

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE**

**AT NASHVILLE**  
**MAY 1999 SESSION**

**FILED**

**January 13, 2000**

**Cecil Crowson, Jr.**  
**Appellate Court Clerk**

**STATE OF TENNESSEE,**

Appellee,

v.

**JOHN ROBERT BENSON,**

Appellant.

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C.C.A. NO. 01C01-9808-CC-00239  
M1998-00652-CCA-R3-CD  
BEDFORD COUNTY

Hon. William Charles Lee, Judge

(Attempted First Degree Murder, Reckless  
Endangerment)

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

AFFIRMED

NORMA MCGEE OGLE, JUDGE

**OPINION**

On May 7, 1998, the appellant, John Robert Benson, was convicted by

a jury in the Bedford County Circuit Court of two counts of attempted first degree murder and three counts of reckless endangerment. On April 20, 1998, the trial court sentenced the appellant as a standard Range I offender to concurrent sentences of twenty two years incarceration for the attempted first degree murder convictions. Additionally, the trial court sentenced the appellant as a multiple Range II offender to four years incarceration for each reckless endangerment conviction. The trial court imposed concurrent sentences for two of the three reckless endangerment convictions, and ordered that the reckless endangerment sentences be served consecutively to the attempted first degree murder sentences, for an effective sentence of thirty years incarceration in the Tennessee Department of Correction.

In this appeal as of right, the appellant presents the following issues for our review:

- (I) Whether the evidence is sufficient to sustain the appellant's convictions of two counts of attempted first degree murder and three counts of reckless endangerment;
- (II) Whether the trial court erred by imposing a sentence of thirty years.

Following a review of the record and the parties' briefs, we affirm the judgment of the trial court.

### **I. Factual Background**

The appellant's convictions resulted from a shooting at the Forest Hills apartment of Jenine McBride in Shelbyville, Tennessee in the early morning hours of August 17, 1997. Andrew Rankins testified on behalf of the State that on Saturday, August 16, 1997, James McBride, Trishia Pease, Ashley Benson, and he spent the evening together. Late that evening, the group returned to Jenine McBride's apartment, where they planned to spend the night. When they arrived at the apartment, Jenine McBride was asleep on the living room sofa. James McBride fell asleep on the living room floor with Ashley Benson, Pease's twenty month old daughter, while Rankins and Pease retired to the bedroom.

Rankins recalled that, sometime before sunrise, he awoke to use the restroom and as he was returning to the bedroom, he heard the sound of gunshots coming from the front of the apartment. He heard three to four shots, a kicking sound, and then two more shots. Rankins proceeded to the living room and saw several people running out the front door. When Rankins yelled, "What's going on?" he observed a man armed with a rifle turn and move back toward the front door. Rankins immediately ran to the door and kicked the door shut in an effort to keep the intruder out of the apartment. However, because the door had been kicked off the hinges, the door failed to close. When the door swung back open, Rankins saw the intruder in the doorway.

According to Rankins' testimony, Rankins then grabbed the barrel of the rifle and a struggle ensued inside the apartment. As the two men wrestled over control of the rifle, the intruder fired one shot. Eventually, both men fell to the floor, and Rankins pinned the intruder to the floor. Rankins told the intruder that he could leave if he left the gun behind. The intruder continued to struggle and sometime during the struggle the stocking covering the intruder's face rolled up, exposing the intruder's eyes and face. Rankins testified that he "could see the intruder's face clearly" for about two minutes despite the darkness of the room. Recognizing the intruder as Ashley Benson's father, Rankins told the intruder, "You could have killed your baby." For a moment the intruder stopped struggling and shook his head.

As Rankins was talking with the intruder, Pease entered the living room, and picked up Ashley Benson. The intruder then managed to fire another bullet that lodged in the wall. The two men began wrestling again and fell onto the floor. Rankins managed to lock his legs around the barrel of the rifle and again told the intruder that he was not leaving with the gun. The intruder then bit Rankins on the shoulder and also cut Rankins' hand as the intruder was attempting to eject a cartridge from the rifle. Realizing that the rifle was jammed, the intruder suddenly released the rifle and ran out of the apartment. Rankins did not attempt to follow the intruder.

