**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE**
**AT JACKSON**
**JANUARY SESSION, 1996**

FILED

**July 26, 1996**

**Cecil Crowson, Jr.**
**Appellate Court Clerk**

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| **STATE OF TENNESSEE**, | ) | |
| | ) | No. 02C01-9502-CC-00053 |
| Appellee | ) | |
| | ) | LAKE COUNTY |
| vs. | ) | |
| | ) | Hon. JOE G. RILEY, JR., Judge |
| **STEVEN DEWAYNE BOLDEN**, | ) | |
| | ) | (Aggravated Assault) |
| Appellant | ) | |

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OPINION FILED: _____

AFFIRMED

**David G. Hayes**
Judge

## OPINION

The appellant, Steven Dewayne Bolden, was convicted by a Lake County jury of aggravated assault, a class C felony. The trial court sentenced the appellant to three years incarceration in the Tennessee Department of Correction. On appeal, the appellant challenges the sufficiency of the evidence to sustain his conviction and the trial court's denial of alternative sentencing.

### I. Factual Background

At trial, Aubrey Smith testified that, on November 17, 1993, he was in downtown Tiptonville and encountered the appellant, Darren Pritchard, and several other men. As the appellant and his companions drove past Smith, one of the group pointed a "[a] big chrome gun ... type of .357" at Smith. Smith testified that he had previously been involved in an altercation with the appellant concerning the appellant's cousin, Tamara. Following the incident in downtown Tiptonville, Smith drove to the Tiptonville Meadows apartment complex, where he visited an acquaintance named Charlotte. He stayed approximately ten minutes. As he was driving away, someone began to shoot at his car. Because it was dark, Smith could not see his assailant. The appellant was rendered unconscious when a bullet struck him behind his ear. He remained in the hospital for approximately one month.

Darren Pritchard and Kenny Strayhorn testified on behalf of the State. Earlier, they had pled guilty to shooting Aubrey Smith. Their testimony revealed that, in the afternoon or early evening of November 17, 1993, the appellant, Darren Pritchard, Kenny Strayhorn, Raymond Davis, and Charles Belk met in Tiptonville and proceeded to a "bar" where they practiced shooting a nine millimeter, semi-automatic pistol belonging to the appellant. The pistol was a "Tec-DC9," manufactured by Intratec, commonly referred to as a Tec-nine. The

appellant testified that he had bought the gun earlier that month. After shooting at the "bar", the appellant borrowed a car, a light blue Cadillac, from an acquaintance, and he, Pritchard, Strayhorn, and Davis drove about town. Apparently, various members of the group, to varying degrees, drank alcohol, smoked marijuana, and ingested cocaine throughout that afternoon and evening. At trial, the appellant asserted that he only drank beer. The group then drove to Ridgely, where the appellant's girlfriend resided. The appellant exited the car, leaving the car keys and his gun inside the car.

Pritchard, Strayhorn, and Davis returned to Tiptonville in the appellant's car. According to Pritchard and Strayhorn, Aubrey Smith, the victim in this case, drove by Pritchard, Strayhorn, and Davis and pointed a gun at them. As a result of this incident, the three men decided to obtain additional guns, including a sawed-off shotgun and a .357 caliber revolver. Apparently, Aubrey Smith was associated with a group of men from Memphis who had allegedly assaulted Charles Belk. Moreover, according to Darren Pritchard, a member of the Memphis group had previously pointed a gun at him. The appellant testified that he had also been involved in an argument with Smith concerning his cousin's girlfriend, Tamara. Additionally, he had argued with Smith when he attempted to retrieve his paycheck from Charles Belk's automobile. According to the appellant, Smith had stolen Belk's car keys.

Pritchard and Strayhorn testified that the appellant rejoined his companions later that evening. The appellant was accompanied by another acquaintance, Ricky Terry. Pritchard testified that, at this point, he, the appellant, Strayhorn and Davis decided to drive to the Tiptonville Meadows apartment complex and "take care of business." Strayhorn also testified at trial that he and his friends decided "[t]o take care of some fellows" at the apartment complex. Strayhorn believed that they were going to beat one of the people

responsible for assaulting Charles Belk.

