



## O P I N I O N

The defendant Helfer was charged with two counts of aggravated robbery and four counts of aggravated assault while defendant Flatt was charged with one count of aggravated robbery and two counts of aggravated assault. Following a jury trial on January 24 and 25, 1994, Helfer was convicted on two counts of aggravated robbery and received consecutive thirty year sentences on those convictions. Further, Helfer was convicted on two of the aggravated assault charges for which he received concurrent ten year sentences to run consecutively to the aggravated robbery sentences. Flatt was convicted on one count each of the aggravated robbery and aggravated assault counts, receiving consecutive twelve and six year sentences, respectively.

In this appeal as of right, the defendants raise a total of nine issues for review. Defendant Helfer contends that:

1. the trial judge erred in failing to grant his motion for judgment of acquittal at the conclusion of the State's proof, contending that the evidence was insufficient to convict him of two counts each of aggravated robbery and aggravated assault; and
2. the trial court imposed an excessive sentence by sentencing him to the maximum for the aggravated robbery counts and further erred by ordering the sentences to run consecutively.

Defendant Flatt claims that:

1. the trial court erred in permitting testimony regarding his wife's employment at the Texaco station where the robbery occurred;
2. the trial court erred in refusing his jury instruction on facilitation of a felony;
3. the trial court erred in disallowing a jury instruction on self-defense;
4. the trial court erred in denying his request for a jury instruction on necessity;

5. no evidence existed to support the jury's verdict of guilt on his charge of aggravated assault involving a shotgun;
6. the trial court abused its discretion in sentencing him to the maximum sentence within the range; and
7. the trial court erred in ordering consecutive sentences for the aggravated robbery and aggravated assault convictions.

Following our review, we affirm the convictions and sentences.

The testimony at trial revealed that around 8:00 a.m. on January 25, 1993, Barbara Milligan, manager of the Texaco station and convenience store on Charlotte Pike in Nashville, had prepared the daily deposit which totalled over two thousand dollars (\$2000). Milligan left her office to place the deposit in the safe until she could take it to the bank later that morning. As she left her office, a young man pushed her against the door and held a pistol to her. When the man exited with the deposit money, Milligan crawled to the phone and called the police. Two photo lineups were shown to Milligan, who could describe the clothing, complexion and eyes of the robber but could not make a positive identification from either lineup. Milligan believed some of the people in the lineup looked like the robber, though the defendant Helfer's photo was not contained in either lineup.

Exactly two weeks later on February 8, Milligan was again robbed by the same person. At gunpoint, Milligan gave the defendant Helfer over seven thousand dollars (\$7000) in cash and checks. During the course of the robbery, Helfer put his sawed-off shotgun next to Milligan's head and threatened to kill her if she did not give him more money. Later in the afternoon, Detective Robert Womack showed Milligan a photo lineup which contained the defendant Helfer's picture. Although Womack and the photograph identification record indicate that Milligan was not completely sure that Helfer was the robber, Milligan testified at trial that she had no doubt that the defendant Helfer

was the perpetrator of both robberies.

Milligan indicated that she had not seen the defendant Flatt during either robbery; however, she did recognize Flatt as the husband of Patricia Flatt, an employee who had been fired from the Texaco station just two weeks prior to the first robbery. Milligan testified that Mrs. Flatt had worked with her and would have known when Milligan made the deposits each day.

Lieutenant Freddie Stromatt testified that he had been driving to lunch on Interstate 40 East in his private vehicle when he had noticed the defendant Helfer running with a white bag and a sawed-off shotgun in the direction of a blue automobile. At almost the same time, Stromatt heard a report on his police radio that the Texaco station in that vicinity had been robbed. Stromatt informed the police station of his location and began to follow the blue car. He testified that as the car approached the Old Hickory Boulevard exit, it appeared as if the driver, later identified as the defendant Flatt, realized that Stromatt was following them.

