

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JULY 1999 SESSION

**FILED**

October 18, 1999

STATE OF TENNESSEE,	*	C.C.A. # 03C01-9807-CR-00237	Crowson, Jr.
Appellee,	*	SULLIVAN COUNTY	Appellate Court Clerk
VS.	*	Hon. R. Jerry Beck, Judge	
CRAIG STEPHEN BOURNE,	*	(Attempted Second Degree Murder;	
Appellant.	*	Aggravated Burglary and Especially	
	*	Aggravated Kidnaping)	

For Appellant:

Joseph S. Harrison  
Office of the Public Defender  
P.O. Box 839  
Blountville, TN 37617

Gale K. Flanary  
Assistant Public Defender  
266 Blountville Bypass  
Blountville, TN 37617  
and  
Gerald L. Gulley, Jr.  
Contract Appellate Defender  
P.O. Box 1708  
Knoxville, TN 37901-1708  
(on appeal)

For Appellee:

Paul G. Summers  
Attorney General and Reporter

Todd R. Kelley  
Assistant Attorney General  
425 Fifth Avenue North  
Second Floor, Cordell Hull Building  
Nashville, TN 37243-0493

Teresa Murray-Smith  
and  
Greg Newman  
Assistant District Attorneys General  
P.O. Box 526  
Blountville, TN 37617

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

JUDGMENTS OF CONVICTION AFFIRMED;  
SENTENCE FOR ESPECIALLY AGGRAVATED KIDNAPING MODIFIED

GARY R. WADE, PRESIDING JUDGE

## OPINION

The defendant, Craig Stephen Bourne, was convicted of attempted second degree murder, aggravated burglary, and especially aggravated kidnaping. The trial court imposed an eight-year sentence for attempted second degree murder, a six-year sentence for aggravated burglary, and a twenty-five year sentence for especially aggravated kidnaping. Because the sentences for attempted second degree murder and especially aggravated kidnaping were ordered to be served consecutively, the effective sentence is thirty-three years. The trial court imposed fines totaling \$48,250.00 for the three offenses.

In this appeal of right, the defendant submits the following issues for our review:

- (1) whether the state properly withdrew its offer to enter into a plea agreement;
- (2) whether the failure to dismiss the charge of especially aggravated kidnaping violated due process;
- (3) whether the evidence was sufficient to support the conviction of attempted second degree murder;
- (4) whether the admission of a statement by the defendant violated his right against self-incrimination;
- (5) whether the exclusion of evidence of illegal drugs and drug paraphernalia at the residence of the victim was erroneous;
- (6) whether incriminating hearsay was properly admitted into evidence;
- (7) whether testimony that the defendant had previously assaulted the victim was properly admitted into evidence;
- (8) whether the admission of color photographs of the victim and her clothing was erroneous;
- (9) whether the cumulative effect of alleged errors at trial violated the due process rights of the defendant; and
- (10) whether the sentence was excessive.

We find no prejudicial error and affirm the judgments of conviction. Due to misapplication of certain of the enhancement factors by the trial judge, the sentence for especially aggravated kidnaping is modified to twenty-four years. The effective sentence, therefore, is thirty-two years.

The victim, Karen Suzette Zimmer, and the defendant dated for approximately three years until August of 1996. Their relationship ended, according to the victim, because the defendant had struck her on two different occasions. The victim, who worked in Morristown part-time as a substitute school teacher and part-time as a waitress at Scooter's Restaurant, had two sons, ages twenty and twenty-four, by a prior marriage at the time of the offense.

At approximately 10:00 to 10:30 P.M. on October 25, 1996, the victim returned from her work at the restaurant. Both of her sons had gone camping that night and were away from the residence. At approximately midnight, the victim went to bed. Shortly after 2:30 A.M., she was suddenly awakened by the defendant who, according to the victim, grabbed her by the hair and said, "Get up, bitch, I'm going to kill you."

At trial, the victim testified that the defendant had telephoned her several times on the evening prior to the assault. Finally, the victim left the receiver off the telephone when the defendant persisted in the use of abusive language. Later, the defendant somehow entered the residence and awoke the victim. After slapping her twice, the defendant struck her with a clenched hand, claiming that was the first time he "ever hit a woman with his fists." The victim recalled the defendant saying that he did not "have anything to live for" and that he intended to slit her throat before committing suicide. She remembered that the defendant took a knife

from his pocket, unfolded it, continued to strike her, and then cut her head, causing a wound on her forehead from the hairline to an eyebrow, which eventually required twelve stitches to close. The victim remembered grabbing at the knife with her hand, causing a cut across her palm and the last two fingers, which ultimately required fifteen stitches. During the course of events, the victim also recalled receiving small cuts to the crown of her head. She was forced to look at herself in a full-length mirror and, as she did so, the defendant, who held her by her hair, smashed her head into the mirror.

The victim related that the episode continued for hours, during which the defendant would alternately talk a while, get upset, and strike the victim again. At one point, the defendant dragged the victim to the kitchen so he could get a beer and then "flung [her] down on the couch in the living room and kicked over the coffee table," striking her "once or twice more" before returning her to the bedroom. Later, the defendant said to the victim, "Get down over there ... I'll give you a minute to make peace with your maker." The victim recalled attempting to talk the defendant "out of this" after which the defendant observed, "Your lips are blue, you know what that means, don't you?"

By this time, the victim had lost quite a bit of blood and the defendant, who went to the kitchen to get another beer, left her alone in the bedroom. The victim testified that she escaped by running out her front door and to the residence of her neighbor, Tonya Renee Terry. The victim recalled "banging" on the outside of the door, after which Ms. Terry pulled her inside and called the police. The victim sustained other injuries which included two black eyes, a cut lip, and a chipped tooth. Three small, color photographs taken shortly after the arrival of police reflected to a degree the extent of her visible injuries and the extent of her blood

loss.