Pritchard asserted at trial that he informed the appellant that he was going to carry the appellant's gun.[1] Pritchard stated, "I told him that if he didn't want his gun to be involved, to let me know." According to Pritchard, the appellant did not respond. Pritchard conceded on cross-examination that he had told T.B.I. agent Roger Hughes that the appellant was unaware that Pritchard was carrying the Tec-nine. He explained that he had shot the victim and did not want to blame anyone else. Pritchard also conceded that the appellant could not have prevented him from using the Tec-nine.

Pritchard and Strayhorn testified that, when they arrived at Tiptonville Meadows, they spotted Aubrey Smith. The appellant waited in the car, while Pritchard, Strayhorn, and Davis shot at Smith's vehicle. Pritchard used the appellant's Tec-nine, Strayhorn used the .357 caliber revolver, and Davis used the sawed-off shotgun. Strayhorn testified that the shooting occurred at approximately 7:00 p.m. or 7:30 p.m. Following the shooting, the appellant drove the group toward Dyersburg.

Deputy Paul Jones of the Lake County Sheriff's Department testified that, on November 17, 1993, he was notified that a shooting had occurred at the Tiptonville Meadows apartment complex. When he arrived at the scene of the shooting, the victim had already been transported to the hospital. Deputy Jones was informed that a gray Cadillac was connected with the shooting. Shortly thereafter, a car matching that description was apprehended in Dyer County.

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[1]Strayhorn testified that he could not recall Pritchard informing the appellant that he was taking his gun.

Deputy Jones proceeded to Dyer County, where he determined that the occupants of the car included the appellant, Darren Pritchard, Kenny Strayhorn, and Raymond Davis. Deputy Jones delivered several weapons recovered by the Dyer County authorities to Special Agent Roger Hughes with the Tennessee Bureau of Investigation.

Deputy Danny Sawyers of the Dyer County Sheriff's Department testified that on the night of November 17, 1993, a "B.O.L.O." or "be on the lookout" was broadcast for a blue or gray Cadillac from Lake County. He spotted a vehicle matching that description heading south on Great River Road in Dyer County. He observed three or four people in the car. Calling for assistance, Deputy Sawyers followed the Cadillac. Additional officers arrived in two separate vehicles. The police vehicles drew alongside the suspects' vehicle, which immediately stopped. The officers conducted a "felony takedown," i.e., the officers positioned themselves behind the open doors of their vehicles with their weapons drawn until the suspects exited the Cadillac. Sergeant Bill French with the Dyer County Sheriff's Department and Officer Mike Murray searched the suspects' vehicle. Among other items, the police recovered a Tec-nine, nine millimeter, semi-automatic pistol from underneath the driver's seat.

Special Agent Robert Royse, a firearm identification expert with the Tennessee Bureau of Investigation, testified at trial that he examined three weapons. A Tec-nine and a sawed-off shotgun had been recovered from the Cadillac. A .357 caliber revolver was thrown from the window of the Cadillac before the car was apprehended by the police. He also examined a bullet obtained from Aubrey Smith's body and numerous spent cartridges found at the scene of the shooting. Although the identification was not conclusive, the bullet recovered from Smith's body exhibited "the same class characteristics and similar individual characteristics" when compared with the Tec-nine semi-

automatic pistol. He was able to positively determine that thirteen spent cartridges recovered at the scene of the shooting had been fired from the Tec-nine. He concluded that a spent "shotshell case" found at the scene had been discharged from the sawed-off shotgun.

