IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
DECEMBER SESSION, 1996

FILED

April 3, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9606-CR-00249
Appellee	)	
	)	KNOX COUNTY
vs.	)	
	)	Hon. RAY L. JENKINS, Judge
JENNIFER STREVEL,	)	
	)	(Especially aggravated robbery;
Appellant	)	Criminal responsibility for facilitation of first degree murder)

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OPINION FILED: _____

CONVICTIONS AFFIRMED; SENTENCES MODIFIED

David G. Hayes
Judge

OPINION

The appellant, Jennifer Strevel, appeals her jury convictions for the crimes of especially aggravated robbery and criminal responsibility for facilitation of first degree murder.[1] The Criminal Court of Knox County sentenced the appellant to serve twenty-five years in the Department of Correction for each conviction with the two sentences to run consecutively for an effective sentence of fifty years. On appeal, the appellant raises the following issues:

> I. Whether the evidence is sufficient to sustain the appellant's convictions.
>
> II. Whether the appellant is entitled to a new trial based upon the alleged failure of the State to disclose Brady material.
>
> III. Whether the trial court correctly applied enhancement and mitigating factors in determining the length of the appellant's sentences.
>
> IV. Whether the trial court properly imposed consecutive sentences.

After a review of the evidence in the record, we affirm the appellant's convictions for especially aggravated robbery and criminal responsibility for the facilitation of first degree murder. However, the appellant's sentences are modified to reflect a term of twenty years for each offense and are ordered to run concurrently.

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[1]On February 9, 1994, the Grand Jury of Knox County returned a three count indictment charging the appellant, along with Russell Holloway and Stephen "Joe" Cooper, with the felony murder of Nikki Butler, count one, and with especially aggravated robbery, count three. Russell Holloway was charged, in count two, with the premeditated and deliberated first degree murder of Nikki Butler. Co-defendant Holloway entered a guilty plea to felony murder and especially aggravated robbery. He received a life sentence without the possibility of parole for the murder conviction and twenty-five years for the especially aggravated robbery conviction. Co-defendant Cooper entered a guilty plea to especially aggravated robbery. He received a sentence of twenty-five years.

I. Background

In the late evening hours of November 9, 1993, the body of Nikki Butler, a convenience store clerk, was found at the Smoky Mountain Market on North Central Avenue Pike in Knoxville. Earlier that evening, the appellant, Russell Holloway, and Joe Cooper were watching television at Cooper's residence on Shell Lane[2]. Both Cooper and Holloway had been drinking beer and "snorting crystal [meth]." At some point, Holloway and Cooper decided to leave the house. However, due to their intoxication, they asked the appellant to drive. She agreed. In her statement to police investigators, the appellant stated that the two men told her that "they were going to get money." The appellant understood this to mean that they were going to sell drugs or were going to sell stolen property.[3] However, later in her statement, she admitted that she knew that Holloway planned to commit a robbery.[4]

The appellant and her co-defendants left the residence. As they approached the Smoky Mountain Market, Holloway directed the appellant to drive down an alley behind the market. The appellant complied, then drove around the block surrounding the market, and eventually pulled into the parking lot of the market. After completing this circle, the appellant, again, drove down the alley behind the market, and, again, pulled into the parking lot of the Smoky Mountain Market. Once more, the appellant left the parking lot and drove behind

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[2]The record indicates that, at the time of the offense, the appellant was eighteen years old, Cooper was seventeen years old, and Holloway was twenty-three years old.

[3]The "stolen property" was later revealed to be recently stolen guns and clothing in Holloway's possession.

[4]
Detective Jones:	Why did he tell you to drive back behind the store?
Appellant:	He was gonna [sic] rob the store.
Jones:	That's what he told you.
Appellant:	Uh-huh (affirmative).
Jones:	He told you he was gonna [sic] go in and rob the store.
Appellant:	Yeah, he said he was gonna [sic] go get money. He just said he was going to get money.
Jones:	And you knew what he meant by that?
Appellant:	Uh-huh.

the building. At this point, the appellant stopped the car and Holloway left the car to enter the market. She then drove around the block twice. Five to seven minutes later, the appellant returned to the alley to pick up Holloway.

The appellant stated that, when Holloway got back into the car,

> he was just breathing real [sic] heavy and he told me that he had beat [Nikki Butler] to death and I asked him why he beat her to death. He said because she knew his name and then he sat there a few minutes and then he said, 'Jennifer I shot her.'

She also observed that Holloway had in his possession a pocketbook, a bankbag, and a small gun which were later identified as belonging to Nikki Butler. The appellant then drove back to Cooper's residence.

