IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1996 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 02C01-9503-CC-00095
Appellee,	*	MADISON COUNTY
VS.	*	Hon. John Franklin Murchison, Judge
JAMES CECIL SELLERS,	*	(Agg. Assault, Esp. Agg. Kidnapping, Agg. Burglary, Poss. Deadly Weapon)
Appellant.	*	

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OPINION FILED _____

AFFIRMED AS MODIFIED

GARY R. WADE, JUDGE

OPINION

The defendant, James Cecil Sellers, was convicted of aggravated assault, especially aggravated kidnapping, aggravated burglary, and possession of a deadly weapon during the commission of an offense. The trial court imposed the following concurrent sentences:

aggravated assault	5 years	Range I
especially aggravated kidnapping	18 years	Range I
aggravated burglary	6 years	Range I
possession of a deadly weapon during commission of an offense	2 years	Range I

In this appeal as of right, the defendant presents the following issues for review:

> (1) whether the trial court erred by admitting evidence of prior domestic disputes between the victim and the defendant;
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> (2) whether the trial court erred by admitting as rebuttal a tape recording of a telephone call the victim made to police;
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> (3) whether the trial court erred by denying a motion to strike a juror for cause;
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> (4) whether the weapon count should merge with the conviction for aggravated assault;
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> (5) whether the trial court erred by refusing to charge kidnapping as a lesser included offense; and
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> (6) whether the trial court erred in the imposition of sentence.

In our view, the weapon count should merge with the conviction for aggravated assault; the sentence for especially aggravated kidnapping is modified to sixteen years. Otherwise, the judgment is affirmed.

The defendant and his wife, Kelly Lynn Sellers, were married on June 16, 1993. Soon afterwards, problems arose. According to the victim, Ms. Sellers, the defendant "just liked to beat on me [and] would come in from work in a bad mood and take it out on me."

Ms. Sellers testified that in mid-July of 1993 the defendant pinned her against a bathtub and kicked her in the head while wearing cowboy boots, beating her for about "20 minutes." The victim suffered a displaced jaw, several bruises, and a "busted" lip.

The victim then described the events occurring on July 28 of the same year. She testified that the defendant struck her across the face with a telephone. While the victim reported the incident to sheriff's deputies who helped her move her belongings into her parents' residence, the victim did not immediately swear out a warrant. The defendant followed the victim to her parents' house, insisted that she return, and threatened to kill the victim and her father. After his departure, the victim signed an arrest warrant.

The next day, both the victim and her father sought orders of protection. In the early morning hours of August 2, 1993, the defendant went to the victim's parents' house and hid in the utility room near the carport. When the victim's father and mother both left for work at about 7:00 a.m., the defendant broke into the house. Carrying a .20 shotgun, he said to the victim, "I come to kill you and

me." When the victim asked how he gained entrance to the house, the defendant replied that he broke the glass in the door and unlocked it from the outside. He informed the victim that he had cut the phone lines.

The defendant ordered the victim to get dressed and threatened to kill her five-year old daughter, who was present. He then directed the two to the victim's car, drove the child to his sister's house, and then transported the victim southward toward the Alabama state line. Although the victim was allowed to mail a hospital bill, she testified that she was unable to escape. Eventually, she convinced the defendant to let her check on her daughter. When they stopped at Cox Bar-b-que, the victim informed the cashier that she had been kidnapped. She then called the Madison County Sheriff's department and spoke with Officer Fitzgerald, who stayed on the phone until another officer arrived at the scene. Meanwhile, the defendant, who tried and failed to get the victim off the phone, drove away in the victim's car. The episode lasted approximately two to three hours. Soon after this incident, the victim filed a divorce petition; she included a tort claim and sought money damages.

The victim's father, Jackie Attaway, corroborated much of the victim's testimony. He admitted that he had not approved of his daughter's marriage to the defendant.

Elizabeth Attaway, the defendant's sister, and the wife of the victim's brother, testified that she had previously heard her brother threaten to kill Jackie Attaway. She described the threat as a "figure of speech."

Landis Wilkes, a retired state trooper, related that he was the first officer to arrive at the barbecue restautant. He described the victim as "going into a state of shock." Russell Lambert, who lives about one mile from Cox Bar-b-que, testified that he found parts of a gun near his house and notified authorities. In earlier testimony, the victim identified the parts of the gun as being the gun the defendant used to threaten her.

