IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY 1997 SESSION

FILED

October 16, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01C01-9608-CC-00350**
Appellee,	)	
	)	**WILLIAMSON COUNTY**
VS.	)	
	)	**HON. CORNELIA A. CLARK,**
CLIFTON EDWARD ELLISON,	)	**JUDGE**
	)	
Appellant.	)	(Aggravated assault and joyriding)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted for joyriding, theft and two counts of aggravated assault by use of a deadly weapon. The State nolled the theft charge and one count of aggravated assault. A jury convicted the defendant of joyriding[1] and the remaining count of aggravated assault, Class C.[2] After a hearing, he was sentenced as a Range I standard offender on the felony charge to four years incarceration, suspended, with five years probation. He was sentenced on the joyriding charge to eleven months, twenty-nine days in jail, suspended, with eleven months, twenty-nine days probation, concurrent to the aggravated assault sentence. As a condition of each of his periods of probation, he was ordered to serve one hundred days, day for day, in the county jail. In this direct appeal, the defendant challenges the sufficiency of the evidence on the assault conviction and complains about his sentences. Upon our review of the record, we affirm the judgment below.

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

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[1]The jury was instructed that the defendant had pled guilty to joyriding.

[2]Effective May 12, 1993, aggravated assault committed recklessly became a Class D felony. If it was committed intentionally or knowingly, it remained a Class C felony. See T.C.A. §§ 39-13-102(d) (Supp. 1993) and 39-13-102(b) (Repl. 1991).

Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

In this case, the State's proof established that on the morning of January 4, 1995, several employees of Eatherly Construction were on a job site in Franklin, Tennessee. One of the company's trucks was at the site, idling. The defendant approached Ralph Jones and asked if he could borrow the truck. Jones had never before seen the defendant. Jones told the defendant no and resumed his work. The defendant then got in the truck and drove off. Jones sought out his supervisor and the defendant's actions were reported to the police.

About twenty minutes later, the defendant drove the truck back to the work site where Mr. Raymond Clay was working. As Clay approached the truck, the defendant got out holding an open knife. Clay briefly grappled with the defendant, swinging him around. Another worker, Steve Parker, had approached and told Clay to get back, the defendant had a knife. Parker retrieved a shovel from the back of the truck to use as protection. As the defendant started to leave the scene, Parker attempted to detain him by blocking his path. Parker testified that the defendant had then run at him and threatened him with the knife. According to Parker, the defendant had said, "I'll cut your throat, white boy." Parker testified that he had continued to block the defendant's path, that the defendant had continued to threaten him, and that throughout their confrontation he feared imminent bodily injury. According to Parker, he and the defendant continued

on in a "thrust and parry" type of confrontation for approximately ten minutes, with Parker's goal being to detain the defendant until the police arrived. Parker testified that he never hit the defendant with the shovel.

Officer Melvin Scales was the first police officer on the scene. Officer Scales testified that he had known the defendant for thirteen or fourteen years. When he saw the defendant he called his name and the defendant walked toward him. Officer Scales testified that the defendant appeared as though he had been drinking. Officer Scales obtained the knife from the defendant, searched and handcuffed him, and placed him in his patrol car.

In order to convict the defendant of aggravated assault by use of a deadly weapon, Class C, the State had to prove beyond a reasonable doubt that the defendant had intentionally or knowingly committed an assault on Parker and used or displayed a deadly weapon. T.C.A. § 39-13-102(a)(1)(B) (Supp. 1995). The defendant committed an assault if he intentionally or knowingly caused Parker to reasonably fear imminent bodily injury. T.C.A. § 39-13-101(a)(2) (Repl. 1991). Parker testified that the defendant had threatened him with a knife, threatened to cut his throat, and that he had feared imminent bodily injury throughout their confrontation. This evidence is sufficient to support the defendant's conviction. This issue is without merit.

The defendant next challenges his sentences. He first complains that the trial court erred when it sentenced him to four years on the felony conviction. He concedes that the trial court correctly applied as an enhancement factor that he has a previous history of criminal convictions or behavior in addition to those necessary to establish the range. See T.C.A. § 40-35-114(1). However, he contends that the trial

court erred when it determined that there were no mitigating factors. The defendant argues that he established five mitigating factors: that he acted under strong provocation; that substantial grounds existed tending to excuse or justify his conduct although failing to establish a defense; that he has potential for rehabilitation; that he has a good employment record; and that he expressed willingness to take responsibility for his actions. See T.C.A. § 40-35-113(2), (3) and (13).

When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

A portion of the Sentencing Reform Act of 1989, codified at T.C.A. § 40-35-210, established a number of specific procedures to be followed in sentencing. This section mandates the court's consideration of the following:

> (1) The evidence, if any, received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in his own behalf about sentencing.

T.C.A. § 40-35-210.

In addition, this section provides that the minimum sentence within the range

is the presumptive sentence for C felonies. If there are enhancing and mitigating factors, the court must start at the minimum sentence in the range and enhance the sentence as appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors. If there are no mitigating factors, the court may set the sentence above the minimum in that range but still within the range. The weight to be given each factor is left to the discretion of the trial judge. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

The Act further provides that "[w]henever the court imposes a sentence, it shall place on the record either orally or in writing, what enhancement or mitigating factors it found, if any, as well as findings of fact as required by § 40-35-209." T.C.A. § 40-35-210(f) (emphasis added). Because of the importance of enhancing and mitigating factors under the sentencing guidelines, even the absence of these factors must be recorded if none are found. T.C.A. § 40-35-210 comment. These findings by the trial judge must be recorded in order to allow an adequate review on appeal.

We find no abuse of discretion by the trial court in its refusal to apply any mitigating factors. While the trial court agreed that the defendant had a good employment record, such does not automatically entitle the defendant to mitigation. See State v. Keel, 882 S.W.2d 410, 423 (Tenn. Crim. App. 1994). The record does not support the remaining mitigating factors which the defendant asserts should have been applied. Accordingly, a midrange sentence of four years[3] was appropriate. This issue has no merit.

The defendant also complains that the court below should not have

[3]The sentencing range for a Range I standard offender convicted of Class C aggravated assault is three to six years. T.C.A. § 40-35-112(a)(3).

sentenced him to serve one hundred days in confinement as a condition of his probation in either sentence. However, the defendant fails to cite us to any specific authority in support of his complaint. "A defendant receiving probation may be required to serve a portion of the sentence in continuous confinement for up to one (1) year in the local jail or workhouse, with probation for a period of time up to and including the statutory maximum time for the class of the conviction offense." T.C.A. § 40-35-306(a). This defendant has received probation numerous times in the past: obviously, it has not deterred him from committing further crimes. The court below took all of the appropriate facts and circumstances of the crimes and the defendant's history into account and fashioned an appropriate sentence. This issue is without merit.

The judgment below is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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WILLIAM M. BARKER, Judge

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JERRY L. SMITH, Judge