IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MAY 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. #02C01-9411-CR-00249
APPELLEE,	*	SHELBY COUNTY
VS.	*	Hon. Joseph B. Dailey , Judge
RUNAKO Q. BLAIR,	*	(Second Degree Murder & Attempted Second Degree Murder)
APPELLANT.	*	

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OPINION FILED:_____

AFFIRMED

William M. Barker

OPINION

The appellant, Runako Q. Blair, was convicted of second degree murder, a class A felony, and attempted second degree murder, a class B felony.[1] He was sentenced to twenty-three years and ten years, respectively, and the sentences are to be served consecutively. On appeal, the appellant argues that the trial court erred by excluding exculpatory evidence from the statement of a codefendant and by imposing excessive sentences. We affirm the judgments of the trial court.

On October 23, 1992, at approximately 7:00 p.m., Terry Hicks and her family were dining at a Krystal fast food restaurant on Elvis Presley Boulevard in Memphis. Ms. Hicks saw two vehicles drive into the parking lot and park toward the rear of the building. She heard "loud talking" followed by gunshots. Ms. Hicks did not recall how many shots she heard, nor did she see who was involved in the shooting. She recalled making an earlier statement indicating she heard four or five shots.

Passing motorists informed Memphis police officer Charlie Morris of the shooting, and Morris arrived at the scene seconds later. He saw a red station wagon in the parking lot, and a man lying face down on the ground who appeared to be in "extremely critical condition." A second man crawled from around the passenger side of the vehicle and said he had been shot; the man had blood on his hands and was holding his neck. Both men were unarmed; however, the passenger door of the station wagon was open, and a nine millimeter Ruger handgun was on the front seat. It appeared to be cocked, and it was covered with blood. There was a bullet hole and a

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[1] The appellant was indicted with a codefendant, Michael Boyd, for premeditated first degree murder, felony murder, attempted premeditated murder, and attempted felony murder. The charge of attempted felony murder was dismissed prior to trial. Like the appellant, Boyd was convicted of second degree murder and attempted second degree murder, and he received concurrent seventeen and ten year sentences.

bullet in the frame of the driver's door, but otherwise no spent shell casings in the area. To the north of the vehicle was a bag of white powder that appeared to be cocaine.[2] After speaking to a witness, Morris requested the dispatcher broadcast a description of a turquoise Honda prelude.

Detective Timothy Cook was the case officer at the scene. He learned that one victim, (Andre Ferell Armstrong), had been killed, and that a second individual, (Corey Ryan), had been taken to the hospital for a gunshot wound to his neck. A nine millimeter handgun was found in the passenger's side of the station wagon; it was cocked and fully loaded with fifteen live rounds.[3] No nine millimeter shell casings were found in the area. Cook talked to Corey Ryan the next day in the hospital. Ryan said that Armstrong had arranged a cocaine sale to the appellant and Michael Boyd. Several days later, both the appellant and Boyd were arrested.

Cook testified that the nine millimeter Ruger was not test-fired because no shell casings had been recovered from the scene with which to conduct an analysis. Cook acknowledged that the barrel of the weapon appeared to be dirty, which indicated that it had been fired at some time, but he was unaware of any tests that could have determined precisely when the weapon had been fired. Cook testified that they recovered two bullets from Armstrong's body and one from Ryan's. He did not recall whether the bullets were analyzed, but opined that two different weapons had been used to shoot the victims. Similarly, Cook said that bullets recovered from the driver's side door could not be analyzed because they were "ricochet" bullets. He also

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[2] The bag was later established to contain 263 grams of cocaine. No fingerprints were recovered from the bag.

[3] Cook acknowledged that it was possible to load the weapon with sixteen rounds by placing fifteen rounds in the clip, jacking a round into the chamber, and then placing one more round in the clip. Nonetheless, he described the weapon with fourteen rounds in the clip and one in the chamber as "fully loaded."

acknowledged that Ryan and Armstrong were not tested to see whether they had fired weapons. Finally, Cook said that officers discussed charging Ryan with a narcotics offense, but ultimately left that decision to the District Attorney's Office.

Officer George Coleman testified that he collected evidence from the scene that included a bag of white powder and a nine millimeter handgun containing fifteen live shells.[4] Two spent bullets were retrieved from the driver's side door; however, he did not know whether any tests were performed on the bullets. Coleman also testified that no nine millimeter shells were recovered from the scene. Officer Don Woody testified that a small bag containing cocaine was recovered from Armstrong. The bag later was lost and not introduced as evidence.

