

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 2000 SESSION

**FILED**

March 9, 2000

Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE, )  
 )  
 Appellee, )  
 )  
 VS. )  
 )  
 CHRISTOPHER TODD BROWN, )  
 )  
 Appellant. )

NO. M1999-00691-CCA-R3-CD  
  
DAVIDSON COUNTY  
  
HON. STEVE R. DOZIER,  
JUDGE  
  
(Attempted First Degree Murder;  
Attempted Second Degree Murder)

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(At Trial)

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

**AFFIRMED**

**JOE G. RILEY, JUDGE**

## OPINION

Defendant was indicted on two counts of attempted first degree murder. A Davidson County jury found him guilty of one count of attempted first degree murder and one count of attempted second degree murder. He was sentenced as a Range I standard offender to consecutive sentences of twenty-three years and ten years, respectively. In this appeal as of right, defendant claims (1) the trial court failed to instruct the jury on the appropriate lesser included offenses to attempted first degree murder; and (2) the trial court inappropriately ordered the sentences to be served consecutively. After reviewing the record, we **AFFIRM** the judgment of the trial court.

### I. FACTS

On March 7, 1997, a verbal altercation arose between the defendant and the victims during a "dice game" at the Urban Manor Apartments. The defendant left the area, but returned approximately fifteen minutes later. As the defendant rounded the corner of the building, he yelled "I got you now, die MF die." Defendant proceeded to open fire on Jerry Anthony. Anthony was shot in the arm, hip and chest. The defendant continued to shoot even after Anthony had fallen to the sidewalk. Robert Wray positioned himself on top of Anthony to protect him from the continuing barrage of shots. Wray was shot twice in the leg.

Defendant was indicted on two charges of attempted first degree murder. The jury found him guilty of attempted first degree murder of Anthony and attempted second degree murder of Wray. Defendant was sentenced as a Range I standard offender and received consecutive sentences of twenty-three years and ten years, respectively.

## II. LESSER INCLUDED OFFENSES

Defendant claims the jury did not receive an appropriate instruction on the lesser-included offenses of attempted first degree murder. Defendant argues the trial court should have instructed the jury on the offenses of aggravated assault, assault and attempted criminally negligent homicide.

An offense is a lesser included offense if :

- (a) all of its statutory elements are included within the statutory elements of the offense charged; or
- (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing
  - (1) a different mental state indicating a lesser kind of culpability; and/or
  - (2) a less serious harm or risk of harm to the same person, property or public interest; or
- (c) it consists of
  - (1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
  - (2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
  - (3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b).

State v. Burns, 6 S.W.3d 453, 466-67 (Tenn. 1999). In evaluating whether to charge the jury on a lesser-included offense, the trial court must apply the above test to determine if the lesser offense is included in the greater charged offense. *Id.* at 467. “If a lesser offense is not included in the offense charged, then an instruction should not be given, regardless of whether the evidence supports it.” *Id.* at 467.

In the instant case, defendant was charged with attempted first degree murder. Attempted first degree murder is the attempt to kill another when the defendant acts intentionally and with premeditation. See Tenn. Code Ann. §§ 39-

12-101; 39-13-202(a)(1). Assault requires bodily injury, fear of bodily injury or offensive physical contact. Tenn. Code Ann. § 39-13-101(a). Aggravated assault is an assault accompanied by serious bodily injury or use of a deadly weapon. Tenn. Code Ann. § 39-13-102(a). The statutory elements of assault and aggravated assault are not included in the statutory elements of attempted first degree murder. Thus, neither of these offenses meets part (a) of the Burns test. Nor does either meet part (b) or part (c) of the Burns test. Thus, assault and aggravated assault are not lesser included offenses of attempted first degree murder.

As to attempted criminally negligent homicide, there is no such offense in Tennessee. State v. Rush, C.C.A. No. 03C01-9805-CR-00193, Sullivan County (Tenn. Crim. App. filed October 13, 1999, at Knoxville); State v. Mooney, C.C.A. No. 02C01-9508-CC-00216, Madison County (Tenn. Crim. App. filed December 30, 1998, at Jackson); State v. Nolan, C.C.A. No. 01C01-9511-CC-00387, Sequatchie County (Tenn. Crim. App. filed June 26, 1997, at Nashville), *perm. to app. denied* (Tenn. March 2, 1998). Thus, the trial court did not err in failing to charge this alleged offense.

This issue is without merit.

#### **IV. CONSECUTIVE SENTENCING**

Defendant argues the trial court improperly ordered consecutive sentencing. A court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:

[t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high.

Tenn. Code Ann. § 40-35-115(b)(4). Under this statute, consecutive sentencing

may be considered any time a defendant has been convicted of more than one criminal offense, regardless of whether the offenses arose out of multiple proceedings or the same proceeding. State v. Moore, 942 S.W.2d 570, 572 (Tenn. Crim. App. 1996). However, this does not mean that all defendants convicted of several counts of a dangerous offense should be consecutively sentenced. See State v. Smith, 891 S.W.2d 922, 933 (Tenn. Crim. App. 1994). Imposing consecutive sentences for inherently dangerous crimes should be based upon the presence of aggravating circumstances and not merely on the fact that two or more dangerous crimes were committed. *Id.*

Furthermore, for the dangerous offender the court is required to determine whether the consecutive sentences (1) are reasonably related to the severity of the offenses committed; and (2) serve to protect the public from further criminal conduct by the offender. See State v. Lane, 3 S.W.3d 456, 460 (Tenn. 1999); State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995)

The trial court's decision to run defendant's sentences consecutively was based on the circumstances surrounding the offenses. The trial court noted that defendant fired multiple rounds into a crowd of people, hitting multiple victims.<sup>1</sup> In addition, the trial court found defendant demonstrated callous indifference to the value of human life when he continued to fire at Jerry Anthony after the victim had fallen to the sidewalk. The trial court found defendant's actions to be further aggravated when he shot the second victim, Robert Wray, as he attempted to shield Anthony. Furthermore, the trial court held "there is a need to protect the public against further criminal conduct by this defendant," and endeavored to "fashion a sentence that will be fair" in relation to "the severity of these offenses."

We conclude the record contains sufficient proof that the defendant has little

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<sup>1</sup> In addition to the two victims listed in the indictments, a small child suffered a flesh wound as a result of the gunfire.

or no regard for human life and no hesitation about committing a crime in which the risk to human life is high. In addition, we hold the trial court made the appropriate *Wilkerson* findings. Thus, consecutive sentences were properly imposed. This issue is without merit.

## V. CONCLUSION

For the foregoing reasons, the judgment of the trial court is **AFFIRMED**.

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**JOE G. RILEY, JUDGE**

**CONCUR:**

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**THOMAS T. WOODALL, JUDGE**

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**JAMES CURWOOD WITT, JR., JUDGE**