Dekeisha Swift, the appellant's girlfriend, testified on behalf of the appellant at trial. She stated that, on the evening of November 17, 1993, at approximately 6:00 p.m., the appellant visited her at her home in Ridgely. He was in a Cadillac with several other men. His companions left in the Cadillac. Subsequently, Swift drove the appellant and her little sister to Tiptonville in her grandmother's car. At James Hunter's Club in Tiptonville, Swift and the appellant again encountered Strayhorn, Pritchard, Davis, and Belk. She and the appellant then left the club to buy some food. When they returned, it was approximately 7:00 p.m., the appellant's friends were no longer at the club, and the appellant's car was gone. They drove about town looking for the appellant's friends. Finally, Swift dropped the appellant off at another club, the Soul Brother's Club. She observed the appellant get into a car belonging to an acquaintance, Ricky Terry. Swift did not see the appellant again that evening. The appellant never mentioned to Swift any altercation or shooting, and he did not have a gun. On cross-examination, Swift stated that she was expecting the appellant's child.

Ricky Terry testified that, on the evening of November 17, 1993, he met the appellant at the Soul Brother's Club sometime after 6:00 p.m. The appellant asked Terry to help him locate his car. Terry and the appellant drove about town and finally located the appellant's car near Tiptonville Meadows. Terry observed several people inside the appellant's car. At no time did he hear gunshots or sirens.

Raymond Davis also testified on behalf of the appellant. He stated that the appellant rejoined him, Pritchard, and Strayhorn after the shooting at Tiptonville Meadows. He admitted that he signed a statement written by T.B.I. special agent Roger Hughes indicating that the appellant had driven his companions to the scene of the shooting and had waited for their return. When asked why he signed the statement, he explained,

> Man, it was two o'clock in the morning. Them folks done had me handcuffed for two or three hours. [Agent Hughes is] sitting there threatening me, telling me how long I'm going to fry in jail, this and that. I'm high on that bud, drinking that beer, you know what I'm saying? I'm ready to get somewhere and lay down.

T.B.I. agent Roger Hughes testified in rebuttal that on November 18, 1993, he obtained statements from several suspects in the Tiptonville Meadows shooting, including Raymond Davis.[2] He administered an oath to Davis, in which Davis swore to give a true and complete statement. He then wrote down Davis' statement. Hughes explained that he always handwrites a suspect's statement. He then reviews the statement with the suspect and requires that the suspect sign each individual page of the statement and any corrections. Finally, the suspect signs a separate document acknowledging that the statement is true. Hughes testified that he followed this procedure in the instant case. Moreover, he denied threatening Davis or making any promises in exchange for Davis' statement.

The appellant testified at trial. He denied driving his friends to the scene of the shooting. He asserted that he met them after the shooting. As Ricky Terry drove him toward Tiptonville Meadows in search of his car, he heard

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[2]The appellant refused to give a written statement to the police.

gunshots from the direction of the apartment complex and observed two men running from that direction. When he located his car in the vicinity of Tiptonville Meadows, he noticed his gun on the front seat of the car where he had left it. It was unloaded. He testified that, when he got into the car, his friends were "kind of hyped-up." He asserted that he did not know "what had happened or who had did what." His friends never told him what had happened but asked him to drive them to Dyersburg. They told him to use back roads, because they had marijuana and cocaine in the car. He observed Strayhorn and Davis snorting cocaine in the backseat. He did not notice the additional guns. However, he began to suspect what had happened due to his companions' conversation. Moreover, when a police car passed them, his friends began throwing objects from the windows of the car, including the .357 caliber revolver.

The jury found the appellant guilty of aggravated assault. On September 26, 1994, the trial court conducted a sentencing hearing. The State relied upon the presentence report and the evidence introduced at trial. The appellant again testified on his own behalf. He indicated that he had attended Lake County High School and had graduated in 1988. After graduating from high school, he joined the Navy, received training, and served as an avionic technician for four years. He was honorably discharged in 1993. At the time of the shooting, he was employed at Northwest Correctional Center. He has no prior history of criminal arrests or convictions. He denied any alcohol or drug abuse problem. However, he admitted that he had used alcohol and marijuana in the past. At the time of the sentencing hearing, he had two children. With respect to the Tiptonville Meadows shooting, the appellant claimed that he was a "victim of the circumstance."

