

OPINION

The appellant, Brian Swick, was convicted of felonious reckless endangerment, a class E felony, by a jury in the Circuit Court of Greene County. He was sentenced to serve fifteen (15) months in the county jail. On appeal, he raises the following issues for our consideration:

- (1) Whether the evidence adduced at trial was sufficient to sustain the verdict of the jury.
- (2) Whether the trial court erred in refusing to grant a second continuance to the appellant.
- (3) Whether the trial court erred when it refused to allow the appellant to call the probation officer of a missing witness for the purpose of explaining to the jury that the witness was subject to an outstanding warrant.
- (4) Whether the sentence imposed by the trial court was excessive.

For the reasons contained herein, we affirm the trial court.

I. FACTUAL BACKGROUND

On December 29, 1994, around 7:00 p.m., Officer Stewart Kilgore of the Greeneville Police Department was standing next to his police cruiser on Chapel Street. Chapel Street is an extremely narrow street in Greeneville, Tennessee. The officer heard a vehicle coming down this narrow street at a high rate of speed. In an attempt to wave the vehicle down and warn the driver to slow down his car, the officer waved his flashlight at the vehicle. The vehicle, a truck, did slow down in response to the light. However, as the truck approached the officer and the officer reached out to touch the driver-side door, the driver of the truck suddenly accelerated the truck running over Officer Kilgore's foot in the process. The truck sped away from the scene and the officer radioed a description of the driver and the passenger. Believing that the driver was Brian Swick, with whom the officer had had prior dealings, the officer surmised that the appellant and his passenger would drive to the appellant's

mobile home. The officer went to the appellant's mobile home. Christopher Smith, the passenger of the speeding truck, opened the door and the officer went into the home and effected an arrest of the appellant who was, in Officer Kilgore's opinion, hiding in a back room of the mobile home.

Officer Kilgore was the only witness presented by the State and it was his testimony that the driver of the vehicle who ran over his foot and sped through the streets of Greeneville on the evening of December 29, 1995, was the appellant.

The appellant testified in his own behalf and agreed with Officer Kilgore's testimony as to the events of that evening with the notable exception that the appellant claimed that he was not driving the vehicle but was merely a passenger. The appellant testified that Christopher Smith, identified by Officer Kilgore as the passenger, was the driver of the truck on that evening. Jerry Bell testified on behalf of the appellant that sometime between 7:30 and 7:45 p.m. on the night in question Christopher Smith and the appellant came racing down the road on which he lives at a high rate of speed towards the appellant's home and that Christopher Smith was the driver of the truck. Similarly, Randy Ricker testified on behalf of the appellant that on that same evening he observed a truck driven by Christopher Smith, in which the appellant was a passenger, traveling at a high rate of speed towards the appellant's house where it came to a stop and both the appellant and Mr. Smith got out of the truck and ran into the house.

Christopher Smith did not testify. The appellant attempted to call Christopher Smith's probation officer for the purpose of informing the jury that there was an outstanding warrant for Smith in order to explain Smith's absence. The trial court denied the appellant's request to call this witness apparently on grounds that Smith's arrest warrant on an unrelated matter was irrelevant. The trial court did advise counsel for the appellant, however, that he could ask the appellant if "the police officers are not out looking for [Smith]." Counsel did not ask the appellant that question. The

appellant was asked, however, if he had tried to locate Smith, and appellant responded, "Looked around a bit and all I've heard and everything he's somewhere in Morristown."

II. SUFFICIENCY OF THE EVIDENCE

Where the sufficiency of the evidence is challenged, the relevant question for this court is whether, after reviewing 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, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); T.R.A.P. 13 (e).

A guilty verdict, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves any conflicts in favor of the State's theory. 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 to all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978). A verdict against the defendant removes the presumption of innocence and replaces it with a presumption of guilt on appeal. State v. Grace, 493 S.W.2d 474 (Tenn. 1973). The defendant has the burden of overcoming the presumption of guilt. State v. Brown, 551 S.W.2d 329 (Tenn. 1977).

