IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER SESSION, 1994

FILED

April 10, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	No. 03C01-9404-CR-00153
	)	
Appellee	)	Hamilton County
	)	
v.	)	Hon. Russell C. Hinson, Judge
	)	
LEONARD LEBRON ROSS,	)	(Especially Aggravated Robbery,
	)	Attempted Second Degree Murder,
Appellant	)	Burglary)

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

O P I N I O N

On October 5, 1993, a jury convicted appellant, Leonard Lebron Ross, of especially aggravated robbery, attempted second degree murder, and burglary. As a Range I offender, appellant was sentenced to twenty-two years for especially aggravated robbery, ten years for attempted second degree murder, and three years for burglary. The trial court ordered that the sentences be served consecutively.

In addition to the sufficiency of the evidence, appellant raises four issues on appeal:

1. the admissibility of appellant's first statement to the police;

2. the denial of defendant's motion for continuance when a co-defendant was added as a witness on the day of trial;

3. the admissibility of a letter written by appellant to a co-defendant; and

4. the correctness of the sentences imposed.

After a review of the record, we affirm the judgment of the trial court.

At trial, the state presented evidence to prove that appellant, his aunt, Novella Owens, and Vatonya Hollins, his girlfriend, had brutally beaten and robbed an elderly woman of her television set in order to buy a rock of crack cocaine. In the early morning hours of January 4, 1993, Mrs. Mary Sanford, a seventy-nine year old great-grandmother was sleeping in her arm chair when she was roused by crashing sounds. Moments later, a man appeared in the kitchen doorway. At first the intruder called her "grandmama," but when Mrs. Sanford denied that he was her grandson, the man told her that "Jeffrey" was in the

kitchen.[1] Puzzled, Mrs. Sanford called to her grandson and then got up to see where he was.

When she entered the kitchen, a woman attacked Mrs. Sanford with a hammer, striking her repeatedly on the head. Mrs. Sanford fought back and kept calling for help. Eventually, the woman, whom Mrs. Sanford later identified as Novella Owens, wrestled her to the floor.[2] In the struggle, a chair and a mop pail were overturned. When Mrs. Sanford continued to scream, Owens attempted to stifle her screams with a pillow. Just before she passed out, Mrs. Sanford felt a man's hands between her thighs and Owens' hands squeezing her throat. She passed out for some time and when she regained consciousness, the intruders were gone. The only missing item was a 19" color portable television set and its remote control.

Mrs. Sanford was in the bathroom attempting to wipe the blood off her head and face when the three intruders returned. Co-defendant Hollins attempted to help Mrs. Sanford by wiping her head with a damp towel. The man, whom Mrs. Sanford was unable to identify, began searching through her dresser for money. He told her that if she would give him five dollars he would get her a taxi or find another way to take her to the hospital.

Mrs. Sanford refused to give him anything and told the three that she would "just appreciate it if you-all would just go on and leave me alone." After they had gone, she called 911. Shortly thereafter, the police located appellant, Hollins, and Owens across the street at Owens' apartment.

Hollins and Owens entered guilty pleas on the day of trial and both testified for the state. According to their testimony, the three co-defendants had

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[1]Appellant and Mrs. Sanford's grandson, Jeffrey, were good friends.

[2]Owens lived across the street from Sanford. Apparently appellant, Vatonya Hollins, and their baby were staying with Owens.

spent the night drinking, playing cards, and smoking crack cocaine. When they ran out of crack, appellant suggested they rob somebody to get something to trade for drugs. The three crossed the street where appellant used a hammer to break open the back door of Mrs. Sanford's apartment. Owens admitted that she took the hammer and struck Mrs. Sanford two or three times on the head while appellant was disconnecting the television set. According to Owens, when the victim continued to scream and struggle, appellant handed her a sofa pillow to muffle Mrs. Sanford's screams. When she told appellant she couldn't do it, he said, "I'll calm her down," and stuck his hand between her thighs.