The police arrived shortly after the intruder fled the scene. Rankins surrendered the rifle used in the shooting, and the police interviewed witnesses at the apartment. Some of the witnesses indicated that there may have been two suspects, but could not provide a description of any second suspect. At some point during the questioning, Rankins indicated that he believed the man with whom he had wrestled was the appellant. Trishia Pease then provided a description of the appellant's automobile, a blue Chevrolet Beretta, and a partial license plate number.

Approximately fifteen minutes later, the police apprehended the appellant's cousin, Timmy Reese, nearby and brought him to the apartment for a show-up identification. Although initially Rankins was unsure whether Reese was the gunman, when Pease stated that Reese was the appellant's cousin, Rankins said, "No, that's not the guy." Approximately ten minutes later, the police apprehended the appellant in his blue Chevrolet Beretta a few blocks from Jenine McBride's apartment complex. The appellant was arrested and placed in the back of a police cruiser. When Rankins and Pease were brought to the scene of the arrest to identify the appellant, Rankins, without hesitation, identified the appellant as the gunman. At trial, Rankins again identified the appellant as the gunman, testifying that he was "positive" and "certain" that the appellant was the gunman. Rankins also testified that he had seen the appellant on two occasions prior to the shooting. Rankins recalled seeing the appellant in the Calsonic parking lot and also outside the Forest Hills Apartments prior to the shooting.

Trishia Pease testified on behalf of the State that she and the appellant had a relationship for approximately four and one-half years. During that time, the couple occasionally lived together and also conceived a child, Ashley Benson. The relationship ended in July 1997 and shortly thereafter, Pease began dating Andrew Rankins. On the night of August 16, 1997, Pease, Rankins, Ashley Benson, James McBride and Jenine McBride stayed at the McBride apartment. In the early morning hours, Pease was awakened by the sound of knocking or banging

coming from the living room. As Rankins ran to the living room, Pease heard a gunshot and initially went into the hallway. As Rankins and the gunman wrestled, Pease crawled on the floor into the living room, grabbed the baby, and ran to a closet where she hid with the baby. Pease heard a second gunshot as she grabbed the baby from the living room floor.

When the police arrived, Pease could not identify the gunman but she did recall that he had a "small head" and was wearing black jogging pants, a dark top, and white tennis shoes. Pease did provide the police with information regarding the appellant's blue Chevrolet Beretta. However, because she was unsure of the gunman's identity, Pease did not identify either Reese or the appellant as the gunman.

On cross examination, Pease stated that Rankins and McBride had both been drinking that evening. Also, she claimed that when she gave the police information about the appellant's automobile, she was not suggesting that she thought the appellant was the gunman. Furthermore, in contrast to Rankins' testimony, Pease claimed that Rankins initially identified Reese as the gunman. However, Pease claimed that once she stated that the suspect's name was Timmy Reese, Rankins changed his mind and stated that Reese was not the gunman. Pease also recalled that at the time of the appellant's arrest, he was wearing a white shirt, blue shorts, and black tennis shoes.

James Donald McBride also testified that he spent the night of October 16, 1997 at his mother's apartment with Pease, Rankins, Benson and his mother. McBride was asleep on the living room floor when he was awakened by a banging noise and then gunfire coming through the front door. He testified that he saw three flashes of fire, the door "flew open" and he saw a person in the doorway. When the intruder entered the apartment, McBride "just took off" and ran out of the apartment. As he was running away from the apartment, he heard more gunfire. McBride then hid in the woods near the apartment until he saw someone he believed to be the

intruder run out of the apartment in the direction of the woods. He returned to the apartment as the police were arriving. Although McBride could not identify the gunman, he testified at trial that the appellant's "stocky" build resembled the build of the gunman.

Jenine McBride recalled that in August 1997 she resided in the Forest Hills Apartment complex in Shelbyville. Late in the evening of August 16 or in the early morning hours of August 17, she was asleep on the living room sofa when her son and a number of his friends arrived at her apartment to spend the night. Sometime thereafter, Ms. McBride was awakened by a loud banging on the front door, and stood up but immediately observed fire coming through the door. Ms. McBride sat down again on the sofa when a gunman burst through the door, and "splattered" shots along the hallway and into the apartment. When Rankins and the gunman wrestled for control of the gun, the gunman fired another shot and Ms. McBride quietly left the apartment and proceeded to a neighbor's apartment where she called 911. Ms. McBride was unable to identify the gunman, but she remembered him as being "short and stocky."