Judy Clite, the defendant's mother, testified for the defendant. She related that the defendant had advised her that the source of their marital strife was that the victim had "slept with two Mexicans ... just before they were married ...." She also acknowledged that her family and the victim's family were on very unfriendly terms.

The defendant testified that he and the victim fought continuously after their marriage. He reiterated the claim that a major source of their conflict was that the victim had previously had sexual relations with "two Mexicans." He contended that the victim had a temper and "did stuff to me as much as I have her."

The defendant admitted going to the victim's parents' house on the day of the assault. His version of the events, however, differed dramatically from that of the victim. First, he claimed his visit was an attempt to reconcile. He explained that he took the shotgun for protection from the victim's father, who had never liked him and had made death threats against him. The defendant insisted that the gun was unloaded, although the victim never knew that. He testified that he never meant to harm anyone. He denied that he cut the phone lines and asserted that the glass in the door broke when the door slammed as he left the residence with the victim.

The defendant maintained that the victim invited him into the Attaway residence. He contended that he later left the victim at Cox Bar-b-que at her insistence. He claimed that the reason the victim was upset at the end of their road trip was that they were arguing about the defendant's former girlfriend. He otherwise described the morning's events as without incident-- "just driving around, talking--no problems at all." He conceded that he had thrown the gun away but claimed that he had done so only because he knew the victim would "call the law on [him]."

In rebuttal, the state played the tape recorded telephone complaint the victim made to the officer on duty. The trial judge allowed the introduction of the tape into evidence to rebut the defendant's contentions that the victim told him to leave her there and that the only reason the victim was upset was because of an argument over a former girlfriend. Nothing on the tape recording indicated that the victim asked to be left at the barbecue restaurant.

I

Initially, the defendant asserts that the trial court erred by admitting evidence of his prior domestic disputes with the victim. Specifically he argues that evidence of prior incidents of violence occurring the few weeks and days before the kidnapping should have been excluded.

The state submits that the issue has been waived by the defendant's failure to request a jury-out hearing, as required under Tenn. R. Evid. 404(b), and by failure to include the issue as a ground for relief in his motion for new trial. See Tenn. R. App. P. 3(e). In our view, the waiver rule applies. The ground should have been presented in the motion for a new trial. Had the issue been properly

preserved, however, we would have likely found for the state as to the second incident of abuse.

Rule 401, Tenn. R. Evid., defines relevant evidence as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 declares that "all relevant evidence is admissible," unless specifically excepted, and that "[e]vidence which is not relevant is inadmissible." The procedure for determining whether prior misconduct is admissible, even when relevant, is found in Tenn. R. Evid. 404(b):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
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> (1) The court upon request must hold a hearing outside the jury's presence;
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> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and
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> (3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Generally, this rule is one of exclusion. As stated, there are exceptions. See State v. Parton, 694 S.W.2d 299 (Tenn. 1985); Bunch v. State, 605 S.W.2d 227 (Tenn. 1980); Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (1963); see also State v. Rickman, 876 S.W.2d 824 (Tenn. 1994) (favorably citing both Parton and Bunch). Most authorities suggest that trial courts take a "restrictive approach to 404(b) ... because 'other act' evidence carries a significant potential for unfairly influencing a jury." See Cohen, Paine and Sheppeard, Tennessee Law of

Evidence, § 404.7 at 131. That perhaps best explains the traditional posture of the courts that any testimony of prior bad acts by a defendant, when used as substantive evidence of guilt of the crime on trial, is not usually permissible. Parton, 694 S.W.2d at 302-03.

The exceptions to the rule are when the evidence is offered to prove the motive of the defendant, his identity, his intent, the absence of mistake, opportunity, or as a part of a common scheme or plan. Bunch, 605 S.W.2d at 229. Our supreme court recently spoke on the procedure used to determine whether a prior crime or bad act fell within an exception to the rule:

> [I]f evidence that the defendant has committed a crime separate and distinct from the one on trial is relevant to some matter actually in issue in the case on trial, and if its probative value as evidence is not outweighed by its prejudicial effect upon the defendant, then such evidence may be properly admitted.

