

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1997 SESSION

**FILED**

June 17, 1998

Cecil W. Crowson  
Appellate Court Clerk

STATE OF TENNESSEE, )  
)  
Appellee, )  
)  
VS. )  
)  
ROBERT ANTHONY PAYNE, )  
a.k.a. ANTHONY JORDAN, )  
)  
Appellant. )

NO. 01C01-9701-CR-00031

DAVIDSON COUNTY

HON. ANN LACY JOHNS, JUDGE

(Vehicular Homicide, Reckless  
Endangerment, Reckless  
Aggravated Assault, Intentional or  
Knowing Aggravated Assault)

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OPINION FILED: \_\_\_\_\_

**AFFIRMED**

**JOE G. RILEY,**  
**JUDGE**

## OPINION

The defendant, Robert Anthony Payne, a.k.a. Anthony Jordan, was convicted by a Davidson County jury of one (1) count of vehicular homicide, a Class C felony; two (2) counts of reckless endangerment with a deadly weapon, Class E felonies; three (3) counts of reckless aggravated assault, Class D felonies; and one (1) count of intentional or knowing aggravated assault, a Class C felony. The trial court sentenced defendant as a Range II offender to ten (10) years for vehicular homicide, two (2) years for each count of reckless endangerment, eight (8) years for each count of reckless aggravated assault, and ten (10) years for intentional or knowing aggravated assault. The trial court ordered that the sentences run consecutively for an effective sentence of forty-eight (48) years.

On appeal, defendant presents five issues for review:

- (1) whether the trial court erred in denying the defendant's motion to sever;
- (2) whether the evidence is sufficient to support findings of guilt for both counts of reckless endangerment;
- (3) whether the trial court violated the defendant's due process rights and rights against double jeopardy by allowing separate convictions for reckless endangerment and aggravated assault;
- (4) whether the parole eligibility jury instruction was unconstitutional; and
- (5) whether the trial court erred in imposing excessive and consecutive sentences.

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

## FACTS

A few minutes after midnight on July 25, 1995, Sergeant Scott Robinson saw the defendant driving around the parking lot at the Holiday Inn Vanderbilt in Nashville. The officer said the defendant's older model car seemed out of place at the "high-dollar" hotel. Scott checked the license tag number with the dispatcher, and the tag was registered to a newer model rental car. Robinson followed the

defendant at a safe distance, but did not signal the defendant to pull over because he was waiting for "back-up." The defendant led the officer on and off the interstate, then stopped at Jefferson Street, jumped out of his car, approached the officer, and demanded to know why the officer was following him. The officer told the defendant to return to his car. The defendant entered his car and took off at a high rate of speed.

The officer followed the defendant. Near an intersection, the defendant made a U-turn and drove his car directly at Sgt. Robinson. Robinson took an evasive maneuver to avoid colliding with the defendant. The defendant later turned off his headlights in a residential neighborhood and continued to drive at a high rate of speed. Sgt. Robinson decided to end the pursuit because the two men had been traveling at speeds between 70 and 80 mph, and the defendant was driving with his lights off in a residential neighborhood. The defendant was not apprehended.

Four days later on July 29, 1995, Officer Allen Finchum was patrolling in approximately the same area where Robinson's pursuit had occurred several days before. Finchum was following another officer, Dhana Jones, who was in a patrol car several car lengths ahead of him. As Finchum approached an intersection, the defendant pulled out in front of him. Finchum had to swerve to avoid hitting the defendant. Finchum engaged his blue lights and stopped the defendant. Officer Jones turned her vehicle around to assist Officer Finchum. The defendant exited his car and approached Finchum's patrol car. He accused the officer of speeding and began arguing with him. When defendant told the officer he did not have any identification on him, the officer told him to return to his car and look for identification.

The officer asked the police dispatcher to check the license tag number on the defendant's car, but no information was available for the number provided. When the officer approached the defendant's car, he asked the defendant to step out of the car. The defendant started the ignition and drove away with the officer clinging on to the vehicle for a brief time before he fell off. Officers Finchum and Jones got into their respective vehicles and followed in pursuit of defendant.

Defendant continued driving through a residential area, ignoring stop signs. At one intersection the defendant made a U-turn and drove his car towards the officers who had to take evasive measures to avoid a collision. At another intersection, the defendant went around a car stopped at a traffic light and continued driving.

Defendant's car eventually collided at an intersection with a vehicle driven by Hattie Gray. Although Officer Finchum testified that his speed was between 55 and 60 mph, he and Officer Jones were not able to catch up to the defendant prior to the collision.

As a result of the collision, two children in the victim's car were ejected. The defendant's car struck a utility pole which caused it to stop. The street on which defendant was traveling was a two-lane street marked with a double yellow line to indicate no passing. An accident reconstructionist estimated that the defendant's car was traveling 93 mph before impact.

Noel Aihie was driving on the same street when he noticed the victim's car ahead of him waiting to make a left turn at the intersection. Aihie looked in his rearview mirror and saw the defendant coming up behind him at a high rate of speed. Aihie estimated the speed was at least 70 mph. Aihie veered his pickup truck to the right to get out of the defendant's way. The defendant went into the wrong lane to go around Aihie just as the victim's car made a left turn. The defendant's car struck the victim's car slightly behind the driver's side.

Gray was hospitalized for two weeks; she was in a coma for seven days and sustained broken ribs, a broken pelvis, crushed ankles, a collapsed lung, and an injury to the head. Her five-year-old daughter, Ashley Gray, died from a skull fracture after being ejected from the car. Another daughter, Jasmine Dartis, then 7 months old, was also ejected from the car. She sustained a head injury, a broken leg and abrasions to the face and arms. Also injured was James Gray, age 10, who was seated in the back seat behind his mother. He sustained a head injury and leg injury and underwent rehabilitation for two months.