Corey Ryan testified that he was twenty-two years of age at the time of the trial. He and Armstrong, nicknamed "Dray," went to the scene to sell one kilogram of cocaine to the appellant and Michael Boyd for $26,000. Ryan claimed that he did not know the appellant or Michael Boyd, and that he participated to ensure that nothing "would go wrong." The sale was to occur in the parking lot of Marlowe's on Elvis Presley Boulevard. Armstrong drove and Ryan rode in the front passenger seat. Ryan's nine millimeter Ruger, loaded with fifteen live rounds, was on the floorboard. The cocaine was in four separate bags, each containing a quarter kilo.

After initially meeting at Marlowe's, it was decided that the sale would be made in the parking lot of the Krystal, which was immediately next door. When the appellant got into the back seat, a "few words were said." Ryan handed two or three bags of cocaine to the appellant, and then "turned around and heard gunshots." Ryan

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[4] Coleman testified that there were fourteen rounds in the magazine and one in the chamber.

testified that he did not point or fire his nine millimeter at the appellant. He tried to pick up his weapon after he heard shots but dropped it. After the shooting, Ryan tried to move the car, but Armstrong fell from the car into the parking lot.

On cross examination, Ryan denied setting up the drug sale and insisted it had been arranged by Armstrong.[5] He said that when everyone met at Marlowe's, the appellant got in the station wagon for about five minutes. When someone came out of Marlowe's, it was decided that the deal would be completed in the Krystal parking lot. Ryan denied that he and Armstrong planned to rob the appellant of his $26,000. He said that the appellant had not showed them any money but did have a chicken box that appeared to have money in it.[6] Ryan denied pointing or firing his weapon at the appellant, and maintained that it was on the floorboard of the car. He also denied that he asked bystanders to get rid of his gun and the bag of cocaine after he had been shot. He conceded that he had not been charged with a crime for his involvement in the attempted drug sale; however, he denied that state or federal charges were withheld in exchange for his testimony.

Dr. Violet Hnilica, Shelby County Medical Examiner, testified that the deceased victim had received two gunshot wounds to his back. One bullet entered his shoulder; the other went through his neck and was recovered from the right cheek region of his head. The latter bullet caused fatal wounds to the victim's carotid artery, jugular vein, and trachea. The injuries appeared to be "distant wounds" fired from more than three feet away. There did not appear to be any intermediary targets such as glass or upholstery because the bullet holes were "fairly small and circular."

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[5] Ryan admitted this was not his first involvement in a drug transaction; however, the only prior conviction introduced for impeachment was for theft.

[6] Other officers testified that scraps of chicken were found in the front seat of the station wagon.

Boyd and the appellant confessed. The appellant admitted that he shot at Ryan five times with a .38 caliber long barrel handgun, and he gave the following statement:

> I wanted to buy a kilo of cocaine. Then me and Dray [Armstrong] met up to talk to make a deal and Dray told me he charged $26,000 a kilo....Dray told me to meet him at Marlowe's on Elvis Presley about 6 p.m. So I got in the red station wagon with Dray. I tasted two bags of cocaine. At that time a white guy walked out of Marlowe's, started looking and then Dray told me to go to Krystal's to do the deal. We back[ed] in beside one another about a half a car length apart. I was driving. I got into Dray's car behind Dray who was in the driver's seat. The bright guy [Ryan] was on the passenger side. I had a...box in my hand. Chicken and biscuits was in the box. At that time I tasted two more bags of cocaine so they told me to pass the chicken box up there because they thought the money was in it. At the time the bright boy [Ryan] pulled his pistol out and told me to get out of the car.... As I was backing out of the car, I pulled my pistol out and he shot once and I started shooting. I went back to my car, [and] got in it on the driver's side.

The appellant left the scene with three of the four bags of cocaine. He said that Armstrong was not in possession of a weapon, and denied shooting at him. He concluded his statement by saying: "I know for sure I didn't kill Dray but I know I shot [Ryan] for sure."

The defense case included the testimony of Goley Allen, a captain with the Memphis Crime Scene Unit. Allen related that the nine millimeter Ruger was found in the passenger side of the car. He testified that three bullet holes were found on the outside of the driver's side door, indicating that the shots had been fired from outside the car. They were closely grouped, but Allen did not know whether they had been fired from the same weapon. There were no bullet holes in the rear upholstery of the driver's seat, or anywhere else inside the car, and no nine millimeter shells in the area.

