IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER SESSION, 1999

FILED

January 27, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. 03C01-9810-CR-00372**
	)	
Appellee,	)	
	)	**HAMILTON COUNTY**
V.	)	
	)	
	)	**HON. REBECCA J. STERN, JUDGE**
BRUCE MONROE STEVENSON,	)	
	)	**(SIMPLE ASSAULT; ATTEMPTED**
Appellant.	)	**FIRST DEGREE MURDER)**

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OPINION FILED _____

AFFIRMED IN PART; REVERSED IN PART

THOMAS T. WOODALL, JUDGE

OPINION

Defendant Bruce Monroe Stevenson was indicted by the Hamilton County Grand Jury for simple assault and attempted first degree murder. Defendant subsequently filed a motion to sever the two charges and the trial court granted the motion. Following a jury trial for the simple assault charge, Defendant was convicted of simple assault. Thereafter, Defendant was charged by information for three counts of aggravated assault. Following a separate jury trial for the attempted first degree murder charge, Defendant was convicted of the lesser included offenses of attempted second degree murder and three counts of aggravated assault. The trial court subsequently dismissed and merged the aggravated assault convictions with the attempted second degree murder conviction. Following a consolidated sentencing hearing, the trial court sentenced Defendant as a Range II multiple offender to a term of twenty years in the Tennessee Department of Correction for the attempted second degree murder conviction and a term of eleven months and twenty-nine days in the county workhouse for the simple assault conviction. In addition, the trial court ordered the sentences to run consecutively. In this consolidated appeal, Defendant raises the following issues:

> 1) whether the trial court erred when it failed to suppress Defendant's pretrial statement to police;
>
> 2) whether the trial court erred when it admitted evidence of Defendant's prior bad acts into evidence during both trials;
>
> 3) whether the evidence was sufficient to support Defendant's conviction for attempted second degree murder;
>
> 4) whether the trial court erred when it instructed the jury about parole eligibility during the attempted murder trial; and
>
> 5) whether the trial court imposed an excessive sentence for the attempted second degree murder conviction.

After a review of the record, we affirm the judgment of the trial court in part and reverse it in part.

I. FACTS

A. Assault Trial

Angela Billings testified that she had previously been married to Defendant for a period of three months. While Billings and Defendant were fishing on June 4, 1996, Defendant became angry with Billings and he jumped on her and then hit and kicked her. While Billings and Defendant were drinking alcohol on August 16, 1996, the two began fighting and Defendant eventually began "bumping" Billings' head into the floor. Defendant also broke into Billings' residence in August of 1996 and then vandalized the residence and stole her bicycle and toolbox.

Billings testified that after she and Defendant got back together on February 20, 1997, Defendant became upset and he began hitting her and "bumping" her head into the floor. As a result, Billings sustained a black eye, a cut on her head, and a cut on her eye. Shortly thereafter, Defendant took Billings' car and drove away. This February 20 incident was the assault for which Defendant was tried and convicted.

B. Attempted Murder Trial

Dorice Brown, Billings' daughter, testified that in April of 1997, she heard Defendant threaten to kill Billings because she had called the police for something Defendant had done. Brown also heard Defendant threaten Billings in February of 1997.

Officer Wendy LaPointe testified that in June of 1997, she was dispatched to Billings' place of employment on a complaint of harassing phone calls. After the telephone rang and LaPointe answered and identified herself as a police officer, the male caller stated, "Get the whores on the phone . . . I'm going to come over there and [f _ _ _] everybody up." A few minutes later, the telephone rang again and LaPointe answered and identified herself as a police officer. The same male voice

then stated, "Get the whore on the phone. I want to talk to her now." Although LaPointe could not identify the caller, she stated that when she called the individual Mr. Stevenson, "[h]e did not challenge the name."

Billings testified that after she went fishing with Defendant in June of 1996, Defendant hit and kicked her. In August of 1996, Defendant "banged" Billings' head against the floor and only stopped when she began bleeding. In February of 1997, Defendant "bumped" Billings' head on the floor and he then stole her car and subsequently wrecked it.

Billings testified that on May 3, 1997, Defendant called her on the telephoned and threatened to "bang, bang" her if she "didn't get [her] act together." During this same time period, Defendant began calling Billings at work, but she usually refused to talk to him. Defendant subsequently stole Billings' car while it was at her place of employment and he obtained her address from something that was in the car. On or just prior to June 9, 1997, she went to court to obtain a protective order to stop Defendant from harassing her.