At Cooper's house, Holloway and Cooper retreated to a bedroom and locked the door. Sometime later, the appellant went to this bedroom where Holloway gave her one hundred dollars. The next day, he gave her another one hundred dollars to spend at Wal-Mart. Holloway also bought the appellant a dozen roses and a seven cluster diamond ring. Additionally, as a surprise for the appellant, Holloway had "Jen-Jen," her nickname, tattooed on his back.

The State called David Douglas Wilson, a pathologist at the University of Tennessee. Wilson testified that he examined the victim's body to determine the cause of death and to retrieve evidence. He explained that the victim had received two bullet wounds within a short time. Both wounds were to the victims head, however, only one wound, piercing the right side of the brain, was fatal. Wilson testified that both wounds were "close-range gunshot wounds." Wilson stated that the victim's death was instantaneous.

Jason Nguyen, the victim's brother, testified that his sister would have recognized Holloway, because Holloway's bother had previously worked at the market. Turet Thi Nguyen, the victim's mother, testified that she was the owner

of the Smoky Mountain Market and that approximately $3000 was missing from the market after the robbery.

The appellant did not testify at trial. As its only witness, the defense called Russell Holloway, the appellant's co-defendant and ex-boyfriend. Holloway admitted that, on the night of the robbery and murder, he and Cooper had been "snorting crystal [meth] and drinking." However, he maintained that the appellant was neither drinking nor doing any drugs. He testified that the appellant knew nothing of his plan to rob the market.[5] However, on cross-examination, the State impeached Holloway through his prior statement to the police, in which Holloway stated that "They [Cooper and the appellant]- yeah, they knew I was going to rob. They did not know I was going to kill." To rebut Holloway's testimony, the State called Joe Cooper. Cooper testified that, before the robbery, Holloway had talked about what was going to happen, including his intention to rob the market.[6] On cross-examination, however, Cooper contradicted his earlier testimony by stating that, because of his intoxication, he was not exactly sure as to what Holloway had said.

Based upon this evidence, the jury convicted the appellant of criminal responsibility for facilitation of first degree murder and especially aggravated robbery.

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[5] WITNESS HOLLOWAY:
Holloway: I just wanted her [the appellant] to drive us around.
Q: Why?
Holloway: Because I was too intoxicated to drive. . . .
Q: What did you tell Jennifer you were going to do that night?
Holloway: Just -- I told her I was going to get some money is what I told her.
Q: Did you ever tell Jennifer what you were about to do?
Holloway: Before it happened? No, no, I did not.

[6] WITNESS COOPER:
Q: What did Holloway talk about?
Cooper: That he was going to get some money . . . that he was going to rob the store.

At the sentencing hearing, the only proof presented was the pre-sentence report. The presentence report reveals that the appellant has a history of criminal behavior as a juvenile. Her juvenile record reflects delinquent adjudications for the offense of aggravated burglary and four forgery offenses in 1992. The report additionally revealed that the appellant dropped out of school in the ninth grade. Moreover, she admitted to a long history of substance abuse, involving LSD, marijuana, and alcohol, beginning at age thirteen. In her statement to the investigating officer, the appellant stated that "she drank to the point of intoxication approximately three nights per week with the last use [of both alcohol and marijuana] being the evening prior to being taken into custody for the current offense."

The appellant is the youngest of two children. Her parents were divorced when she was young and her father received custody of the children. The appellant's file at juvenile court related that she had a "strained relationship with the members of her family." The appellant's stepfather, a retired police officer, told the juvenile caseworkers that the appellant "would not obey, told lies, and had no respect for authority." Her mother denied knowledge of the appellant's substance abuse, although she admitted that the appellant "started stealing and sneaking out at night" at the age of thirteen.

At the conclusion of the sentencing hearing, the trial court imposed consecutive twenty-five year sentences for each of the appellant's convictions.

II. Sufficiency of the Evidence

The appellant contends that the proof in the record "strongly suggest[s] that the appellant was an innocent bystander to the criminal intentions of the

killer." As such, the evidence was insufficient to sustain the appellant's convictions.