Shondra Alexander testified that she heard shooting as she was leaving

the Krystal. She saw a green car leave the parking lot, and then saw a red station wagon in the parking lot. Shots were fired from the green car toward the red car. When a man got out of the red car and asked her to get rid of a handgun, she ran into the store and told someone to call 911. Alexander gave a statement to police in which she said that men in the parking lot "were shooting at each other;" she admitted that she did not tell police that a man involved had asked her to get rid of the handgun. Similarly, Sophia Nash testified that she heard shots as she was leaving the Krystal. A man near a red car asked for help, and told her to get a gun from the car. She went back into the restaurant. She recalled telling the police she heard five to ten shots.

I

Codefendant Michael Boyd's two statements were read into evidence by Detective Ronald Wilkinson. All references to the appellant's involvement in the offense had been redacted from the statements pursuant to Bruton v. United States, 391 U.S. 123 (1968).[7] On cross examination of Wilkinson, defense counsel tried to elicit certain statements made by Boyd believed to exculpate the appellant. The prosecution objected. The trial court ruled that Boyd's statement either had to be redacted completely under Bruton, or the appellant had to waive his right to confrontation and allow the unredacted statement to be admitted. After initially requesting that the unredacted version be read, the appellant assented to the admission of Boyd's redacted statements.

On appeal, the appellant argues that he was denied the opportunity to introduce three portions of Boyd's statement which he claims were exculpatory. First,

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[7] In Bruton, the United States Supreme Court held that the entry of a non-testifying codefendant's statement implicating the defendant violates the latter's right to confrontation. The Court in a later case clarified that statements from which incriminating references to the defendant are redacted may be admissible in a joint trial. See Richardson v. Marsh, 481 U.S. 200 (1987); see Tenn. R. Crim. P. 14.

in response to a question about how much money the appellant possessed, Boyd said: "He told me it was $25,000. I don't know exactly. I seen [sic] hundreds, twenties and fifties." At another point, Boyd stated that "[the appellant] got out [of] the car and [Ryan] got out of the car chasing [the appellant] behind the car. [The appellant] jumped back in the car and took off." Finally, Boyd told officers that the appellant said "he thought they [Armstrong and Ryan] were gonna rob him so he started shooting."

The appellant argues that the statements supported his theory that he shot the victims in self defense when they tried to rob him. He contends that Bruton does not require redaction of exculpatory statements,[8] and that the exclusion of the evidence denied his rights to confrontation and a fair trial. He also asserts that the evidentiary rule of completeness required the admission of Boyd's entire statement. See Tenn. R. Evid. 106. The State, on the other hand, maintains that the procedure followed Bruton, and that the appellant was not denied his rights to confrontation and a fair trial.

Although the issue was addressed at trial primarily in terms of Bruton, it may be more accurately characterized as an evidentiary question. In this regard, our supreme court addressed a nearly identical issue in State v. King, 694 S.W.2d 941 (Tenn. 1985). Defendant King and codefendant Davis were convicted of first degree murder. King defended on the ground that he and the victim had struggled over a weapon causing it to discharge accidentally. Davis did not testify at the trial, but his statement was read into evidence by an investigating officer. On cross examination of the officer, counsel for King sought to admit portions of Davis's statement which

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[8] He also notes that Tennessee Rule of Criminal Procedure 14(c) provides for redaction of a confession only if the redaction "will not prejudice the moving defendant." The rule, of course, governs severance of defendants in a joint trial, a procedure that was not requested in this case. See LaFave, Criminal Procedure, Vol. 2, §17.4 (1984) (discussing severance where codefendant's statement is exculpatory).

corroborated King's theory of defense. The trial court excluded the evidence, and the supreme court affirmed:

> the statement did not incriminate Davis and was not offered as a declaration against the penal interest of Davis....[T]he statement of Davis was offered for the truth of the matter asserted and for no other purpose. Such an exculpatory statement bears no inherent indicia of trustworthiness and obviously the State would be without power to cross-examine the declarant, a co-defendant, unless the latter should voluntarily take the stand.

Id. at 945.