Billings testified that when she arrived home from work and got out of her vehicle on June 9, 1997, Defendant began hitting her. Billings could not remember anything else about the incident, but she could remember telling the police that Defendant was the person who attacked her.

Thomas Orlin testified that in June of 1997, he was living in the same apartment complex as Billings. While Orlin was sleeping on the afternoon of June 9, 1997, he was awakened by the sound of a woman's screams. Orlin then retrieved a weapon and went outside, where he saw a tall black man running toward a vehicle. When Orlin approached the man, the man acted like he was going to point a gun at him, so Orlin backed away. At this point, Orlin found Billings lying on the ground between two cars. Orlin observed that Billings had a cut on her head, was missing

some hair, was spitting up blood, and was having trouble breathing. Orlin testified that the man he saw on June 9, 1997, had the same general appearance as Defendant, but he could not be certain that Defendant was the man he saw.

Officer Rodney Marler testified that he responded to a call from the apartment complex on June 9, 1997. When Marler arrived at the scene, he observed that Billings was lying on the ground by a red vehicle and she did not respond to anything that was said to her. Marler subsequently observed that there was a dent in the fender of the red vehicle and he also found Billings' hair on the dented fender, on the ground, on concrete by a porch, and on a wooden post.

Detective Jim Kyle testified that he attempted to interview Billings at the hospital on June 9, 1997, but Billings was unable to respond to any questioning. Kyle returned to the hospital on June 10, 1997, and at that time Billings stated that Defendant was her assailant. Kyle also learned that Billings had taken out a protective order against Defendant on the previous day and the order had been served on Defendant approximately two hours before Billings was attacked.

Detective Kyle testified that he subsequently went to the home of Defendant's parents to arrest Defendant. When Kyle arrived and asked whether Defendant was there, Defendant's mother said that he was not. After Defendant's father consented to a search of the residence, Kyle and other officers discovered that Defendant was in a locked bedroom. Shortly thereafter, Defendant came out of the room, grabbed his mother, and pulled her between himself and the officers. At this point, Defendant was advised that he was under arrest for the attempted murder of Billings and he was taken into custody.

Officer Timothy Nabors testified that he was involved in the arrest of Defendant on June 10, 1997. After Defendant was arrested and placed in Nabors' patrol vehicle, Defendant repeatedly asked why he was being arrested. Nabors then

stated, "What do you think you're being arrested for. You put your girlfriend in the hospital." Defendant then responded by saying either "I didn't beat her up that bad," or "I didn't hit her that hard."

Dr. John Gormley testified that he began treating Billings on June 20, 1997. At that time, Dr. Gormley observed that Billings had sustained an injury to the left side of her brain, had weakness on the right side of her body, and had trouble swallowing and speaking. Dr. Gormley opined that some of these conditions would continue for the remainder of Billings' life. Dr. Gormley also opined that Billings' injuries involved a substantial risk of death, protracted unconsciousness, protracted loss or substantial impairment of physical or mental ability, and extreme physical pain.

Dr. Alan Sherwood testified that he treated Billings in June of 1997. At the initial examination, Dr. Sherwood observed that Billings had minor scrapes and contusions on various parts of her body. Dr. Sherwood subsequently observed that Billings had progressive weakness on her right side and she had difficulty speaking and swallowing. Dr. Sherwood opined that there was a chance Billings could have died if she had not been treated for her injuries. Dr. Sherwood also opined that Billings' injuries involved a protracted loss or substantial impairment of physical or mental ability.

Officer Robert Prichard testified that after Billings was placed in the ambulance on June 9, 1997, he attempted to use Billings' key to open her apartment door, but the key would not go in the lock. Donald Tripine testified that as part of his duties as a maintenance person, he attempted to unlock the door to Billings' apartment on June 10, 1997. Tripine was unable to unlock the door because there was a clear substance that appeared to be Super Glue in the lock. Billings testified that when she left for work on June 9, 1997, she had no trouble putting her key in the lock to lock the door.

II. DENIAL OF SUPPRESSION MOTION

Defendant contends that the trial court erred when it denied his motion to suppress the statement he made to Officer Nabors. Specifically, Defendant argues that the statement was inadmissible because he was not advised of his rights as required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before he made the statement.

