IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 01C01-9501-CC-00008
APPELLEE,	*	WILSON COUNTY
VS.	*	Honorable J. O. Bond, Judge
DEWAYNE FOSTER,	*	(Aggravated Assault)
APPELLANT.	*	

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OPINION FILED:_____

AFFIRMED

Gary R. Wade, Judge

OPINION

The defendant, Dewayne Foster, was convicted of aggravated assault. The trial court imposed a Range II, 10-year sentence. The sentence is to be served consecutively to a six-year term for a previous offense committed in Davidson County.

In addition to his challenge to the sufficiency of the evidence, the defendant presents the following issues for our review:

> (1) whether the trial court properly instructed the jury about the possible range of sentence; and
>
> (2) whether the trial court properly sentenced the defendant.

We affirm the conviction and sentence.

During the early morning hours of June 30, 1992, the defendant encountered the victim, Zachery Manier, and his friend, Gregory Wade, in the parking lot of an Upton Heights public housing project in Lebanon. The victim testified that the defendant "said something about my uncle," whose car was parked nearby, and then threatened to "shoot the car up." As the victim locked the driver's side door of the vehicle, the defendant pulled off a gold chain the victim wore around his neck. According to the victim, the defendant said, "Tell your uncle I got your necklace." When the defendant started to walk away, the victim picked up a beer bottle and started after him. Someone then handed the defendant a sawed-off shotgun. The victim, having seen that the weapon was pointed

in his direction, turned quickly, slipped, and heard a shot. Two more shots were fired as the victim ran away. Although unhurt, the victim heard the pellets strike a nearby building.

Although it was dark, Wade said that he saw something in the defendant's hand and confirmed that he had heard shots. He stated that he "heard pellets going everywhere, hitting trees, and ... by my sister's window."

Officer Scott Massey, who was in the area at the time of the shooting, heard three shots and hurried towards the scene on foot. Two black males, one of whom was carrying a sawed-off shotgun, saw the officer and ran. Lebanon Police found two empty shotgun shells where the victim said the shots had been fired. There were several pellet holes in the front of the siding on one of the houses in the projects.

The defendant offered no proof at trial but claims in this appeal that he was merely protecting himself from a possible assault and that the shots were fired to chase the victim away. The state asserts that the jury could have properly inferred from the evidence all of the elements of an aggravated assault.

On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832 (Tenn. 1978). This court must neither reweigh nor reevaluate the proof offered at trial. Id. at 836. When the

sufficiency of the evidence is challenged, the relevant question is whether, after viewing the proof in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Williams, 657 S.W.2d 405 (Tenn. 1983), cert. denied, 465 U.S. 1073 (1984); Tenn. R. App. P. 13(e). A guilty verdict accredits the witnesses for the state and resolves in their favor any conflicts in the testimony. Williams, 657 S.W.2d at 410. The weight to be given any particular testimony is a matter entrusted exclusively to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292 (Tenn. Crim. App. 1978).

An assault has been committed when one "intentionally or knowingly causes another to reasonably fear imminent bodily injury." Tenn. Code Ann. § 39-13-101(a)(2). It becomes aggravated when, among other things, the assailant "[u]ses or displays a deadly weapon." Tenn. Code Ann. § 39-13-102(a)(1)(B). Here, the defendant threatened to "shoot up" the automobile of the victim's uncle, took the victim's gold chain necklace, and, when the victim offered resistance, fired at least one shotgun blast in the direction of the victim. The defendant fled when the police arrived. Under these circumstances, the jury acted within its prerogative in finding the defendant guilty of each of the elements of aggravated assault.

II

The defendant next asserts that because the state

had filed a notice of enhancement to Range II, the trial court should have instructed the jury that the possible range of the sentence for aggravated assault was six to ten years rather than three to ten years. The state contends that the statute requiring an instruction on the possible penalties for an offense is impermissibly vague and should not be charged to the jury at all.

Tenn. Code Ann. § 40-35-201(b) provides, in part, that "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." In State v. Cook, 816 S.W.2d 322 (Tenn. 1991), the trial court had instructed the jury on a Range I offense when the only possible sentence was actually within Range II. Our supreme court held that the legislation had provided the defendant with a statutory right:

> The Legislature, in its wisdom, certainly has the right and power to direct the judicial process. They have said that where a defendant wants his trial jury to know the range of possible punishments resulting from convictions that he is entitled to have that information conveyed to the jury. To deny this defendant that statutory right constitutes prejudice to the judicial process, rendering the error reversible under Rule 36(b) of T.R.A.P.

Id. at 327.