Upon exiting the interstate, the blue automobile pulled into the Gower Elementary School parking lot where Lt. Stromatt partially blocked the entrance to the school with his van. Lt. Stromatt, dressed in full uniform, exited his van, identified himself as a policeman and ordered the driver of the blue automobile to stop. Stromatt's testimony indicated that the defendant Helfer pointed the shotgun at him from inside the car as the car made a U-turn and then accelerated toward him. Lt. Stromatt fired two shots when the children were no longer in the line of fire and two additional shots when the car passed him. One of the shots hit the rear tire of the defendants' car.

Lt. Stromatt pursued the defendants onto Interstate 40 until the flat rear tire

forced the defendants to pull over with Stromatt stopping some forty feet behind them. The defendant Helfer exited the vehicle and "slung" the shotgun toward Stromatt, who fired two shots before kneeling behind his van to reload. The defendant Flatt exited the driver's side of the vehicle after Helfer pointed the gun at Stromatt. Both men ran into the wooded area near the interstate as Helfer stopped and again aimed his weapon at Stromatt. Lt. Stromatt testified that he (Stromatt) believed he had fired six more times.

Officer Charles Anglin arrived at the scene and spotted the defendant Flatt in the woods. On the other side of the wooded area, Officer Rick Debusk captured Flatt who had seventy dollars (\$70.00) in cash on his person. Detective Danny Collins and Sergeant Gluck apprehended the defendant Helfer and found on his person seven thousand five hundred forty-nine dollars and seventy-nine cents (\$7,549.79) in cash and checks made payable to Texaco. The fully loaded sawed-off shotgun was also retrieved in addition to two rounds found in Helfer's pocket. No money was recovered that could be attributed to the first robbery; however, the defendant Helfer confessed in a videotaped statement that he committed both robberies.

Because the defendant Helfer's first issue and the defendant Flatt's fifth issue both address the sufficiency of the evidence in some respects, we combine them for review. Defendant Helfer contends that the trial judge erred in failing to grant his motion for judgment of acquittal at the conclusion of the State's proof due to the insufficiency of the evidence as to the first robbery. Specifically, he contends that Barbara Milligan's statement, "I think that's him", was only speculation, and that it alone is not enough to convict Helfer of the January 25 robbery. The defendant Flatt claims that the evidence was insufficient to support the jury's guilty verdict as to his conviction for aggravated assault with a shotgun. Flatt contends that he did not have the requisite intent to aid or support the defendant Helfer in any way when Helfer pointed the shotgun

at Lt. Stromatt at Gower Elementary. The defendant Flatt believes he was justified in driving away because he was afraid of Lt. Stromatt's gunfire.

A defendant challenging the sufficiency of the proof has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Although Helfer initially proposes a general challenge to the sufficiency of the evidence on all counts, his sole argument is that the evidence was insufficient to convict him of the January 25 robbery. The proof presented to the jury showed that Barbara Milligan initially could not positively identify Helfer as the culprit in the first robbery. However, Milligan testified at trial that she was positive Helfer committed the first and second robberies. Perhaps most telling is the defendant's own confession during which he admits he robbed the Texaco station on both occasions. Although he

now attempts to challenge the confession on the ground that he did not realize to which robberies the officer was referring, the court and the jury heard the defendant's confession that he committed the offenses. Helfer's claim is merely a challenge to Milligan's credibility.

Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Here, the jury heard the proof mentioned above and chose to give the greater weight to the State's witness.

On this same basis the defendant Helfer claims that the trial judge erred in failing to grant his motion for acquittal at the close of the State's proof. The duty of a trial judge and the reviewing court on the determination of a motion for a judgment of acquittal is the same as for the former motion for a directed verdict. This duty is as follows:

The rule for determining a motion for a directed verdict requires the trial judge and the reviewing court on appeal to look at all of the evidence, to take the strongest legitimate view of it in favor of the opponent of the motion, and to allow all reasonable inferences from it in its favor; to discard all countervailing evidence, and if then, there is any dispute as to any material determinative evidence, or any doubt as to the conclusion to be drawn from the whole evidence, the motion must be denied.