In Miranda, the United States Supreme Court held that pursuant to the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination, police officers must advise a defendant of his or her right to remain silent and right to counsel before they may initiate custodial interrogation. 384 U.S. at 479, 86 S.Ct. at 1630. If these warnings are not given, statements elicited from the individual may not be admitted for certain purposes in a criminal trial. Stansbury v. California, 511 U.S. 318, 322, 114 S.Ct. 1526, 1528, 128 L.Ed.2d 293 (1994). For purposes of Miranda, the term "interrogation" refers to

> [N]ot only express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. . . . A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.

Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689–90, 64 L.Ed.2d 297 (1980).

In this case, there is no dispute that Defendant was not advised of his Miranda rights and he was in custody when he made the statement to Officer Nabors. Thus, the only question is whether the statement was given in response to police initiated interrogation.

Officer Nabors testified during the suppression hearing that when Defendant was arrested, he was advised that he had been charged with the aggravated assault

of his girlfriend. Shortly thereafter, Defendant was placed in Nabors' patrol vehicle. While en route to the jail, Defendant repeatedly asked what he had been arrested for. Nabors testified that although he could not remember the exact words, he responded to Defendant's repeated questions with a remark such as, "Don't you know why? You're arrested for aggravated assault because your girlfriend is in the hospital. That's why you're arrested." At this point, Defendant stated "Well, I didn't hit her that hard." Nabors testified that his comment to Defendant was made not to elicit a response, but was a sarcastic remark made because Defendant continued to ask why he had been arrested even though he had already been told why.

At the conclusion of the suppression hearing, the trial court ruled that Defendant's statement was admissible. The trial court based this ruling on its finding that Defendant had initiated the conversation and had not given the statement in response to police interrogation. This Court is obliged to uphold the trial court's findings of fact in a suppression hearing unless the evidence preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). However, the application of the law to the facts is a question of law which is reviewed de novo on appeal. State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997). We conclude that the trial court properly denied the motion to suppress Defendant's statement.

Initially, we note that the Miranda rule only applies to interrogation that is initiated by a law enforcement official. See State v. Anderson, 937 S.W.2d 851, 853 (Tenn. 1996). The evidence simply does not preponderate against the trial court's finding that Defendant initiated the conversation with Nabors. Indeed, the record indicates that Defendant repeatedly asked why he had been arrested and attempted to begin a conversation with Nabors without any encouragement on the part of Nabors.

Second, we do not agree with Defendant that Nabors' comment was of the type that "police should know [is] reasonably likely to elicit an incriminating response

from the suspect." See Innis, 446 U.S. at 301, 100 S.Ct. at 1689. Instead, it appears that the comment was merely a statement made out of growing frustration caused by Defendant's repeated asking of the same question and it appears that the comment was made in order to induce Defendant to be silent, rather than to make an incriminating statement. Moreover, there is no indication that Nabors should have known that his sarcastic offhand remark was reasonably likely to elicit an incriminating statement from Defendant

Because Defendant initiated the conversation with Nabors and because Nabors' comment was not reasonably likely to elicit an incriminating response, we hold that the trial court properly denied the motion to suppress. Defendant is not entitled to relief on this issue.

III. PRIOR BAD ACTS

Defendant contends that the trial court erred when it admitted evidence about his prior bad acts because the evidence was inadmissible under Rule 404(b) of the Tennessee Rules of Evidence.

Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
>
> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and
>
> (3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b). A fourth prerequisite to admission is that the court find by clear and convincing evidence that the defendant committed the prior crime. Tenn. R. Evid. 404 (Advisory Commission Comments); State v. DuBose, 953 S.W.2d 649,

654 (Tenn. 1997); State v. Parton, 694 S.W.2d 299, 303 (Tenn. 1985). When a trial court substantially complies with the procedural requirements of the rule, its determination will not be overturned absent an abuse of discretion. DuBose, 953 S.W.2d at 652. Where a court fails to substantially comply with these requirements, the court's decision is afforded no deference. Id.

A. Attempted Murder Trial

During the attempted murder trial, Billings testified that in addition to the charged offense that occurred on June 9, 1997, Defendant had assaulted her on three prior occasions. Billings also testified that Defendant had previously vandalized her residence and stolen and wrecked her vehicle. In addition, Billings testified that Defendant made threatening phone calls to her on several occasions. Brown testified that Defendant had threatened to kill Billings in April of 1997 and he also threatened Billings on another occasion. Officer LaPointe testified that Defendant had made at least two threatening telephone calls to Billings' place of employment.

