IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

AUGUST 1999 SESSION

FILED

February 24, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	C.C.A. No. 03C01-9809-CR-00344
Appellee,	)	
	)	Sullivan County
v.	)	
	)	Honorable R. Jerry Beck, Judge
DAVID WILLIAM SMITH,	)	
	)	(Attempted Second Degree Murder)
Appellant.	)	

FOR THE APPELLEE:

GALE K. FLANARY
Assistant Public Defender
P. O. Box 839
Blountville, TN 37617-0839
(At Trial)

TERRY L. JORDAN
Assistant Public Defender
P. O. Box 839
Blountville, TN 37617-0839
(At Trial and On Appeal)

GERALD L. GULLEY, JR.
P. O. Box 1708
Knoxville, TN 37901-1708
(On Appeal)

FOR THE APPELLANT:

PAUL G. SUMMERS
Attorney General & Reporter

ERIK W. DAAB
Assistant Attorney General
425 Fifth Avenue North
Nashville, TN 37243-0493

H. GREELEY WELLS, JR.
District Attorney General

JOSEPH EUGENE PERRIN
Assistant District Attorney General
P. O. Box 526
Blountville, TN 37617-0526

OPINION FILED: _____

AFFIRMED

ALAN E. GLENN, JUDGE

O P I N I O N

The defendant, David William Smith, was indicted by the Sullivan County Grand Jury and charged with five counts of attempted first degree murder. Following the first trial, the jury found him not guilty of attempted first degree murder, but could not agree upon the remaining charges, necessitating that a mistrial be declared. After the second jury to hear the charges also could not agree upon a verdict, a second mistrial was declared. However, the third jury to hear the charges convicted him of five counts of attempted second degree murder. The trial court sentenced the defendant to sixteen years for each count as a Range II offender. The court ordered that the sentences for counts one and two be served consecutively and the sentences for counts three, four, and five be served concurrently, for a total effective sentence of thirty-two years. The defendant timely appealed, alleging the following issues:

I. Is it legally possible to commit attempted second degree murder?

II. Is the evidence sufficient to convict the defendant of attempted second degree murder?

III. Did the trial court properly sentence the defendant?

Based upon our review, we affirm the judgment of the trial court.

FACTUAL BACKGROUND

In this matter, the defendant was indicted for attempted first degree murder as the result of his nearly striking five Bristol police officers with his automobile. Following the third trial, the jury found the defendant guilty of five counts of attempted second degree murder. The defendant timely appealed those verdicts.

The State's first witness in the third trial was Dennis Marvin Banks, who was a police officer with the Bristol Police Department at the time of the offense and was named as the victim in count two of Indictment S38440. He testified that, while on duty on November 28, 1995, he received a radio call to go to 2207 Anderson Street in Bristol to look for a female runaway juvenile. Officer David Kirkpatrick accompanied him. They had been instructed to look for a certain vehicle, which was the last one the juvenile had been seen in.

Seeing the vehicle in the driveway as they arrived at the residence, the two officers went to a door of the residence and were given permission by an occupant to enter and

search the premises. The juvenile was found inside the residence and was taken by Banks to his vehicle to be transported to the police station. As Banks escorted her to his vehicle, he was holding her because he thought she might try to run away.

The juvenile asked if a personal item of hers could be brought from the house by the defendant, her boyfriend, who had walked over to the police vehicle. The defendant brought this item to her, and after receiving permission from the officers to do so, kissed her. After the kiss had become "very prolonged," Banks tried to restrain the defendant. However, the defendant began pushing to try and get back into the car with his girlfriend. As he was forced to the rear of the police vehicle, the defendant said that he "could take [the officers] out any time he wanted to." Banks described the defendant's demeanor as "extremely serious" when he made this statement.

