

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1997 SESSION

FILED

February 26, 1998

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee,)
)
 VS.)
)
 SAMUEL PAUL FIELDS,)
)
 Appellant.)

NO. 01C01-9512-CR-00414

DAVIDSON COUNTY

HON. ANN LACY JOHNS,
JUDGE

(Attempted First Degree Murder
and Reckless Aggravated Assault)

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OPINION FILED: _____

AFFIRMED

**JERRY L. SMITH,
JUDGE**

OPINION

The defendant, Samuel Paul Fields, was convicted by a Davidson County jury of one (1) count of attempted first degree murder and one (1) count of reckless aggravated assault. The trial court sentenced him to consecutive sentences of twenty-five (25) years for attempted murder and four (4) years for aggravated assault. On appeal, defendant presents the following issues for our review:

(1) whether the evidence is sufficient to support the jury's verdict of guilt;

(2) whether the trial court erred in allowing the state to introduce a photocopy of a photographic lineup;

(3) whether the trial court erred in allowing the state to take the deposition of the victim, Robert Steven Burton; in the alternative, whether the trial court erred in allowing Burton to testify;

(4) whether the trial court erred in failing to limit the medical testimony concerning Burton's injuries;

(5) whether the trial court erred in allowing the state to amend the indictment; and

(6) whether the trial court erred in sentencing the defendant.

After a thorough review of the record presented, we affirm the judgment of the trial court.

FACTS

In the early morning hours of May 8, 1993, Robert Steven Burton stopped at a local bar, Margie's, on his way home from work. While he socialized with his friend, Terry Coleman, Burton noticed the defendant walk into the bar. Although it was a rather warm evening, defendant was wearing a long-sleeved shirt, pants and a coat. Burton also saw a bulge under defendant's left arm. As Burton and Coleman continued to talk, Burton noticed defendant staring at him. Burton and defendant had known each other for approximately ten years, and defendant's presence made Burton nervous. Eventually, defendant left the bar.

Soon thereafter, Burton decided to leave Margie's. Burton and another

friend, Trina Watson, left the bar at approximately the same time. They got into Burton's car and talked for several minutes. During their conversation, a car pulled into the parking space next to Burton's car. Burton and Watson discussed the identity of the driver, and Burton recognized him as the defendant.¹

Defendant got out of his car, brandished a weapon, and began firing into Burton's car. Watson was struck once in the shoulder as she attempted to duck for cover. Burton was shot several times as he sat in his car. After the firing stopped, defendant returned to his car and drove away.

Watson ran inside the bar and called the police. She and Burton were subsequently transported to Vanderbilt hospital. At the hospital, she told Detective Johnny Lawrence that "Little Paul" was the shooter. While he was in the hospital, Burton told his son, Shannon, that "Little Paul" shot him. Shannon testified at trial that "Little Paul" was the defendant.

Detective Al Gray conducted a photographic lineup to verify that the defendant was the perpetrator of the shooting. Burton was able to identify defendant as the shooter. Although Watson could not identify the gunman, she did identify defendant as a patron of Margie's Bar. At trial, she testified that she could not make a positive identification because she did not get a good look at the man who shot her.

The grand jury of Davidson County returned an indictment charging defendant with one (1) count of attempted first degree murder of Robert Steven Burton and one (1) count of aggravated assault of Trina Watson. The indictment was later amended to provide for two counts of aggravated assault on Watson; namely, in Count Two, intentional or knowing aggravated assault, and in Count Three, reckless aggravated assault.

Following a jury trial, defendant was found guilty of attempted first degree murder of Burton and reckless aggravated assault on Watson. He was sentenced to consecutive sentences of twenty-five (25) years and four (4) years, respectively.

¹ Burton told Watson that the man was "Little Paul," which apparently is the defendant's nickname.

From his convictions and sentences, defendant brings this appeal.

SUFFICIENCY OF THE EVIDENCE

In his first issue, defendant challenges the sufficiency of the convicting evidence. Specifically, he claims that there are material inconsistencies and discrepancies in the witnesses' testimony. He further alleges that Burton's identification is unreliable, given the animosity between the two men at the time of the incident. Therefore, he contends that the evidence is insufficient to support the jury's finding of guilt.