State v. Howell, 868 S.W.2d 238, 254 (Tenn. 1993) (citing Bunch, 605 S.W.2d at 229), cert. denied, 510 U.S. 1215 (1994). In Howell, the court applied the balancing test to determine whether prior convictions for other crimes were admissible, as an exception to the general rule, for purposes other than the character of the defendant. See also State v. Zagorski, 701 S.W.2d 808 (Tenn. 1985), cert. denied, 478 U.S. 1010 (1986); State v. Taylor, 669 S.W.2d 694 (Tenn. Crim. App. 1983).

In our view, this evidence was intended to show the defendant's motive for the crime. Here, the incidents of prior domestic violence qualified perhaps as a reason for the kidnapping. On the other hand, the evidence also showed the defendant had a history of attempting to control and dominate his wife. In that regard, the prior bad acts established propensity--usually a significant prejudicial effect worth avoiding. In either event, however, the evidence, particularly the second altercation, showed that the victim would have had little reason to

voluntarily travel with the defendant. The July 28 incident was especially probative because of its temporal relationship to the crimes. That the victim had sworn out a warrant against the defendant may have served as the chief motivation for his subsequent criminal conduct.

The trial court did not make an explicit finding that the probative value outweighed the prejudicial effect. There was, however, a sidebar conference. Thus, the ruling in favor of the state was implicit. In our view, this was substantial compliance with the procedures set out in Tenn. R. Evid. 404(b). Because the probative value of the testimony on prior incidents outweighed any prejudicial effect, the trial court properly admitted evidence of the July 28 incident.

II

Next, the defendant claims that the trial court erred by allowing the tape recorded telephone call the victim made to police as rebuttal evidence. The defendant first argues the violation of Rule 16, Tenn. R. Crim. P., mandates exclusion; his second argument is that the evidence was not rebuttal, but was case-in-chief evidence. We cannot agree with either contention.

Defense counsel did not learn of the tape until the state attempted to introduce it as part of the case in chief. The trial court originally denied the admission of the tape based upon a violation of Rule 16. The court did, however, reserve ruling on whether the tape could be played during rebuttal. At the conclusion of the defense proof, the trial court ruled the tape admissible to rebut the defendant's version of events.

Rule 16, Tenn. R. Crim. P., provides for limited pretrial discovery. Discovery of the defendant's statements, his prior record, documents and tangible objects, and reports of tests and examinations are all permitted. Tenn. R. Crim. P. 16 (a)(1). Statements made by state witnesses, however, are explicitly excluded from discovery. Tenn. R. Crim. P. 16(a)(2). An interesting question arises as to whether a 911 tape is more appropriately described as a tangible object and, therefore discoverable pretrial, or as a statement by a state witness and, therefore, not discoverable before trial.

In our view, the tape is better characterized as a tangible object. Subpart(a)(2) of the rule excludes statements by state witnesses. The Committee Comment is that discovery of such statements is governed by Rule 26.2(g), Tenn. R. Crim. P. The rule defines "statement" as follows:

> (1) a written statement made by the witness that is signed or otherwise adopted or approved by the witness;
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> or
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> (2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof.

Tenn. R. Crim. P. 26.2(g). The tape is clearly not a written statement. Also, it is not a "recital of an oral statement." A "recital" is "a telling in detail[;] ... the account, story, etc. told." Webster's New World Dictionary (1976). The tape is not a "telling in detail" or accounting of a 911 call. It is an exact duplication of the conversation.

Case law also supports treating the cassette tape as a tangible object. In State v. Cooper, 736 S.W.2d 125 (Tenn. Crim. App. 1987), this court reviewed the discoverability of audio tapes of conversations between the defendant and an

informant. Id. at 131. The court treated the tapes as tangible objects and found the defendant was not entitled to discover the tapes because they were not "material" and were not "intended for use by the State as evidence in chief." Id. at 132; see also Tenn. R. Crim. P. 16(a)(1)(C). It is important to note the court did not treat the tapes as a statement of the defendant and provide it was discoverable under Tenn. R. Crim. P. 16(a)(1)(A); that provision allows the defendant to discover "any relevant written or recorded statements made by the defendant ...." Id. If a recording of a conversation in which the defendant participates is not a defendant's statement, a recording of a conversation in which a state's witness participates likewise cannot be a statement.