When a defendant challenges the sufficiency of the evidence on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). If the evidence was sufficient for a rational trier of fact to find the essential elements of the crimes beyond a reasonable doubt, this court must affirm the convictions. Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); Tenn. R. App. P. 13(e). Guilt may be predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Carey, 914 S.W.2d 93, 95 (Tenn. Crim. App. 1995). Additionally, questions regarding the credibility of the witnesses, the weight and value to be given to the evidence, and all factual issues raised by the evidence, are resolved by the trier of fact and not this court.[7] State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

The jury found the appellant guilty of especially aggravated robbery and criminal responsibility for the facilitation of first degree murder. The appellant contends that she was merely "an innocent bystander" and that she was free from any guilty knowledge of what Holloway intended when he entered the Smoky Mountain Market. The State argues that the appellant is criminally

[7]In the present case, the appellant suggests that, due to inconsistencies in the testimony of material witnesses, the proof is insufficient to support a finding of guilt. We acknowledge that the record is replete with inconsistent and contradictory testimony. However, "once the jury has resolved these inconsistencies for or against the theory of either party in a criminal case, a reviewing court may not substitute its conclusions for those of the jury unless it is demonstrated that the weight of the evidence preponderates against a guilty verdict." Bowers v. State, 512 S.W.2d 592, 594 (Tenn. Crim. App. 1974). The jury chose to accredit that testimony attributing the appellant's knowledge of Holloway's criminal intentions and to reject the testimony supporting her lack of knowledge.

responsible for Holloway's conduct because she assisted the commission of especially aggravated robbery and benefited in the proceeds. Tenn. Code Ann. § 39-11-402. Moreover, the State contends that the appellant is criminally responsible for the facilitation of the felony murder of Nikki Butler because she was aware of Holloway's intent to commit robbery and that she "knowingly furnish[ed] substantial assistance in the commission of the felony," resulting in the victim's death. Tenn. Code Ann. § 39-11-403. The appellant admits that she drove Holloway and Cooper to the Smoky Mountain Market. Although it is unclear as to the trio's intentions upon leaving Cooper's residence, there is an abundance of evidence in the record from which a rational juror could infer that, at the time Holloway exited the car, the appellant was aware of his intentions to rob the market. Moreover, with full knowledge that a robbery and murder had been committed, the appellant returned with her co-defendants to Cooper's residence where Holloway and Cooper divided the proceeds of their ill-gotten gains.

Reviewing the evidence, as we are required to do, in the light most favorable to the State, we conclude that the proof establishes the appellant's guilt of especially aggravated robbery and criminal responsibility for the facilitation of first degree murder beyond a reasonable doubt.

III. Failure to Disclose Brady Material

Next, the appellant contends that the "State violated the dictates of Brady v. Maryland, [373 U.S. 83, 83 S.Ct. 1194 (1963)], and that a new trial is warranted." In support of her allegation, the appellant refers to the State's failure to disclose the statement of Todd Hamilton. The record reveals that several

days after the Smoky Mountain Market robbery, Holloway, Cooper and a juvenile, Todd Hamilton, were involved in an attempted murder and robbery of the desk clerk at the Dixie Motel in Knox County. The weapon utilized by Holloway in this robbery attempt was the weapon stolen from Nikki Butler in the Smokey Mountain Market robbery. Following their apprehension, the juvenile, Hamilton, was questioned by the police concerning his involvement in the Dixie Motel incident and his knowledge of Cooper's and Holloway's involvement in the Smoky Mountain Market robbery and murder.[8] The appellant contends that Hamilton's statement confirms her defense that she was unaware of Holloway's intent to commit the robbery of the Smoky Mountain Market. Specifically, she argues that Hamilton's statement contradicts the in-court testimony of State's witness Joe Cooper, who testified on direct examination that both he and the appellant knew of Holloway's intention to rob the Smoky Mountain Market. The appellant argues that this "undisclosed evidence was critical to the defense in attacking the credibility of [Cooper]. . . ."

In Brady v. Maryland, 373 U.S. at 83, 83 S.Ct. at 1194, the United States Supreme Court held that, in a criminal case, the prosecution has a compelling duty to furnish the accused with exculpatory evidence pertaining either to the accused's guilt or innocence or to the potential punishment that may be imposed. See Bell v. State, No. 03C01-9210-CR-00364 (Tenn. Crim. App. at Knoxville, Mar. 15, 1995), perm. to appeal denied, (Tenn. Aug. 28, 1995). Failure to reveal exculpatory evidence violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Brady, 373 U.S. at 87, 83 S.Ct. at 1196-97. The prosecution must also disclose evidence which may be used by the defense to impeach a witness.

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[8]We note that Detective Dan Steward of the Knox County Sheriff's Department conducted the interview of Todd Hamilton on November 13, 1993. On November 9, 1993, Steward, along with Detective Gracie Jones, interviewed the appellant. Additionally, Steward took the statements of co-defendant Holloway. Steward also testified as a rebuttal witness for the State in the case before us. Thus, it is clear that the State was aware of Hamilton's statement during the pre-trial investigation of the instant case.