Harold McKee, a sergeant with the Shelbyville Police Department, recalled that on August 17, 1997 at approximately 5:30 a.m. he and several officers responded to a call at the Forest Hills Apartments. The dispatcher informed them that a break-in was in progress and shots had been fired. When the officers reached the apartment, they spoke with Rankins and determined that the gunman had fled the scene and had run into the nearby woods. McKee recovered the assault rifle used in the shooting and then he and the other officers searched the apartment. McKee and Ron Simmons, a police officer with the Shelbyville police department, also discovered spent shell casings, a bullet fragment, and live rounds in and around the apartment.<sup>1</sup> Additionally, a search of the apartment revealed gunfire damage to the front door, the entry wall, living room wall, and bedroom wall.

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<sup>1</sup>The police did not attempt to investigate any fingerprints on the assault rifle or on the shell casings found at the scene of the shooting.

Trey Clanton, another police officer with the Shelbyville Police Department, also responded to the call at Forest Hills Apartments. When he arrived at the apartment complex, Officer Clanton and another officer searched for the gunman in the woods near the apartment, but did not find a suspect. Shortly thereafter, another officer notified Clanton that the police had arrested a suspect, Timmy Reese, and were bringing him back to the apartment for a show-up identification. Clanton testified that Rankins was at the apartment when they arrived and Clanton asked if Rankins could identify Reese. Rankins observed Reese and said, "I'm not sure if this is him," and then said, "No, its not him." The police officers asked Rankins again if Reese was the gunman and again Rankins responded negatively. According to Clanton, Rankins also indicated that there was more than one intruder at the apartment but Rankins could not identify the second person.

Following the unsuccessful show-up identification, Clanton decided to search the area around the apartment for the appellant's blue Chevrolet Beretta. Shortly thereafter, Clanton observed the appellant's automobile on Depot Street and stopped the appellant. Clanton contacted the police officers who had remained at the apartment and directed them to bring Rankins and Pease to the scene of the appellant's arrest for a show-up identification. Clanton testified that, upon viewing the appellant, Rankins said without hesitation, "This is the man that was inside the house."

The appellant testified that in August 1997 he lived and worked in Fayetteville, Tennessee. He and Trishia Pease had been involved in a relationship which produced a child, Ashley Benson. That relationship ended in July 1997. The appellant testified that on August 16, 1997, he worked until 11:00 p.m. After work, he drove his blue Chevrolet Beretta to Shelbyville to see his sister, Phyllis Benson. He arrived in Shelbyville at approximately 12:00 a.m. At that time, he was wearing a white t-shirt, blue shorts, and black tennis shoes.

Upon his arrival in Shelbyville, the appellant drove to Ms. Benson's apartment, but discovered that she was not home. He then drove to the home of Ms. Benson's mother who informed the appellant that his sister had gone to a local nightclub. The appellant eventually found Ms. Benson at the nightclub, where they remained until approximately 2:30 or 3:00 a.m. The appellant and Ms. Benson then left the nightclub and proceeded back to Ms. Benson's apartment. Although Ms. Benson made a "pallet" on the couch for him, the appellant testified that he stayed awake and watched television. At approximately 6:15 or 6:30 a.m., the appellant awakened Ms. Benson, said good-bye, and left the apartment in his automobile. As the appellant was attempting to leave Shelbyville and return to Fayetteville, he became lost and was pulled over by a police officer who informed him that he was under arrest for the shooting that occurred at the McBride apartment. The appellant denied any involvement in the shooting at the McBride apartment and requested a gunshot residue test. However, the police did not perform a gunshot residue test on the appellant. The appellant also stated that he was not jealous of Pease's relationship with Rankins.

On cross examination, the appellant stated that he did not remember seeing Rankins at any time prior to the identification following the shooting. The appellant admitted that he had been to Forest Hills Apartments prior to the shooting to give a fellow employee a ride to work. On that day, he remembered seeing Pease but did not recall seeing Rankins. The appellant also did not recall how many years he had lived with Pease before their separation nor how much time had elapsed between their separation and the shooting. The appellant also indicated that he had little contact with Timmy Reese prior to the shooting.

Phyllis Benson, the appellant's sister, testified on behalf of the appellant that she saw the appellant at a nightclub on the weekend of August 17, 1997. On August 16, 1997, the appellant arrived at the nightclub sometime after 10:00 p.m. While at the nightclub, she and the appellant consumed alcohol. Ms. Benson testified that she and the appellant left the nightclub at approximately 2:30

a.m. and arrived back at her apartment at approximately 2:45 a.m. They watched television until she went to sleep sometime between 3:30 a.m. and 4:00 a.m. Ms. Benson recalled that the appellant woke her sometime between 6:00 a.m. and 6:30 a.m. and left her apartment.