The defendant argues the tape should not have been allowed because of the Rule 16 violation. The state submits that Rule 16 only applies to evidence used in the case in chief. In our view, a Rule 16 violation does not require the exclusion of evidence in every case. The rule does, however, require the state to provide the defendant with any necessary items for the defense preparation and provides procedures should the state fail to do so. Tenn. R. Crim. P. 16(a)(1)(C) and (d)(2).

> The rule contains the following language:
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> Upon request of the defendant, the State shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, which are within the possession, custody or control of the State, and which are material to the preparations of the defense or are intended for use by the State as evidence in chief at trial.
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> ***
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> If at any time during the course of the proceedings it is brought to the attention of the court that a party has

> failed to comply with this rule, the court may ... prohibit the party from introducing evidence not disclosed.

Tenn. R. Crim. P. 16(a)(1)(C) and (d)(2) (emphasis added). Even though there was a Rule 16 violation, whether to admit the evidence was a discretionary call for the trial court.

The defendant also argues that the tape did not qualify as rebuttal evidence. The state argued the recorded conversation on the tape would rebut the defendant's contention that the victim told him to leave her at the barbecue restaurant, reasoning that if the victim had, in fact, asked the defendant to leave her, the recording would have contained that statement. The trial court made the following comment about the tape:

> Well, she [the victim] has testified. It is not anything new.... No. There is not anything new, but he [the defendant] said that it didn't occur.... Well, this tape is just, in the opinion of the Court, very inconsistent with the testimony that he has given.

Rebuttal evidence, defined as that "which tends to explain or controvert evidence produced by an adverse party," is admissible within the discretion of the trial court. Cozzolino v. State, 584 S.W.2d 765, 768 (Tenn. 1979); State v. Yarbro, 618 S.W.2d 521, 525 (Tenn. Crim. App. 1981). "Whether [evidence] is rebuttal [evidence] is not determined by the order in which [it is presented]. This determination is based upon the content of the evidence offered." State v. West, 825 S.W.2d 695, 698 (Tenn. Crim. App. 1992). "The rationale behind [the rule] is '[s]ince the state does not and cannot know what evidence the defense will use until it is presented at trial, the state is given the right of rebuttal.'" State v. Cyrus Deville Wilson, slip op. at 9, No. 01C01-9408-CR-00266 (Tenn. Crim. App., at Nashville, November 15, 1995) (quoting State v. Williams, 445 So.2d 1171, 1181 (La. 1984)), perm. to app. denied (1996).

The scope of rebuttal testimony usually lies within the discretion of the trial court. Beasley v. State, 539 S.W.2d 820, 824 (Tenn. Crim. App. 1976). "[I]t is within the discretion of the trial court to permit the state, in a criminal case, to introduce testimony in rebuttal which should have been introduced in chief." State v. Cyrus Deville Wilson, slip op. at 9, (citing Johnson v. State, 469 S.W.2d 529, 530 (Tenn. Crim. App. 1971)).

As observed by the trial judge, the tape adds little to the victim's previous testimony. The tape recorded the victim's assertion that she had been kidnapped by her husband, that he had a gun, and that he had threatened to kill her. The victim sobbed throughout most of the tape and repeatedly asked the officer to help her. She also asked about the safety of her child. At no point did the tape suggest the victim had asked the defendant to leave her at the restaurant.

In our view, the evidence qualified as rebuttal, at least in the broader sense. The content of the tape conflicts with the defendant's version of events. We acknowledge that there is often a thin line between bolstering testimony from the case in chief and rebutting the defendant's testimony. That is likely the case here. Yet the defendant has not shown the trial court had abused its discretion in allowing the evidence.

III

Next, the defendant claims that the trial court should have granted his motion to strike a juror for cause. During voir dire, defense counsel learned that Jamie Darrel King, a member of the jury pool, attended the same church as the prosecuting assistant district attorney and coached his step-daughter in church basketball. King testified that he could be fair and impartial and would not be

influenced by this relationship. When counsel for the defense sought to have King removed for cause, the trial judge denied the motion, finding King to "be a man of sufficient integrity that he wouldn't decide a case in favor of [the prosecutor] because he knows [him]."