Appellant then carried the television set from Mrs. Sanford's house to a crack house a couple of blocks away where he traded it for a single rock of cocaine which he and the two women smoked.[3] Once the crack was gone, the threesome returned to Sanford's house. However, nothing more was taken, and the three eventually left.

The only physical evidence tying appellant to the scene was a single latent fingerprint found on a plastic watch case sitting on Mrs. Sanford's dresser. A fingerprint identification expert testified that the latent print matched the inked print of appellant's right ring finger. The police also found bloody footprints leaving the victim's back door. The prints matched the shoes worn by Hollins and Owens. Traces of the victim's blood were found on those shoes. Appellant's shoes, however, were clean.

When the police found appellant at his aunt's apartment, he gave a false name and denied any knowledge of the robbery. At the police station he made a statement in which he gave his correct name but claimed that he had taken the baby to school at about 6:30 a.m. and could not have participated in any break-in

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[3]According to the testimony of Hollins and Owens, an unidentified man helped appellant carry the television set to the crack house.

at Mrs. Sanford's.[4] The next day appellant made a second statement in which he said that Owens had wakened he and Vatonya from a sound sleep and told them that she had robbed and beaten Mrs. Sanford. They had then hurried across the street to assist the victim. While he was in the victim's bedroom, he tried to find some money for cab fare to take her to the emergency room. Appellant did not testify, but the second statement was read into the record.

Sufficiency of the Evidence

When the sufficiency of the evidence is challenged the standard for review by an appellate court is, whether after considering the evidence in the light most favorable to the prosecution, 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 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn. R. App. P. 13(e).

Appellant was tried and convicted by a jury. A guilty verdict from the jury, approved by the trial judge, accredits the testimony of the state's witnesses and resolves all conflicts in favor of the state. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978).

In determining the sufficiency of the evidence, this court should not reweigh or reevaluate the evidence. Id. Nor may this court substitute its inferences for those drawn by the trier of fact from the evidence. Liakas v. State,

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[4]This statement was not taped. The officer summarized it in his testimony.

286 S.W.2d 856, 859 (Tenn. 1956); Farmer v. State, 574 S.W.2d 49, 51 (Tenn. Crim. App.), cert. denied, (Tenn. 1978).

In this instance, the jury resolved the conflicting evidence in favor of the state. While it is true that Mrs. Sanford was unable to identify appellant as the man who stole her television, the jury chose to accredit his co-defendant's consistent and compelling testimony rather than appellant's self-serving and incredible statements. Although appellant's shoes did not match the bloody footprints at the scene, his fingerprint was found on a plastic watch case on the victim's bedroom dresser. While appellant claimed that he was unable to carry the television set for any distance because of an impaired right arm, the jury, by its verdict, rejected that argument and must have concluded that appellant was assisted by an unidentified third man. The evidence presented at trial was sufficient for a rational trier of fact to conclude that appellant was guilty of the crimes for which he was convicted beyond a reasonable doubt.

Admissibility of Appellant's First Statement

Appellant contends that his so-called "first" statement was made to Inspector Larry Swafford of the Chattanooga Police Department while he was seriously intoxicated and, therefore, was not the product of a rational intellect and free will. Townsend v. Sain, 372 U.S. 293 (1963); Vandegriff v. State, 409 S.W.2d 370 (Tenn. 1966). In this untaped conversation, appellant admitted he had originally given the police a false name and claimed that he had taken his baby to school that morning at about 6:30.

The trial court held a jury-out hearing to determine the admissibility of appellant's statements. Inspector Swafford conceded that appellant had been drinking at the time of the interview, but stated that appellant was not drunk.

The inspector read appellant his rights. According to the police officer's testimony, appellant appeared to understand those rights and signed a waiver.