When the sufficiency of the evidence is challenged, the standard of review is whether, after viewing the evidence in the light most favorable to the state, 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, 318, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); State v. Evans, 838 S.W.2d 185, 190-91 (Tenn. 1992); Tenn. R. App. P. 13(e). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). This Court will not reweigh the evidence, reevaluate the evidence, or substitute its evidentiary inferences for those reached by the jury. State v. Carey, 914 S.W.2d 93, 95 (Tenn. Crim. App. 1995).

Furthermore, in a criminal trial, great weight is given to the result reached by the jury. State v. Johnson, 910 S.W.2d 897, 899 (Tenn. Crim. App. 1995). Once approved by the trial court, a jury verdict accredits the witnesses presented by the state and resolves all conflicts in favor of the state. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). A jury's guilty verdict removes the presumption of innocence enjoyed by the defendant at trial and raises a presumption of guilt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant then bears the burden of overcoming this presumption of guilt on appeal. State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991).

At trial, Burton repeatedly testified that defendant was the person who shot him on the night in question. He had “[n]o doubt at all” that defendant was the shooter. Burton and defendant had known each other for approximately ten years. Burton also stated that the lighting in the parking lot was sufficient to see defendant’s face. The identification of a defendant as the person who committed the offense is a question of fact for the jury to determine. State v. Strickland, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993). The testimony of the victim identifying the defendant as the perpetrator of the crime is sufficient, in and of itself, to support a conviction. Id.

Furthermore, any discrepancies in the testimony are immaterial, and the jury has resolved any inconsistencies against the defendant by virtue of the guilty verdicts. The credibility of witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury as trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984).

We find the evidence is sufficient to support the jury’s verdict. This issue is without merit.

PHOTOGRAPHIC LINEUP

In his next issue, defendant contends that the trial court erred in allowing the state to introduce a photocopy of the photographic lineup used to confirm Burton’s identification of defendant as the shooter. He argues that the state did not comply with the discovery requirements of Tenn. R. Crim. P. 16, in that the state did not allow defendant to inspect the photographic lineup which the state planned to present in its case in chief. He further claims that the admission of a photocopy of the lineup violated the best evidence rule.

Prior to trial, defendant filed a motion in limine requesting the suppression of “any out of court photographic identifications” of the defendant on the basis that the state had failed to comply with discovery requests by refusing to produce the original photographic lineup. At a pre-trial hearing, the state introduced testimony that the original photographic lineup had been lost or misplaced, and the photocopy of the lineup was all the state had in its possession. The trial court found that the photocopy was admissible in light of the confirmatory nature of the lineup, and on the basis that the photocopy was of good quality.

A.

The admissibility of evidence is a matter that rests within the trial court’s discretion and will not be reversed on appeal absent an abuse of discretion. See State v. Harris, 839 S.W.2d 54, 66 (Tenn. 1992). “Where there has been noncompliance with Rule 16, the trial court has discretion to fashion a remedy based upon the circumstances of the case.” State v. Payne, 791 S.W.2d 10, 16 (Tenn. 1990). However, evidence should only be excluded when it is shown that the party is actually prejudiced by the failure to comply with discovery and the prejudice cannot otherwise be eliminated. State v. Caughron, 855 S.W.2d 526, 539 (Tenn. 1993); State v. James, 688 S.W.2d 463, 466 (Tenn. Crim. App. 1984).

In the case *sub judice*, the state technically complied with the mandates of Tenn. R. Crim. P. 16 in that the defendant was given access to the materials in the state’s possession. Furthermore, the nature of the identification process was merely to confirm Burton’s identification of “Little Paul” as the perpetrator. Burton and defendant had known each other for approximately ten years prior to this incident. Defendant maintains that the original of the lineup was required in order to determine if the lineup was unduly suggestive. However, in light of Burton’s past association with defendant and his positive identification of defendant to Watson prior to the shooting, the defendant has not established that he was prejudiced by the admission of the photocopy as opposed to the original.

B.