The State contends that the above evidence of Defendant's prior bad acts committed against Billings was relevant to the issue of Defendant's intent when he attacked Billings on June 9, 1997. We agree. Although Rule 404(b) prohibits the introduction of evidence of other crimes or bad acts in order to show that the defendant acted in conformity with his or her bad character in committing the charged offense, the rule permits the admission of evidence of prior wrongful conduct if the evidence is relevant to an issue such as identity, motive, intent, or rebuttal of accident or mistake. Tenn. R. Evid. 404(b) (Advisory Commission Comments); State v. Electroplating, Inc., 990 S.W.2d 211, 223 (Tenn. Crim. App. 1998).

We conclude that the evidence of Defendant's prior criminal conduct toward Billings was relevant to establishing that he had the intent to kill Billings (i.e., the required mental state for attempted second degree murder) when he attacked her on June 9, 1997. In State v. Smith, 868 S.W.2d 561 (Tenn. 1993), the Tennessee Supreme Court held that evidence of the defendant's prior acts of violence and threats against the victims was admissible under Rule 404(b) in a murder case because the prior bad acts were relevant to showing the defendant's hostility toward the victims, his settled purpose to harm the victims, and his intent and motive for the killings. Id. at 574. Similarly, this Court held in State v. Leroy Hall, Jr., No. 03C01-9303-CR-00065, 1996 WL 740822 (Tenn. Crim. App., Knoxville, Dec. 30, 1996), aff'd, 958 S.W.2d 679 (Tenn. 1997), that evidence about the defendant's previous acts of setting fire to the victim's car was admissible under Rule 404(b) because it was relevant to the defendant's intent in regard to the aggravated arson and murder charges. Id., 1996 WL 740822, at *12–13.

In this case, the State had to prove that Defendant intended to kill Billings in order to establish all of the required elements of the offense of second degree murder. There is clear and convincing evidence in the record that the prior bad acts occurred, and Defendant has apparently conceded that they occurred. As in Smith and Lucas, the evidence of Defendant's prior wrongful conduct toward Billings was highly probative of his intent and his settled purpose to harm Billings. We conclude that this probative value was not outweighed by danger of unfair prejudice and thus, the evidence of Defendant's prior bad acts was admissible in the attempted murder trial. Defendant is not entitled to relief on this issue.

B. Assault Trial

During the assault trial, Billings testified that in addition to the charged offense that occurred on February 20, 1997, Defendant also assaulted her on June 4 and August 16, 1996. Billings also testified that Defendant broke into her residence in

August of 1996, vandalized the residence, and stole some of her property. Billings also made a vague comment about seeing Defendant drive away in her vehicle after one of the assaults, but she did not clearly state that Defendant had stolen the vehicle.

Although it is not entirely clear, the State apparently contends that the above evidence of Defendant's prior bad acts committed against Billings was admissible because it was relevant to the issue of Defendant's intent when he assaulted Billings on February 20, 1997. We disagree.

We conclude that the evidence of Defendant's prior assaults of Billings committed on June 4, 1996, and August 16, 1996, as well as the evidence that he vandalized Billings' residence and stole her property in August of 1996 had little, if any, probative value in establishing Defendant's intent when he assaulted Billings on February 20, 1997. In contrast to attempted second degree murder, where the State had to prove that Defendant attacked Billings with intent to kill her, see Tenn. Code Ann. §§ 39-12-101(a)(2), 39-13-210(a)(1) (1997), the State only had to prove that Defendant intentionally, knowingly, or recklessly caused bodily injury to Billings or intentionally or knowingly caused extremely offensive or provocative physical contact with her in order to establish the commission of the assault, see Tenn. Code Ann. § 39-13-101(a) (1997). The evidence of Defendant's prior bad acts committed against Billings has very little value in establishing this required mental state for simple assault. Moreover, we conclude that this evidence has no relevance at all to any other exception that would allow admission under Rule 404(b). There was nothing similar and distinctive about the various criminal acts committed by Defendant as opposed to every other assault, vandalism, or theft that would establish the identity of the perpetrator of the offenses and there was never any claim that Defendant injured Billings by mistake or accident.

We also conclude that the minimal probative value of this evidence, particularly that of the prior assaults, is clearly outweighed by the danger of unfair prejudice. As stated by the Tennessee Supreme Court:

> The general rule excluding evidence of other crimes is based on the recognition that such evidence easily results in a jury improperly convicting a defendant for his or her bad character or apparent propensity or disposition to commit a crime regardless of the strength of the evidence concerning the offense on trial. Such a potential particularly exists when the conduct or acts are similar to the crimes on trial.