Officers Finchum and Jones apprehended the defendant as he crawled from his vehicle which was on fire. He told the officers they had the wrong person. At

the hospital, he told authorities his name was Anthony Jordan.

The defendant did not present any proof at trial.

### **SEVERANCE OF OFFENSES**

The defendant contends the trial court erred in failing to grant his pretrial motion for severance of Counts 7 and 8 from Counts 1 through 6. Counts 7 and 8 charged reckless endangerment and aggravated assault originating from the police pursuit on July 25, 1995, while the remaining counts resulted from the police pursuit and collision on July 29, 1995.

#### **A.**

Counts 1 through 8 of the indictment were joined permissively pursuant to Tenn. R. Crim. P. 8(b). The indictment included:

- Count 1: Second degree murder (for the death of Ashley Gray, July 29, 1995)
- Count 2: Vehicular homicide (for the death of Ashley Gray, July 29, 1995)
- Count 3: Reckless endangerment (endangering the public at large, July 29, 1995)
- Count 4: Aggravated assault (causing bodily injury to Hattie Gray with a deadly weapon, a car, July 29, 1995)
- Count 5: Aggravated assault (causing bodily injury to James Gray with a deadly weapon, a car, July 29, 1995)
- Count 6: Aggravated assault (causing bodily injury to Jasmine Dartis with a deadly weapon, a car, July 29, 1995)
- Count 7: Reckless endangerment (endangering the public at large, July 25, 1995)
- Count 8: Aggravated assault (causing Sgt. Scott Robinson to fear imminent bodily injury with a deadly weapon, a car, July 25, 1995).

The defendant filed a motion to sever Counts 7 and 8 from the first six (6) counts. He argued that the offenses from two separate dates were not part of a common

scheme or plan, and the evidence of one set of offenses would not be admissible in the trial of the other. The trial court denied the defendant's motion.

**B.**

A motion for severance of offenses is a matter which addresses itself to the sound discretion of the trial court, and this Court will not interfere with the exercise of this discretion unless it appears on the face of the record that the accused was prejudiced by the court's ruling. State v. Furlough, 797 S.W.2d 631, 642 (Tenn. Crim. App. 1990); State v. Wiseman, 643 S.W.2d 354, 362 (Tenn. Crim. App. 1982). Whether severance should be granted "depends upon the facts and circumstances involved in the various crimes charged." State v. Morris, 788 S.W.2d 820, 822 (Tenn. Crim. App. 1990).

Tennessee Rules of Criminal Procedure provide for mandatory and permissive joinder of offenses charged in separate indictments. It is permissible to join offenses under Rule 8(b) "if the offenses constitute parts of a common scheme or plan or if they are of the same or similar character." Under Rule 14(b)(1) a defendant shall have the right to severance of the offenses unless the offenses are (a) part of a common scheme or plan and (b) the evidence of one would be admissible upon the trial of the others. State v. Hoyt, 928 S.W.2d 935, 943 (Tenn. Crim. App. 1995); State v. Hallock, 875 S.W.2d 285, 289 (Tenn. Crim. App. 1993). To avoid severance, both portions of the rule must be satisfied. State v. Hallock, 875 S.W.2d at 289.

Rule 14(b)(1) requires the trial court to find a common scheme or plan to meet the first prong. State v. Hoyt, 928 S.W.2d at 943. There are three categories of common scheme or plan evidence: (1) distinctive design or signature crimes; (2) a larger continuing plan or conspiracy; and (3) same transaction. N. Cohen, D. Paine & Sheppard, Tennessee Law of Evidence § 404.11 (3d ed. 1995).

Pertinent in this case are crimes that are of "distinctive design or signature." To fall into this category, similar crimes "are admissible to show the defendant's 'modus operandi' from which it may be inferred that the defendant probably committed the nearly identical crime for which he or she is on trial." Id. The modus

operandi must be so unique and distinctive to be like a signature to be probative of the defendant's identity. State v. Hallock, 875 S.W.2d at 290.

The second prong of Rule 14(b)(1) requires that the evidence of the offenses be admissible at the trial of the other. State v. Hoyt, 928 S.W.2d at 943; State v. McKnight, 900 S.W.2d 36, 50 (Tenn. Crim. App. 1994). Evidence that the accused committed crimes independent of those for which he is on trial is generally inadmissible because such evidence lacks relevance and invites the finder of fact to infer guilt from propensity. Tenn. R. Evid. 404(b). However, evidence of other crimes, wrongs, or acts may be admissible for other purposes. Id.

In State v. Parton, 694 S.W.2d 299, 303 (Tenn. 1985), the Supreme Court held that proof of other crimes may be admissible if, after a jury-out hearing, the trial court determines: (1) the evidence is relevant to an issue at trial, such as identity, and (2) the probative value of the evidence outweighs its prejudicial effect. Tenn. R. Evid. 404(b) was drafted in accordance with these standards. See Tenn. R. Evid. 404, Advisory Commission Comments.

This Court must now determine whether the admission of this evidence was relevant to establish one of the exceptions to Rule 404(b).

### **C.**

The trial court is required to hold a pretrial hearing to determine the appropriateness of severance. State v. Hoyt, 928 S.W.2d at 944-45. The court must make a determination that the evidence of one crime is relevant to a material issue in the trial of the other. Id. at 945. The court must then consider whether the probative value of the evidence outweighs any prejudicial effect. Id.

In this case the trial court only briefly addressed the issue of severance before trial and during the trial. The trial court failed to make a finding as to the relevance of the evidence. The trial court also failed to weigh the probative value against the prejudicial effect. This Court will complete this analysis pursuant to Tenn. R. Evid. 404(b).

### **D.**

We conclude that the evidence was relevant to proving identity and motive.