A waiver must be made "voluntarily, knowingly, and intelligently" to be valid. Miranda v. Arizona, 384 U.S. 436, 444 (1966). The state has the burden of showing voluntariness by a preponderance of the evidence. State v. Kelly, 603 S.W.2d 726, 728 (Tenn. 1980). Further, waiver is to be determined by considering the totality of the circumstances. State v. Benton, 759 S.W.2d 427, 431-32 (Tenn. Crim. App. 1988).

On appeal, this court is bound to accept the trial court's factual findings with reference to compliance with Miranda, unless the evidence preponderates against them. State v. Kelly, 603 S.W.2d at 729. Intoxication or mental unsoundness does not render a confession invalid, if the evidence shows that the confessor was capable of understanding and waiving his or her rights. State v. Bell, 690 S.W.2d 879, 882 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1985); State v. Green, 613 S.W.2d 229, 233 (Tenn. Crim. App. 1980), perm. to appeal denied, (Tenn. 1981). If a defendant understands his or her rights and is capable of making a narrative of past events, the use of alcohol does not prevent the admission of the statement. State v. Michael Abernathy, No. 03C01-9111-CR-00372, slip op. at 13 (Tenn. Crim. App., Knoxville, Oct. 2, 1992), perm. to appeal denied, (Tenn. 1992).

In this case, appellant was properly advised of his rights, had the capacity to understand those rights, and was not coerced. The evidence does not preponderate against the trial court's determination that appellant made a knowing, voluntary, and intelligent waiver of his rights. Therefore, this court will not disturb the trial court's finding that the statement was admissible.

In conjunction with his argument that the statement was involuntary, appellant also contends that the trial court erred by allowing Inspector Swafford to testify to the ultimate issue of voluntariness of the statement in front of the jury. However, appellant's brief does not cite to any statement by the officer in front of the jury that relates to the voluntariness of the first statement, and our review of the record has failed to discover one.[5] This issue is without merit.

Denial of Continuance

On the morning of trial, appellant's two co-defendants accepted plea bargains offered by the state in exchange for their testimony at trial. During the course of the plea bargaining session, defense counsel learned for the first time that Novella Owens would testify that appellant had handed her a pillow to stifle the victim's screams. Because Owens had never been identified by the state as a possible witness and because of the new information, defense counsel moved for a continuance. Appellant appeals the trial court's refusal to grant a continuance.

The state contends that this issue has been waived since appellant failed to raise it in his motion for new trial. Although the fourth issue in the motion for new trial alludes to the addition of witnesses not listed in the indictment, no issue is raised respecting the trial court's denial of a motion to continue.

As a general rule, appellate review is limited to issues that are properly preserved for review in the trial court, contained in a motion for new trial, and properly presented for review in this court. Tenn. R. App. P. 3(e), 13(b),

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[5]During the jury-out hearing, Inspector Swafford testified that appellant did not appear to be drunk when he signed the waiver. Such testimony is proper and appellant does not contest its propriety. Adv. Comm. Comments, Tenn. R. Evid. 701.

27(a)(4), & 36(b). However, this court may, in the exercise of its discretion consider an issue that has been waived or not presented for review to prevent needless litigation, to prevent injury to the interests of the public, to prevent prejudice to the judicial process, or to do substantial justice. Tenn. R. App. P. 13(b); Tenn. R. Crim. P. 52(b). We elect to address this issue on it merits.

The granting of a continuance rests within the sound discretion of the trial court. State v. Morgan, 825 S.W.2d 113, 117 (Tenn. Crim. App. 1991), perm. to appeal denied, (Tenn. 1992). An appellate court may reverse only if the denial was an abuse of discretion, and a different result might reasonably have been reached had the continuance been granted. State v. Dykes, 803 S.W.2d 250, 257 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1990). In this instance, denying the continuance would have been an abuse of discretion if admission of Owens' testimony without a continuance were error and if appellant was prejudiced by its admission.