Defendant also suggests that the photocopy of the lineup should have been excluded because it was not the “best evidence” as required by Tenn. R. Evid. 1002. However, under Tenn. R. Evid. 1004(1), the original photograph is not required if “[a]ll originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith.”

During the hearing, Detective Al Gray testified that the Homicide and Murder divisions of the police department had been “reconstructed” and possibly the original photographic lineup was misplaced in the process. Detective Gray stated that he had searched for the original on numerous occasions. He denied intentionally losing the original and was unaware if the original had been destroyed. Defendant offered no evidence to rebut this testimony.

We, therefore, find no evidence that the police lost or destroyed the original photographic lineup in bad faith. Therefore, the photocopy of the lineup was admissible under Tenn. R. Evid. 1004(1).

C.

The problem of police carelessness with evidence is unfortunately not a novel issue. It is always a serious matter when evidence is mislaid or destroyed. In Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), the Supreme Court held that failure to preserve potentially useful evidence can be a denial of due process if the defendant can show bad faith on the part of the police. The Court noted that the presence of bad faith necessarily turns on the police's knowledge of the exculpatory nature of the evidence at the time it is lost or misplaced. Id. at 56. However, the mere fact that evidence is missing is not indicative of bad faith. State v. Eldridge, 951 S.W.2d 775, 778 (Tenn. Crim. App. 1997).

Defendant alludes to possible police misconduct in losing the original photographic lineup. However, as previously discussed, we find no evidence of bad faith on the part of the police. Any error on the part of the state was merely negligence. See Eldridge, 951 S.W.2d at 778. This issue is without merit.

VICTIM'S DEPOSITION AND TESTIMONY

Defendant next argues that the trial court erred in allowing the state to depose Burton prior to trial. He claims that the state failed to comply with the requirements of taking a deposition pursuant to Tenn. R. Crim. P. 15. Alternatively, defendant contends that the trial court erred in allowing Burton to testify at trial due to his physical condition.

A. Victim's Deposition

Several days before the trial was scheduled to begin, the state learned that Burton was suffering from a massive septic infection. Burton's physicians estimated that he might not survive. The state requested to take Burton's deposition on the premise that he might be "unavailable" to testify at trial. The trial court granted this request.

The crux of defendant's complaint is that the state did not substantially comply with the mandates of Tenn. R. Crim. P. 15 in taking Burton's deposition. He argues that (1) the state did not provide him with written notice of the time and place of the deposition, (2) the state did not establish the medical necessity of taking the deposition, and (3) due to Burton's medical condition at the time, the state did not establish that he was competent to testify.

However, this Court has not been provided with a transcript of any of the relevant discussions concerning Burton's deposition. It is the appellant's duty to have prepared an adequate record in order to allow a meaningful review on appeal. Tenn. R. App. P. 24; State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993). When no evidence is preserved in the record for review, we are precluded from considering the issue. State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988). Therefore, the issue is waived.

Furthermore, defendant has not established that he was prejudiced by the taking of Burton's deposition. Indeed, Burton was able to testify at trial, so the deposition was not admitted as substantive evidence in the state's case in chief. Moreover, defendant used statements made during the deposition to impeach

Burton's testimony at trial. Therefore, any error is harmless at best. See Tenn. R. Crim. P. 52(a).

This issue has no merit.

B. Victim's Testimony

In the alternative, defendant claims that the state, by taking Burton's deposition, has impliedly conceded that Burton was not in physical condition to personally appear and give testimony.² He, therefore, argues that allowing the victim to testify at trial after being wheeled into the courtroom on a gurney was unfairly prejudicial pursuant to Tenn. R. Evid. 403.

Defendant concedes that he made no objection to Burton's testimony at trial. Furthermore, he failed to raise this issue in the motion for new trial. Generally, this results in waiver of the issue. Tenn. R. App. P. 3(e) and 36(a); State v. Walker, 910 S.W.2d 381, 386 (Tenn. 1995).

However, defendant contends that this Court should recognize plain error in this instance due to the prejudicial nature of the victim's presence in the courtroom. This Court may, in an exercise of its discretion, consider an issue which has been waived. However, in order for this Court to find plain error, the error must affect a substantial right of the accused. Tenn. R. Crim. P. 52(b).