In accordance with the above standard of review, we hold that the evidence was sufficient as a matter of law to support the jury's verdict.

Tennessee Code Annotated section 39-13-103(a) provides that "a person commits an offense who recklessly engages in conduct which places or may place another person in imminent danger of death or serious bodily injury." Such reckless conduct committed with a deadly weapon is a class E felony. Tenn. Code Ann. § 39-13-103(b) (1991 Repl.). There was conflicting testimony from the witnesses as to who

was driving the truck on the night in question. The jury obviously resolved this issue against the appellant by crediting the officer's testimony that the appellant was the driver.

The appellant argues that even if the evidence supports the conclusion that he was the driver of the vehicle, the State failed to prove the elements of the offense beyond a reasonable doubt. We disagree.

A person acts recklessly when

. . . with respect to circumstances surrounding the conduct or the result of conduct . . . the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

Tenn. Code Ann. § 39-11-106(31) (1995 Supp.).

Concluding, as the jury obviously did, that the appellant was the driver of the truck, the facts support the determination that the appellant acted recklessly when he drove at a high rate of speed on a very narrow street in the dark and when he deliberately sped up after slowing down when Officer Kilgore approached and touched his vehicle. The appellant consciously and unjustifiably disregarded the inherent risks of his conduct. His actions placed the officer in imminent danger of death or serious bodily injury and in fact did cause bodily injury to the officer.

A deadly weapon is "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." Tenn. Code Ann. § 39-11-106(5)(B) (1995 Supp.). In State v. Scott W. Long, No. 03C01-9301-CR-00032 (Tenn. Crim. App., at Knoxville, August 19, 1993), perm. to appeal denied (Tenn. 1993), this Court held that a vehicle can be a deadly weapon when misused. In Long we held that whether an automobile is a deadly weapon or not depends upon the method of use and that the resolution of the issue necessarily turns on the particular

facts of each case. In the case at bar, the appellant drove on a very narrow street in Greeneville in the dark at a high rate of speed. The appellant placed the life of Officer Kilgore in danger. The appellant could have easily killed Officer Kilgore when he sped away into the night on a narrow street while Officer Kilgore stood inches away from the truck. The jury's conclusion that the appellant's speeding pickup truck was a deadly weapon is supported by the evidence in this case. Accordingly, this issue is without merit.

II. CONTINUANCE

The appellant claims that it was error for the trial court to deny his second request for a continuance based on his inability to find Christopher Smith to testify on his behalf at trial.¹ The record contains no transcript of a hearing on the second motion to continue. Additionally, there is no order denying the motion in the record. It is the duty of the appealing party to preserve and assemble the record so that meaningful appellate review may be had. Rule 24(b) of the Rules of Appellate Procedure provides in pertinent part that “the appellant shall have prepared a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal.” In the absence of any record of why the motion to continue was denied, this court is precluded from considering the issue and we are obliged to “conclusively presume” that the trial court correctly denied the second motion to continue. State v. Locke, 771 S.W.2d 132, 138 (Tenn. Crim. App. 1988); State v. Hopper, 695 S.W.2d 530, 537 (Tenn. Crim. App. 1985); State v. Griffith, 649 S.W.2d 9, 10 (Tenn. Crim. App. 1982); see also State v. Cooper, 736 S.W.2d 125, 131 (Tenn. Crim. App. 1987).

¹ The trial court had previously granted a continuance to the defense in order to allow the appellant additional time to find Christopher Smith.

III. EXCLUSION OF DEFENSE WITNESS TESTIMONY

The appellant sought to introduce the testimony of Christopher Smith's probation officer for the purpose of explaining to the jury that Mr. Smith was subject to arrest for a probation violation. It was the defense's theory that this would help the jury understand that this witness was unavailable. Trial courts have broad discretion in determining the admission of evidence. See State v. Hutchison, 898 S.W.2d 161, 172 (Tenn. 1995); State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978). We find no abuse of the court's discretion in refusing to allow Christopher Smith's probation officer to testify to that which the appellant himself could have testified. As previously noted, the trial court ruled that the appellant could testify that the police were looking for Smith. The appellant elected not to.

