked in some way to the making of the threat.
>
> The Court is of the opinion that there is no link here, sufficient link between either of these defendants and this alleged threat. And I'm instructing you that I don't want you to consider that in your deliberations of the case. The thing I want you to concentrate on are the facts of this case, whether or not these defendants are guilty of the crime for which they're charged. And that's where I want your emphasis to be. So we'll just leave it at that, okay.

The purpose of a curative instruction is to correct an improper statement, remark or the attempt to present inadmissible evidence in the presence of the jury. The instruction advises the jury to disregard the improper statement, remark or the inadmissible evidence, and such is not to be considered by the jury for any purpose. The jury is presumed to follow the instruction given by the trial court. State v. Smith, 893 S.W.2d 908, 914 (Tenn. 1995); State v. Melvin, 913 S.W.2d 195, 201 (Tenn. Crim. App.), per. app. denied (Tenn. 1995); State v. Blackmon, 701 S.W.2d 228, 233 (Tenn. Crim, App.), per. app. denied (Tenn. 1985). While this presumption is rebuttable in nature, the appellant did not attempt to rebut the presumption. See Melvin, 913 S.W.2d at 201.

The appellant was not prejudiced by what transpired. It was made perfectly clear by the witness that the appellant did not make any threats to the witness, and he did not strike the witness. Furthermore, the trial court advised the jury what happened could not be attributed to the appellant, and the statements of the witness should not be considered when the jury considered its verdict. In summary, the exploration of this evidence was clearly harmless in view of the curative instruction. Tenn. R. App. P. 36(b).

This issue is without merit.

III.

The indictment charged the appellant and his brother with aggravated robbery. The document alleged the accused "[put] the [victim] in fear, by use of a deadly weapon." The assistant district attorney general suggested the trial court should charge the lesser included offense of robbery. Counsel for the accused objected to the inclusion of an instruction on robbery in the charge given to the jury. The appellant contends the State of Tennessee has no right to request an instruction on a lesser included offense.

The argument given in support of this issue does not support the conclusion the appellant asks this Court to reach. The appellant candidly admits the trial court sua sponte may and should give an instruction on a lesser included offense where the evidence supports the principal offense alleged in the charging instrument and a lesser included offense.

Ironically, the appellant makes this argument in one breath and in the next breath unequivocally states the evidence presented by the State of Tennessee was clearly insufficient, as a matter of law, to support a conviction for simple robbery. Given the facts of this case, the trial court was obligated to give the instruction on the lesser included offense of robbery as a matter of law. It is irrelevant whether a party requested the instruction.

This issue is without merit.

IV.

The appellant complains the trial court imposed the maximum sentence of six (6) years. He contends the trial court should have applied several mitigating factors and misapplied two enhancement factors.

After a de novo review of the record pursuant to Tenn. Code Ann. § 40-35-401(d), this Court is of the opinion the trial court properly refused to apply the mitigating factors asserted by the appellant when determining the length of the sentence to be imposed. The trial court properly used enhancement factors Tenn. Code Ann. § 40-35-114 (1), (4), (8), and (13) to increase the length of the sentence within Range I. All of these factors are supported by the evidence. The length of the appellant's record and the numerous probation violations he has incurred in his short life are sufficient. Moreover, he was on probation when he committed this offense. In the past, the appellant has received fair, lenient treatment within the criminal justice system. Yet he has failed to reform his conduct. His proclivity to engage in criminal conduct has persisted practically his entire life. A review of the appellant's record reveals that if he is not deterred for an extended period of time, he will be back on the streets of Knoxville engaging in criminal conduct and terrorizing the citizens of Knoxville as he and his brother did in this case. The trial court noted this tendency and imposed the maximum sentence to protect the citizens of Knoxville from the appellant.

This issue is without merit.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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DAVID G. HAYES, JUDGE

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WILLIAM M. DENDER, SPECIAL JUDGE