As Banks was transporting the defendant's girlfriend to the police station, he smelled smoke. He looked into the rearview mirror and saw that the juvenile was smoking a cigarette in the backseat of the police vehicle. He stopped the car and instructed her to throw the cigarette away, which she did. He then proceeded again to the police station. After he had gone a few more blocks, she told him that she had "lit another one." Banks radioed the police station that he was stopping his vehicle and why he was doing so. After the defendant's girlfriend refused to throw away the second cigarette, Banks took hold of her hand to shake the cigarette loose. As she dropped the cigarette, she began kicking at Banks. The first kick struck him in the chest, while the second connected with his eye. As Banks was trying to restrain her, she kicked again and broke Banks's finger. She then began acting as if she were going to vomit and was allowed to sit on the edge of the seat, with her feet on the ground.

Banks then saw the defendant come walking into the area where they were stopped, although he was not coming from the direction of the house where they had last seen him. The defendant approached the officers and again said that "he could take [them] out anytime he wanted to." Banks believed that the defendant "meant what he said." The defendant's demeanor was "very stern." At that point, Banks's supervisor radioed for assistance. Soon Officer Keith Feathers and Lieutenant Steve Terry arrived in separate vehicles. Their arrivals, coupled with that of Lieutenant Fred Overbay, meant that there were then four marked Bristol police vehicles at the scene. The defendant was instructed to leave the area. It appeared to Banks that the defendant and Officer Feathers were

having a dispute. However, as Banks approached them, the defendant walked off between some houses and into the dark. Officer Lloyd Heaton arrived in his police vehicle just after the defendant had left. Heaton parked his car last in the line of police vehicles, and the rear of his car was toward the center of the street.

Officer Banks detected a very faint odor of alcohol on the defendant when they were at the Anderson Street residence where the defendant's girlfriend had been hiding. However, there was nothing in the defendant's actions as he walked or spoke that caused Banks to believe the defendant was intoxicated.

All of the officers remained on the scene, waiting for the rescue squad to arrive to check the condition of the defendant's girlfriend. Officer Banks then observed a light blue car coming from a nearby alley. At first, the car's headlights were on, but they suddenly went out. Banks described what he observed as the vehicle approached:

> They were on and then they went off just like that. And at the same time the lights went off, you could hear the sound of the motor revving up, you could see the rear end of the car literally squat and the front end come up as it began to accelerate forward.

Officer Banks continued to describe the actions of the vehicle as it got closer:

> Well, instead of traveling straight on down the – the street which it had plenty of room to do, when the lights went out and the motor revved and it began this action, instead of going straight, it swerved to the right, it came toward us. And like I said, Lieutenant hollered and everybody started jumping.

According to Officer Banks, the car continued to accelerate and passed within "two to three inches of [his] hinder parts." However, none of the officers were injured because they all jumped out of the way.

The State's second witness was Lieutenant Fred Overbay of the Bristol Police Department who was named as the victim in count one of the indictment. He was present when the defendant's girlfriend was removed from the residence and placed into the police vehicle. He assisted Officer Banks in trying to separate the defendant from kissing his girlfriend and heard the defendant say that "he was a third degree black belt . . . and could take us out any time he wanted to." After Officer Banks left the scene with the defendant's girlfriend, Lieutenant Overbay left in his own vehicle to perform other duties. He heard on his radio that Officer Banks had stopped his vehicle, so he proceeded to Banks's location. He testified that it was a violation of police regulations for those being transported in a

police vehicle to smoke, because a cigarette could be used as a weapon. At the scene, he allowed the defendant's girlfriend to sit in the backseat with her feet on the ground because she was trying to vomit. He saw the defendant come walking up from the opposite direction of the house where the defendant's girlfriend was found. He heard the defendant tell Officer Banks that he could "take them," and felt this statement to be sufficiently threatening that he radioed for assistance.

As the result of that radio call, Lieutenant Terry, Officer Feathers, and Officer Heaton arrived at the scene. The last of the five police vehicles in the line was that of Officer Heaton, who had left his emergency lights on. As Lieutenant Overbay was attempting to assist the defendant's girlfriend, he noticed a blue car with its headlights turned off, about twenty to thirty feet away. He saw that its "engine was revved up and it was accelerating." The car was traveling in the direction where all the officers were standing. Overbay jumped out of the way, and the car touched his leg as it passed. It traveled directly over where he had been standing before he jumped.