State v. Rickman, 876 S.W.2d 824, 828 (Tenn. 1994) (citations omitted). In this case, introduction of the evidence about Defendant's prior assaults of Billings created the opportunity for the jury to impermissibly infer that Defendant had a bad character and a propensity to commit simple assaults and he must have acted in conformity with that character and propensity by assaulting Billings on February 20, 1997. Thus, we conclude that the prior bad act evidence was improperly admitted in the assault trial.

Further, we cannot say that the introduction of this evidence in the assault trial was harmless beyond a reasonable doubt. The State's evidence was not overwhelming, rather, it essentially consisted only of Billings' somewhat confused testimony about the events of the night in question. Therefore, we reverse Defendant's conviction for simple assault and we remand for a new trial for that offense.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant contends that the evidence was insufficient to support his conviction for attempted second degree murder.

Where the sufficiency of the evidence is contested on appeal, the relevant question for the reviewing court is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979). In determining the sufficiency of the evidence, this Court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). 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 (1956). To the contrary, this Court is required to afford the State 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. Tuttle, 914 S.W.2d 926, 932 (Tenn. Crim. App.1995). Since a verdict of guilt removes the presumption of a defendant's innocence and replaces it with a presumption of guilt, the defendant has the burden of proof on the sufficiency of the evidence at the appellate level. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Under Tennessee law, second degree murder is "[a] knowing killing of another." Tenn. Code Ann. § 39-13-210(a)(1) (1997). In addition, "[a] person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense . . . [a]cts 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." Tenn. Code Ann. § 39-12-101(a)(2) (1997). We conclude that when the evidence is viewed in the light most favorable to the State, as it must be, the evidence was sufficient for a rational jury to find beyond a reasonable doubt that Defendant committed the offense of attempted second degree murder.

First, Defendant contends that the evidence was insufficient to establish his identity as the person who attacked Billings on June 9, 1997. We conclude that the evidence was clearly sufficient to establish Defendant's identity as Billings' assailant. Billings identified Defendant as her attacker when she regained consciousness at the hospital and she also made an in-court identification of Defendant during trial. In addition, although Orlin was not able to identify Defendant as the man he saw on June 9, he testified that Defendant had the same general appearance as the man

he saw. Further, when Defendant made the statement to Officer Nabors, he expressly admitted that he was the person who had attacked Billings.

Second, Defendant contends that the evidence was insufficient to establish the elements of the offense. We conclude that the evidence was sufficient to establish all of the required elements. Defendant physically assaulted Billings on three prior occasions and he beat her head against the floor on two of those occasions. Defendant also called Billings at work and threatened to "bang, bang" her if she did not get her act together. In April of 1997, Defendant expressly threatened to kill Billings if she ever reported him to the police. On June 9, 1997, Defendant was served with the protective order obtained by Billings. Within a few hours, Defendant beat Billings' head against a concrete porch, a wooden post, and the fender of a car until she lost consciousness. As a result of this beating, Billings sustained permanent brain injury. Dr. Sherwood opined that there was a possibility that Billings would have died if she had not received medical attention and Dr. Gormley opined that Billings' injuries involved a substantial risk of death. The jury could infer from this evidence that Defendant had an ongoing settled purpose to harm Billings, he became angry and decided to carry out his previous threat to kill Billings when he was served with the protective order, and he intended to kill Billings when he attacked her on June 9. In short, this evidence is sufficient to support the jury's finding that Defendant forcefully beat Billings' head against various objects with the intent to kill her and he believed that he would accomplish that objective without further conduct on his part. Defendant is not entitled to relief on this issue.

V. PAROLE ELIGIBILITY INSTRUCTION

Defendant contends that the trial court erred when it instructed the jury about parole eligibility in the attempted murder case.

The record indicates that the trial court provided the jury with the following instruction:

> Although you will not be concerned with fixing any sentence, for your information only, the Court will set out ranges of sentence applicable to each of the criminal offenses described in these instructions. However, you may weigh and consider the meaning of a sentence of imprisonment.