On appeal, the defendant argues that because of the personal relationship between the juror and the prosecutor, the juror "could not help but have some built in bias toward the prosecutor, however unconscious on the part of [the juror]." Further, this bias was prejudicial because the juror was eventually elected foreman. The state argues that the defendant waived this issue because the record does not establish the defendant had exhausted his peremptory challenges. Also, even if the defendant had exhausted his peremptory challenges, there was no error because a trial court's finding of a juror to be qualified is not reversible, unless there was an abuse of discretion.

Only a portion of voir dire is included in the record. In a sidebar conference, defense counsel claimed that he had exhausted his peremptory challenges. The portion of the record which would support that assertion, however, is not included in the record. "It is a long-settled principle that a defendant who disagrees with a trial court's ruling on for cause challenges must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise peremptory challenges to remove the jurors." State v. Howell, 868 S.W.2d 238, 248 (Tenn. 1993), cert. denied, 510 U.S. 1215 (1994). We will nevertheless address the issue.

Art I. § 9 of the Tennessee Constitution assures the accused in a criminal prosecution "the right, among other rights, to a speedy public trial ... [by] an impartial jury." "[T]he challenge for cause was designed to exclude from the jury

triers whose bias or prejudice rendered them unfit ...." Manning v. State, 155 Tenn. 266, 292 S.W. 451, 455 (1927). "The qualification of a juror is within the trial judge's discretion and his finding a juror to be qualified will not be disturbed on review except on the clear showing of an abuse of discretion." Burns v. State, 591 S.W.2d 780, 782 (Tenn. Crim. App. 1979).

The facts of this case are similar to the situation in Bowman v. State, 598 S.W.2d 809 (Tenn. Crim. App. 1980). In Bowman, the juror responded in voir dire that she personally knew the assistant district attorney general and that they had visited each other in their homes several times over the years. Id. at 812. The burden is on the defendant to show the juror was biased or prejudiced. Id. In Bowman, the defendant presented no evidence that the juror had been prejudiced or biased. Accordingly, no reversible error was found. Id.

The record establishes that juror King claimed that he could be fair and impartial in this case, despite his relationship with the assistant district attorney. Certainly, the defendant has presented no proof that the juror was biased or prejudiced. In our view, the trial judge did not abuse its discretion in refusing to excuse King for cause. See also State v. Smith, 893 S.W.2d 908, 914-15 (Tenn. 1994)(no error to refuse to excuse for cause juror who stopped working for sheriff's department only two months before trial, where juror indicated he could be fair and impartial), cert. denied, _____ U.S. _____, 116 S.Ct. 99 (1995).

IV

As his fourth issue, the defendant argues that the weapons conviction should have been merged with the conviction for aggravated assault. The state concedes that there cannot be separate offenses under these circumstances.

The double jeopardy clauses of the United States and Tennessee Constitutions protect against multiple convictions or punishments for the same offense. Multiple convictions for the same offense cannot stand unless the offenses supporting the convictions are "wholly separate and distinct." State v. Goins, 705 S.W.2d 648, 650 (Tenn. 1986)(citations omitted); State v. Pelayo, 881 S.W.2d 7, 10 (Tenn. Crim. App. 1994). Double jeopardy principles require an analysis of the following factors in order to determine whether separate convictions can be upheld for offenses occurring in a related transaction:

> (1) whether the event is a violation of two distinct statutory provisions;
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> (2) whether either offense is necessarily included in the other;
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> (3) whether the offenses require proof of different elements;
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> (4) whether each offense requires proof of additional facts not required by the other; and
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> (5) whether the legislative intent suggests that one or several offenses were intended.

State v. Black, 524 S.W.2d 913, 919-20 (Tenn. 1975); State v. Pelayo, 881 S.W.2d at 10.

The most relevant factor in this case is “whether either offense is necessarily included in the other.” State v. Black, 524 S.W.2d at 919. “Generally, an offense qualifies as a lesser included offense only if the elements of the included offense are a subset of the elements of the charged offense and only if the greater offense cannot be committed without also committing the lesser offense.” State v. Trusty, 919 S.W.2d 305, 310 (Tenn. 1996) (citing Schmuck v. United State, 489 U.S. 705, 716 (1989)). In determining whether an offense is necessarily included in another, one must look to the “‘elements [of the offense], as those elements are set

forth in the indictment.'" Trusty, 919 S.W.2d at 310-311 (citing Howard v. State, 578 S.W.2d 83, 85 (Tenn. 1979)).