IV. SENTENCING

Convicted of a class E felony, the appellant was subject to a Range I sentence of between one and two years. The trial court ordered the appellant to serve a sentence of fifteen (15) months as a Range I offender.

The Criminal Sentencing Reform Act of 1989 provides that appellate courts are to review sentences de novo with the presumption that the determinations of the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1990 Repl.). In reviewing the sentence we consider: (1) the evidence received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors in sections 40-35-113 and 40-35-114; and (6) any statements the defendant wishes to make in his own behalf about sentencing. Tenn. Code Ann. § 40-35-210 (1990 Repl.). The burden is on the defendant to show that the sentence

imposed was improper. Tenn. Code Ann. § 40-35-401 (d) Sentencing Commission Comments; State v. Ashby, 823 S.W. 2d 166, 169 (Tenn. 1991).

The State sought the application of the following enhancement factors in this case.

- (9) The defendant possessed or employed . . . a deadly weapon during the commission of the offense;
- (10) The defendant had no hesitation about committing a crime when the risk to human life was high;
- (12) During the commission of the felony, the defendant willfully inflicted bodily injury upon another person . . .;
- (13) The felony was committed while on release status; and
- (16) The crime was committed under circumstances under which the potential for bodily injury to a victim was particularly great.

Tenn. Code Ann. § 40-35-114 (1995 Supp.).

Although the trial court considered all of the enhancement factors sought by the State, it is unclear from the record precisely which factors the court applied in reaching its decision to sentence the appellant above the minimum sentence within the range. We therefore review the sentence de novo. It appears as if the court applied all of the above factors except enhancement factor thirteen (13). We have reviewed the record including the sentencing hearing and conclude that none of the above factors are appropriate in this case.

Felony reckless endangerment requires the use of a deadly weapon; accordingly, factor nine (9) was an element of the offense and it was improper to enhance the sentence on this basis.

Factor ten (10) was likewise improper because the state failed to show that the appellant's conduct created a risk to human life greater than that inherent in any offense in which a deadly weapon is used. See State v. Hill, 885 S.W.2d 357, 363

(Tenn. Crim. App. 1994); State v. Hicks, 868 S.W.2d 729, 732 (Tenn. Crim. App. 1993).

Factor twelve (12) was not an appropriate factor in this case because the State failed to establish that the appellant's conduct in running over the officer's foot was willful.

Enhancement factor sixteen (16) was not an appropriate factor in this case. Although the appellant's conduct placed Officer Kilgore at risk for bodily injury, the State failed to establish that the appellant's conduct created a risk of bodily injury to anyone other than Officer Kilgore. The risk of bodily injury to the officer was an element of the offense of felonious reckless endangerment. Therefore, the sentence could not be enhanced on this basis. See State v. Hill, 885 S.W.2d 357, 363 (Tenn. Crim. App. 1994); State v. Hicks, 868 S.W.2d 729, 732 (Tenn. Crim. App. 1993). Although there was testimony that there were two (2) bystanders on the street with the officer, the proof failed to establish that they were at risk for bodily injury as a result of the appellant's conduct.

However, as the state correctly points out in its brief, the evidence at the sentencing hearing established that the appellant had a history of criminal conduct beyond that necessary to establish the appropriate sentencing range. Tennessee Code Annotated section 40-35-114(1) provides that this is a ground for imposing a sentence above the presumed minimum sentence. Although not applied by the trial court, we believe that this factor standing alone supports a sentence of 15 months, 3 months over the minimum sentence.

Accordingly, the judgment is affirmed.

WILLIAM M. BARKER, JUDGE

CONCUR:

GARY R. WADE, JUDGE

DAVID H. WELLES, JUDGE