A similar conclusion was reached in State v. West, 767 S.W.2d 387 (Tenn. 1989), cert. denied, 497 U.S. 1010 (1990). There, defendant West, who was convicted of the first degree murder of two victims, admitted to being at the scene but asserted that his codefendant, Martin, inflicted all of the injuries and killed the victims. West sought the admission of a tape recording in which Martin's cellmate said that Martin confessed to the killings, but it was excluded as hearsay. In affirming the convictions, the supreme court questioned not only the reliability of the tape recording but also whether it contained exculpatory material: "[T]he guilt of Martin does not exonerate defendant, who was present, participating, aiding and abetting, and [West's] defense that his participation was commanded at gun point by Martin would not have been corroborated by the excluded evidence." Id. at 396; see also State v. Caughron, 855 S.W.2d 526, 542 (Tenn.), cert. denied, ___ U.S. ___, 114 S.Ct. 475, 126 L.Ed.2d 426 (1993); State v. Holcomb, 643 S.W.2d 336, 343 (Tenn. Crim. App. 1982).

The courts in West, Caughron, and Holcomb considered the issue under Chambers v. Mississippi, 410 U.S. 284 (1973), which is likewise relevant to this case.[9]

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[9] The appellant has not cited Chambers but relies instead on Rivera v. Director, Dept. of Corrections, 915 F.2d 280 (7th Cir. 1990), a case in which Chambers was held to be controlling. There the defendant in a first degree murder trial sought the admission of a codefendant's confession that he alone committed the crime. The

In Chambers, the United States Supreme Court said that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." In Chambers, the defendant was charged with murdering a police officer; he defended by asserting that the killing had been done by a witness named McDonald who had given a sworn statement confessing the killing. At trial, McDonald's sworn confession was introduced into evidence but he testified that he was innocent and offered an alibi. The trial court refused to allow the defendant to introduce the testimony of three witnesses who heard McDonald confess, ruling that such testimony was hearsay.[10]

The Supreme Court reversed the conviction. The Court noted that "[t]o the extent that McDonald's sworn confession tended to incriminate him, it tended also to exculpate Chambers." Id. at 297. The Court then noted that McDonald's statements, although hearsay, were made "under circumstances that provided considerable assurance of their reliability." In particular, the statements were made spontaneously to a close acquaintance shortly after the killing occurred, the statements were corroborated by other reliable evidence at trial, the statements were made against McDonald's own penal interests, and McDonald had been available to testify. Id. at 300-301. Accordingly, the Court held:

> The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony was also

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Court, as in Chambers, noted the critical nature of the evidence and said that "if the defendant tenders vital evidence the judge cannot refuse to admit it without having a better reason than that it is hearsay." Id. at 281-82. We note, however, that later cases from the Seventh Circuit have essentially limited Rivera to its facts. See Carson v. Peters, 42 F.3d 384 (7th Cir. 1994); Cunningham v. Peters, 941 F.2d 535 (7th Cir. 1991), cert. denied, 503 U.S. 940 (1992); Lee v. McCaughtry, 933 F.2d 536 (7th Cir.), cert. denied, 502 U.S. 895 (1991).

[10] The trial court also refused to allow the defendant to examine McDonald as an adverse witness under the so-called "voucher rule."

> critical to Chambers' defense....We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process.

Id. at 302. Thus, under Chambers, a court must consider whether the evidence was "critical" and whether its exclusion denied a fair trial. See, e.g., State v. Caughron, 855 S.W.2d at 542; State v. West, 767 S.W.2d at 396; State v. Holcomb, 643 S.W.2d at 343; see also United States v. Fowlie, 24 F.3d 1059, 1069 (9th Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 742, 130 L.Ed.2d 643 (1995); Gomez v. Greer, 896 F.2d 252, 254 (7th Cir.), cert. denied, 498 U.S. 944 (1990).

We conclude that the exclusion of this evidence did not render the trial fundamentally unfair. None of Boyd's statements exonerated the appellant from the offense; rather, they indicated that a shooting took place between four men in the midst of a drug sale. Boyd's statement that the appellant had money in his possession may have corroborated the defense theory that he intended to buy and not steal the cocaine, but not to such a degree as to deny the appellant a fair trial. The record indicates, for example, that Corey Ryan, the state's key witness, admitted that the appellant appeared to have money in his possession.