The identity of the defendant as the perpetrator of the July 25th incident was an issue at trial. The evidence showed that the defendant was driving the same car both times. Sgt. Robinson identified the defendant as the same person he followed during the early morning hours of July 25th. Robinson testified that the license tag displayed on the defendant's car was registered to a newer model rental car. Looking at a photograph made at the situs of the July 29th collision, he identified the defendant's car and license tag depicted in the photograph as the same that he saw on July 25th.

After the collision on July 29th, Officer Jones testified that she heard the defendant tell officers they did not have the right person. Officer Finchum identified the defendant's car and tag in a photograph as the one he had pursued. Officer Charles Drew testified that he visited the defendant in the hospital. The defendant identified himself as "Anthony John Jordan." Officer Drew identified the defendant as the same man he spoke with in the hospital.

The evidence of both police pursuits and confrontations with officers was relevant to the issue of identity because the defendant told officers they had the wrong person on July 29th and gave authorities an alias. Moreover, Sgt. Robinson was not able to apprehend the offender of the July 25th incident, making the defendant's identity a material issue. Furthermore, the evidence is also relevant to the defendant's motive for running from police.

#### **E.**

This Court must now weigh the probative value of the evidence against any unfair prejudicial effect. This Court said in McKnight:

Factors in weighing the probative value include the prosecution's need for the evidence, the likelihood the defendant committed the other crimes, and the degree of its relevance. The similarity of the acts makes the probative value particularly significant.

900 S.W.2d at 51.

In this case, the prejudicial effect did not outweigh the probative value. The evidence was extremely relevant to show identity. Moreover, the prejudicial impact of joining the offenses was slight, considering the overwhelming nature of the evidence against defendant. Thus, the trial court did not err in denying the

defendant's motion for severance.

This issue is without merit.

### **SUFFICIENCY OF THE EVIDENCE**

The defendant next contends that the evidence contained in the record is insufficient, as a matter of law, to support a finding by a rational trier of fact that he is guilty of reckless endangerment to the "public at large" in Counts 3 and 7. The crux of defendant's argument is that the evidence is insufficient to show that any specific individual was endangered by the defendant's conduct.

#### **A.**

When an accused challenges the sufficiency of the convicting evidence, this Court must review the record to determine if the evidence adduced at trial is sufficient "to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990).

In determining the sufficiency of the convicting evidence, this Court does not reweigh or reevaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859, *cert. denied*, 352 U.S. 845, 77 S.Ct. 39, 1 L.Ed.2d 49 (1956). To the contrary, this Court is required to afford the state the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this Court. State v. Cabbage, 571 S.W.2d at 835.

“A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

Since a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused, as the appellant, has the burden in this Court of illustrating why the evidence is insufficient to support the verdicts returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record are insufficient, as a matter of law, for a rational trier of fact to find that the accused is guilty beyond a reasonable doubt. Id. at 914.

## **B.**

Defendant contends that this Court has held that a charge of “[r]eckless endangerment requires that a specific individual be placed in imminent danger by the defendant’s reckless acts.” The defendant argues that there is no evidence that “any specific identifiable person or persons were endangered by the defendant’s conduct apart from the victims named in the remaining counts of the indictment.”

### **1. Statutory Definition of Reckless Endangerment**

Reckless endangerment occurs when a person “recklessly engages in conduct which places or may place another person in imminent danger of death or serious bodily injury.” Tenn. Code Ann. § 39-13-103(a) (emphasis added). Reckless endangerment is a Class E felony when it is committed with a deadly weapon. Tenn. Code Ann. § 39-13-103(b). “Deadly weapon” means “[a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury.” Tenn. Code Ann. § 39-11-106(5)(B). An automobile qualifies as a deadly weapon. State v. Tate, 912 S.W.2d 785, 787-88 (Tenn. Crim. App. 1995).

### **2. July 25th Incident**

Regarding the reckless endangerment charge stemming from the July 25th incident, the evidence showed that Sgt. Robinson followed the defendant from a hotel parking lot near Vanderbilt onto the interstate, off the interstate, and into a residential neighborhood shortly after midnight. The defendant stopped his car,

approached the officer, and demanded to know why he was being followed. When the officer told him to wait in his car, the defendant returned to his car and drove off at a high rate of speed. Sgt. Robinson followed the defendant in his patrol car. The defendant made a sharp U-turn and drove his car in the direction of Robinson's patrol car. The officer had to take evasive measures to avoid a collision. The defendant continued on at a high rate of speed, turned off his headlights to avoid detection and continued driving in a residential neighborhood. The officer ended pursuit in the interest of safety.

In State v. Clifford Bidwell, C.C.A. No. 03C01-9308-CR-00287, Bradley County (Tenn. Crim. App. filed August 30, 1994, at Knoxville), the defendant was involved in a high speed chase with a patrol officer after a burglary. In that case, the defendant led the officer through stop signs and ran through a police roadblock in excess of the posted speed limit. This Court found that the evidence was sufficient to sustain a conviction for reckless endangerment, stating:

Although the state did not establish that any particular person was threatened with death or serious bodily injury as a result of appellant's reckless operation of a motor vehicle, we find that the evidence is sufficient to convict him of reckless endangerment. Appellant drove his automobile at a high rate of speed in a congested area through several stop signs and through a police roadblock. It is not necessary for the state to prove that a particular individual was threatened with death or serious bodily injury while in the zone of danger created by appellant. It is sufficient if his conduct is reasonably likely to place others in danger.

State v. Clifford Bidwell, 1994 Tenn. Crim. App. LEXIS 558 at \*2 (emphasis added).