Officer Keith Feathers, also of the Bristol Police Department, who was named as the victim in count four of the indictment, testified that he responded to the call for assistance when Officer Banks stopped to take the cigarette from the defendant's girlfriend. He and Lieutenant Terry escorted the defendant from the area. He did not smell alcohol on the defendant or observe the defendant having any trouble walking. The defendant told him that he had driven to the location and parked his car in the alley that they were walking toward. The defendant then walked toward where he said he had parked his car. Officer Feathers heard Lieutenant Terry yell, "Look out." He turned and saw a car with its lights out coming directly at them. He shoved Officer Heaton out of the way and then jumped himself. He jumped into his own vehicle and began pursuit of the car. The car's headlights came on as he began pursuing it. As Officer Feathers chased the car, his siren and emergency lights were activated. The chase ended when the car hit two telephone poles, knocking down the wires. Feathers testified that the car he chased was registered to the defendant. Feathers temporarily detained John McGuire, who was standing by the passenger door of the car. He did not see McGuire get out of the car because he was distracted as a result of the accident.

Officer Feathers took the defendant into custody and transported him to the police station. The defendant told Feathers that he drank one shot of vodka about 3:00 p.m. that

afternoon and wanted to take a Breathalyzer test. The defendant did not appear to be intoxicated and did not have an odor of an intoxicant. He administered the test, and the defendant's blood alcohol level registered .12 percent.[1]

The State's next witness was Lieutenant Steve Terry, who was a Bristol police officer at the time of the incident and was named as the victim in count three of the indictment. He responded to the call for assistance from Lieutenant Overbay. Terry escorted the defendant from the area where his girlfriend was being detained by other officers. He testified that he detected an odor of alcohol on the defendant, but he was not intoxicated. Neither the defendant's speech nor his walk indicated that he was intoxicated. As the officers were at the scene, passing cars slowed down to see what the officers were doing. Terry then saw a blue Chevrolet Malibu approaching them, when its lights went out suddenly. He testified as to what he saw as he watched the car:

> **And then I noticed the lights went out. And – and then I noticed – what really brought my attention to focus on it was the – the vehicle accelerated and the – the vehicle front end raised up in the car and then you could hear the – like a four barrel kicking in and the motor revving up and then the vehicle was getting faster. And then I hollered to look out because the vehicle started to swerve towards us as we were standing there.**

Terry testified that he "rolled down the front fender to keep the Malibu from striking me." He said that the car came to within three to five inches of him. The car's path of travel was where all of the officers had been standing.

After the car had passed, Terry got into his vehicle and began pursuit of the car with Officer Feathers. He saw the car lose control and strike a utility pole. As he watched, he saw "a silhouette of a subject" run from the driver's side of the car. Officer Terry, along with other Bristol officers, and officers from Virginia then set up a perimeter to watch the area.

Officer Lloyd Heaton, of the Bristol Police Department, who was named as the victim in count five of the indictment testified regarding his responding to the radio

---

[1]Officer Feathers testified that protocol was for him to observe the defendant for twenty minutes prior to administering the test, but he did not do so. For such test results to be admissible, the testing officer must testify as to a number of matters regarding the equipment used and the test protocol, including the fact that the motorist was observed for "20 minutes prior to the test, and during this period, he did not have foreign matter in his mouth, did not consume any alcoholic beverage, smoke, or regurgitate. . . ." **State v. Sensing, 843 S.W.2d 412, 416 (Tenn. 1992).**

call for assistance from Lieutenant Overbay. He testified that, although the rear end of his vehicle, which was the last in the line of five Bristol police vehicles parked at the scene, was partially in the street, it was not blocking traffic. He said that he is somewhat hearing impaired and was pushed out of the way of the oncoming vehicle by another officer. He did not see the defendant at the scene.

The State's next witness was David Metzger, the transportation planning engineer for the cities of Bristol, Tennessee, and Bristol, Virginia. He testified that, according to his measurements, there would have been approximately three feet of clearance on each side of a vehicle coming on the street and passing by where the five police cars were parked.