Giglio v. United States, 405 U.S. 150, 154-55, 92 S.Ct. 763, 766 (1972); Workman v. State, 868 S.W.2d 705, 709 (Tenn. Crim. App. 1993); State v. Davis, 823 S.W.2d 217, 218 (Tenn. Crim. App. 1991).

Before a reviewing court may find a due process violation under Brady, four prerequisites must be satisfied:

> (1) The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);
> (2) The State must have suppressed the information;
> (3) The information must have been favorable to the accused; and
> (4) The information must have been material.

State v. Edgin, 902 S.W.2d 387, 390 (Tenn.), amended on reh'g, (Tenn. 1995). Our examination of the record leads us to the conclusion (1) that the information was requested, (2) that the information was suppressed by the State and (3) that the information is favorable to the appellant. Thus, the remaining issue is whether the suppressed information was material.

A. Materiality

In Kyles v. Whitley, -- U.S. --, 115 S.Ct. 1555 (1995), the United States Supreme Court pronounced the standard by which the materiality of undisclosed information is determined. The Court held:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Kyles, -- U.S. at --, 115 S.Ct. at 1566. See also Edgin, 902 S.W.2d at 390. Thus, in order to prove a Brady violation, a defendant must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id.

i. Statements at Issue

Again, the appellant alleges that the statement of Todd Hamilton, *supra*, was "critical to the defense in attacking the credibility of [Joe Cooper], who testified, contrary to his earlier statement, that both he and the appellant had prior knowledge of the [Holloway's] intention." In an attempt to provide greater clarity from the maze of contradictory testimony presented at trial, we summarize the testimony relevant to the determination of this issue.

a. Statements of the Appellant

During the pre-trial investigation, the appellant initially stated that, on the night of the offenses, she understood that Holloway was "going to get money," and that, in order to do this, he was going to sell drugs or stolen property. However, later, she admitted that she knew that Holloway was going to rob the market. See, *supra* note 4. The appellant did not testify at trial. This statement was introduced through Detective Gracie Jones.

b. Statements of Co-defendant Holloway

Called as a defense witness at trial, Holloway testified, on direct, that "[he] just wanted [the appellant] to drive us around." He also stated that he "told her [he] was going to get some money. . . ." See, *supra* note 9. On cross-examination, Holloway admitted that he had told police, in a previous statement, that both the appellant and Cooper knew he was going to rob the market, although they did not know he was going to kill.

c. Statements of Co-defendant Cooper

In rebuttal to Holloway's testimony, the State called Cooper. Cooper, on direct, testified that, before the crime occurred, Holloway had told both the appellant and himself of his intention to rob the market. However, on cross-

examination, he admitted that, due to his intoxication, he was not exactly sure as to what Holloway had said and, in fact, did not think that "Holloway was going in there to rob that store."

d. Undisclosed Statement of Todd Hamilton

The statement given by Todd Hamilton to police during the investigation of the attempted robbery of the Dixie Motel revealed the following:

> Hamilton: . . .And they was a, Joe [Cooper] was telling us about [the crimes at the Smoky Mountain Market]. Joe said that he didn't know nothin' about it. He said that he was just riding with Jennifer and Jennifer and Joe sat in the car and Russ went in and Russ came out and they took off. . . .
> . . .[Cooper] told me like this, "Todd. Todd man, Russell went and shot this lady last night, man, we, we was just going to get a pack of cigarettes" like that said Russ came out and said he'd shot this lady and got some money.
>
> Det. Steward: So, according to Joe, he didn't know that, about that, until after it happened, right?
>
> Hamilton: Right. Him and Jennifer both.

Hamilton's statement offers no substantive proof as to the appellant's knowledge of Holloway's intent other than that which had already been revealed. Moreover, if Hamilton's statement had been introduced at trial, presumably as a prior consistent statement to impeach State's witness Cooper, its effect would have been nil, as Cooper was already effectively impeached. See Tenn.R.Evid. 613. Thus, Hamilton's statement is, at best, cumulative of other proof introduced at trial.[9] See Tenn. R. Evid. 403. We conclude that, under the Kyles "materiality standard," the appellant has failed to demonstrate that Hamilton's undisclosed statement was material. The absence of the undisclosed statement did not