State v. Thompson, 549 S.W.2d 943, 946 (Tenn. 1977) (citing Jones v. State, 533 S.W.2d 326, 329 (Tenn. Crim. App. 1975)); State v. Stowe, 634 S.W.2d 674, 675 (Tenn. Crim. App. 1982) (citing Jones v. State, 533 S.W.2d 326, 329 (Tenn. Crim. App. 1975)). In the instant case the trial judge considered the evidence presented by the State and

concluded that it was sufficient to go to the jury for deliberation. Following our review, we find that the evidence was sufficient to justify the denial of the defendant's motion for acquittal and was sufficient to support the verdict. This issue has no merit.

The defendant Flatt contends that there was no evidence to support his conviction of aggravated assault involving the shotgun. Specifically, Flatt claims that the proof failed to establish that he had the requisite intent to assist Helfer in committing the crime of aggravated assault against Lt. Stromatt at Gower Elementary. He claims that his actions of driving hurriedly away in the car while Helfer pointed the shotgun at Stromatt were only those of a "desperate man, fearful for his life, attempting to escape harm that was unnecessarily directed towards him by Lt. Stromatt."

A person commits aggravated assault who:

(1) Intentionally, knowingly or recklessly causes bodily injury to another; (2) Intentionally, knowingly or recklessly causes another to reasonably fear imminent bodily injury; or (3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative . . . and (A) Causes serious bodily injury to another; or (B) Uses or displays a deadly weapon . . . .

T.C.A. §§ 39-13-101 and 39-13-102. The State, citing T.C.A. § 39-11-402(2), asserts that a person is responsible for the criminal conduct of another if "[a]cting with the intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense." The testimony indicated that Flatt, as driver of the blue vehicle, spotted Stromatt as they exited the interstate. Testimony also stated that Flatt turned the car back towards Lt. Stromatt when other routes of escape were readily accessible. No gunshots were fired by Stromatt until after defendant Helfer had pointed the shotgun at him. Flatt was in control of the car as it drove toward Stromatt carrying Helfer with a



loaded shotgun pointed at Stromatt. Here, the jury had sufficient evidence to conclude that Flatt was assisting Helfer in the aggravated assault. Therefore, we find that the defendants' issues challenging the sufficiency of the evidence are without merit.

Next, both defendants challenge some aspect of the sentences imposed against them. The defendant Helfer argues in his second issue that the trial judge imposed an excessive sentence because each sentence was in the upper range on each count and because the trial judge errantly ordered the sentences to run consecutively. In his sixth issue the defendant Flatt makes essentially the same argument but states that the trial judge abused his discretion by sentencing Flatt to the maximum within the range and by ordering consecutive sentences.

When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, is conditioned upon an 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).

A portion of the Sentencing Reform Act of 1989, codified at T.C.A. § 40-35-210, established a number of specific procedures to be followed in sentencing. This section mandates the court's consideration of the following:

- (1) The evidence, if any, received at the trial and the sentencing hearing;
- (2) [t]he presentence report;
- (3) [t]he principles of sentencing and arguments as to sentencing alternatives;
- (4) [t]he nature and characteristics of the criminal conduct involved;
- (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and
- (6) [a]ny statement the

defendant wishes to make in his own behalf about sentencing.

T.C.A. § 40-35-210.

In addition, this section provides that the minimum sentence within the range is the presumptive sentence. If there are enhancing and mitigating factors, the court must start at the minimum sentence in the range and enhance the sentence as appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors. If there are no mitigating factors, the court may set the sentence above the minimum in that range but still within the range. The weight to be given each factor is left to the discretion of the trial judge. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

The Act further provides that "[w]henver the court imposes a sentence, it shall place on the record either orally or in writing, what enhancement or mitigating factors it found, if any, as well as findings of fact as required by § 40-35-209." T.C.A. § 40-35-210(f) (emphasis added). Because of the importance of enhancing and mitigating factors under the sentencing guidelines, even the absence of these factors must be recorded if none are found. T.C.A. § 40-35-210 comment. These findings by the trial judge must be recorded in order to allow an adequate review on appeal.