Officer David Kirkpatrick, of the Bristol Police Department, testified that he accompanied Officer Banks to the Anderson Street residence where they were trying to locate the runaway juvenile, who turned out to be the defendant's girlfriend. Kirkpatrick knew there was a problem when the defendant told them that "he was a black belt and he would take us out." As the defendant's girlfriend was being driven to Bristol police headquarters, Kirkpatrick returned to routine patrol. Later, by radio, he learned of the vehicle pursuit by other officers and was asked to assist. He drove past where the pursued vehicle had wrecked and parked halfway between the accident scene and the location where the defendant's girlfriend had been taken into custody. He observed the defendant walking in the direction of the residence. After he drove toward the defendant and instructed him to stop, the defendant began running. He pursued the defendant on foot, but lost him. Officer Kirkpatrick radioed that he had spotted the defendant. He then saw the defendant walking on the other side of the fence at the Burlington Volunteer Textile Plant and told him to halt. Two other officers then arrived with a police dog. The defendant climbed over the fence where Kirkpatrick and another officer were waiting for him. Kirkpatrick testified that it took "quite a bit" of force to handcuff the defendant.

The State's next witness, Officer Greg Leek, of the Bristol Police Department, testified that he assisted Officer Kirkpatrick in arresting the defendant. The defendant resisted arrest, and Leek struck him twice with his nightstick to secure him. Later that night, after the defendant had been taken to the jail and complained of an injury to his shoulder, Officer Leek took the defendant to the Bristol Regional

Medical Center and then returned him to the jail. As the defendant was being returned to the jail, Officer Leek related a conversation they had:

> **He asked what he was going to be charged with and I advised him that he would probably be charged with attempted murder and his reply was that that was bullshit, that he could have ran them all down if he had have [sic] wanted to.**

The State then rested its case. The only defense witness was Donald Carl Smith, the older brother of the defendant. He testified that he drove past the location where the officers had stopped with the defendant's girlfriend and had a short conversation with the defendant, whom he described as exhibiting "classic symptoms" of intoxication. Further, he testified that the defendant wears eyeglasses but was not wearing them that night. During cross-examination, he described the defendant's car as having a "350 V8 in it." He also stated that he twice drove his own vehicle past the location where the police cars were parked.

As a rebuttal witness, the State presented Lieutenant George Eden of the Bristol Police Department, who testified that he saw the defendant driving his automobile on November 3, 1995, and the defendant was not wearing glasses. During cross-examination, the witness testified that he had observed the defendant driving in broad daylight but had not seen him driving at night.

ANALYSIS

We will consider seriatim the claims presented by the defendant.

I. VALIDITY OF CHARGE OF ATTEMPT TO COMMIT SECOND DEGREE MURDER

In an opinion released subsequently to the filing of the defendant's brief in this matter, our supreme court, in State v. Madkins, 989 S.W.2d 697 (Tenn. 1999), remanded that case to the trial court where the State could then proceed, if it wished, upon the charge of attempted second degree murder:

> Moreover, under the instructions, the verdict of guilty as to attempted felony murder necessarily means that the jury did not consider the charge of attempted second degree murder, which was properly charged as a lesser offense to attempted premeditated murder. The prosecution is, therefore, able to proceed on this charge upon remand to the trial court should it elect to do so.

989 S.W.2d at 699 (citation omitted).

Additionally, this court has previously considered whether the crime of attempted second degree murder exists in Tennessee. Holding that the Tennessee attempt statute does apply to the offense of second degree murder, the court stated:

> One commits second degree murder if one knowingly tries to kill another and succeeds in doing so. However, if one does not succeed, and his or her actions constitute a substantial step toward the commission of the killing, he or she is guilty of *attempted* second degree murder.

State v. Craig Bryant, No. 02C01-9707-CR-00286, 1999 WL 5633, at *6 (Tenn. Crim. App., Jackson, Jan. 8, 1999) (emphasis in original).

Thus, this assignment is without merit.

II. SUFFICIENCY OF THE EVIDENCE

In this regard, the defendant makes three arguments:

A. Proof regarding the defendant's state of mind is circumstantial, and that proof does not exclude every other reasonable theory or hypothesis.

B. There was ample proof that the defendant was in a "highly emotionally charged state of mind" at the time of the offense.