[9]Evidence which is merely cumulative of other proof at trial is not material. See United States v. Agurs, 427 U.S. 97, 114, 96 S.Ct. 2392, 2402; Stafford v. Maynard, 848 F.Supp. 946 (W.D. Okl. 1994) (holding that although impeachment evidence is covered, there is no Brady violation where the withheld evidence is merely cumulative impeachment evidence); State v. Marshall, 845 S.W.2d 228, 234 (Tenn. Crim. App. 1992); State v. Cason, 503 S.W.2d 206, 209 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1973); State v. Suggs, No. 01C01-9411-CC-00390 (Tenn. Crim. App. at Nashville, Oct. 10, 1996); Bell, No. 03C01-9210-CR-00364. See also United States v. O'Dell, 805 F.2d 637, 640 (6th Cir. 1986); United States v. Schledwitz, No. 95-5309, 1995 WL 712755, at *4 (6th Cir. 1995).

deprive the appellant of a fair trial and does not undermine faith in the verdict reached by the jury. In light of the evidence presented at trial, even had the statement of Hamilton been disclosed, there is not a reasonable probability that the result would have been different. See Edgin, 902 S.W.2d at 390. Accordingly, the State's failure to disclose the exculpatory information to the defense prior to trial was not so prejudicial to the appellant as to warrant a new trial.

IV. Sentencing

In her final issues, the appellant alleges that the trial court erred in imposing the maximum sentences for both convictions and in ordering her sentences to be served consecutively.

Review, by this court, of the length, range, or 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). This presumption only applies, however, if the record demonstrates that the trial court properly considered relevant sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In making our review, this court must consider the evidence heard at trial and at sentencing, the presentence report, the arguments of counsel, the nature and characteristics of the offense, any mitigating and enhancement factors, the appellant's statements, and the appellant's potential for rehabilitation. Tenn. Code Ann. §§ 40-35-102, -103(5), -210(b) (1990); see also State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993) (citing Ashby, 923 S.W.2d at 168). The burden is on the appellant to show that the sentence imposed was improper. Sentencing Commission Comments, Tenn. Code Ann. § 40-35-401(d).

A. Enhancement Factors

The trial court, applying four enhancement factors and no mitigating factors, imposed the maximum twenty-five year sentences for each conviction. Specifically, the trial court found that (1) the appellant has a history of criminal convictions; (7) the offense involved a victim and was committed to gratify the appellant's desire for pleasure; (10) the appellant had no hesitation about committing a crime when the risk to human life was high; and (16) that the crimes were committed under circumstances under which the potential for bodily injury to the victim was great. Tenn. Code Ann. § 40-35-114. Factor (6), that the personal injuries to the victim were particularly great, was applied only to the especially aggravated robbery conviction. The appellant contends that "[b]ased upon a proper consideration of the applicability of enhancement factors to the instant case, the court should have imposed either the presumptive minimum for both offenses or a sentence in the lower range."

i. Factor (1): Prior Criminal History

The appellant's presentence report indicates that she has four juvenile adjudications for the offense of forgery and one juvenile adjudication for the offense of aggravated burglary in 1992. She admits to a long history of substance abuse, including LSD, marijuana, and alcohol. The appellant's mother indicated that, at the age of thirteen, the appellant began "stealing and sneaking out of the house at night." Additionally, we acknowledge the fact that, subsequent to her release from juvenile detention, the appellant continued to socialize with those involved in criminal activities. The appellant now contends that her "meager juvenile history" is not sufficient to warrant application of enhancement factor (1).

The appellant's juvenile record is relevant since the appellant was only eighteen years old at the time of the instant offenses. The disposition of a child in a juvenile court may be used against the child in "dispositional proceedings after conviction of a felony for the purposes of a presentence investigation and report." State v. Zeolia, No. 03C01-9503-CR-00080 (Tenn. Crim. App. at Knoxville, Mar. 21, 1996) (citing Tenn. Code Ann. § 37-1-133 (1991)). Moreover, in State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993), our supreme court held that a defendant's juvenile record qualifies as a prior criminal history. Adams, 864 S.W.2d at 34 (citing State v. Stockton, 733 S.W.2d 111, 112-13 (Tenn. Crim. App. 1986)); see also State v. Belser, No. 03C01-9502-CR-00056 (Tenn. Crim. App. at Knoxville, Sept. 18, 1996); State v. Blaylock, No. 03C01-9412-CR-00435 (Tenn. Crim. App. at Knoxville, Dec. 13, 1995). The appellant's juvenile record and her admitted abuse of controlled substances support the application of this factor.

ii. Factor (7): Offense Committed to Gratify Desire for Pleasure

Next, the appellant asserts that the trial court improperly applied enhancing factor (7), "The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement." See Tenn. Code Ann. § 40-35-114(7). We conclude that the record preponderates against the trial court's finding in applying this enhancing factor. The appellant, in her statement to the police, admitted that she "volunteered to drive Holloway who was going out to get money" through illegal means. For her role in the commission of the crimes, she received money on two separate occasions, in addition to a diamond ring and roses. Although she received a portion of the ill-gotten gain, small in comparison to the amount stolen, this fact alone will not support proof that her participation was based solely on her desire for pleasure or excitement. The

desire for pleasure cannot be presumed merely because the record does not reflect any other reason for the offense to have occurred. State v. Salazar, No. 02C01-9105-CR-00098 (Tenn. Crim. App. at Jackson, Jan. 15, 1992).