The trial court then instructed the jury that attempted first degree murder had a sentencing range of fifteen to forty years with a release eligibility of 1.77 years, that attempted second degree murder had a sentencing range of eight to twenty years with a release eligibility of .94 years, that attempted voluntary manslaughter had a sentencing range of two to eight years with a release eligibility of .24 years, that aggravated assault had a sentencing range of three to ten years with a release eligibility of .35 years, and that assault had a sentencing range of zero to eleven months and twenty-nine days. Finally, the trial court instructed the jury that whether a defendant is released on the date of first release eligibility is a discretionary decision made by the board of paroles.

When Defendant was tried for attempted first degree murder in January of 1998, Tennessee Code Annotated section 40-35-201 provided, in relevant part:

> (b)(1) In all contested criminal cases, except for capital crimes which are governed by the procedures contained in §§ 39-13-204 and 39-13-205, upon the motion of either party, filed with the court prior to the selection of the jury, the court shall charge the possible penalties for the offense charged and all lesser included offenses.
>
> (2)(A)(i) When a charge as to possible penalties has been requested pursuant to subdivision (b)(1), the judge shall also include in the instructions for the jury to weigh and consider the meaning of a sentence of imprisonment for the offense charged and any lesser included offenses. Such instruction shall include an approximate calculation of the minimum number of years a person sentenced to imprisonment for the offense charged and lesser included offenses must serve before reaching such person's earliest release eligibility date. Such calculation shall include such factors as the release eligibility percentage established by § 40-35-501, maximum and minimum sentence reduction credits authorized by § 41-21-236 and the governor's power to reduce prison overcrowding pursuant to title 41, chapter 1, part 5, if applicable.
>
> (ii) Such instructions to the jury shall also include a statement that whether a defendant is actually released from incarceration on the date when such defendant is first eligible for release is a discretionary decision made by the board of paroles based upon many factors, and that such board has the authority to require the defendant to serve the entire sentence imposed by the court.

Tenn. Code Ann. § 40-35-201 (1997). In State v. King, 973 S.W.2d 586 (Tenn.1998), the Tennessee Supreme Court held that section 40-35-201(b)(2) was constitutional and stated:

> We conclude that Tenn. Code Ann. § 40-35-201(b)(2) does not violate the Separation of Powers Clauses of the Tennessee Constitution. Neither is the statute impermissibly vague, nor does it require a misleading jury instruction. Additionally, we are satisfied that the jury based its verdict upon the law and evidence, in accordance with the instructions of the trial court. Thus, we find that neither the Due Process Clause of the United States nor the Tennessee Constitution was violated by the jury instruction given pursuant to the statute.

Id. at 592. However, the supreme court was careful to limit its holding to the circumstances of that case by stating:

> Significantly, [the jurors] were additionally instructed that they were not to attempt to fix punishment for the offense and that the sentencing information was "for your information only." When the trial court explains, as it did here, that the sentencing, parole, and early release information is not to be considered in the determination of guilt or innocence, then certainly no due process violation has occurred.

Id.

In support of his proposition that the trial court erred when it instructed the jury that it could "weigh and consider the meaning of a sentence of imprisonment," Defendant cites State v. Jason M. Weiskopf, No. 02C01-9611-CR-00381, 1998 WL 84000 (Tenn. Crim. App., Jackson, Dec. 4, 1998) (Rule 11 application filed Feb. 3, 1999), in which this Court found that it was plain error for the trial court to instruct the jury that it could "weigh and consider the meaning of a sentence of imprisonment." This Court began by distinguishing the instruction in that case from the instruction in King by noting that the instruction in Weiskopf informed the jury that it could "weigh and consider" the possible sentence while the instruction in King informed the jury that the sentencing information was "for your information only." Id., 1998 WL 84000, at *3. This Court then determined that it was improper to instruct the jury that it could "weigh and consider" the possible sentences because the jury's only function is to determine guilt or innocence and the "weigh and consider" instruction informed the jury that it could "consider extraneous information that had nothing whatever to

do with guilt or innocence in arriving at [the] verdict." Id., 1998 WL 84000, at *3. This Court then determined that the error was not harmless because

> We know not to what extent, if any, the jury considered the ridiculously low release eligibility dates for second degree murder and voluntary manslaughter [1.06 years and .21 years] as compared to the much higher release eligibility date for first degree murder [twenty-five years] . . . since the primary issue was the degree of homicide.

Id., 1998 WL 84000, at *4.