C. The defendant's statements while under arrest indicate that he was not acting intentionally or rationally but, rather, in an "irrational manner."

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.), perm. 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.), perm. 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 verdict 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 guilty 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.

The defendant was charged and convicted under the criminal attempt and second degree murder statutes. The criminal attempt statute provides:

> (a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:
>
> (1) Intentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;
>
> (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
>
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.
>
> (b) Conduct does not constitute a substantial step under subdivision (a)(3) unless the person's entire course of action is corroborative of the intent to commit the offense.
>
> (c) It is no defense to prosecution for criminal attempt that the offense attempted was actually committed.

Tenn. Code Ann. § 39-12-101.

Second degree murder is defined as a "knowing killing of another." Tenn. Code Ann. § 39-13-210(a)(1). "Knowing" is defined as follows:

> "Knowing" refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

Tenn. Code Ann. § 39-11-302(b).

Thus, it was necessary for the State to prove that the defendant "knowingly" attempted to kill the police officers who took his girlfriend into custody. The defendant argues only circumstantial evidence was presented as to his state of mind, and this evidence did not "exclude every other reasonable theory or hypothesis." Specifically, the defendant points to the proof of his intoxication and of his "highly emotionally charged state of mind" resulting from his girlfriend's being taken into custody by police officers.

Applying the appropriate standard of review, we conclude that the evidence presented was sufficient for the jury to convict the defendant of attempt to commit second degree murder. We disagree with the defendant's characterization that the proof of his "intent or knowledge" at the time was circumstantial. In fact, there was ample direct proof from which the jury could conclude that the defendant intended to kill the officers.

The defendant stated to the officers, after being physically separated from his girlfriend, that he "could take [them] out any time he wanted to." The officers took this threat so seriously that it prompted Lieutenant Overbay to call for backup.

Officer Banks described what he saw as the defendant's automobile approached the location where the defendant had just left and officers were detaining the defendant's girlfriend. He first described that the officers had not blocked the street to traffic:

> While we were standing there, and again, this – this young lady had slipped out of the back seat and was kneeling on the pavement, we were standing there and just to the – to the right of us from where I was standing, there was an alley way that comes out from between two houses. It's not paved, it's gravel. And a lot of the gravel had been dragged onto the roadway itself. And as the cars would come by where they had to ease over to that side of the road, as they came through, you could hear them hit the gravel. As I was standing there, I heard the gravel and as I turned my head to the right to look over my shoulder, this light blue car was coming through that section and all of the [sic] sudden, the lights went totally out. All of the headlights went out.

Banks described the continuing actions of the defendant in his car:

> They were on and then they went off just like that. And at the same time the lights went off, you could hear the sound of the motor revving up, you could see the rear end of the car literally squat and the front end come up as it began to accelerate forward.

Banks testified that other cars had passed by without turning off their headlights or accelerating. He then described how his lieutenant yelled out and that "everybody started jumping." He described the continued path of the defendant's car:

> Well, instead of traveling straight on down the – the street which it had plenty of room to do, when the lights went out and the motor revved and it began this action, instead of going straight, it swerved to the right, it came toward us. And like I said, Lieutenant hollered and everybody started jumping.

The officers described in various fashions how they avoided being struck by the defendant's car. Banks jumped when the car came within "two or three inches" of him. Lieutenant Overbay testified that the car passed over where he and Banks had been standing before they had jumped out of its path. Officer Feathers testified that he shoved Officer Heaton out of the way of the oncoming vehicle.

Thus, there was abundant direct evidence from which the jury could conclude that the defendant knowingly attempted to kill the police officers. However, the defendant contends that the evidence was insufficient to show his state of mind.

In fact, it was for the jury to decide whether the defendant was too intoxicated to form the requisite mental state. State v. Brooks, 909 S.W.2d 854, 859 (Tenn. Crim. App. 1995). Although Officer Feathers testified that the defendant registered .12 on a Breathalyzer test following the incident, witnesses stated that he did not appear to be intoxicated. Thus, there was evidence in the record from which a rational juror could have found the essential elements of the crime. The same analysis applies to the defendant's assertions that his "highly emotionally charged state of mind" does not support a conviction for attempted second degree murder. However, the fact that a person is in a state of "passion or excited when the design was carried into effect" does not mean that a person cannot deliberate and premeditate to kill another. Leonard v. State, 155 Tenn. 325, 337-38, 292 S.W. 849, 852 (1927); see State v. McAfee, 784 S.W.2d 930, 932 (Tenn. Crim. App. 1989) ("strong feelings and excitement can co-exist with premeditation and deliberation"). Thus, this assignment is without merit.