Moreover, the appellant has not shown that Boyd's statements warranted "a persuasive assurance of trustworthiness" as in Chambers. See State v. Caughron, 855 S.W.2d at 542 (considering whether declarant's confession was spontaneous, corroborated by other evidence or against declarant's interest). To the contrary, many of the statements are double hearsay, that is, statements made by the appellant to Boyd and repeated by Boyd in his confession. The self serving statements of the appellant bear no indicia of reliability. See Gacy v. Welborn, 994 F.2d 305, 316 (7th Cir.), cert. denied, ___ U.S. ___, 114 S.Ct. 269, 126 L.Ed.2d 220 (1993). In sum, the

appellant made no showing that the evidence was admissible on any ground.

The appellant's contention that he was denied his right to confrontation is also unavailing. Compliance with Bruton preserved his right with regard to Boyd's out of court statements. Excluding portions of Boyd's statements also did not infringe on the appellant's cross examination of Detective Wilkinson. The appellant's reliance on Delaware v. Van Arsdale, 475 U.S. 673 (1986) is misplaced. In that case, the defendant was prevented from cross examining the witness about the witness's own potential bias.

Finally, the appellant has not shown that the rule of completeness required the admission of Boyd's entire statement, nor did he advance this ground in the trial court. The rule states:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Tenn. R. Evid. 106. Boyd's statements were redacted to exclude incriminating references to the appellant. Their admission did not convey the appellant in a false light or otherwise mislead the jury with regard to the appellant's role. In such circumstances, the appellant has not shown how "fairness" required the admission of Boyd's entire statement, particularly since the remainder of the statement contained statements highly incriminatory of the appellant. Compare United States v. Mussaleen, 35 F.3d 692, 697 (2d Cir. 1994)(rule of completeness may apply to a defendant's own statement when redactions alter its substance or delete "substantially exculpatory" information).

II

The appellant argues that the trial court erred by imposing excessive sentences and by ordering consecutive sentences. Thus, we must conduct a de novo review on the record with a presumption that the determinations made by the trial court were correct. Tenn. Code Ann. §40-35-401(d). 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. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

A

The sentencing act provides that a sentence is presumptively the minimum within the applicable range unless there are enhancement factors present. Tenn. Code Ann. §40-35-210(c). Procedurally, the trial court is to increase the sentence within the range based upon the existence of applicable enhancement factors and then reduce the sentence as appropriate for any mitigating factors. Tenn. Code Ann. §40-35-210(d) & (e). The weight to be afforded each 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. Tenn. Code Ann. §40-35-210 (sentencing commission comments).

The appellant was sentenced as a standard, Range I offender for a class A felony and a class B felony. The ranges for the offenses were fifteen to twenty-five years, and eight to twelve years, respectively. In imposing sentences of twenty-three years and ten years, the trial court applied the following enhancement factors:

> (1) the appellant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the range of sentencing;

> (2) the appellant was a leader in the commission of the offense involving two or more actors;
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> (3) the offenses involved more than one victim;
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> (4) the appellant has a previous history of unwillingness to comply with conditions of a sentence involving release into the community;
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> (5) the appellant used a firearm; and
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> (6) the appellant had no hesitation about committing a crime where the risk to human life was high.

Tenn. Code Ann. §40-35-114(1), (2), (3), (8), (9), & (10). The trial court reduced the sentences to reflect a single mitigating factor: the appellant's young age, sixteen, at the time of the offenses. Tenn. Code Ann. §40-35-113(6).

The appellant argues that the evidence did not support the trial court's finding that he was a leader in the commission of the offenses; he asserts that while he may have been the more visible participant in the drug transaction, he was not a leader in either the second degree murder or attempted second degree murder. See State v. Clifford Atkins & George Wesley Short, No. 03C01-9302-CR-00058 & 00059 (Tenn. Crim. App., Mar. 3, 1994, Knoxville). The trial court, however, made the following observations:

> [T]he primary participation in the logistics of setting [up the drug buy] and meeting, as I recall, was by [the appellant]. And he's the one who, when the cars met at Marlowe's, got out, got in the other car, began the process of the transaction, got out, they drove to Krystal, he got out again, got in the car. He's the one who...provided the money, initially, and disposed of the money later....

The court also noted the appellant's role in initiating the shooting. These detailed findings distinguish this case from Atkins & Short. We conclude, therefore, that the record supports the trial court's determinations, and that the appellant has not overcome the presumption of correctness.