Other panels of this Court have agreed with Weiskopf that it is improper to instruct the jury that it may "weigh and consider" the meaning of a sentence of imprisonment. See State v. Teddy Echols, No 03C01-9707-CR-00342, 1999 WL 318882, at *5–6, (Tenn. Crim. App., Knoxville, May 17, 1999) (Rule 11 application filed July 19, 1999); State v. Raymond Hale, No. 01C01-9712-CR-00564, 1999 WL 280485, at *6 (Tenn. Crim. App., Nashville, May 6, 1999) (Rule 11 application filed July 2, 1999). Other panels of this Court have upheld the validity of such "weigh and consider" jury instructions. See State v. Green, 995 S.W.2d 591, 615–16 (Tenn. Crim. App. 1998); State v. Lewis L. Bell, No. 01C01-9807-CR-00279, 1999 WL 332517, at *5–6 (Tenn. Crim. App., Nashville, May 26, 1999) (Rule 11 application filed July 19, 1999).

We need not resolve this dispute because erroneous jury instructions are subject to harmless error review, see State v. Belser, 945 S.W.2d 776, 782 (Tenn. Crim. App.1996), and we conclude that any error in giving the "weigh and consider" instruction was harmless beyond a reasonable doubt.

In concluding that the "weigh and consider" jury instruction in Weiskopf was not harmless, this Court placed great emphasis in the tremendous discrepancy between the release eligibility for first degree murder (twenty-five years) and the release eligibility for second degree murder (1.06 years) and voluntary manslaughter (.21 years). 1998 WL at *4. In contrast, there is no similar glaring discrepancy in the release eligibility for the offenses in this case. The jury was instructed that

attempted first degree murder had a release eligibility of 1.77 years, that attempted second degree murder had a release eligibility of .94 years, that attempted voluntary manslaughter had a release eligibility of .24 years, that aggravated assault had a release eligibility of .35 years, and that assault had a sentencing range of zero to eleven months and twenty-nine days. In our view, this was clearly not a case where the jury convicted Defendant of the greatest offense in order to ensure that he would serve the longest sentence. Indeed, the jury acquitted Defendant of attempted first degree murder and instead, only convicted him of attempted second degree murder. This convinces us that the jury based it verdict on the evidence, rather than on the "weigh and consider" instruction. Thus, we conclude that any error in giving the "weigh and consider" instruction was harmless because it does not "affirmatively appear to have affected the result of the trial on the merits." Tenn. R. Crim. P. 52(a). Defendant is not entitled to relief on this issue.

VI. LENGTH OF SENTENCE

Defendant contends that the trial court erroneously imposed a longer sentence than he deserves for his attempted second degree murder conviction.

"When reviewing sentencing issues . . . including the granting or denial of probation and the length of sentence, the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d) (1997). "However, the presumption of correctness which accompanies the trial court's action 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). In conducting our review, we must consider all the evidence, the presentence report, the sentencing principles, the enhancing and mitigating factors, arguments of counsel, the defendant's statements, the nature and

character of the offense, and the defendant's potential for rehabilitation. Tenn. Code Ann. §§ 40-35-103(5), -210(b) (1997 & Supp. 1999); Ashby, 823 S.W.2d at 169. "The defendant has the burden of demonstrating that the sentence is improper." Id. Because the record in this case indicates that the trial court properly considered the sentencing principles and all relevant facts and circumstances, our review is de novo with a presumption of correctness.

_____In this case, Defendant was convicted of attempted second degree murder, which is a Class B felony. See Tenn. Code Ann. §§ 39-12-107(a), 39-13-210(b) (1997). The sentence for a Range II offender convicted of a Class B felony is between twelve and twenty years. Tenn. Code Ann. § 40-35-112(b)(2) (1997). If the court finds that enhancement and mitigating factors are applicable, the court must begin with the minimum and enhance the sentence to appropriately reflect the weight of any statutory enhancement factors and then the court must reduce the sentence to appropriately reflect the weight of any mitigating factors. Tenn. Code Ann. § 40-35-210(e) (Supp. 1999).

The record indicates that in determining to impose a sentence of twenty years, the trial court found that the following enhancement factors applied: (1) Defendant had a previous history of criminal convictions or behavior in addition to those necessary to establish the appropriate sentencing range, (5) Defendant treated the victim with exceptional cruelty during the commission of the offense, (6) the personal injuries inflicted on the victim were particularly great, (8) Defendant had a prior history of unwillingness to comply with the conditions of a sentence involving release into the community, and (11) the felony offense resulted in death or bodily injury to another person and Defendant had previously been convicted of a felony that resulted in death or bodily injury. See Tenn. Code Ann. § 40-35-114(1), (5), (6), (8), (11) (1997). The trial court also found that mitigating factor (13) applied because Defendant had a somewhat stable employment history and had support from his

family. See Tenn. Code Ann. § 40-35-113(13) (1997). However, the trial court found that the mitigating factor was basically entitled to no weight.