Possession of a deadly weapon with intent to commit a felony is necessarily included in aggravated assault, as it is alleged in the indictment. The indictment alleges, the defendant "did ...by displaying and/or using a deadly weapon, to wit: a shotgun ... cause Kelly Sellers to reasonably fear imminent bodily injury ...." Because the indictment charges the use or display of a deadly weapon as the only aggravator for the offense, we hold that the separate conviction for possession of a deadly weapon is barred by the conviction for aggravated assault. See generally State v. Hudson, 562 S.W.2d 416, 417-18 (Tenn. 1978) (holding that a conviction for using a firearms as a means of committing a felony was void when the accused was also convicted of robbery with a deadly weapon and assault with attempt to commit murder in the second degree); Carr v. State, 455 S.W.2d 619, 620 (Tenn. Crim. App. 1970) ("the conviction for carrying a weapon must merge with the greater offense of robbery by the use of a deadly weapon"); State v. Mario Lamont Wilson, No. 02C01-9404-CC-00078 (Tenn. Crim. App., at Jackson, Jan. 18, 1995), aff'd, 924 S.W.2d 648 (Tenn. 1996) (reviewing and affirming an unrelated issue); and State v. John Michael Denton, No. 01C01-9310-CC-00345 (Tenn. Crim. App. at Nashville, March 30, 1995) perm. to app. granted (1995).

V

As his next issue, the defendant insists the trial court erred by refusing to charge kidnapping as a lesser offense. The defendant was indicted for especially aggravated kidnapping; the jury was so charged. Tenn. Code Ann. § 39-13-305. The trial judge also instructed on aggravated kidnapping. Tenn. Code Ann. § 39-13-304. The defendant complains that the evidence also warranted an instruction on

simple kidnapping. Tenn. Code Ann. § 39-13-303. The defendant argues the jury could have found the victim knew the gun was unloaded and thus no deadly weapon was involved. In response, the state submits that because the defendant admitted having a gun in his possession, there was simply no evidence of anything less than aggravated kidnapping.

In State v. Trusty, our supreme court observed that "Tennessee law recognizes two types of lesser offenses ... : a lesser grade or class of the charged offense and a lesser included offense." 919 S.W.2d 305, 310 (Tenn. 1996). The trial judge has a statutory duty to charge the jury "on lesser grades or classes of the charged offense supported by the evidence." Id.; Tenn. Code Ann. § 40-18-110. The trial judge also has a duty grounded in case law to instruct the jury on lesser included offenses. Trusty, 919 S.W.2d at 311.

A lesser grade or class of the charged offense is determined by reference to the statutory scheme. Id. For example, the varying grades or classes of kidnapping and false imprisonment crimes are codified at Tenn. Code Ann. §§ 39-13-101 through -106.

The other type of lesser offense is one "necessarily included in the indictment." Trusty, 919 S.W.2d at 311. In Wright v. State, 549 S.W.2d 682 (Tenn. 1977), our supreme court outlined the test to determine whether an offense is lesser and included in the greater offense. Quoting the late Justice Weldon White in Johnson v. State, 217 Tenn. 234, 243, 397 S.W.2d 170, 174 (1965), the court ruled as follows:

> The true test of which is a lesser and which is a greater crime is whether the elements of the former are completely contained within the latter, so that to prove

> the greater the State must first prove the elements of the lesser.

Wright v. State, 549 S.W.2d at 685-86.

> Two years later, the supreme court again addressed the subject:
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> We believe that the better rule, and the one to be followed henceforth in this State, is the rule adopted implicitly by this court in Wright v. State, supra, that, in this context, an offense is necessarily included in another if the elements of the greater offense, as those elements are set forth in the indictment, include, but are not congruent with, all the elements of the lesser. If there is evidence to support a conviction for such a lesser offense, it must be charged by the trial judge. T.C.A. § 40-2519 [now Tenn. Code Ann. § 40-18-118(a)]; Whitwell v. State, 520 S.W.2d 338 (Tenn. 1975).