On cross examination, Ms. Benson stated that she met Timmy Reese the weekend prior to the shooting. In contrast to the appellant's testimony, Ms. Benson recalled that Reese and the appellant were together the weekend prior to the shooting. However, she did not see Reese with the appellant on the weekend of the shooting. Ms. Benson also stated that she had been awake since approximately 6:00 a.m. on the day before the shooting, and she also admitted that she began drinking alcohol at about 6:00 p.m. on the evening of the shooting.

## **II. Analysis**

### **Sufficiency of the Evidence**

The appellant first contends that the evidence is not sufficient to sustain his convictions of two counts of attempted first degree murder and three counts of reckless endangerment. Specifically, the appellant challenges Andrew Rankins' identification of him as the gunman on August 17, 1997.

In Tennessee, appellate courts accord considerable weight to the verdict of a jury in a criminal trial. In essence, a jury conviction removes the presumption of the defendant's innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will not support the jury's findings. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The appellant must establish that "no reasonable trier of fact" could have found the essential elements of the offenses beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn R. App. P. 13(e).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom.

State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

Moreover, it is well-established that the identification of a defendant as the person who committed the offense for which he is on trial is a factual issue to be determined by the jury upon consideration of all competent proof. State v. Strickland, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993) (citing State v. Crawford, 635 S.W.2d 704, 705 (Tenn. Crim. App. 1982)); see also State v. Williams, 623 S.W.2d 118, 120 (Tenn. Crim. App. 1981). Indeed, this court has held that the testimony of a victim identifying the perpetrator is sufficient in and of itself to support a conviction. Strickland, 885 S.W.2d at 87-88; see also State v. Radley, No. 01C01-9803-CR-00113, 1999 WL 510515, at \*4 (Tenn. Crim. App. at Nashville, July 15, 1999); State v. Faulkens, No. 02C01-9809-CR-00283, 1999 WL 314766, at \*3 (Tenn. Crim. App. at Jackson, May 20, 1999).

In this case, testimony at trial indicated that Rankins struggled with the gunman for several minutes. During the struggle, the stocking covering the gunman's head rolled up. Rankins was on top of the gunman at this point and had the opportunity to view the gunman's eyes and face for several moments. Although the room was darkened, Rankins had seen the appellant on two prior occasions. While Rankins expressed some uncertainty when asked to identify Reese, he expressed no such uncertainty when he identified the appellant several hours after the shooting. Additionally, at trial, Rankins was certain of his identification. Moreover, James McBride testified that the appellant's physical characteristics matched the gunman's physical characteristics. Finally, the police arrested the appellant a short time and distance from the scene of the shooting.

Although the appellant presented an alibi defense, the jury, by

returning a guilty verdict, accredited the testimony of the State's witnesses. In light of the trial court's complete instructions concerning identification testimony, it was the prerogative of the jury to accredit Rankins' identification. Accordingly, we conclude that the evidence is sufficient for a rational trier of fact to find the appellant guilty beyond a reasonable doubt. This issue is without merit.

## **B. Sentencing**

### **I. Excessive Sentence**

The appellant contends that sentences imposed by the trial court are excessive. Specifically, the appellant argues that the trial court erred by improperly applying an enhancement factor and imposing an excessive sentence.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997). This presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court 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 appellant to demonstrate the impropriety of the sentence. State v. Wilkerson, 905 S.W.2d 933, 934 (Tenn. 1995).

Our review of the appellant's sentence requires an analysis of (1) the evidence, if any, received at trial and at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offenses; (5) any mitigating or enhancement factors; (6) any statements made by the appellant on his own behalf; and (7) the appellant's potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-102, -103, and -210 (1997).