Defendant claims that the victim's physical condition elicited such sympathy from the jury that he was denied the right to a fair trial. We disagree. There is no authority to support the proposition that a victim may not testify merely because the victim is in bad physical condition. Defendant does not question Burton's competency to testify as a result of his injuries. Certainly, Burton had a clear recollection of the incident as defendant concedes that his testimony at trial was substantially similar to the testimony given at his deposition.

Moreover, Burton identified defendant as the perpetrator of the shooting. Clearly, the probative value of his testimony outweighed any prejudice resulting from what defendant refers to as the "grand and spectacular theater" of bringing Burton

² At the time of trial, Burton was paralyzed from the second thoracic vertebrae down to his toes and was blind as a result of the shooting. He had difficulty speaking and was subject to extreme cramps.

to the witness stand. We find no plain error.

This issue is without merit.

MEDICAL TESTIMONY

In his next issue, defendant contends that the trial court erred in denying defendant's motion to limit the medical testimony relating to Burton's injuries. He claims that much of the medical testimony presented by the state was irrelevant to the issues before the jury. He further asserts that the prejudicial nature of such testimony outweighed its probative value.

The determination of the relevance or probative value of evidence is within the trial court's discretion. State v. Leath, 744 S.W.2d 591, 593 (Tenn. Crim. App. 1987). The decision of the trial court will not be overturned absent a clear showing of an abuse of that discretion State v. Williamson, 919 S.W.2d 69, 79 (Tenn. Crim. App. 1995); State v. Hayes, 899 S.W.2d 175, 183 (Tenn. Crim. App. 1995).

Prior to trial, the trial court found that medical testimony would be admissible as it was relevant to prove the elements of the charged offenses. We agree. Evidence is relevant if it has "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." Tenn. R. Evid. 401. The nature and extent of Burton's injuries are relevant to prove the defendant's intent to kill. Accordingly, we find no abuse of discretion in allowing the state to present medical testimony concerning the nature of Burton's injuries.

Defendant points to several portions of Dr. Virginia Eddy's testimony as being irrelevant and highly prejudicial. However, defendant made no objections to Dr. Eddy's testimony at trial. Therefore, any allegation regarding specific portions of Dr. Eddy's testimony is waived. Tenn. R. Crim. P. 36(a). Furthermore, if there was error, it was harmless. Tenn. R. Crim. P. 52(a).

This issue has no merit.

AMENDMENT TO THE INDICTMENT

Defendant next contends that the trial court erred in allowing the state to amend the indictment to provide for two counts of aggravated assault. He also contends that the crime of reckless aggravated assault did not exist on the date in question; therefore, to allow defendant to be tried and convicted of this offense violated his rights against *ex post facto* laws.

At the time of the crime, aggravated assault was defined as “intentionally, knowingly or recklessly” causing bodily injury to another while using or displaying a deadly weapon. Tenn. Code Ann. §§ 39-13-101(a)(1), 39-13-102(a)(1)(B) (1991). Under that statute, aggravated assault was a Class C felony. Tenn. Code Ann. § 39-13-102(b) (1991). However, effective May 12, 1993, four days after the shooting, the legislature amended the statute to provide that reckless aggravated assault is a Class D felony, while intentional or knowing aggravated assault remained a Class C felony. Tenn. Code Ann. § 39-13-102(a), (d) (Supp. 1993).

Prior to trial, defendant moved to strike Count Two of indictment, as it charged intentional, knowing and reckless aggravated assault. In effect, defendant’s argument was that Count Two was duplicitous and defective as it charged both a Class C and a Class D felony. The state argued that defendant was indicted pursuant to the aggravated assault statute in effect at the time the crimes were committed. However, because the new statute provided for a lesser punishment for reckless aggravated assault, the trial court allowed the state to amend the indictment to provide for separate, alternative counts of aggravated assault. Specifically, Count Two was amended to charge intentional or knowing aggravated assault, and Count Three was added to charge reckless aggravated assault. This was done so that defendant would receive the benefit of the reduced punishment for reckless aggravated assault if convicted of that offense.³

³ Tenn. Code Ann. § 39-11-112 provides:

[w]henver any penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, any offense, as defined by the statute or act being repealed or amended, committed while such statute or act

Rule 7(b) of the Tennessee Rules of Criminal Procedure provides that “if no additional or different offense is thereby charged and no substantial rights of the defendant are thereby prejudiced, the court may permit an amendment without the defendant's consent before jeopardy attaches.”