Howard v. State, 578 S.W.2d 83, 85 (Tenn. 1979).

The trial judge has a duty to give a complete charge of the law applicable to the facts of the case. State v. Harbison, 704 S.W.2d 314, 319 (Tenn.), cert. denied, 476 U.S. 1153 (1986). It is settled law that when "there are any facts that are susceptible of inferring guilt of any lesser included offense or offenses, then there is a mandatory duty upon the trial judge to charge on such offense or offenses. Failure to do so denies a defendant his constitutional right of trial by a jury." State v. Wright, 618 S.W.2d 310, 315 (Tenn. Crim. App. 1981) (citations omitted); Tenn. Code Ann. § 40-18-110(a). When there is a trial on a single charge of a felony, there is also a trial on all lesser included offenses, "as the facts may be." Strader v. State, 210 Tenn. 669, 675, 362 S.W.2d 224, 227 (1962).

Trial courts, however, are not required to charge the jury on a lesser included offense when the record is devoid of evidence to support an inference of guilt of the lesser offense. State v. Stephenson, 878 S.W.2d 530, 549-50 (Tenn.

1994); State v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990), cert. denied, 498 U.S. 1074 (1991); State v. Dulsworth, 781 S.W.2d 277, 287 (Tenn. Crim. App. 1989).

Here, the defendant was indicted for especially aggravated kidnapping. The lesser grade offenses as provided by statute include aggravated kidnapping and simple kidnapping. See State v. Trusty, 919 S.W.2d 305, 311 (Tenn. 1996). The court in Trusty held that "if the evidence would support a conviction for the offense, defendants are entitled to jury instructions ... on all offenses which are a lesser grade or class of the charged offense." State v. Trusty, 919 S.W.2d at 311.

The defendant argues that there was evidence to support a conviction for simple kidnapping. We cannot agree. The record is truly devoid of any evidence which would suggest the kidnapping occurred without a deadly weapon. The defendant admits carrying the gun. Whether it was loaded was largely irrelevant. Because there is absolutely no evidence in the record to suggest the kidnapping was accomplished without the presence of a weapon, the conviction must stand.

VI

In his final issue, the defendant challenges the trial court's imposition of a Range I eighteen-year sentence for especially aggravated kidnapping, a Class A felony. Tenn. Code Ann. § 39-13-305. When a challenge is made 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 court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-40l(d). 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 (l) 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-l02, -l03, and -210.

At the time of this offense, the presumptive sentence was the minimum in the range if there were no enhancement and mitigating factors. Tenn. Code Ann. § 40-35-210 (amended in 1995 changing the presumptive sentence for a Class A felony to the midpoint in the range). Should the trial court find mitigating and enhancement factors, it must start at the minimum sentence in the range and enhance the sentence based upon any applicable enhancement factors, then reduce the sentence based upon any appropriate mitigating factors. Tenn. Code Ann. § 40-35-210(e). The weight given to each factor is within the trial court's discretion provided that the record supports its findings and it complies with the Sentencing Act. See State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The trial court, however, should make specific findings on the record which indicate his application of the sentencing principles. Tenn. Code Ann. §§ 40-35-209 and -210.

At the sentencing hearing, the trial court found the following enhancement factors applicable:

> (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range. Tenn. Code Ann. § 40-35-114(1);
>
> (2) The offense involved more than one victim. Tenn. Code Ann. § 40-35-114(3); and

> (3) The defendant had no hesitation about committing a crime when the risk to human life was high. Tenn. Code Ann. § 40-35-114(10).[1]

The trial judge also found several nonstatutory factors which appeared to be considered in the imposition of the term of sentence:

> (1) The defendant apparently had no hesitation about using the weapon against Mr. Attaway, were he to be home when the defendant committed the burglary;
>
> (2) The defendant perjured himself on the witness stand; and
>
> (3) The charges arose from a multicount indictment.

The defendant does not challenge the application of the first statutory factor (the history of criminal behavior); he does, however, dispute the other two statutory factors, as well as the use of nonstatutory enhancement factors.