III. SENTENCING CONSIDERATIONS

A. Length of Sentences

In each of the five attempted second degree murder convictions, the defendant was sentenced to sixteen years imprisonment as a Range II offender. We will next consider his arguments that he should have received sentences in each case of no more than twelve years, the minimum sentence as a Range II offender. He does not contest his classification as a Range II offender.

The procedure to be followed by the trial court in setting the sentence is as follows:

> (b) To determine the specific sentence and the appropriate combination of sentencing alternatives that shall be imposed on the defendant, the court shall consider the following:
>
> (1) The evidence, if any, received at the trial and the 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 involved;
>
> (5) Evidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and
>
> (6) Any statement the defendant wishes to make in the defendant's own behalf about sentencing.

Tenn. Code Ann. § 40-35-210.

According to the presentence report, the State filed a notice of its intention to seek enhanced punishment, setting out that the defendant had been convicted in the Sullivan County Criminal Court on August 30, 1994, in three separate cases of aggravated burglary and theft over $1,000. These offenses occurred on separate days. Further, he was convicted on May 24, 1995, in the Sullivan County General Sessions Court of failure to stop at the scene of an accident. According to that report, the defendant was granted probation on the three aggravated burglary and three theft cases on August 30, 1994. A violation of probation warrant was then issued on February 3, 1995, alleging that the defendant had failed to obey the law, failed to report all arrests, changed his address without permission, failed to report as instructed, and used intoxicants. On February 15, 1995, the defendant was placed into the community corrections program as the result of

the issuance of the violation of probation warrant. On July 14, 1995, he was returned to regular probation, which was revoked on June 26, 1996, as the result of his being charged with the offenses which are the basis for this appeal.

The defendant's employment history, set out in the presentence report, showed that he had been employed at four, unskilled jobs during the period from August 23, 1993, to September 30, 1994. He had not been fired from any of these jobs.

At the sentencing hearing in this matter, the State sought to have the defendant sentenced to other than the minimum sentence. The State contended that the trial court should apply enhancing factors (1), (8), (9), and (13)(C). Tenn. Code Ann. § 40-35-114. The defense urged the application of mitigating factors (6) and (13). Tenn. Code Ann. § 40-35-113.

As enhancing factors, the court applied numbers (1), "previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range"; (8), "a previous history of unwillingness to comply with the conditions of a sentence involving release in the community"; and (13), felonies committed while on release from prior felony convictions. The defendant did not contest the applicability of these enhancing factors. Additionally, the court applied factor (9), the defendant possessed a "deadly weapon during the commission of the offense." Tenn. Code Ann. § 40-35-114(9). However, the court gave this last factor little weight.

As a mitigating factor, the trial court considered the defendant's youth under Tenn. Code Ann. § 40-35-113(13). The court rejected the defendant's contention that his age should be considered under factor (6), reasoning that his youth had not affected his substantial judgment with regard to the offenses. Additionally, under factor (13), the court noted that the defendant had a supportive family who had come to court with the defendant and posted his bond. The defendant argued that the trial court erred, however, in its consideration of the mitigating factors:

> Specifically, the trial court erred by failing to consider the Defendant's positive work history, no prior convictions for a crime of violence, a supportive family, his relatively young age of twenty (20) years, and his attainment of a G.E.D. – in sentencing Mr. Smith to sixteen (16) years as a Range II offender.

The trial court accepted the defendant's assertion that the court should consider as

mitigating factors that the defendant had a supportive family, had obtained his G.E.D., and had no prior convictions for crimes of violence. The court found that the enhancing factors "heavily outweigh[ed] the mitigating factors" and fixed the defendant's sentence at sixteen years in each case as a Range II offender.