Contrary to defendant’s position, the amended indictment did not charge an additional offense. Whether an aggravated assault is “intentional or knowing,” or whether it is “reckless,” it is still an aggravated assault. The only difference is the punishment.

Defendant was indicted pursuant to the statute in effect at the time the offenses were committed. The mental states of intentionally, knowingly and recklessly were encompassed in the original indictment. For the sake of clarity, the trial court ordered that the indictment be amended to provide for separate, alternative counts of aggravated assault.

Moreover, amending the indictment served to benefit the defendant as he would have been punished for a Class C felony under the statute in effect at the time of the offense. Instead, defendant was convicted of the Class D reckless aggravated assault. Accordingly, we find no error in allowing the state to amend the indictment to provide for two (2) counts of aggravated assault.

This issue is without merit.

SENTENCING

Finally, defendant contends that the sentences imposed by the trial court were erroneous. More specifically, he claims that he was not afforded a sentencing hearing within 45 days as required by Tenn. Code Ann. § 40-35-209(a). He also argues that the trial court erred in imposing the maximum sentence within the range

was in full force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense. Except as provided under the provisions of § 40-35-117, in the event the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act.

(Emphasis added).

for each of his convictions. He further asserts that the trial court erred in imposing consecutive sentences.

A. Sentencing Hearing Delay

Defendant initially argues that his sentencing hearing was not timely conducted. He was convicted of these offenses on March 8, 1995. The sentencing hearing was conducted on April 27, approximately fifty (50) days after the date of conviction. Tenn. Code Ann. § 40-35-209(a) provides that the trial court shall conduct a sentencing hearing “no more than forty-five (45) days after the finding of guilt.”

Any error concerning the delay is harmless at best. Firstly, defendant has not established that he was prejudiced by any delay. Secondly, this Court has previously held that statutory provisions relating to the timing of court actions are not mandatory, but merely directory, and unless there is a showing of prejudice, any error is harmless. State v. Jones, 729 S.W.2d 683, 685 (Tenn. Crim. App. 1986).

This issue is without merit.

B. Length of Sentences

Defendant further claims that the trial court erred in imposing the maximum sentence for each offense. He argues that the trial court misapplied four enhancement factors. He also contends that the trial court improperly considered the death of the victim in imposing the sentence.⁴

(1) Standard of Review

This Court’s review of the sentence imposed by the trial court is *de novo* with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d). This presumption is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If the trial court fails to comply

⁴ Burton died on May 12, which was after the initial sentencing hearing but before the trial court imposed the sentences.

with the statutory directives, there is no presumption of correctness and our review is *de novo*. State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997).

The burden is upon the appealing party to show that the sentence is improper. Tenn. Code Ann. § 40-35-401(d) Sentencing Commission Comments. In conducting our review, we are required, pursuant to Tenn. Code Ann. § 40-35-210, to consider the following factors in sentencing:

(1) [t]he 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.

If no mitigating or enhancement factors for sentencing are present, Tenn. Code Ann. § 40-35-210(c) provides that the presumptive sentence shall be the minimum sentence within the applicable range. See State v. Fletcher, 805 S.W.2d 785, 788 (Tenn. Crim. App. 1991).⁵ However, if such factors do exist, a trial court should start at the minimum sentence, enhance the minimum sentence within the range for enhancement factors and then reduce the sentence within the range for the mitigating factors. Tenn. Code Ann. § 40-35-210(e). No particular weight for each factor is prescribed by the statute, as the weight given to each factor is left to the discretion of the trial court as long as its findings are supported by the record. State v. Moss, 727 S.W.2d 229, 238 (Tenn. 1986); State v. Santiago, 914 S.W.2d 116, 125 (Tenn. Crim. App. 1995); see Tenn. Code Ann. § 40-35-210 Sentencing Commission Comments. Nevertheless, should there be no mitigating factors, but enhancement factors are present, a trial court may set the sentence above the minimum within the range. Tenn. Code Ann. § 40-35-210(d); see Manning v. State, 883 S.W.2d 635, 638 (Tenn. Crim. App. 1994).