We find the reasoning of this Court's decision in Bidwell to be persuasive. *But see* State v. Wayne L. Hughes, C.C.A. No. 01C01-9502-CC-00033, Coffee County (Tenn. Crim. App. filed June 20, 1996, at Nashville) (stating that reckless endangerment "requires that a specific individual be placed in imminent danger by the defendant's reckless acts."). The defendant drove through a residential neighborhood at speeds in excess of 70 mph with his headlights turned off in order to avoid being stopped by Sgt. Robinson. Our reckless endangerment statute includes conduct that not only "places" but also "may place another person in imminent danger of death or serious bodily injury." Tenn. Code Ann. §39-13-103(a) (emphasis added). It was certainly reasonable for the jury to conclude that

defendant's actions "may" have placed those in the residential neighborhood in imminent danger of serious bodily injury or death. We, therefore, find that the evidence is sufficient to support defendant's conviction for reckless endangerment in Count 7.

### **3. July 29th Incident**

Regarding the reckless endangerment charge stemming from the July 29th incident, the evidence showed that Officer Finchum had to swerve to avoid hitting the defendant at an intersection. When the officer stopped the defendant's car, he asked the defendant to step out of his car. The defendant closed his car door and started the car. Officer Finchum, who was clinging to the car, eventually fell off as the defendant drove away.

Officers Finchum and Jones followed the defendant in their cars. Finchum said the area was a residential/commercial neighborhood, and residents were on the sidewalks when the pursuit occurred. At one point during the pursuit, the defendant made a U-turn in the street and drove his car directly at Officer Finchum who had to take evasive action to avoid a collision. Officer Jones who was behind Finchum in her patrol car also had to take evasive action to avoid a collision.

Noel Aihie testified that he was coming to a stop behind the victim's vehicle. Aihie looked in his rearview mirror and saw the defendant's car speeding toward him from behind. Aihie said he tried to move his pickup truck over to the right to get out of the way.

The evidence indicated that the defendant recklessly endangered Officers Finchum and Jones, Aihie and the pedestrians on the sidewalks. None of these individuals was the subject of charges in the other counts.

This Court is of the opinion the evidence contained in the record is clearly sufficient to support a finding by a rational trier of fact that the defendant was guilty of reckless endangerment from the July 29th pursuit in Count 3 as well as the July 25th pursuit in Count 7. Tenn. R. App. 13(e); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

This issue is without merit.

## PROPRIETY OF “DUAL CONVICTIONS”

The defendant next contends that the trial court erred in allowing separate convictions for reckless endangerment and aggravated assault because the multiple convictions violated double jeopardy and due process protections of the Tennessee and United States Constitutions. He argues that if this Court determines that the evidence is sufficient to uphold the reckless endangerment convictions in Counts 3 and 7, separate counts of aggravated assault in Counts 4, 5, 6, and 8 cannot stand.

### **A. Double Jeopardy**

The defendant first contends that separate convictions for reckless endangerment and reckless aggravated assault violate the principles of double jeopardy. He argues his conviction for the July 29th reckless endangerment in Count 3 should merge with his convictions for the July 29th reckless aggravated assaults in Counts 4, 5, and 6. He similarly argues that his conviction for the July 25th reckless endangerment in Count 7 should merge with his conviction for the July 25th aggravated assault in Count 8. The defendant argues that under State v. Denton, 938 S.W.2d 373 (Tenn. 1996), this Court should merge the convictions. Defendant contends that this Court has held that the elements of aggravated assault committed with a deadly weapon include the elements of reckless endangerment. The defendant also argues that one act of reckless driving, despite how many people it may victimize, does not transfer into separate or multiple acts. The defendant relies upon State v. Ramsey, 903 S.W.2d 709, 713 (Tenn. Crim. App. 1995).

In Ramsey this Court consolidated multiple counts of reckless endangerment because they arose from a single act of driving. 903 S.W.2d at 713. This Court reasoned that “if the statute prohibits a course of conduct, as opposed to individual acts, then there can be only one (1) conviction even though several acts constituting the course of conduct may be proven.” Ramsey, 903 S.W.2d at 713. But this Court went on to say that it was “not fashion[ing] a blanket rule that provides a defendant’s

continuous operation of a vehicle may only result in one act of reckless endangerment under the statute.” Id.

The determination of the double jeopardy issue rests upon the following: (1) an analysis of the statutory offenses; (2) an analysis of the evidence used to prove the offenses; (3) a consideration of whether there were multiple victims or discrete acts; and (4) a comparison of the purposes of the respective statutes. State v. Denton, 938 S.W.2d at 381. The evidence in this case supports convictions for both reckless endangerment and aggravated assault on all counts because there were different victims and distinct conduct involved for each offense. The reckless endangerment in Count 3 occurred when the defendant drove his vehicle recklessly and placed Officers Finchum and Jones, motorist Aihie and pedestrians in danger of serious bodily injury or death. The aggravated assaults in Counts 4, 5 and 6 occurred when defendant’s car collided with the vehicle driven by Hattie Gray, causing bodily injury to three (3) victims.

Furthermore, the reckless endangerment conviction in Count 7 occurred when defendant drove at speeds in excess of 70 mph through a residential neighborhood with no lights. The aggravated assault in Count 8 occurred when defendant drove his vehicle towards Sgt. Robinson’s vehicle, causing Sgt. Robinson to fear imminent bodily injury. Double jeopardy principles are not violated by defendant’s separate convictions for aggravated assault with a deadly weapon and reckless endangerment with a deadly weapon under these circumstances.

This issue is without merit.

## **B. Due Process**

The defendant next contends that separate convictions for aggravated assault committed with a deadly weapon and reckless endangerment committed with a deadly weapon violate his due process rights. The defendant relies on State v. Anthony, 817 S.W.2d 299 (Tenn. 1991).

### **1.**

In Anthony, the Supreme Court held that when kidnapping is “essentially incidental” to armed robbery, due process prohibits a conviction for kidnapping.

Anthony, 817 S.W.2d at 307. The Court determined the test to be:

whether the confinement, movement, or detention is essentially incidental to the accompanying felony and is not, therefore, sufficient to support a separate conviction for kidnapping, or whether it is significant enough, in and of itself, to warrant independent prosecution and is, therefore, sufficient to support such a conviction.