At the conclusion of the sentencing hearing, the trial judge found the mitigating factor that the appellant had no history of criminal convictions. Tenn.

Code Ann. § 40-35-113 (13) (1990). As an enhancement factor, the court found that the appellant had no hesitation about committing a crime when the risk to human life was high. Tenn. Code Ann. § 40-35-114 (1994 Supp.). Moreover, the trial court observed that confinement is necessary to avoid depreciating the seriousness of the offense and is necessary for general deterrence. Tenn. Code Ann. § 40-35-103(1)(B) (1990). Finally, the court noted that the appellant's potential for rehabilitation is "fair at best."

## II. Analysis

### a. Sufficiency of the Evidence

The appellant challenges the sufficiency of the evidence to sustain his conviction for aggravated assault. A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant must establish that the evidence presented at trial was so deficient that no "reasonable trier of fact" could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994), cert. denied, __ U.S. __, 115 S.Ct. 743 (1995); Tenn. R. App. P. 13(e).

Moreover, an appellate court may neither reweigh nor reevaluate the evidence when determining its sufficiency. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). "A jury verdict approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory." State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073, 104 S.Ct. 1429 (1984). The State is entitled to the

strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. Id. See also State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992), cert. denied, 507 U.S. 954, 113 S.Ct. 1368 (1993).

The appellant was convicted of aggravated assault, a class C felony. A person is guilty of aggravated assault, a class C felony, if he (1) intentionally or knowingly causes bodily injury to another, and (2) such injury is serious bodily injury, or he uses or displays a deadly weapon. Tenn. Code Ann. § 39-13-102 (1994 Supp.). It is undisputed that, in the instant case, the appellant is not the person who shot the victim. Nevertheless, a person may be charged with the commission of an offense if the offense is committed by the conduct of another for which the person is criminally responsible. Tenn. Code Ann. § 39-11-401 (1991). A person is criminally responsible for an offense committed by the conduct of another if, "[a]cting with intent to promote or assist the commission of the offense ... , the person solicits, directs, aids, or attempts to aid another person to commit the offense." Tenn. Code Ann. § 39-11-402 (1991).

In order to sustain the conviction of an accomplice, "[t]here must be some evidence, at least circumstantial, of participation in the crime ... ." State v. Smith, No 03C01-9208-CR-00269 (Tenn. Crim. App. at Knoxville), perm. to appeal denied, (Tenn. 1993). Moreover, a defendant cannot be convicted upon the uncorroborated testimony of a fellow accomplice. State v. Barnard, 899 S.W.2d 617, 626 (Tenn. Crim. App. 1994), perm. to appeal denied, (Tenn. 1995). See also State v. Hensley, 656 S.W.2d 410, 412 (Tenn. Crim. App. 1983). Yet, the corroborating evidence need not be sufficient to support a guilty verdict by itself, and the evidence may be circumstantial. Hensley, 656 S.W.2d at 412. See also State v. Comer, No. 85-170-III (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1986)("slight circumstances are sufficient to satisfy the required corroboration of an accomplice's testimony"). Indeed, this court has observed

that the amount of evidence sufficient to corroborate the testimony of an accomplice is a matter for the determination of the jury. Comer, No. 85-170-III. Finally, "[p]resence, companionship, and conduct before and after the commission of the offense, are circumstances from which one's participation may be inferred." State v. Pendleton, No. 87-189-III (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1988)(citing State v. McBee, 644 S.W.2d 425, 428 (Tenn. Crim. App. 1982)).