We find that the trial court properly considered the appropriate sentencing factors and set out its findings on the record. Accordingly, the presumption of correctness applies. This assignment is without merit.

B. Consecutive Sentencing

The defendant claims that the trial court erred in ordering that two of the sentences be served consecutively. In doing so, the trial court ruled as follows:

> Now, a more difficult issue presented to the Court is whether or not the sentences should be served consecutively. The Defendant, at the time of these offenses, was on probation for three aggravated burglaries, Class C felony offenses. And what was his total sentence in those?
>
> GENERAL PERRIN: I believe it was four years, Your Honor.
>
> THE COURT: Four year sentence. The State . . .
>
> GENERAL PERRIN: I think it was four years, yes, sir.
>
> THE COURT: Under TCA 40-35-115, the effective sentence in what he was [sic] probation for was four years in all those cases as set out in exhibits 1, 2 and 3 that's been introduced. The Court notes the Defendant is a young person and that he is facing, on each one of the sentence, a sixteen year sentence. A sixteen year sentence, Range II, Multiple Offender status would require the Defendant to serve as a Range II five years, seven months and six days before he became eligible for any type of release. It's doubtful, considering the nature of these offenses, the parole board would act favorably toward him. I don't know that, that would be a matter for the parole board. But, the Court could – should consider that he will be serving a substantial amount of time just on one offense.
>
> Now, the consecutive sentencing rule – statute, TCA 40-35-115, is a mechanical type rule. Clearly, the State has proven that number two, prior criminal conduct by the Defendant, prior criminal acts other than those necessary to establish in the range is clearly established by the evidence in the case as previously stated.
>
> Clearly, the Defendant was on probation, under consecutive sentencing factor number six, at the time of this offense. The Defendant did a very dangerous act and came very close to harming at least – some of the officers saw more than other officer saw. So, would he be a dangerous offender? His act indicates he's a dangerous offender, but under State v. Wilkerson, even if the Court finds the Defendant to be a dangerous offender, the Court must be able to go forward and say that the Defendant – that a long incarceration is necessary to insure the safety of the public.
>
> Considering all of the factors stated, the Court, I think with

confidence under State v. Wilkerson, can state the Defendant would be a dangerous offender that a long incarceration would be necessary to protect the public. Therefore, the Court finds that consecutive – consecutive sentencing factor number four would be applicable.

So, the Court finds the State has proven beyond a reasonable doubt the existence of three statutory enhancing factors, and the Court specifically finds under the dangerous offender factor that the Defendant would present a danger to the public if a long incarceration was not entered.

So, the issue then becomes how many of these cases should be stacked? The State insists all of them should be stacked. The Court, upon a review of the facts, there is evidence that drinking was involved during the course of this event. The Defendant was present with a runaway, which was described at trial as his girlfriend when the police went to his home or a third party's home to retrieve the juvenile, that the Defendant appeared to be aggravated and upset at that time in that he either braggadocio or otherwise stated that he could take care of himself or he could take the officers out or words to that effect.

While the police officers are transporting the juvenile to the police department, the juvenile became sick smoking a cigarette. The officer stopped the car and other officers arrived at the scene while the officers looked about her safety.

The most disturbing thing about this case is that all the evidence indicated that the Defendant's girlfriend was out of the car, perhaps on her knees at the time the Defendant came walking up and this should have been, to an ordinary reasonable person, observable by him. That after seeing his girlfriend, the juvenile in the position she was in, the officers standing around, the proof appears to be rather heavy that the Defendant drove a vehicle at the same area where his girlfriend and the police officers were located out of the police cars or police cruisers.

In addition to affirming the State's opinion that the Defendant is a dangerous offender, that to do something like that, even going to where your girlfriend may be located and driving your car in that manner would indicate the Defendant would present a present danger to the community if released without some consecutive sentencing.

Now, if the Court runs one of these sentences consecutive, it brings the Defendant up to a sentence of sixteen years, which would require him to – of – of thirty two years, which would require him to serve eleven years, two months and twelve days as a Range II, Persistent or – Persistent Offender status.