The defendant Helfer's claim is nothing more than a general challenge to the length of his sentence. The trial judge found that Helfer was a Range III persistent offender<sup>1</sup> and imposed consecutive thirty year sentences in the aggravated robbery convictions, the maximum within the range for Class B felonies. In the two aggravated assault convictions, Class C felonies, the trial judge imposed the minimum, concurrent

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<sup>1</sup>The State filed a Notice of Enhanced Punishment pursuant to T.C.A. § 40-35-202(a), which indicated that Helfer had four prior Class B felony convictions and two prior Class D felony convictions. Therefore, the defendant was properly considered a Range III offender.

ten year sentences; however, he ordered these sentences to run consecutively to the aggravated robbery sentences for a total effective sentence of seventy years. Helfer does not specifically challenge the enhancement factors nor the factors used by the trial judge to support a consecutive sentence but concludes that his sentence is excessive.

The trial court found as enhancement factors that the defendant Helfer has a history of criminal convictions and criminal behavior in addition to those relied upon to establish him as a persistent offender; that the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community; the defendant had no hesitation about committing a crime when the risk to human life was high; and that the felony was committed while Helfer was on parole from a prior felony conviction. T.C.A. §§ 40-35-114(1), (8), (10), and (13). We find that the record supports the sentences imposed.

The defendant Flatt was sentenced as a Range I offender due to the State's failure to file a notice of intent to seek enhanced punishment which with six prior Class E felonies would have classified Flatt as a persistent offender. Flatt received a twelve year sentence in the aggravated robbery conviction and a consecutive six year sentence in the aggravated assault conviction, the maximum on each conviction. He now argues that the trial judge abused his discretion in ordering the maximum sentence on each count. Further, he alleges error in the trial court's failure to give weight to applicable mitigating factors though he did not file a Statement of Mitigating Factors as permitted by T.C.A. § 40-35-202(b)(2).

The trial court failed to explicitly state the enhancement factors it considered as to the defendant Flatt; therefore, the presumption of correctness is removed and we will conduct a de novo review of the proof to determine the appropriateness of Flatt's

sentence.

As with the defendant Helfer, Flatt has a previous history of criminal behavior in addition to those necessary to establish the appropriate range. T.C.A. § 40-35-114(1). Flatt had a very lengthy record which included six prior Class E felonies. This alone justifies the application of this enhancement factor. Also, he has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community. T.C.A. § 40-35-114(8). The presentence report reveals that Flatt had been on probation on at least one occasion which was subsequently revoked. This factor is supported by the record.

Finally, the State contends that the defendant Flatt demonstrated that he had no hesitation about committing a crime when the risk to human life was high. T.C.A. § 40-35-114(10). The vehicle, under Flatt's control, accelerated toward Lt. Stromatt with the defendant Helfer pointing a shotgun at Stromatt while in an elementary school parking lot. The proof indicates that children were in the vicinity when the incident occurred. Further, Flatt did not hesitate to drive recklessly in an attempt to elude Officer Stromatt, thereby posing potential harm to other drivers and pedestrians. We find that this factor seems particularly applicable as an enhancement factor in the aggravated assault charge.

The defendant claims that the trial court should have considered two mitigating factors. First, he argues that he played a minor role in the commission of the crime and second, that he was under the influence of cocaine during the commission of the crime. We find no merit to Flatt's arguments. We do not agree that driving the getaway vehicle was a minor role under the facts of this case. The defendant clearly attempted to escape from Lt. Stromatt even to the point of driving toward Stromatt with

the defendant Helfer pointing a gun at Stromatt. Further, we find no mitigation in the fact that Flatt had been "doing cocaine" some two days and nights before the robbery.

Because Flatt was a Range I offender he faced potential sentence ranges of eight to twelve years in the aggravated robbery conviction and three to six years in the aggravated assault conviction. T.C.A. §§ 40-35-112(2) and (3). Based upon our de novo review, we find that the proof supports the maximum sentence within each range for the defendant Flatt.