817 S.W.2d at 306. The Anthony court noted that there is no prohibition against convictions for both offenses “simply because they arise out of the same episode.”

Id. at 307. A court should instead determine if there is a “substantially increased risk of harm over and above that necessarily present” in the crime of robbery. Id.

Defendant is asking this Court to draw the same analogy with reckless endangerment with a deadly weapon and aggravated assault with a deadly weapon.

Reckless endangerment is generally a Class A misdemeanor occurring when a person “recklessly engages in conduct which places or may place another person in imminent danger of death or serious bodily injury.” Tenn. Code Ann. § 39-13-103. It becomes a Class E felony when it is committed with a deadly weapon.

Aggravated assault occurs when an individual intentionally, knowingly or recklessly causes serious bodily injury to another or uses or displays a deadly weapon. Tenn. Code Ann. § 39-13-102(a). Intentional or knowing aggravated assault is a Class C felony, but reckless aggravated assault is a Class D felony. Tenn. Code Ann. § 39-13-102(d). The defendant was convicted of reckless aggravated assault in Counts 4 through 6.

## 2.

The defendant’s conduct created risk to others in addition to those named in the counts for aggravated assault. Making U-turns in the street, driving his vehicle toward the officers, passing a properly stopped car, and speeding through a populated semi-residential area lend themselves to the charge and conviction of reckless endangerment with a deadly weapon in Count 3. Although defendant had the opportunity to rectify his behavior, he continued his reckless driving which culminated in the collision which killed one innocent victim and seriously injured three (3) others as charged in the other counts.

Moreover, on July 25, defendant recklessly drove through a residential

neighborhood at an excessive speed giving rise to a reckless endangerment conviction in Count 7. By driving his car into the path of Sgt. Robinson's car, defendant committed an aggravated assault in Count 8. The charges of aggravated assault are not "essentially incidental" to the reckless endangerment conviction. The separate convictions do not offend due process rights.

The issue is without merit.

### **PAROLE ELIGIBILITY JURY CHARGE**

The defendant next challenges the trial court's use of the "Truth in Sentencing" instruction (codified at Tenn. Code Ann. § 40-35-201(b)) and argues that the trial court erred by "instructing the jury on the minimum number of years the defendant would serve before being eligible for parole." He contends (a) the statute requiring the instruction is unconstitutionally vague, (b) the statute violates due process and deprives the defendant of a fair and impartial jury, and (c) the statute is an unconstitutional attempt by the general assembly to exercise judicial powers in violation of the Tennessee Constitution.

#### **A.**

The state filed a request asking the trial court to charge the jury on the applicable range of punishment for all charges in the indictment and the lesser included offenses. The defendant objected.

The trial court instructed the jury as follows:

The jury will not attempt to fix any sentence; however, you may weigh and consider the meaning of a sentence of imprisonment. The range of punishment for the crimes involved herein is as follows . . .

(Emphasis added). The trial court then gave the statutory range of punishment for each offense, including the minimum amount of time a person must serve before reaching the earliest release eligibility date. The trial court further instructed the jury that whether a defendant is actually released on the earliest release eligibility date is a discretionary decision made by the Board of Paroles. These instructions were in accord with the statutory mandate. See Tenn. Code Ann. § 40-35-201(b)(2)(A).

## B.

In State v. Howard E. King, C.C.A. No. 02C01-9601-CR-00032, Shelby County (Tenn. Crim. App. filed October 22, 1996, at Jackson), *perm. to app. granted* (Tenn. March 10, 1997), a panel of this Court held the instruction constitutional.<sup>1</sup> However, in State v. Jason M. Weiskopf, C.C.A. No. 02C01-9611-CR-00381, Shelby County (Tenn. Crim. App. filed February 4, 1998, at Jackson), a panel of this Court found that the parole eligibility charge violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, § 8 of the Tennessee Constitution. The Court said the instruction “contained such egregious and fundamental error that it affected the fairness and the integrity of the judicial proceedings.” State v. Weiskopf, C.C.A. No. 02C01-9611-CR-00381, slip op. at 8. The jury in Weiskopf was told it could weigh and consider the meaning of a sentence of imprisonment just as in the instant case. This Court found that the jury “was implicitly instructed that they could consider punishment in determining the guilt or innocence of the defendant. In short, they were told they could consider extraneous information that had nothing whatever to do with guilt or innocence in arriving at their verdict.” Id. “Advising a jury that it can consider punishment allows consideration of extraneous information, not adduced as proof, that in no way relates to their determination of guilt or innocence.” Id. at 9.

Once the court determined that the instruction was unconstitutional, the Court then considered whether the giving of the instruction was harmless error. The Court noted that the evidence was clear that the defendant killed the victim. The real issue for the jury was to determine the degree of murder (premeditated first degree, second degree, or voluntary manslaughter). The jury was told it could weigh and

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<sup>1</sup> Other panels of this Court have also rejected challenges to the mandated instruction. State v. David Palmer, C.C.A. No. 01C01-9607-CR-00285, Davidson County (Tenn. Crim. App. filed November 20, 1997, at Nashville); State v. William K. Howell, C.C.A. No. 01C01-9610-CR-00443, Davidson County (Tenn. Crim. App. filed November 6, 1997, at Nashville); State v. Dwjuan L. Bradford, C.C.A. No. 01C01-9607-CR-00294, Davidson County (Tenn. Crim. App. filed September 30, 1997, at Nashville).

In State v. Jerry Ray Cooper, C.C.A. No. 01C01-9604-CC-00150, Lincoln County (Tenn. Crim. App. filed November 17, 1997, at Nashville), two members of the panel found the statute unconstitutional.

consider this sentencing information. The Court was “unable to conclude that this information had no impact upon the jury since the primary question for the jury in this case was the degree of homicide.” *Id.* at 10.