Appellant contends that Tennessee law requires the district attorney general to list on the indictment the names of witnesses who may be called to testify. Tennessee Code Annotated Section 40-17-106 provides that:

> It is the duty of the district attorney general to endorse on each indictment or presentment, at the term at which the same is found, the names of such witnesses as he intends shall be summoned in the cause, and sign his name thereto.

Tenn. Code Ann. § 40-17-106 (1990 Repl.)

However, it is well settled in Tennessee that this provision is directive, rather than mandatory. State v. Melson, 638 S.W.2d 342 (Tenn.), cert. denied, 459 U.S. 1137 (1982); State v. Crabtree, 655 S.W.2d 173 (Tenn. Crim. App. 1983); State v. Roberson, 644 S.W.2d 696 (Tenn. Crim. App. 1982), perm. to appeal denied, (Tenn. 1983); Thomas v. State, 465 S.W.2d 887 (Tenn. Crim. App. 1970), cert. denied, (Tenn. 1971). The purpose of the statute is to prevent surprise or ambush which would effectively cripple a defendant's ability to plan

an adequate defense. State v. Martin, 634 S.W.2d 639, 643 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1982). The failure to list or provide names of witnesses neither disqualifies the witness nor entitles defendant to relief, unless prejudice can be shown. State v. Morris, 750 S.W.2d 746, 749 (Tenn. Crim. App. 1987), perm. to appeal denied, (Tenn. 1988).

When the state adds witnesses to the list on the indictment and defendant alleges an insufficient opportunity to interview the witnesses, the trial court must determine whether a continuance is required to avoid unfair prejudice. State v. Crabtree, 655 S.W.2d at 177. The decision to allow a witness to testify is within the sound discretion of the trial court. McBee v. State, 372 S.W.2d 173, 179 (Tenn. 1963); State v. Jackie Ray Coffman and George Jones, No. 03C01-9203-CR-00065, slip op. at 8-9 (Tenn. Crim. App., Knoxville, Jan. 7, 1993), perm. to appeal denied, (Tenn. 1993); State v. Carl Lambert, No. 114, slip op. at 2 (Tenn. Crim. App., Knoxville, Feb. 13, 1991), perm. to appeal denied, (Tenn. 1991); State v. Lavely Brown, No. 1278, slip op. at 4 (Tenn. Crim. App., Knoxville, Aug. 8, 1990), perm. to appeal denied, (Tenn. 1990).

Where there is no surprise, prejudice, or disadvantage by reason of the delay in identifying a witness, the trial court may properly admit the testimony of witnesses even though their names were omitted from the indictment. State v. Craft, 743 S.W.2d 203, 204 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1987); State v. Martin, 634 S.W.2d at 643; State v. Lawrence Eugene Goss, No. 54, slip op. at 11 (Tenn. Crim. App., Knoxville, July 13, 1990), perm. to appeal denied, (Tenn 1990).

In this instance, the three defendants were indicted separately; however, a single indictment bearing three names and three docket numbers was returned on each count. None of the indictments contained a list of potential witnesses.[6]

[6]The prosecutor provided the defense with a list of potential witnesses and amended that list at least once prior to trial.

Our review of Tennessee case law indicates that trial courts generally ensure that defense counsel has the opportunity to interview and evaluate the testimony of any witness added on the brink of trial. See State v. Olen "Eddie" Hutchison, No. 03S01-9108-CR-00078 (Tenn., Knoxville, June 7, 1994); State v. Crabtree, 655 S.W.2d 173 (Tenn. Crim. App. 1983); State v. Gilbert, 612 S.W.2d 188 (Tenn. Crim. App. 1980), perm. to appeal denied, (Tenn. 1981); Thomas v State, 465 S.W.2d 887 (Tenn. Crim. App. 1970), cert. denied, (Tenn. 1971); State v. Barry Dewayne Anderson, No. 01C01-9212-CR-00376 (Tenn. Crim. App., Nashville, Sept. 16, 1993), perm. to appeal denied, (Tenn. 1994); State v. Burl Lakins, No. 32 (Tenn. Crim. App., Knoxville, May, 24, 1991); State v. Eddie Lee Curtis, No. 1163 (Tenn. Crim. App., Knoxville, Oct. 5, 1990), perm. to appeal denied (Tenn. 1990); State v. Michael Leon Grady, No. 277 (Tenn. Crim. App., Knoxville, June 20, 1990), perm. to appeal denied, (Tenn. 1990); State v. James Edward Johnson and Jerry Hodge, No. 1 (Tenn. Crim. App., Mar. 23, 1988).