iii. Factors (10), (16) & (6): Risk to Human Life High and Potential for Bodily Injury Great Victim's Injuries Particularly Great

The appellant contends that the trial court erred in applying the enhancement factors found in Tenn. Code Ann. § 40-35-114(10), risk to human life high, and (16), and potential for bodily injury great.[10] Specifically, she contends that these factors are inherent within the offenses of especially aggravated robbery and facilitation of murder though not specifically listed as elements of the respective offenses. The State concedes misapplication of these factors.

Whenever an offense is committed with a deadly weapon, it is inherent within the offense that there was a high risk to human life and that the potential for injury is great. State v. Hill, 885 S.W.2d 357, 363 (Tenn. Crim. App. 1994); Tenn. Code Ann. § 40-35-114(10), -114(16). Naturally, these factors are inherent in the offenses of especially aggravated robbery and facilitation to commit murder. State v. Nix, No. 03C01-9406-CR-00211 (Tenn. Crim. App. at Knoxville, Nov. 21, 1995). See also State v. Nunley, No. 01C01-9309-CC-00316 (Tenn. Crim. App. at Nashville, Feb. 2, 1995), perm. to appeal denied, (Tenn. May 8, 1995). Thus, Tenn. Code Ann. § 40-35-114(10) and -114(16) are inapplicable to the present offenses. See State v. Claybrooks, 910 S.W.2d 868, 872-73 (Tenn. Crim. App. 1994).

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[10]The trial court recognized the conflict in applying these factors to the present offenses: However, [factors ten and sixteen] are contained in the elements of the offense and not -- the facts surrounding the proof of the elements of the offense is hard to determine. However, the Court does find these factors.

The trial court applied factor (6), that the victim's injuries were particularly great, to the appellant's conviction for especially aggravated robbery. The appellant now argues that the court erred in applying this factor. The State concedes the trial court's misapplication and we agree. See Nix, No. 03C01-9406-CR-00211; Nunley, No. 01C01-9309-CC-00316. Especially aggravated robbery requires that the robbery be accomplished with a deadly weapon and that the victim suffer serious bodily injury. Tenn. Code Ann. § 39-13-403(a). "Proof of serious bodily injury will always constitute proof of particularly great injury." State v. Jones, 883 S.W.2d 597, 602 (Tenn. 1994). Thus, factor (6) may not be used to enhance the appellant's sentence for especially aggravated robbery.

Accordingly, upon *de novo* review, we conclude that only factor (1), the appellant's history of criminal behavior, is applicable to the present offenses.

B. Mitigating Factors

The appellant contends that the court erred by failing to apply any mitigators. Specifically, she asserts that the court failed to find the following mitigating factors applicable to both offenses:

> (2) The defendant acted under strong provocation;
>
> (3) Substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
>
> (4) The defendant played a minor role in the commission of the offense;
>
> (6) The defendant, because of [her] youth . . . , lacked substantial judgment in committing the offense;
>
> (11) The defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct;
>
> (12) The defendant acted under duress or under domination of

> another person, even though duress or the domination of another person is not sufficient to constitute a defense to the crime; and
>
> (13) Any other factor . . . includ[ing] a significant mistake or lapse in judgment on the part of law enforcement personnel which allowed an extremely dangerous, violent, crime-prone, drug-addicted individual to remain on the streets where he was able to lure less culpable individuals, such as the appellant, into his criminal actions. . . .

Tenn. Code Ann. §40-35-113(1990). The appellant fails to enumerate the applicable mitigating factors, excepting factor (6), in her brief. Rather, she refers this court to her pre-trial Notice of Mitigation Factors. Additionally, we note that, excepting factor (6), the appellant submits no argument to support her contentions, nor does she cite to any authority. As such, these issues are waived. Tenn. R. App. P. 27(a)(7), (h); Tenn. Ct. Crim. R. App. 10(b). Moreover, the trial court reviewed each of the above enumerated mitigating factors submitted by the appellant. In rejecting the applicability of each of these factors, the trial court appropriately entered its findings on the record. We agree with these findings.