The Court's therefore of the opinion two of these sentences should run consecutively with each other and the sentences should run consecutive to the burglary sentence the Defendant was on probation for. The Court recognizes some of these rules are mechanical, and often times, these mechanical rules work against the State. In this case, the mechanical rules work in favor of the State.

Appropriate sentence in this case would be that two of these attempt to commit second degree murder cases should be run consecutively for the reasons stated. And I have taken, under Diaz v. State, State v. Jones, take some care to explain the reason for the sentencing structure I'm entering.

Since the defendant has challenged the manner of service of his sentences, this

court must conduct a *de novo* review, with the "presumption that the determinations made by the lower court from which the appeal is taken are correct." State v. Pettus, 986 S.W.2d 540, 543 (Tenn. 1999). The 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. Davis, 940 S.W.2d 558, 559 (Tenn. 1997); State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

Tennessee Code Annotated § 40-35-115(b) sets out the criteria which the trial court must consider in ordering that sentences be served consecutively:

> (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) The defendant is a dangerously mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The 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;
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
>
> (6) The defendant is sentenced for an offense committed while on probation; or
>
> (7) The defendant is sentenced for criminal contempt.

Of these factors, the trial court applied numbers (2), (4), and (6). Number (2) was applied because the trial court found that the defendant had an extensive criminal record beyond that necessary to establish the appropriate range. As for number (4), the court found that the defendant was a "dangerous offender," and, applying State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995), that "a long incarceration would be necessary to protect the public." Number (6) was applied because the defendant was on probation for aggravated burglary and theft over $1,000 at the time of these offenses.

The defendant urges that the necessity of consecutive sentencing was precluded because he was only 20 years of age at the time of the offenses, had obtained his G.E.D., and, according to testimony at the sentencing hearing, was not prone to violent acts and the ones he committed were not in character. Additionally, the defendant argues that the trial court committed several errors in ordering consecutive sentences: the court did not find that the consecutive sentences "reasonably relate[d] to the severity of the offenses committed," Wilkerson, 905 S.W.2d at 939; the court stated, without setting out a basis, that the defendant was a "dangerous offender" and a "long incarceration [was] necessary to insure the safety of the public"; and the sentencing rules the court applied were "mechanical" in nature. Further, the defendant contends that the trial court did not satisfy the proportionality requirement of Wilkerson in that there was no basis for the court's finding that the defendant should be incarcerated for a long period in order to protect the public.

According to the presentence report, the defendant, although only 20 years of age, had a lengthy criminal record. In three separate cases, he had been convicted of aggravated burglary and theft over $1,000, these offenses occurring on separate days in October 1993. He was on probation for those offenses when he committed the acts which resulted in the offenses which are the basis for this appeal. Additionally, he was convicted on May 24, 1995, of reckless driving and failure to stop at the scene of an accident and was sentenced to six months confinement and a fine of $25 in each case. He was convicted on February 28, 1994, of possession and distribution of intoxicating liquor by a person under age 21 and received a suspended sentence of eleven months and twenty-nine days and was ordered to pay a fine in an undisclosed amount.

In our *de novo* review of this matter, we hold that the trial court properly applied Tenn. Code Ann. § 40-35-115 and made the additional findings required by Wilkerson. In view of the defendant's three prior convictions for aggravated burglary and theft over $1,000, as well as the misdemeanor traffic convictions, we agree with the finding of the trial court that the defendant is "an offender whose record of criminal activity is extensive." Tenn. Code Ann. § 40-35-115(2). Additionally, the testimony of the police officers as to the manner in which the defendant's automobile accelerated as he approached them, coupled with the fact that the officers would have been struck by it had they not jumped out of the way, establishes that the "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(4). With regard to this consideration, the trial court specifically found that the defendant met the additional criteria established by Wilkerson in that "an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences [are] reasonably relate[d] to the offenses committed." 905 S.W.2d at 939.

Thus, we conclude that the trial court properly applied the sentencing considerations in this matter.

CONCLUSION

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

_____
ALAN E. GLENN, JUDGE

CONCUR:

_____
JOSEPH M. TIPTON, JUDGE

_____
JOHN EVERETT WILLIAMS, JUDGE