However, when defense counsel was or should have been aware of the possibility of a witness testifying and when the substance of the testimony was available to the defense, Tennessee courts have not hesitated to admit the testimony. State v. Morris, 750 S.W.2d 746 (Tenn. Crim. App. 1987), perm. to appeal denied, (Tenn. 1988) (witnesses were "close to the case" and appearance was expected); State v. Roberson, 644 S.W.2d 696 (Tenn. Crim. App. 1982), perm. to appeal denied, (Tenn. 1983) (defense aware of witness and his testimony at preliminary hearing); State v. Gilbert, 612 S.W.2d 188 (Tenn. Crim. App. 1980), perm. to appeal denied, (Tenn. 1981) (testimony was substantially similar to listed witness); Thomas v. State, 465 S.W.2d 887 (Tenn. Crim. App. 1970), cert. denied, (Tenn. 1971) (defendant was well-informed as to co-defendant's knowledge of the offense); State v. Lawrence Eugene Goss, No. 54 (Tenn. Crim. App., Knoxville, July 13, 1990), perm. to appeal denied, (Tenn. 1990) (testimony of forensic pathologist required by death of medical examiner);

State v. Patricia Walton, No. 03C01-9205-CR-156 (Tenn. Crim. App., Knoxville, Dec. 17, 1992) (identification of illicit substance expected in drug case).

In this instance, the state failed to comply with the statute. However, defense counsel was certainly aware that, if a plea bargain were reached, Novella Owens might testify for the state. Defense counsel was a party to the plea negotiations and became aware that Owens would testify at the same time the state knew. Pre-trial, Owens had not been unavailable to the defense. She could have been interviewed at any time. In fact, the prosecutor pointed out that defense access to Owens was better than his had been. Defense counsel did not disagree.

Nothing in the record indicates that Owens refused to talk to appellant's counsel or that she had invented the story about the pillow at the last moment. If appellant was "surprised" by Owens' testimony at trial, the surprise was of his own making. See Tenn. R. App. P. 36(a). Technical noncompliance with the directive statute, under these circumstances, did not justify a continuance or disqualification of the witness. See State v. Crabtree, 655 S.W.2d at 177.

Moreover, we find nothing in the record to indicate that appellant was unfairly disadvantaged at trial. Defense counsel had full opportunity to cross-examine Owens rigorously. See State v. Morris, 750 S.W.2d at 749; Thomas v. State, 465 S.W.2d at 890. Nothing in the record indicates that appellant could have changed his defense strategy with earlier notice or that he could have produced evidence to refute Owens' statements. Statements made by Mrs. Sanford and co-defendant Hollins corroborated much of Owens' testimony. The record does not show that appellant was placed in a less favorable position by the late announcement than he would have been had Owens' name been listed as a witness on the indictment or had the continuance been granted.

A denial of a continuance is an abuse of discretion if the "defendant has been deprived of his [or her] rights and an injustice done." State v. Goodman, 643 S.W.2d 375, 378 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1982). A reversal is required if appellant "did not have a fair trial and [if] a different result would or might reasonably have been reached had there been a different disposition." Id. (emphasis in original). Nothing indicates that appellant did not receive a fair trial or that the granting of a continuance might reasonably have resulted in a different outcome of the case. Therefore, we find no abuse of discretion in denying the continuance.