Clearly, the evidence adduced at trial was sufficient to support the appellant's conviction for aggravated assault. It is undisputed that the principle assailants shot and seriously wounded the victim. It is undisputed that, prior to the shooting, the appellant was involved in an altercation with the victim. It is undisputed that the appellant was with the principal assailants before and after the shooting. It is undisputed that the appellant's car transported the principle assailants to and from the scene of the shooting. It is undisputed that one of the assailants used the appellant's gun. Finally, the appellant's assertion that he heard gunshots immediately prior to rejoining his companions is contradicted by the testimony of Ricky Terry. Again, Ricky Terry testified that he returned the appellant to his car. However, he stated that he heard neither gunshots nor sirens. We conclude that these circumstances adequately corroborate the testimony of the appellant's fellow accomplices that the appellant drove the assailants to and from the scene of the shooting and was aware that the assailants were armed and intended to assault a member of the Memphis group. This issue is without merit.

**b. Sentencing**

The appellant also challenges the trial court's denial of alternative sentencing. The appellant bears the burden of showing that his sentence is improper. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). Review by this

court of the manner of service of a sentence is *de novo* with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d) (1990). The presumption of correctness, however, only applies if the record demonstrates that the trial court properly considered sentencing principles and all relevant facts and circumstances. Ashby, 823 S.W.2d at 169. For reasons subsequently discussed in this opinion, we conclude that the trial court applied inappropriate sentencing considerations. Therefore, we do not defer to its sentencing determination.

In reviewing a trial court's denial of an alternative sentence, we must first determine whether the appellant is entitled to the statutory presumption that he is a favorable candidate for alternative sentencing. State v. Bingham, 910 S.W.2d 448, 453 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995)(citing State v. Bonestel, 871 S.W.2d 163, 167 (Tenn. Crim. App. 1993)). To be eligible for the statutory presumption, three requirements must be met. First, the appellant must be convicted of a class C, D, or E felony. Tenn. Code Ann. § 40-35-102(6) (1994 Supp.). Second, he must be sentenced as a mitigated or standard offender. Id. Third, the defendant must not fall within the parameters of section 40-35-102(5). Id. Thus, in order to benefit from the presumption, the defendant cannot have a criminal history evincing either a "clear disregard for the laws and morals of society" or "failure of past efforts at rehabilitation." Tenn. Code Ann. § 40-35-102(5). The appellant is a standard, range I offender of a class C felony with no prior criminal history. Accordingly, we apply the presumption.

However, this presumption may be rebutted by "evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). See also Bingham, 910 S.W.2d at 454. Evidence to the contrary may include the following sentencing considerations, codified in Tenn. Code Ann. § 40-35-103 (1990):

> (1) Sentences involving confinement should be based on the following considerations:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Bingham, 910 S.W.2d at 454 (citing Ashby, 823 S.W.2d at 169). A court may also apply the mitigating and enhancing factors set forth in Tenn. Code Ann. § 40-35-113 (1990) and -114 (Supp. 1994), as they are relevant to the § 40-35-103 considerations. Tenn. Code Ann. § 40-35-210(b)(5) (1990). Finally, the potential or lack of potential for rehabilitation of a defendant should be considered in determining whether he should be granted an alternative sentence. Tenn. Code Ann. § 40-35-103(5).

Initially, we note that the trial court improperly considered deterrence in sentencing the appellant. Tenn. Code Ann. § 40-35-103(1)(B). Before a trial court can deny alternative sentencing on the basis of deterrence, evidence in the record must support a need within the jurisdiction to deter individuals other than the appellant from committing similar crimes. Bingham, 910 S.W.2d at 455 (citing Ashby, 823 S.W.2d at 170); Bonestel, 871 S.W.2d at 167; State v. Byrd, 861 S.W.2d 377, 380 (Tenn. Crim. App. 1993); State v. Jones, No. 03C01-9302-CR-00057 (Tenn. Crim. App. at Knoxville, November 22, 1994), perm. to appeal denied, (Tenn. 1995). A finding that the appellant's sentence will have a deterrent effect cannot be merely conclusory. Id. In the instant case, there is no evidence in the record to support a need for deterrence.