(2) Trial Court's Findings

⁵ Effective July 1, 1995, Tenn. Code Ann. § 40-35-210(c) was amended as follows:

The presumptive sentence for a Class B, C, D and E felony shall be the minimum sentence in the range if there are no enhancement or mitigating factors. The presumptive sentence for a Class A felony shall be the midpoint of the range if there are no enhancement or mitigating factors.

In determining defendant's sentence, the trial court considered the following enhancement factors:

Count One, Attempted First Degree Murder of Burton:

(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 personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great, Tenn. Code Ann. § 40-35-114(6);

(3) The defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense, Tenn. Code Ann. § 40-35-114(9);⁶ and

(4) During the commission of the felony, the defendant willfully inflicted bodily injury upon another person, or the actions of the defendant resulted in the death of or serious bodily injury to a victim or a person other than the intended victim, Tenn. Code Ann. § 40-35-114(12).

Count Three, Reckless Aggravated Assault on Watson:

(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 personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great, Tenn. Code Ann. § 40-35-114(6); and

(3) During the commission of the felony, the defendant willfully inflicted bodily injury upon another person, or the actions of the defendant resulted in the death of or serious bodily injury to a victim or a person other than the intended victim, Tenn. Code Ann. § 40-35-114(12).

The trial court found no mitigating factors.

(3) Prior Criminal History

Defendant claims that the trial court erred in applying enhancement factor number 1 because his entire criminal history consists of only one misdemeanor conviction. Tenn. Code Ann. § 40-35-114(1) does not require that prior convictions be felonies. See State v. Williamson, 919 S.W.2d 69, 82 (Tenn. Crim. App. 1995) (upholding the application of Tenn. Code Ann. § 40-35-114(1) as enhancement

⁶ Although the trial court stated that this factor was applied to Count Three only, a review of the entire sentencing hearing indicates that the trial court intended to apply this enhancement factor to the attempted first degree murder conviction, not the reckless aggravated assault conviction.

factor when defendant had only one prior conviction for driving under the influence). Furthermore, it appears that the trial court placed little weight on this factor. This factor was appropriately applied.

(4) Great Personal Injuries

Defendant objects to the trial court's application to reckless aggravated assault of enhancement factor number 6, that the personal injuries inflicted upon the victim were particularly great. He claims that serious bodily injury is a necessary element of aggravated assault. However, defendant was indicted and convicted of aggravated assault by the use of a deadly weapon. As such, serious bodily injury is not a necessary element of the convicted offense. Therefore, the trial court properly applied this enhancement factor.

(5) Deadly Weapon

Defendant also disputes the application of Tenn. Code Ann. § 40-35-114(9) to the aggravated assault conviction. He correctly asserts that the use of a deadly weapon is an essential element of the offense. However, a complete review of the sentencing hearing indicates that the trial judge merely misspoke when pronouncing her decision. During the sentencing hearing, the following exchange occurred:

THE COURT: . . . let me ask you this, General. Since you alleged in your indictment the gun as to Count 3, do you agree that [factor nine] is not applicable?

GENERAL HAAS: Yes, Your Honor, as to Count 3, it is not applicable.

THE COURT: Okay. So your argument as to that is only on Mr. Burton. . .

It is clear from the record that the trial court realized the impropriety of applying factor nine to the aggravated assault conviction, and instead intended to apply that factor to the attempted first degree murder conviction. Furthermore, because defendant used a deadly weapon in the commission of these offenses, Tenn. Code Ann. § 40-35-114(9) was properly applied to the attempted first degree murder conviction.