Lay Witness Identification of Defendant's Handwriting

The state introduced a letter received by co-defendant Hollins to prove that appellant had instructed her to lie at trial. On appeal, appellant contends that the letter was not properly authenticated, as there was no showing that Hollins was familiar with his handwriting. We respectfully disagree.

A lay witness must be familiar with the signature and handwriting of the maker by personal experience in order to identify the maker of a handwriting. Tenn. R. Evid. 901(b)(2); State v. Harris, 839 S.W.2d 54, 70 (Tenn. 1992). Hollins had lived with appellant for two years prior to her arrest. She testified that they had written each other numerous letters while in jail. She positively identified the handwriting as that of appellant.

A witness' competency to identify particular handwriting is a matter within the trial judge's discretion. State v. Harris, 839 S.W.2d at 70. There was no abuse of discretion in allowing Hollins to give her opinion that the letter was in appellant's handwriting. The letter was properly authenticated pursuant to Rule 901(b)(2) of the Tennessee Rules of Evidence.

Consecutive Sentencing

The appellant contends that the imposition of consecutive sentences in his case is contrary to Tenn. Code Ann. § 40-35-115 (1990) and results in a sentence that is disproportionate to the crime, his age, and his prior record. The State concedes that the trial court improperly applied one factor, but argues that the record supports a finding that the appellant is a dangerous offender and that confinement for thirty-five years is necessary to protect the public. For the reasons discussed below, we affirm the appellant's consecutive sentences of twenty-two years for especially aggravated robbery, ten years for attempted second degree murder, and three years for simple burglary.

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)(1990). 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). 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 a defendant on his or her own behalf; and (7) defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, & -210 (1990 & 1994 Supp.); State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

The trial court applied three enhancement factors, presumably to each offense:

> (1) previous history of criminal behavior in addition to that necessary to establish the appropriate range; Tenn. Code Ann. § 40-35-114(1) (1994 Supp.);
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> (2) leader in the commission of the offense; Tenn. Code Ann. § 40-35-114(2) (1994 Supp.); and
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> (3) victim was particularly vulnerable because of age and physical disability; Tenn. Code Ann. § 40-35-114(4) (1994 Supp.).

Evidence in the record supports applicability of these factors. The trial court found no mitigating factors, nor do we. Based on our review of the entire record, we conclude that the appellant's sentences are justified.

With respect to consecutive sentencing, the trial court found that consecutive sentencing is appropriate since the appellant had committed the crime while he was on probation and since he was a dangerous offender as defined by statute. Tenn. Code Ann. § 40-35-115 (b)(4) & (6). The appellant contends that the resulting thirty-five year sentence is disproportionate and that the multiple conviction factors were inappropriately applied.

Consecutive sentencing may be imposed in the discretion of the trial court upon a determination that one or more of the following criteria exist:

> (1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
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> (2) The defendant is an offender whose record of criminal activity is extensive;
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> (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;
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> (6) The defendant is sentenced for an offense committed while on probation; or
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> (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b). See also Tenn. R. Crim. P. 32.

The State concedes and we agree that, since the appellant was not sentenced to probation until March 3, 1993, this factor is inapplicable in sentencing for a crime committed prior to that date. Tenn. Code Ann. § 40-35-115(b)(6). We must now determine whether consecutive sentences are justified because the appellant is a dangerous offender.[7]

The appellant contends that the trial court erred in enhancing his sentences and ordering them to be served based upon the same criteria. This argument has been rejected by this court on several occasions. See, e.g., State v. Meeks, 867 361 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993).

We also conclude that consecutive sentences were proper in this case. An accused qualifies as a "dangerous offender" when his "behavior indicates little or no regard for human life, and [he has] no hesitation about committing a crime in which the risk to human life is high." Tenn. Code Ann. § 40-35-115(b)(4). This language is essentially a codification of our supreme court's holding in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). See State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995). In Gray, our supreme court qualified this classification by requiring the court to find aggravating factors

[7]The record does not support a finding of the other factors which support consecutive sentences.

present before a defendant may be classified as a "dangerous offender." Gray, 538 S.W.2d at 393.