In a more recent case, State v. Michael Dinkins, C.C.A. No. 02C01-9702-CR-00075, Shelby County (Tenn. Crim. App. filed March 12, 1998, at Jackson), a panel of this Court held the “Truth in Sentencing” instruction unconstitutional because it violates Due Process as secured by Article 1, § 8 of the Tennessee Constitution.<sup>2</sup> The Court next considered whether the error in Dinkins was harmless. After finding that the evidence pointed “overwhelmingly to the guilt of the appellant” and the evidence went unchallenged, the Court concluded there was no dispute that the crime was committed. The Court then found that the parole eligibility instruction made no contribution to the jury’s verdict and found the error to be harmless. Slip op. at 10-11.

### C.

In the case *sub judice*, the jury was instructed as per the statute to “weigh and consider the meaning of a sentence of imprisonment.” The instruction violated the defendant’s rights to due process by instructing the jury it could consider extraneous information in determining guilt or innocence. However, this Court must now determine whether the parole eligibility jury instruction was harmless error.

The evidence against the defendant in this case was overwhelming. He was identified by Officers Finchum, Jones and Robinson as being the perpetrator of the crimes committed on July 25 and July 29, 1995. Moreover, an examination of the jury’s verdict reveals that the jury did not convict defendant simply because of the

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<sup>2</sup> In a concurring opinion, Judge Joe G. Riley wrote that the Dinkins jury was not instructed that it could weigh and consider the meaning of a sentence of imprisonment. The Dinkins jury was told the information regarding parole eligibility was “for your information only.” Judge Riley found there was no due process violation when the court instructs the jury that the sentencing information is furnished for informational purposes only. The statute requires that the instruction tell “the jury to weigh and consider the meaning of a sentence of imprisonment.” Judge Riley found an instruction per the statute is “clearly unconstitutional” because it tells the jury to consider the sentencing in determining guilt or innocence. But in Dinkins, the trial judge altered the wording to tell the jury the information was for “information only.” Judge Riley found no constitutional violation based upon this instruction.

minimum amount of time he would be required to serve before becoming eligible for parole. Indeed, defendant was convicted of the lesser offense of reckless aggravated assault in Counts 4, 5 and 6 and was acquitted of second degree murder as charged in Count 1. Therefore, we conclude that the erroneous parole eligibility instruction was harmless beyond a reasonable doubt.

### **SENTENCING**

The defendant contends his sentences are excessive. The trial court imposed a Range II<sup>3</sup> sentence of ten (10) years for vehicular homicide, eight (8) years for each count of reckless aggravated assault, ten (10) years for intentional or knowing aggravated assault, and two (2) years for each count of reckless endangerment. The trial court ordered that the sentences run consecutively for an effective sentence of forty-eight (48) years.

#### **A.**

When an accused challenges the length and manner of service of a sentence, it is the duty of this Court to conduct a *de novo* review on the record with a presumption that “the determinations made by the court from which the appeal is taken are correct.” Tenn. Code Ann. § 40-35-401(d). This presumption 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). The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994). However, this Court is required to give great weight to the trial court’s determination of controverted facts as the trial court’s determination of these facts is predicated upon the witnesses’ demeanor and appearance when testifying.

In conducting a *de novo* review of a sentence, this Court must consider (a)

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<sup>3</sup> Defendant does not dispute his status as a Range II offender.

any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancing factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-210; State v. Scott, 735 S.W.2d 825, 829 (Tenn. Crim. App. 1987).

The party challenging the sentences imposed by the trial court has the burden of establishing that the sentences are erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments; State v. Ashby, 823 S.W.2d at 169; State v. Butler, 900 S.W.2d at 311. In this case, the defendant has the burden of illustrating the sentences imposed by the trial court are erroneous.

#### **B.**

The defendant challenges the use of four enhancement factors. The trial court found the following enhancement factors applied:

- (1) "The defendant had 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 . . . the victim was particularly great," Tenn. Code Ann. § 40-35-114(6);
- (3) "The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community," Tenn. Code Ann. § 40-35-114(8);
- (4) "The defendant had no hesitation about committing a crime when the risk to human life was high," Tenn. Code Ann. § 40-35-114 (10);
- (5) "The felony was committed while on . . . release status . . ." Tenn. Code Ann. § 40-35-114(13); and
- (6) "The crime was committed under circumstances under which the potential for bodily injury to a victim was great," Tenn. Code Ann. § 40-35-114(16).

The trial court also enhanced the conviction of intentional or knowing aggravated assault because the victim was a law enforcement officer. Tenn. Code Ann. § 39-13-102(d). The trial court found no mitigating factors.

The trial court failed to specify which enhancement factors applied to which offenses. Thus, the statutory presumption of correctness afforded by Tenn. Code

Ann. § 40-35-401(d) does not apply. See State v. Holly Lack Earls, C.C.A. No. 01C01-9612-CC-00506, Coffee County (Tenn. Crim. App. filed January 16, 1998, at Nashville). This Court will address each factor without a presumption of correctness.

The defendant objects to the use of factors (10) and (16) to enhance the vehicular homicide conviction; the use of factors (10) and (16) to enhance the reckless aggravated assault convictions and the conviction for intentional or knowing aggravated assault; and the use of factor (8) and factor (13) for all offenses.

**C.**

The defendant does not object to the application of enhancement factor (1). This factor is appropriate for all convictions.<sup>4</sup> Nor does the defendant object to application of factor (6) to Counts 4, 5 and 6, the convictions for reckless aggravated assault.