C. Length of Sentence

The appellant was convicted, as a range I offender, of especially aggravated robbery and criminal responsibility for facilitation of first degree murder, both class A felonies. See Tenn. Code Ann. § 39-13-403(b); Tenn. Code Ann. § 39-11-117 (a) (1991). Accordingly, she is subject to a sentence "not less than fifteen nor more than twenty-five years." Tenn. Code Ann. § 40-35-112(a)(1) (1990). The trial court imposed the maximum sentence, twenty-five years, for each offense. The appellant now contends that, considering the trial court's misapplication of enhancement factors, the court erred in imposing the maximum sentence within the range to her two convictions.

Regarding the length of a sentence, the presumptive sentence shall be

the minimum sentence in the range if there are no enhancement or mitigating factors.[11] Tenn. Code Ann. § 40-35-210(c). Thus, the presumptive sentence for the instant offenses is fifteen years. However, if there are enhancement factors but no mitigating factors, the court may set the sentence above the minimum in the range, but still within the range. Tenn. Code Ann. §40-35-210(d).

Again, in the present case, one enhancement factor is applicable, enhancement factor (1), that the appellant "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). Moreover, no mitigating factors are applicable. "The weight to be afforded mitigating and enhancement factors derives from balancing relative degrees of culpability within the totality of the circumstances of the case involved." State v. Moss, 727 S.W.2d 229, 238 (Tenn. 1986). See also State v. Marshall, 870 S.W.2d 532, 541 (Tenn. Crim. App. 1993). Upon *de novo* review, with full consideration of the applicable enhancement factor, the absence of any mitigators, the presumptive sentence at the minimum of the range, the facts and circumstances of these offenses, and the appellant's egregious social history, we conclude that, due to the elimination of four enhancement factors, the appellant's sentences must be modified to twenty years for each offense.

D. Consecutive Sentences

Finally, the appellant contends that the trial court erred in ordering her sentences to be served consecutively. At the conclusion of the sentencing hearing, the court determined that the appellant qualified as a "dangerous

[11]Effective July 1, 1995, the presumptive sentence for a class A felony is the mid-point of the range. Tenn. Code Ann. § 40-35-210 (1996 Supp.).

offender" under Tenn. Code Ann. § 40-35-115(b)(4) (1990) and imposed consecutive sentences. The appellant submits to this court that this characterization is erroneous,"offends the principles of sentencing, and is contradicted by case law."

In Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976), our supreme court held that "[a] defendant may be classified as a dangerous offender if the crimes for which he is convicted indicate that he has little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." See also Tenn. Code Ann. § 40-35-115(b)(4); State v. Wilkerson, 905 S.W.2d 933, 937 (Tenn. 1995). If a court decides to impose consecutive sentences based upon the inherently dangerous nature of the instant offenses, the court should base its decision upon the presence of aggravating circumstances and not merely on the fact that two or more dangerous crimes were committed. Gray, 538 S.W.2d at 393. While acknowledging the serious and violent nature inherent within the crimes for which she is convicted, we are unable to conclude that her operation of the vehicle to and from the crime scene establishes that the appellant has little or no regard for human life. Accordingly, we conclude upon *de novo* review that the appellant's conduct in this case fails to establish aggravating circumstances necessary for classification as a dangerous offender.

Moreover, before consecutive sentencing may be imposed, "the proof must establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender." Id. In the present case, we find that concurrent sentences of twenty years are reasonably related to the severity of the offenses and satisfy the need to protect the public from further criminal acts of the appellant. We are unable to conclude that consecutive sentences are

warranted in the present case. Accordingly, the appellant's sentences are ordered to run concurrently.

IV. Conclusion

For the foregoing reasons, we affirm the judgment of convictions for the offenses of especially aggravated robbery and criminal responsibility for facilitation of first degree murder. The appellant's sentences are modified to reflect a term of twenty years for the especially aggravated robbery conviction and a term of twenty years for the criminal responsibility for facilitation of first degree murder conviction. Additionally, the sentences are to run concurrently. This case is remanded for entry of judgments of conviction consistent with this opinion.

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DAVID G. HAYES, Judge

CONCUR:

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DAVID H. WELLES, Judge

_____
THOMAS T. WOODALL, Judge

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1996

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9606-CR-00249**
Appellee,	)	
	)	**KNOX COUNTY**
	)	
V.	)	**HON. RAY L. JENKINS, JUDGE**
	)	
JENNIFER STREVEL,	)	**(Especially Aggravated Robbery**;
	)	**Robbery; Criminal Responsibility for**
Appellant.	)	**Facilitation of First Degree Murder)**

SEPARATE OPINION CONCURRING IN PART AND DISSENTING IN PART

I concur in all aspects of the majority's opinion in this case except that portion which orders the sentences to be served concurrently rather than consecutively. To that portion I respectfully dissent.