The presumptive sentence for a Class A felony is the midpoint of the

range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210 (1997). The presumptive sentence for Class B, C, D, and E felonies is the minimum sentence in the range if there are no enhancement or mitigating factors. Id. If the trial court finds that there are enhancement or mitigating factors, the court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors. Id. The weight given to any existing factor is left to the trial court's discretion so long as the trial court complies with the purposes and principles of sentencing and the court's findings are adequately supported by the record. State v. Shropshire, 874 S.W.2d 634, 642 (Tenn. Crim. App. 1993). See also State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

In the instant case, the appellant was convicted as a standard Range I offender of two counts of attempted first degree murder, a class A felony. Tenn. Code Ann. § 39-11-117(a)(2) (1997). The sentencing range applicable to the appellant for these offenses was fifteen to twenty-five years. Tenn. Code Ann. § 40-35-112 (a)(1) (1997). The appellant received a mid-range sentence of twenty-two years.

The appellant was also convicted as a multiple Range II offender of three counts of reckless endangerment, a Class E felony. Tenn. Code Ann. § 39-13-103(b) (1997). The sentencing range applicable to the appellant was two to four years per offense. Tenn. Code Ann. § 40-35-112(b)(5). The appellant received a maximum sentence of four years for each offense.

In determining the appellant's sentence, the trial court properly found four enhancement factors: the appellant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; the appellant was the leader in the commission of the offense; the appellant has a previous history of unwillingness to comply with the conditions of

a sentence involving release in the community; and the appellant possessed or employed a firearm during the commission of the offense. See Tenn. Code Ann. § 40-35-114(1), (2), (8), and (9) (1997).<sup>2</sup> The appellant does not contest the application of these enhancement factors. The trial court found no mitigating factors present in this case.

The appellant only contends that the trial court erred by applying Tenn. Code Ann. § 40-35-114(10), that the defendant had no hesitation about committing a crime when the risk to human life was high. However, the record reflects that the trial court did not use this enhancement factor to enhance the appellant's sentence. When the trial court erroneously began discussing the application of this enhancement factor to the appellant's sentence, defense counsel alerted the trial court to the error. In clarifying which enhancement factors applied to the appellant's sentence, the trial court stated, "I said [factor] 10. I meant [factors] 8 and 9; [factors] 1, 2, 8, and 9 apply to all offenses. 1, 2, and 8 apply to the reckless endangerment offenses." Because the trial court did not apply Tenn. Code Ann. § 40-35-114(10), this issue is without merit. In short, the record fully supports the sentences imposed by the trial court.

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## **II. Consecutive Sentences**

The appellant also argues that the trial court erred by imposing consecutive sentencing. The appellant contends that the thirty year sentence is disproportionate to the severity of the offenses.

Tenn. Code Ann. § 40-35-115(a) (1997) provides that a trial court may impose consecutive sentencing only upon the determination that a defendant meets one of the criteria listed therein. Moreover, when a defendant is classified as a dangerous offender, a court must further find that the defendant's sentence reasonably relates to the severity of the offenses committed and is necessary in

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<sup>2</sup>The trial court noted that while the possession of a firearm is an element of the offense of reckless endangerment, it is not a necessary element of attempted first degree murder. Therefore, the trial court only applied this enhancement factor to enhance the attempted first degree murder sentences and not the reckless endangerment sentences.

order to protect the public from further criminal conduct by the appellant, Wilkerson 905 S.W.2d at 938.

In this case, the trial court found that the appellant is a dangerous offender as set forth in Tenn. Code Ann. § 40-35-115(b)(4) and properly considered the Wilkerson factors concluding that the appellant's extensive criminal record, dangerous behavior, and the circumstances of the offenses warranted partial consecutive sentencing. Applying a presumption of correctness, we conclude that the record supports the trial court's sentencing determination.

### **III. Excessive Fines**

Finally, the appellant argues that the fines imposed by the trial court are excessive because he is indigent. The trial court imposed the fines set by the jury. See Tenn. Code Ann. § 40-35-301 (1997); Tenn. Code Ann. § 40-35-111 (1997). Specifically, the trial court ordered the appellant to pay \$50,000 per count of attempted first degree murder and \$3,000 per count of reckless endangerment.

We note that the appellant failed to present the issue of excessive fines in his motion for new trial and the trial court did not address this issue in the motion for new trial hearing. Tenn. R. App. P. 3(e) provides that failure to specifically state an issue in a motion for new trial results in waiver of the issue on appeal. See State v. Clinton, 754 S.W.2d 100,103 (Tenn. Crim. App. 1988). Therefore, this issue has been waived.

Accordingly, the judgment of the trial court is affirmed.

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Norma McGee Ogle, Judge

CONCUR:

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David G. Hayes, Judge

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Jerry L. Smith, Judge