Nevertheless, we agree with the trial court that confinement is necessary to avoid depreciating the seriousness of the offense. Tenn. Code Ann. § 40-35-103 (1)(B). In order to deny an alternative sentence on the basis of the

seriousness of the offense, the circumstances of the offense must be especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree, and the nature of the offense must outweigh all factors favoring a sentence other than confinement. Bingham, 910 S.W.2d at 454 (citing State v. Hartley, 818 S.W.2d 370, 374-375 (Tenn. Crim. App. 1991)). In the instant case, the appellant's companions leaped from the appellant's car, armed with an arsenal of weapons, including a nine millimeter, semi-automatic pistol, a .357 caliber revolver, and a sawed-off shotgun, and simply began shooting at a car exiting an apartment complex. Although there is no evidence in the record that other individuals were in the vicinity at the time of the shooting, the shooting occurred at night, and it was so dark that the victim could not see his assailants. Moreover, the record reflects that the shooting occurred following an afternoon and evening of snorting cocaine and abusing marijuana and alcohol. The possibility of harm to others under these circumstances illustrates the wanton nature of the assailants' actions. We conclude that the conduct in which the appellant participated was sufficiently egregious to justify confinement in the Department of Correction.

In denying an alternative sentence, the trial court specifically found the aggravating circumstance set forth in Tenn. Code Ann. § 40-35-114 (10), that the appellant had no hesitation about committing a crime when the risk to human life was high. Again, in denying an alternative sentence, a court may apply the enhancing and mitigating factors set forth in Tenn. Code Ann. § 40-35-113 and -114, as they are pertinent to Tenn. Code Ann. § 40-35-103 considerations. Tenn. Code Ann. § 40-35-210 (b)(5). We note that, in State v. Jones, 883 S.W.2d 597, 602-603 (Tenn. 1994), our supreme court observed that evidence of high risk to human life is not required to establish aggravated assault causing serious bodily injury and, therefore, is not precluded from consideration for enhancement purposes. However, this court has observed that a high risk to

human life is inherent in aggravated assault committed with a deadly weapon. State v. Hill, 885 S.W.2d 357, 363 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994). See also State v. Bennett, No. 03C01-9403-CR-00104 (Tenn. Crim. App. at Knoxville, December 8, 1994). "'It is difficult to discern a situation in which an offense committed with a deadly weapon would not necessarily entail a risk to human life.'" Hill, 885 S.W.2d at 363 (citation omitted). Factors that are inherent in a particular offense, even if not designated as an element, may not be applied to enhance the length of an appellant's sentence. State v. Claybrooks, 910 S.W.2d 868, 872 (Tenn. Crim. App. 1994), perm. to appeal denied, (Tenn. 1995). It is unclear from the record before us whether the appellant was convicted of aggravated assault accompanied by serious bodily injury or aggravated assault involving the use of a weapon. Moreover, as in Hill, the record is devoid of evidence that there were individuals in close proximity to the shooting, other than the victim, who were in danger of being injured. Nevertheless, this court has implied, that in contrast to the context of determining the length of a sentence for aggravated assault with a deadly weapon, in the context of determining the suitability of alternative sentencing, a court may consider the defendant's disregard for the risk to human life. State v. Myers, No. 03C01-9404-CR-00162 (Tenn. Crim. App. at Knoxville), perm. to appeal denied, (Tenn. 1995). Certainly, under the circumstances of this case, the participants' flagrant disregard for the value of human life contributed to the seriousness of the offense. Tenn. Code Ann. § 40-35-103(1)(B).

In any event, we agree with the trial court that the appellant's refusal to accept responsibility for his crime, his assertion that he was a "victim of the circumstance," reflects poor potential for rehabilitation. State v. Dowdy, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994). See also Tenn. Code Ann. § 40-35-103(5)(1990). The appellant's poor potential for rehabilitation and the seriousness of the offense justify the denial of an alternative sentence.

Accordingly, we affirm the judgment of the trial court.

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DAVID G. HAYES, Judge

CONCUR:

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JERRY L. SMITH, Judge

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LYNN W. BROWN, Special Judge