In State v. Wilkerson, 905 S.W.2d at 933, our supreme court reaffirmed these principles and provided additional guidelines for finding a defendant to be a "dangerous offender." The court held that proof that a defendant was a "dangerous offender," standing alone, was not enough to sustain the imposition of consecutive sentences. Id. at 938. Consequently, under Wilkerson, before the sentencing court may discretionarily impose consecutive sentences for one classified as a "dangerous offender," the following criteria must be met:

> (1) the defendant's "behavior indicates little or no regard for human life, and [he has] no hesitation about committing a crime in which the risk to human life is high;"
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> (2) aggravating factors must be present;
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> (3) the terms imposed are reasonably related to the severity of the offenses committed;
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> (4) consecutive sentences are necessary in order to protect the public from further criminal acts by the offender; and
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> (5) the sentence is in accordance with the principles set forth in the Sentencing Reform Act.

Id.[8]

Upon a *de novo* review of the record, we conclude that the appellant meets these requirements. First, the appellant acted with "little or no regard for human life" and he did not hesitate "about committing a crime in which the risk to human life is high." The record reflects that the appellant and his co-defendants were willing to trade the life of an elderly woman for a single rock of crack cocaine. Second, there are aggravating circumstances present. The trial court found the appellant to be the leader in the commission of the offenses. The appellant and his co-defendants inflicted multiple blows with a hammer to the

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[8]Tenn. Code Ann. § 40-35-115 provides guidelines for discretionary consecutive sentencing as opposed to Tenn. R. Crim. P. 32(a) which provides for procedurally mandated consecutive sentencing.

head and face of the victim, smothered her with a pillow, and left her for dead. The victim of the brutal assault was seventy-nine years old. She still suffers from dizziness and blackouts, and requires surgery on her broken finger. She has moved from her residence for her protection. These circumstances are beyond those necessary to commit the crimes for which the defendant was convicted. Additionally, we find that the aggregate length of the sentences reasonably relates to the severity of the crimes for which the defendant stands convicted. We have previously concluded that the actions of the appellant and his co-defendants were brutal and vicious.

Moreover, the aggregate sentence imposed is necessary to protect the public from further criminal acts by the appellant. After a review of the record, we conclude that the appellant's history does not suggest amenability to rehabilitation. Although the appellant was only twenty years old when the offense was committed, his record indicates an extensive criminal history for someone his age. The appellant's criminal history is in dispute as to several convictions.[9] However, the presentence report and the appellant's own admissions reflect adult convictions for felony theft of property, public intoxication, theft of an automobile, and a weapons violation. The appellant also has numerous convictions as a juvenile, including grand larceny and weapons and drugs violations. Additionally, both of the appellant's co-defendants testified that, on the evening of the offense, the appellant stated that he was going to break into someone's house. Thirty minutes prior to the offense, the appellant grabbed co-defendant Hollins, put a knife to her throat, and stated "B----, I'll kill you!" After their arrest on the present charges, the appellant wrote to Hollins in an attempt to suborn perjury by fabricating events which placed all the blame upon the co-defendant Owens. Thus, there is little, if anything, in the record to

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[9]The appellant's testimony at the sentencing hearing was in conflict with the presentence report in many respects, including criminal, educational, and employment history. Furthermore, the appellant, during cross-examination, refused to answer questions involving the offense for which he was convicted, invoking his Fifth Amendment right on advice of counsel.

indicate that the appellant could be released into society anytime in the near future without risk to society. Finally, we conclude that an aggregate sentence of thirty-five years is consistent with the principles of sentencing. Based upon the foregoing and consistent with the holding in Wilkerson, we conclude that the trial court did not err in imposing consecutive sentences.

The judgment of the trial court is affirmed.

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David G. Hayes, Judge

CONCUR:

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Jerry Scott, Presiding Judge

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Penny J. White, Judge