**D.**

The defendant objects to the use of factor (8) to enhance his sentences because the presentence report does not reflect the defendant previously failed to comply with the conditions of a sentence involving release into the community. The presentence report indicates the defendant was sentenced to serve three years of incarceration on May 16, 1991, for two counts of aggravated assault. On November 29, 1992, defendant was arrested and subsequently convicted on January 5, 1993, of contributing to the delinquency of a minor. On February 6, 1994, defendant was arrested and convicted on April 7, 1994, of assault. Both of these convictions occurred within three (3) years of his convictions for aggravated assault in 1991 while defendant was on some form of release into the community. Furthermore,

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<sup>4</sup> The defendant's presentence report indicates two prior convictions for unspecified traffic offenses, three convictions for aggravated assault, contributing to the delinquency of a minor, two convictions for possession of unspecified drugs, possession of marijuana, reckless driving, and simple assault. His eleven convictions span a six-year period. His presentence report also indicates arrests on 53 other charges between September 1988 and July 1995 in which the dispositions were unknown. The defendant also admitted to the probation officer that his last use of cocaine and marijuana was July 29, 1995, the date of the fatal collision. Thus, the evidence supports the use of factor (1).

defendant was on probation for the April 7, 1994, assault conviction when he was arrested and subsequently convicted for traffic offenses committed on April 15 and May 1, 1994.<sup>5</sup> Thus, the use of this enhancement factor was appropriate.

**E.**

The defendant objects to the use of enhancement factor (10), no hesitation about committing a crime when the risk to human life was high, for the vehicular homicide conviction. He argues this factor is inherent in any offense involving the death of the victim.

This Court has held this enhancement factor should not be applied if the only risk to life was to the victim. See State v. Makoka, 885 S.W.2d 366, 373 (Tenn. Crim. App. 1994). However, when the lives of other people are at risk due to the offense committed by the accused, this factor is applicable. State v. Dockery, 917 S.W.2d 258, 263 (Tenn. Crim. App. 1995); State v. Makoka, 885 S.W.2d at 373. More particularly, this enhancement factor has been applied in vehicular homicide cases when the accused places the life of a third party at risk. State v. Williamson, 919 S.W.2d 69, 83 (Tenn. Crim. App. 1995); State v. Bingham, 910 S.W.2d 448, 453 (Tenn. Crim. App. 1995); State v. Lambert, 741 S.W.2d 127, 134 (Tenn. Crim. App. 1987).

There are reasons which justified the trial court's use of this enhancement factor to enhance the defendant's sentence. The evidence showed the lives of Officers Finchum and Jones were at risk by the defendant's driving. The life of Aihie who pulled out of the way to avoid being rear-ended was also at risk as were the lives of the people in the neighborhood. Thus, the use of this factor was appropriate for enhancing the sentence for vehicular homicide.

**F.**

The defendant also argues that use of enhancement factor (10), having no hesitation about committing a crime when the risk to human life was high, was inappropriate for the aggravated assault charges (counts 4, 5, 6, 8). He argues this Court has held that factor (10) cannot be applied to a sentence for aggravated

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<sup>5</sup>The defendant was sentenced to time served on these two traffic offenses.

assault with a deadly weapon and relies on this Court's opinion in State v. Hill, 885 S.W.2d 357, 363 (Tenn. Crim. App. 1994).

The situation in Hill is distinguishable from the facts in this case. In Hill the facts demonstrated there was only one intended victim; there was no evidence that other individuals in close proximity were in danger of being injured. Hill, 885 S.W.2d at 363.

In State v. John L. Smith, C.C.A. No. 01C01-9309-CR-00308, Davidson County (Tenn. Crim. App. filed October 20, 1994, at Nashville), this Court held that when the evidence shows there are other potential victims present and threatened by the defendant's conduct, use of factor (10) is appropriate. In Smith, the defendant fired a gun into a restaurant where a patron was seated at the bar and a bus boy was cleaning tables. This Court found the trial court erred in not applying this factor.

In this case, the defendant was behind the wheel of a car driving at excessive speeds through a residential neighborhood, making U-turns, driving his vehicle toward officers who were pursuing him, driving around a car properly stopped at an intersection and nearly rear-ending a driver who was coming to a stop behind the victim. The evidence also indicated there were people in the neighborhood on the sidewalks at the time of the pursuit. Thus, the application of this factor was appropriate for Counts 4, 5, and 6 stemming from the July 29th pursuit.

As to Count 8, we find that the evidence would also support the application of factor (10). Defendant was driving at an excessive speed through a residential neighborhood. Certainly, defendant's actions showed an indifference to the high risk to human life. Therefore, the application of this factor was appropriate for Count 8.

#### **G.**

The defendant also contends the use of enhancement factor (13), the felony was committed while the defendant was on bond, was inappropriate because the record lacked proof the defendant was on bond when the offenses were committed. The defendant argues that the only "evidence" of the defendant's status were

comments at the sentencing hearing made by the prosecutor who said the defendant was “on bond when these events . . . occurred.” The defendant argues the mere statements of counsel are not enough.

The presentence report indicates the defendant was arrested on July 2, 1995, on charges of cocaine possession, marijuana possession and criminal impersonation. All these offenses are misdemeanors. Furthermore, the charges were dismissed on August 8, 1995, after the July 29th fatal collision. Being on bond for misdemeanor offenses does not qualify for enhancement factor (13).

It has long been established in this jurisdiction that allegations contained in pleadings and the statements made by counsel do not constitute evidence. State v. Aucoin, 756 S.W.2d 705, 716 (Tenn. Crim. App. 1988); Trotter v. State, 508 S.W.2d 808, 809 (Tenn. Crim. App. 1974). As this Court stated in Trotter, “[w]hile it is true that a lawyer is an officer of the court, his [or her] statement of extra-judicial facts made in the course of argument, when not under oath as a witness and not subject to cross-examination, proves nothing.” 508 S.W.2d at 809. Thus, there is insufficient proof that the defendant was on bond for a felony offense which subsequently resulted in a felony conviction at the time of the commission of these offenses.

For these reasons, the trial court inappropriately applied enhancement factor (13).