Defendant does not challenge the application of enhancement factor (1) and we conclude that it was properly applied. Indeed, the record indicates that in addition to the two felony convictions required to establish Defendant as a Range II offender, Defendant has previously been convicted of theft and vandalism.

Defendant does not challenge the application of enhancement factor (5), and we conclude that it was properly applied. The record indicates that when Defendant attacked Billings, he beat her head against the corner of a concrete porch and against a wooden post, causing "a large chunk of hair" to become embedded in the post. The attack continued approximately 36 feet across the parking lot where Defendant beat Billings' head against a car with enough force to dent the fender. In addition, Dr. Gormley testified that the injuries Billings sustained during this attack would have caused extreme physical pain. In short, we conclude that this enhancement factor was properly applied because Defendant's conduct involved cruelty that was over and above that inherently attendant to the offense. See, e.g. State v. Alexander, 957 S.W.2d 1, 6 (Tenn. Crim. App. 1997) (holding that application of enhancement factor (5) was proper in an attempted murder case because the vicious attack involved actions that went far beyond what was necessary to establish the commission of the offense).

Defendant argues that the trial court erred when it applied enhancement factor (6) because bodily injury is an element of the offense. However, this Court has clearly stated that "personal injuries, great or small, are not an element of attempted murder" and thus, enhancement factor (6) may be applied to a sentence for attempted murder. Id. at 7. Dr. Gormley testified that as a result of Defendant's conduct, Billings sustained an injury to the left side of her brain that caused severe weakness on the right side of her body and created speech problems. Dr. Gormley

also testified that the weakness and the speech problems were permanent conditions. Clearly, the personal injuries inflicted on Billings were particularly great.

Defendant does not challenged the application of enhancement factor (8), and we conclude that it was properly applied because the record indicates that Defendant has previously received a suspended sentence that was subsequently revoked.

Defendant argues that enhancement factor (11) was not applicable because death or bodily injury is an element of the offense. However, this Court has previously held that factor (11) can be applied to a sentence for attempted murder because bodily injury is not essential to the commission of the offense. State v. Nix, 922 S.W.2d 894, 903 (Tenn. Crim. App. 1995). Nevertheless, we agree with Defendant that this factor was improperly applied. The record indicates that the trial court applied factor (11) merely because Defendant had previously been convicted of the felony offenses of rape and kidnapping. However, the trial court did not find and nothing in the record indicates that either the rape or kidnapping resulted in death or bodily injury. Because enhancement factor (11) expressly requires that the previous felony "resulted in death or bodily injury," we conclude that the trial court erred when it applied this factor.

Neither Defendant nor the State contends that the trial court erred when it applied mitigating factor (13) and failed to apply any other mitigating factors. We conclude that the trial court did not err in its application of this mitigating factor and we conclude that no other mitigating factors are applicable.

Finally, Defendant contends that the trial court erroneously gave the enhancement factors more weight than they deserve and gave the mitigating factor less weight than it deserves. However, it is well-established that the weight to be given to each enhancement and mitigating factor is left to the trial court's discretion

so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. State v. Zonge, 973 S.W.2d 250, 259 (Tenn. Crim. App. 1997); State v. Baxter, 938 S.W.2d 697, 705 (Tenn. Crim. App. 1996). The record indicates that in determining the weight of these factors, the trial court complied with the sentencing purposes and principles. In addition, the record supports the trial court's findings. The trial court did not abuse its discretion when it determined the weight of the enhancement and mitigating factors in this case.

In our de novo review, we conclude that four enhancement factors and one mitigating factor are applicable to the attempted second degree murder sentence. Under these circumstances, we hold that a sentence of twenty years is entirely appropriate in this case. Defendant is not entitled to relief on this issue.

VII. CONCLUSION

For the reasons stated above, we reverse Defendant's conviction for simple assault and we remand for a new trial for that offense. In all other respects, the judgment of the trial court is affirmed.

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THOMAS T. WOODALL, Judge

CONCUR:

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JOSEPH M. TIPTON, Judge

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JERRY L. SMITH, Judge