(6) Bodily Injury of Victim

Defendant also contends that the trial court erred in applying enhancement factor number 12 to both convictions. Tenn. Code Ann. § 40-35-114(12) provides, “[d]uring the commission of the felony, the defendant willfully inflicted bodily injury upon another person, or the actions of the defendant resulted in the death of or serious bodily injury to a victim or a person other than the intended victim.” In support of his argument for the attempted first degree murder conviction, defendant cites this Court’s opinion in State v. Makoka, 885 S.W.2d 366 (Tenn. Crim. App. 1994). In Makoka, this Court held that enhancement factor number 12 could not be considered based on the injuries sustained by the victim of an attempted first or second degree murder. 885 S.W.2d at 374. The Court reasoned that a victim of either of these offenses was “susceptible to the infliction of serious bodily injury.” Id. The Court further stated that because the legislature considered the infliction of serious bodily injury when classifying the offenses, enhancing the punishment based upon serious bodily injury would constitute double enhancement. Id.

However, the reasoning in Makoka was questioned in the later case of State v. Freeman, 943 S.W.2d 25, 31-32 (Tenn. Crim. App. 1996). In Freeman, this Court recognized that an attempted murder does not necessarily involve bodily injury. 943 S.W.2d at 32 (quoting State v. Trusty, 919 S.W.2d 305, 313 n.7 (Tenn. 1996)). The Court further pointed out that the cases cited in Makoka involved either murder or aggravated assault by serious bodily injury. Id. Therefore, the Court declined to follow Makoka and held that enhancement factor number 12 could be considered based upon the injuries sustained by the victim of an attempted murder.

Accordingly, we find that because bodily injury is not an essential element of the offense of attempted second-degree murder, the trial court properly enhanced the defendant’s sentence for that offense with regard to the victim who was actually wounded. In so finding, we note our disagreement with the Makoka court’s reasoning to the contrary given the language of our Supreme Court in Trusty.

943 S.W.2d at 32.

We agree with the holding in Freeman and find that the trial court properly applied enhancement factor number 12 to the attempted first degree murder conviction.

Moreover, because serious bodily injury is not an essential element of aggravated assault by the use of a deadly weapon, the trial court properly applied this enhancing factor to the aggravated assault conviction.

(7) Death of Victim

We now address defendant's argument that the trial court improperly considered Burton's death in imposing sentence because the state did not prove that his death was caused by the injuries sustained on March 8, 1993. Despite the introduction of the death certificate in the record, we do not find that the trial court considered Burton's death in imposing sentence. Indeed, at the sentencing hearing, the trial court remarked:

at any rate, I don't know that it matters ultimately because of the degree of the injuries that I already had the proof on. I think it is almost an academic point in light of the condition that Mr. Burton was in and the expert testimony that I received regarding that that is certainly indisputably properly before the Court, so I'm just kind of certainly going to let you make that objection on the record, and just sort of treat it as, for my purposes, neither here nor there for anything I'm going to do.

This issue is without merit.

C. Consecutive Sentencing

Finally, defendant argues that the trial court improperly ordered his sentences to run consecutively. He claims that the trial court did not make sufficient findings to support consecutive sentencing.

Consecutive sentencing is governed by Tenn. Code Ann. § 40-35-115. The trial court may order sentences to run consecutively if it finds by a preponderance of the evidence that one or more of the required statutory criteria exist. State v. Black, 924 S.W.2d 912, 917 (Tenn. Crim. App. 1995). Furthermore, the court is required to determine whether the consecutive sentences (1) are reasonably related to the severity of the offenses committed; (2) serve to protect the public from further criminal conduct by the offender; and (3) are congruent with general principles of sentencing. State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995).

The trial court found that defendant was a dangerous offender. Tenn. Code Ann. § 40-35-115(b)(4). We agree. The defendant, without provocation, repeatedly shot at two people while they sat helpless in an automobile. Furthermore, the terms

imposed by the trial judge are reasonably related to the severity of the offenses and are necessary to protect the public from further criminal acts by the offender. State v. Wilkerson, 905 S.W.2d at 938. Although the trial court did not make the findings required by Wilkerson, we find that these factors are present under our power of *de novo* review. See State v. Adams, 859 S.W.2d 359, 363 (Tenn. Crim. App. 1993); State v. Edward Thompson, C.C.A. No. 03C01-9503-CR-00060, Cocke County (Tenn. Crim. App. filed December 12, 1996, at Knoxville). Consecutive sentencing is appropriate.

This issue is without merit.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

JOE G. RILEY, JUDGE