#### H.

The defendant finally contends the use of enhancement factor (16), that the crime was committed under circumstances under which the potential for bodily injury was great, was inappropriate for the convictions of vehicular homicide in Count 2 and aggravated assault in Counts 4, 5, 6, and 8.

This Court has consistently held that this factor should not be used to enhance a sentence for vehicular homicide. State v. Williamson, 919 S.W.2d at 82; State v. Bingham, 910 S.W.2d at 452. Application of factor (16) was inappropriate here.

This Court has held that applying factor (16) to aggravated assault is error

when the factor is inherent in the offense of aggravated assault. State v. Hill, 885 S.W.2d at 364. Nonetheless, this Court has upheld the use of factor (16) when the facts showed more than one victim was present when the act occurred. State v. Demond R. Barnhill, C.C.A. No. 01C01-9506-CC-00197, Warren County (Tenn. Crim. App. filed February 13, 1996, at Nashville), *per. app. denied* (Tenn. July 22, 1996).

In this case, the evidence showed that on July 29th, there were other motorists and pedestrians in the area when the defendant sped through the neighborhood, made U-turns, drove toward police officers and improperly passed other motorists who were stopped. The application of this factor for Counts 4, 5, 6, was proper.

Similarly, on July 25th, defendant was driving through a residential neighborhood at an excessive speed. The potential for bodily injury to residents in the neighborhood was indeed great. The trial court did not err in applying this factor to Count 8.

#### I.

The sentencing range for vehicular homicide under Range II was six (6) to ten (10) years; reckless aggravated assault four (4) to eight (8) years; intentional or knowing aggravated assault six (6) to ten (10) years; and reckless endangerment with a deadly weapon two (2) to four (4) years. The defendant received the maximum sentence for each offense except reckless endangerment, for which he received the minimum sentence. The mere fact that the trial court erroneously applied enhancement factors does not mean that defendant is entitled to a reduction in his sentence. State v. Lavender, \_\_\_ S.W.2d \_\_\_ (Tenn. 1998).

This Court finds under our power of *de novo* review that even though the trial court erroneously applied enhancement factors, the sentences received by the defendant were proper.

#### J.

The defendant next contends the court erred by ordering that his sentences be served consecutively for a total of 48 years. An accused may be required to

serve multiple sentences consecutively if (a) the accused meets the criteria for consecutive sentencing set forth in Tenn. Code Ann. § 40-35-115 or other applicable rules or statutes, (b) the effective sentence imposed reasonably relates to the severity of the crimes committed by the accused, and (c) an extended period of incarceration is necessary to protect the public from the accused's future criminal conduct. State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995). In this case, the evidence supports consecutive sentencing.

The trial court found that the primary justification for imposing consecutive sentences was that “defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high.” Tenn. Code Ann. § 40-35-115(b)(4). The defendant contends that this finding by itself is not enough to support consecutive sentencing. He further argues that consecutive sentencing is not appropriate for episodic offenses.

An accused qualifies as a dangerous offender when his “behavior indicates little or no regard for human life, and [he has] no hesitation about committing a crime in which the risk to human life is high.” Tenn. Code Ann. § 40-35-115(b)(4); see Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). While the defendant qualifies as a dangerous offender, this fact, standing alone, will not justify consecutive sentencing. State v. Wilkerson, 905 S.W.2d at 938-39; see State v. Taylor, 739 S.W.2d 227, 230 (Tenn. 1987); Gray v. State, 538 S.W.2d at 393; State v. Woods, 814 S.W.2d 378, 380 (Tenn. Crim. App. 1991). As the Supreme Court said in Wilkerson:

As previously stated in this opinion, the imposition of consecutive sentences on an offender found to be a dangerous offender requires, in addition to the application of general principles 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.

905 S.W.2d at 939.

At the time of sentencing the defendant was 27 years old. The defendant had convictions for two unspecified traffic offenses, two convictions for aggravated

assault, contributing to the delinquency of a minor, two convictions for drug possession, marijuana possession, reckless driving, and simple assault. His eleven (11) convictions span a five-year period.

The defendant also admitted to a probation officer that his last use of cocaine and marijuana was July 29, 1995, the date of the fatal car collision. The defendant told the investigating officer he had no employment history. He could not provide a legitimate home address.

This Court notes that given the defendant's eleven prior convictions and the facts of this case, society needs be protected from the defendant's future criminal conduct. Although not noted by the trial court, defendant also qualifies for consecutive sentencing because his "record of criminal activity is extensive." Tenn. Code Ann. § 40-35-115(b)(2). The defendant has had multiple drug-related convictions. He also has had several traffic offenses. The report indicates that the defendant had recently used cocaine and marijuana before driving on July 29th and taking the life of Ashley Gray. Thus, the record establishes the defendant will continue to engage in criminal activity if released into society. His history of criminal convictions supports this conclusion. See Wilkerson, 905 S.W.2d at 939.

This Court is of the opinion imposition of consecutive sentences is appropriate to prevent the defendant from harming other human beings as he did in this case. Moreover, the lengths of the sentences imposed were commensurate with the crimes the defendant committed.

This issue is without merit.

### **CONCLUSION**

After a thorough review of the record presented before this Court, we find no reversible error. Accordingly, the judgment of the trial court is affirmed.<sup>6</sup>

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<sup>6</sup> This case was originally assigned to our colleague, Judge Joe B. Jones. After Judge Jones' untimely death on May 1, 1998, the case was re-assigned. Prior to his death, Judge Jones and his staff had done extensive work on this case. Much of that work has been utilized and incorporated into the opinion. This Court acknowledges the faithful service of Judge Jones to the Court, both as a member

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**JOE G. RILEY, JUDGE**

**CONCUR:**

**(See separate concurring opinion)**

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**PAUL G. SUMMERS, JUDGE**

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**WILLIAM M. BARKER, JUDGE**

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and as its Presiding Judge.