Here, the trial court instructed the jury that aggravated assault provided for a range of punishment of from three to ten years. A Range I sentence must be between three and six years. A Range II sentence for an aggravated assault

is between six and ten years. Whether the defendant qualified as Range I or Range II depended upon the proof offered at any subsequent sentencing hearing. Thus, the jury was aware of the possible range of punishment that could have resulted from their verdict. Cf. State v. Daniel Phillip Watrous, No. 01C01-9009-CC-00234 (Tenn. Crim. App., at Nashville, February 26, 1991). In our view, the instructions were accurate. See State v. Howard Martin Adams, No. 03C01-9403-CR-00123 (Tenn. Crim. App., at Knoxville, January 11, 1995).

III

The defendant has also challenged the propriety of the sentence. He contends that certified copies of convictions are required to establish his prior criminal history; he submits that several of the enhancement factors were improperly applied by the trial court; and he argues that the trial court should not have imposed consecutive sentencing.

We will first address whether the inclusion of the prior convictions of the defendant in the presentence report is sufficiently reliable to qualify as evidence. See Tenn. Code Ann. § 40-35-209(b). In State v. Richard J. Crossman, No. 01C01-9311-CR-00394 (Tenn. Crim. App., at Nashville, October 6, 1994), perm. to app. denied, (Tenn. 1995), this court ruled as follows:

> [T]hese statutes contemplate the use of presentence investigation procedures which assure the acquisition of reasonably reliable information and it is incumbent upon the trial court to ensure that such procedures are used. However, ... a trial

> court is in the best position to know the procedures used by presentence officers ... and is entitled to rely on such a report's contents, absent a showing that the report is based upon unreliable sources or is otherwise inaccurate. Such a showing may occur through the report itself, or through other evidence submitted at the sentencing hearing.

The defendant objected only because the state had not proved the convictions by certified copies of the judgments; he did not otherwise contest the accuracy of his previous criminal history. Nothing in the record suggests that the information in the presentence report was unreliable. A defendant cannot be granted relief when he has failed to take action "available to him to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a). The defendant presented no evidence to indicate that his prior convictions were insufficient to establish him as a Range II offender. In any event, the defendant qualified as Range II by our count.

Next, the defendant claims that the trial court erred in the application of certain of the enhancement factors. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption 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); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). The Sentencing Commission Comments provide that the burden is

on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

In calculating the sentence for Class B, C, D, or E felony convictions, the presumptive sentence is the minimum within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancement factors but no mitigating factors, the trial court may set the sentence above the minimum. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence may then be reduced within the range by any weight assigned to the mitigating factors present. Id.

Here, the trial court found that the defendant had a prior history of criminal convictions or behavior. Tenn. Code Ann. § 40-35-114(1). The record supports that finding. The trial court also found and the defendant did not challenge that he "had a history of unwillingness to comply with the

conditions of a sentence involving release into the community." Tenn. Code Ann. § 40-35-114(8). The state has conceded as error the trial court's conclusion that two other enhancement factors applied: that the defendant possessed a "deadly weapon during the commission of the offense" and that the defendant "had no hesitation about committing a crime when the risk to human life was high." Tenn. Code Ann. § 40-35-114(9) and (10).

The use of a deadly weapon is, of course, an element of the offense of aggravated assault. We do not, however, agree with the state's concession on factor (10). In our view, the evidence established an "increased risk either to human life in general or to the victim in particular" by the reckless manner in which the defendant fired his gun into a residential area. See State v. Jones, 883 S.W.2d 597 (Tenn. 1994). Moreover, it also appears that another enhancement applies: that the offense was committed while the defendant was on probation. Tenn. Code Ann. § 40-35-114(13). Because the trial court erroneously applied only one factor and at least one other factor appears to apply, the record fully supports the maximum sentence imposed by the trial court.

Finally, the defendant complains that the trial court had no authority to impose consecutive sentencing. We disagree.

Prior to the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case, our

supreme court ruled that aggravating circumstances must be present before placement in any one of the classifications. Later, in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), the court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. There were, however, additional words of caution:

> [C]onsecutive sentences should not be routinely imposed ... and ... the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.

739 S.W.2d at 230. The Sentencing Commission Comments adopted the cautionary language. Tenn. Code Ann. § 40-35-115. The 1989 Act is, in essence, the codification of the holdings in Gray and Taylor; consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria[1] exist:

> (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;

[1]The first four criteria are found in Gray. A fifth category in Gray, based on a specific number of prior felony convictions, may enhance the sentence range but is no longer a listed criterion. See Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments.

> (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.

Tenn. Code Ann. § 40-35-115(b).

Here, the defendant was on probation for a prior offense at the time he committed this crime. That, in combination with the circumstances, is a sufficient basis for the imposition of consecutive sentences.

Accordingly, the judgment is affirmed.

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Gary R. Wade, Judge

CONCUR:

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John H. Peay, Judge

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David H. Welles, Judge