While nonstatutory mitigating factors may be considered, nonstatutory enhancement factors are irrelevant and impermissible in determining the length or the range of the sentence. State v. Strickland, 885 S.W.2d 85, 89 (Tenn. Crim. App. 1993), perm. to app. denied (1994); State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), perm. to app. denied. Thus the trial court had no authority to utilize additional factors.

That the defendant had no hesitation about committing a crime when the risk to human life was high is also inapplicable. See State v. Jones, 883 S.W.2d 597, 603 (Tenn. 1994). In Jones, our supreme court held that "[t]he determinative language of this factor is 'the risk to human life was high.'" Id. at 602. To justify

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[1]It is unclear whether the trial court actually used this factor to enhance the sentence. The trial judge determined that the "defendant had no hesitation about committing a crime, and the risk to human life was there. Of course, that's there, but it is always there." The trial judge clearly found the presence of this factor, but it is unclear whether he used to factor to increase the sentence.

using this factor, the state must prove the defendant "demonstrated a culpability distinct from and appreciably greater than that incident to the offense for which he was convicted." Id. at 603. The state has failed to prove that the defendant demonstrated this type of culpability. Accordingly, application of the factor was erroneous.

Next, there was not more than one victim of the crimes. The trial court found Ms. Sellers' five-year-old daughter to be an additional victim of the crimes. The defendant was indicted for the aggravated assault and the especially aggravated kidnapping of the child; but the jury acquitted him of those charges. In State v. Lambert, 741 S.W.2d 127, 134 (Tenn. Crim. App. 1987), this court held that where a defendant receives a separate sentence for each victim, use of the more than one victim factor is inappropriate. The Lambert rule has been extended to bar use of this factor when the jury acquits the defendant of the charges against the additional victims. State v. John L. Smith, No. 01C01-9309-CR-00308, slip op. at 10 (Tenn. Crim. App., at Nashville, Oct. 20, 1994); State v. Greg Patterson, No. 03C01-9106-CR-180, slip op. at 9 (Tenn. Crim. App., at Knoxville, May 19, 1992). Thus, the rule in Lambert bars use of this factor in this case.

The defendant also contends that the trial court erred by incorrectly analyzing mitigating factors. The trial court found the following in mitigation:

(1) that the defendant "has had a tough life;" and

(2) that the defendant released the victim unharmed.

See 39-13-305(4)(b)(2).

The defendant argues that the trial court should have also considered the following: that the defendant has no prior felony convictions; that he was

remorseful; that he was cooperative with the presentence report writer; that he provided for his girlfriend who was pregnant with his child; that he pays child support on another child who lives out-of-state; and that he was a conscientious employee.

Our review of the record suggests that all of these factors, except for the defendant's claim of being remorseful, should have been applied, even if to a limited degree. During cross-examination at the sentencing hearing, the defendant said, "I think it was just blown way out of proportion...." When asked if the defendant believed he did anything wrong, he answered, "Marrying [the victim]." That answer most assuredly undermined his claim of remorse.

In balancing all of these factors, the trial court sentenced the defendant to 18 years for the especially aggravated kidnapping charge, a midrange sentence. The trial court placed great emphasis on a nonstatutory factor, the defendant's going to the victim's father's house with the intention to use the gun. The trial court characterized this as an "extremely aggravating situation." The trial judge also observed "[you] can't give a person the minimum sentence when they have four convictions ...."

Normally, the weight given to each factor is within the trial court's discretion, provided that the record supports its findings and it complies with the Sentencing Act. See State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). Here, however, the trial court's use of the enhancement factors deviated significantly from the requirements of the Sentencing Act. The trial court placed emphasis on enhancement factors that are not provided for in the statute. Other enhancement factors were misapplied. The defendant had no prior felony convictions and relatively few misdemeanors. Thus there is limited prior criminal history. The

defendant's youth (twenty-one years of age at the time of sentencing), his conscientiousness as an employee, and his willingness to meet his financial obligations warrant some favorable consideration. Because the trial court's sentence has lost its presumption of correctness and because our review must be on a de novo basis, discounting the improperly applied factors, we conclude that a sentence of sixteen years is warranted by the record.

As modified, the convictions are affirmed. The effective sentence is modified to 16 years.

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Gary R. Wade, Judge

CONCUR:

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Joe B. Jones, Presiding Judge

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Jerry L. Smith, Judge