Within the sentencing issues, both defendants claim that the trial court errantly ordered consecutive sentences. A portion of the Sentencing Reform Act of 1989, codified at T.C.A. § 40-35-115, established that where there are multiple convictions, the trial judge must consider a number of factors in deciding whether to order sentences to run consecutively or concurrently. Under this section, the trial judge may order sentences to run consecutively if he or she finds, by a preponderance of the evidence, that one or more of the following seven conditions is met:

- (1) The defendant is a professional criminal who has knowingly devoted himself 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 dangerous 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.

T.C.A. § 40-35-115(b).

As to the defendant Helfer, the trial court ordered consecutive sentences based upon its finding that the defendant is a professional criminal, that he has an extensive criminal record and that he is a "dangerous offender" whose behavior indicated little or no regard for human life and no hesitation about committing a crime where the risk to human life is high. T.C.A. §§ 40-35-114(b)(1), (2), & (4).

As to the first factor that the defendant was a professional criminal, the proof revealed that Helfer had a number of prior convictions for theft-related crimes, including a prior aggravated robbery conviction, fraud, third degree burglary, shoplifting and petit larceny, which tend to support the trial court's finding. We agree that this factor is supported by the record. Next, the trial court found that the defendant had an extensive criminal history. Again, as stated above, this factor is supported by the record.

Finally, the trial court concluded that Helfer was a "dangerous offender." Based upon the current and past convictions, we agree that this defendant showed little hesitation before committing these crimes that posed a high risk to human life. Further, we find that consecutive sentences are appropriate in the instant case to protect society from the violence continuously instigated by this defendant, and that punishment is entirely appropriate and proportional to the crimes committed. See State v. Wilkerson, \_\_\_ S.W.2d \_\_\_ (Tenn. 1995). The trial judge had more than enough evidence to support a finding that the sentences should run consecutively. This issue has no merit.

The defendant Flatt also claims that the trial court abused its discretion in

ordering his sentences to run consecutively. The trial court found that he was a professional criminal. T.C.A. § 40-35-115(b)(1). Flatt has a record of extensive criminal activity. Concededly, the trial court recognized that many of the counts were dismissed; however, the court pointed to the large number of offenses committed over the course of Flatt's life. The presentence report indicated that Flatt had no consistent means of support but was continually charged and convicted of criminal offenses. Without question, the proof supports a finding that the defendant Flatt is a professional criminal whose major source of income is from crime and whose record of criminal activity is extensive.

Additionally, the trial court found that Flatt was a "dangerous offender." We agree that society needs protecting and that the sentence is proportional to the crime committed. See Wilkerson, supra. Therefore, the trial judge did not err in ordering consecutive sentences in Flatt's convictions. This issue is without merit.

The defendant Helfer's issue two and Flatt's issues six and seven challenging their respective sentences have no merit.

The defendant Flatt raises four additional issues. First, he claims that the trial court erred by allowing the testimony of Barbara Milligan, the Texaco employee who was robbed. Flatt argues that the testimony was irrelevant or alternatively was prejudicial. Milligan testified that the defendant Flatt's wife had worked at the Texaco station but had been fired some two weeks before the first robbery. Milligan further testified that Mrs. Flatt had introduced her husband, the defendant Flatt, to her when he had been in the station. Tennessee Rule of Evidence 401 states that evidence is relevant if it tends to "make the existence of any fact that is of consequence to determination of the action more probable or less probable than it would be without the

evidence." Flatt argues that the fact that his wife had recently worked at the Texaco station had no bearing on the outcome of the case. We disagree. This proof was wholly relevant to show among other things that the defendant Flatt had access to knowledge of the Texaco market and when deposits were made, even though the testimony indicated that Flatt was not trained in the deposit preparation procedures.