Next, the appellant argues that -114(3) should not have been applied because no one other than victims Armstrong and Ryan were injured in the offenses. The state concedes that this factor was inapplicable, as separate convictions were entered for each victim. See State v. Lambert, 741 S.W.2d 127, 134 (Tenn. Crim. App. 1987).

Finally, the appellant claims that factor -114(10) was improperly used to enhance the sentence for second degree murder because it is inherently part of the offense.[11] The state claims the factor was appropriate because the appellant did not hesitate to commit the crimes and there was great risk to the lives of numerous bystanders. The state points to the testimony of those who were at the Krystal during the offense and thus, at great risk of harm. See, e.g., State v. Darrin Roosevelt Hicks, No. 03C01-9210-CR-00366 (Tenn. Crim. App., July 28, 1993, Knoxville)("the enhancement factor is not limited to risk to the victim's life, [and] might be applicable when the proof established the risk to the life of a person other than the victim, for example, a customer or loiterer."). The record indicates that this was the basis for the trial court's finding: "I think it's very reasonable to argue that a lot of people were put in a lot of danger on the Krystal parking lot that friday night...." We agree that this was a proper consideration.

The appellant does not challenge the applicability of the remaining enhancement factors. Moreover, the record reveals that after enhancing the sentences within the range, the trial court then properly reduced the sentences for the single mitigating factor shown. We conclude, therefore, that the sentences were appropriate for the offenses.

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[11] The appellant has not argued that the factor was improper with respect to the attempted second degree murder conviction.

B

Tennessee Code Annotated section 40-35-115 provides the circumstances under which a court may order consecutive sentences. Based upon that statute, the trial court imposed consecutive sentences for three reasons:

> (1) the appellant is an offender whose record of criminal activity is extensive;
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> (2) the defendant is a dangerous mentally abnormal person; and
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> (3) 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.

See Tenn. Code Ann. §40-35-115(b)(2), (3), & (4). The appellant claims that none of the findings are supported by the record. The state concedes that -115(3) should not have been applied,[12] but contends that consecutive sentencing was proper based upon either of the remaining two findings.

The appellant testified during the sentencing hearing that he has been arrested twenty-two times as a juvenile. He admitted that he has sold drugs on numerous occasions, begining with small amounts and then expanding his role to that of a "wholesaler." He also admitted that he has stolen cars on frequent occasions; and he described his involvement in an aggravated assault and a robbery. A presentence report confirmed the appellant's long record of committing offenses as a juvenile. The report, however, is not clear as to the precise number of offenses, the nature of the appellant's involvement, or the dispositions. It appears, for example, that the many of the juvenile complaints were either dismissed or handled "non-judicially." Nonetheless,

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[12] This section requires proof that 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." Tenn. Code Ann. §40-35-115(b)(3).

the trial court commented that the record was "substantial with at least five separate commitments to juvenile facilities prior to this event." When coupled with the appellant's own testimony, it is clear that consecutive sentencing was properly based on this factor. See State v. Marshall, 888 S.W.2d 786 (Tenn. Crim. App. 1994).

We note, however, that the trial court did not make findings to support its conclusion that the appellant was a dangerous offender. Recently, the supreme court addressed the dangerous offender provision in State v. Wilkinson, ___ S.W.2d ___ (Tenn. 1995)(filed August 21, 1995). The court said that evidence which shows a defendant had little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high establishes that the offender is a dangerous offender but is not alone sufficient for consecutive sentencing. Instead, the court held:

> Every offender convicted of two or more dangerous crimes is not a dangerous offender subject to consecutive sentences; consequently, the provisions of Section 40-35-115 cannot be read in isolation from the other provisions of the Act. The proof must also establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender. In addition, the Sentencing Reform Act requires application of the sentencing principles set forth in the Act applicable to all cases. The Act requires a principled justification for every sentence, including, of course, consecutive sentences. See Tenn. Code Ann. §§40-35-102(1); 40-35-103(1)(2); 40-35-113; 40-35-114 (1990 & Supp. 1994).

Id. at slip op. 13.

There is no indication in the record that the trial court fully considered the criteria for consecutive sentencing under -115(4). Nonetheless, given the court's findings with regard to the appellant's extensive criminal history under -115(2), we conclude that consecutive sentencing was proper.

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William M. Barker, Judge

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John H. Peay, Judge

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David G. Hayes, Judge