Proof of the existence of facts necessary to justify consecutive sentencing must only be established by a preponderance of the evidence. Tenn. Code Ann. § 40-35-115(b). Also, consecutive sentencing requires that,

> "...in addition to the application of general principals of sentencing, the finding that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed."

State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995).

While there may not be sufficient evidence in this record to support a finding that Appellant is a "dangerous offender" under Tennessee Code Annotated section 40-35-115(b)(4), there is sufficient evidence to justify consecutive sentencing based upon Appellant being an offender "whose record of criminal activity is extensive" pursuant to Tennessee Code Annotated section 40-35-115(b)(2). Also, I feel there is sufficient evidence in the record to support a finding that consecutive sentencing is necessary to protect the public against further criminal conduct by the Appellant and that consecutive sentencing for the Appellant reasonably relates to the severity of the offenses committed.

In August 1992, Appellant was adjudged delinquent based upon an aggravated burglary charge in Blount County Juvenile Court. Joe Cooper, a co-defendant in the case sub judice, was also a co-defendant with Appellant in the Blount County aggravated burglary. Three (3) months later Appellant was adjudged delinquent on four (4) separate forgery charges in Knox County Juvenile Court. These juvenile adjudications were all when Appellant was seventeen (17) years old. Appellant was in the custody of the Tennessee Department of Youth Development based upon these juvenile adjudications from August 1992 until June 1993. She was involved with the murder and robbery only five (5) months after having been released from custody. At the sentencing hearing, in addressing one of the mitigating factors proposed by Appellant, the trial court stated, "it appears that, upon her release from the juvenile authorities, her criminal activities increased; and, were it not for the fact she was arrested on this charge, it would have continued to escalate."

The co-defendant, Joe Cooper, who was seventeen (17) years old at the time of the commission of these offenses, entered a guilty plea to

especially aggravated robbery, and received a sentence of twenty-five (25) years. The co-defendant Mr. Holloway entered a plea of guilty to felony murder, for which he received a sentence of life imprisonment without parole and also received a sentence of twenty-five (25) years upon a guilty plea to especially aggravated robbery.

Appellant was eighteen (18) years old at the time of the offense, and has an extensive history of substance abuse problems dating back to when she was thirteen (13) years old. However, on the night of the offenses, she was not under the influence of any drugs or alcohol, even though her co-defendants were intoxicated from the use of "crystal meth" and consumption of beer. Appellant voluntarily took her co-defendants to a convenience store at or near midnight, an approximate twenty-minute drive from their location. Appellant knew that her co-defendant, Mr. Holloway, who was also her boyfriend, was going there to commit robbery. She parked the car in the lot of the store so that the situation could be surveyed by the defendants. Subsequently, Appellant drove around, came back, drove around to the back of the store and let Mr. Holloway out. She then left with the intention to pick him up a few minutes after commission of the crime. Appellant did return shortly thereafter, picked up Mr. Holloway, and returned with her co-defendants to Mr. Cooper's house. The record reflects that Appellant was aware, a short time after she picked up Mr. Holloway, that he had killed the victim during the robbery. The record further reflects that between the commission of the crime and Appellant's arrest, she told no one about who was involved in the incident, and went about her normal activities of life as if nothing unusual had occurred.

Appellant's juvenile record includes five offenses, all of which would have been felonies had they been committed when she was an adult. Appellant's admitted abuse of controlled substances dates back to when she was thirteen years old. She used LSD regularly from age fifteen (15) to age seventeen (17) and quit only after being placed in a group home. Consideration of prior criminal convictions and conduct for both enhancement and consecutive sentencing purposes is not prohibited by the Tennessee Criminal Sentencing Reform Act of 1989. State v. Davis, 825 S.W.2d 109, 113 (Tenn. Crim. App. 1991). Furthermore, this court has recently held that juvenile offenses may be considered to justify consecutive sentences under similar circumstances. State v. Jeffrey A. Mika, No. 02C01-9508-CR-00244, Shelby County, slip. op. at 10-11 (Tenn. Crim. App., Jackson, filed February 25, 1997); State v. Robert Chapman, No. 02C01-9510-CR-00304, Shelby County, slip. op. At p. 8 n. 1 (Tenn. Crim. App., Jackson, filed January 14, 1997).

I believe there is sufficient evidence in this record to support the trial court's discretion in ordering the sentences to run consecutively. Therefore, I would affirm the trial court's requirement that the sentences imposed upon the Appellant be served consecutively.

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THOMAS T. WOODALL, Judge