Alternatively, the defendant Flatt contends that this testimony was prejudicial. Rule 403 of the Tennessee Rules of Evidence states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Again, Milligan's testimony was that Patricia Flatt worked directly under her and that she (Milligan) had met the defendant Flatt on two occasions, one of which Flatt offered to repair the toilet in the ladies' rest room. We do not find that this testimony rose to the level of being "unfairly prejudicial." This issue is without merit.

In Flatt's second, third and fourth independent issues, he claims that the trial court erred in refusing jury instructions on facilitation of a felony, self-defense and necessity. It is well established that the trial judge has a duty to give a complete charge of the law as to every issue of fact raised by the evidence and material to his defense. State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986); State v. Thompson, 519 S.W.2d 789, 792 (Tenn. 1975).

Defendant Flatt asserts that the trial judge should have given a jury instruction on facilitation of a felony in order to have a complete charge of the law concerning his involvement with the aggravated robbery. A person is guilty of facilitation of a felony if:

(a) [K]nowing that another intends to commit a specific felony,



but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony.

T.C.A. § 39-11-403(a). Pursuant to Tennessee Code Annotated § 39-11-402, Criminal responsibility for conduct of another reads:

(2) Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense . . . .

T.C.A. § 39-11-402(2). The primary difference between the two is the degree of assistance that Flatt intended to give Helfer in connection with the aggravated robbery. Although we think it would have been better for the trial judge to have charged the jury with facilitation of a felony as a lesser included offense, we are satisfied that this error was harmless beyond a doubt. T.R.A.P. 36(b); Tenn. R. Crim. P. 52(a).

It is also defendant Flatt's contention that he was entitled to a jury instruction on self-defense because his actions against Lt. Stromatt were committed in apprehension of great bodily injury. A person is justified in using self-defense against a police officer when:

(1) The law enforcement officer uses or attempts to use greater force than necessary to make the arrest, search, stop and frisk, or halt; and (2) The person reasonably believes that the force is immediately necessary to protect against the law enforcement officer's use or attempted use of greater force than necessary.

T.C.A. § 39-11-611. The defendant Flatt argues that he did not realize he was being chased by a law enforcement officer. The reenactment photographs submitted into evidence by Flatt indicated that Lt. Stromatt was in plain view less than twenty yards away from Flatt. Stromatt was also in full uniform. No gunshots were fired at Flatt until Flatt began to accelerate towards Lt. Stromatt. No use or attempted use of force was

directed at Flatt until Flatt had the opportunity to see that he was being pursued by a police officer and chose to accelerate toward that officer. Lt. Stromatt had only raised his weapon and ordered the defendants to halt. A review board found that Stromatt's actions were justified. Since it appears that Flatt and Helfer initiated the use of forceful conduct, self-defense would not apply in this situation. The trial judge was correct in not allowing a jury instruction for self-defense.

Defendant Flatt finally argues that a jury instruction on necessity should have been given by the judge concerning Flatt's reckless driving out of Gower Elementary. Necessity can be used as a justification for a criminal act if:

- (1) The person reasonably believes the conduct is immediately necessary to avoid imminent harm; and
- (2) The desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct.

T.C.A. § 39-11-609. Flatt's argument here is similar to his self-defense argument, i.e., his reckless driving was not done to assist Helfer's aggravated assault on Lt. Stromatt. Flatt states he was only trying to escape gunfire from an unknown pursuer. Using the reasonable person standard that is required when examining this defense, it appears that the judge was correct in determining this argument was not applicable to the facts at hand. Lt. Stromatt could clearly be identified upon exiting his vehicle as a police officer. Again, no gunfire was used by Lt. Stromatt until after the car had begun turning in his direction and the defendant Helfer had pointed the shotgun at him. Since the harm that Flatt contends forced him to commit his criminal act was created by his own actions, necessity could not have applied here. The trial judge ruled correctly, and this issue is without merit.

The action of the trial judge is in all respects affirmed as to both defendants.

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JOHN H. PEAY, Judge

CONCUR:

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GARY R. WADE, Judge

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DAVID H. WELLES, Judge