At trial, Ms. Terry testified that she was awakened by "a beating on the front door." When she answered, she recognized the victim who, she said, had a "caved in" skull, a "nose ... pretty much swollen all over her face." She wore "a jogging suit ... soaked in blood." When Ms. Terry asked what had happened, the victim, who was shaking and appeared to be in shock remarked, "It was her boyfriend."

Officer Glenn Howard James of the Bristol Police Department testified that he was dispatched to the Terry residence at 1316 Pennsylvania Avenue in Bristol at 4:27 A.M. He recalled that he had difficulty locating the house numbers and approached a residence which had its inside lights on. While the screen door was closed, the inner door was open and Officer James was able to see the defendant, who was not wearing a shirt, sitting on a couch inside. Officer James stated that the defendant remarked that nobody had called the police and no one was hurt. Officer James testified that he then left the residence and searched for a visible house number until he found 1316 at the Terry residence. At that point, the officer heard a female voice and then saw Ms. Terry, who directed him inside. Officer James, who had been trained as an emergency medical technician, rendered treatment to the victim after observing blood on her face, forehead, and left hand. He testified that the victim identified the defendant as her assailant.

Officer Darin Keith Feathers of the Bristol Police Department and another officer, who was in separate police vehicle, were dispatched to the residence of the victim at 1314 Pennsylvania. The officers observed the defendant inside and knocked on the door. The defendant refused to answer. After making

radio contact with Officer James, the two officers entered the residence and found the defendant drinking a beer. The area from his hands to his elbows were "red with blood." Officer Feathers asked about a weapon and the defendant took a folding knife from his right rear pocket and placed it on the floor. The officer then made the arrest. After the defendant was handcuffed, Officer Feathers asked if he was injured. He recalled the defendant's reply: the blood was "hers, not his." The officer also remembered the defendant saying, "She should know who she could f--- with and who she couldn't." Officer Feathers stated the defendant admitted that he was upset with the victim and that his feelings "used to be strong, but now they were weak." He also recalled that the defendant claimed the victim "grabbed the knife and cut herself." Officer Feathers remembered that the defendant then contradicted himself by acknowledging that he had cut the victim.

The defendant did not testify and his only witness was his brother, Phillip Bourne. Bourne, who had been with the defendant shortly before the incident, described him as "worried and depressed" that night. He remembered that the defendant was crying and remorseful about his relationship with the victim.

I

Prior to trial, the defendant, his counsel, and an assistant district attorney general executed a document styled "offer/acceptance" which included the following terms:

- (1) Count one, attempted second degree murder, Range I, twelve years, \$100.00 fine.
- (2) Count two, aggravated burglary, Range I, six years, \$100.00 fine.
- (3) Count three, kidnaping, Range I, six years, \$100.00 fine (all concurrent).

That document is accompanied by a "request for acceptance of plea of guilty [and] waiver of rights." The document included the following language:

I do hereby request that my plea of guilty to the charges set forth above be accepted by the court. If this plea of guilty is accepted, I do hereby expressly and knowingly waive my right to a trial by jury or by judge sitting without a jury and my right to have a jury impose the fine and submit my case to the trial judge for decision both as to my guilt and the punishment to be imposed upon me. I fully understand my right to have my case reviewed by an appellate court, but hereby expressly and knowingly waive my right to file a motion for a new trial or otherwise appeal the convictions in my case here today.

The proof was stipulated. After the defendant was warned of his various rights, the trial court inquired as to whether the defendant intended an Alford (best interest) plea, to which defense counsel answered, "Probably would be, Your Honor." At that point, the trial court learned that defense counsel had attempted to interview the victim in advance of the scheduled trial but had been unsuccessful. The defendant stated that he had given directions to defense counsel as to how to find the victim but that his defense counsel, who insisted that he had made three separate attempts to acquire information from the victim, had not made contact. A recess was taken for defense counsel to talk to the defendant, after which the trial court acknowledged the defendant's concern that his defense counsel "should have interviewed the ... victim." The victim had not previously provided a statement to police and the stipulated facts as presented by the state were based upon a statement she had made directly to the assistant district attorney general. The defendant expressed satisfaction with his counsel at the recess but did remark, "I just have conflicting interests on the statement that the DA read." The defendant asserted that the victim had claimed "she had nothing to do with having these charges increased on me and didn't want to see me do this kind of time." The trial judge chose not to accept the plea and the hearing was adjourned until the next

day.

When the case was called, the assistant district attorney withdrew the offer "in view of what occurred yesterday, and after conferring with Mrs. Zimmer." When defense counsel objected to the change in position, the trial court ruled that it had neither approved nor accepted the plea and terminated the proceeding.

Rule 11 of the Tennessee Rules of Criminal Procedure govern the procedure by which a defendant may enter a plea of guilt. The rule provides not only for acceptance of any proposed plea agreement but also for a rejection. There is, of course, no right to plea bargain. Even if the offer by the state is accepted by the defense, the trial court is under no duty to approve the agreement. North Carolina v. Alford, 400 U.S. 25, 38 (1970). Trial courts are afforded broad discretion in the acceptance or rejection of pleas. This court cannot set aside a judgment unless there has been an abuse of the authority. State v. Williams, 851 S.W.2d 828, 830 (Tenn. Crim. App. 1992).

In this case, the trial judge expressed a reason for his reluctance to approve the plea agreement before the state announced that the proposal had been withdrawn. That is, the defendant had not yet established that his plea was entirely voluntary because of his belief, mistaken or otherwise, that the victim wished a less severe penalty. As was the case in Williams, approval of the plea at that point "would have been an invitation for a post-conviction relief petition on the issue of voluntariness." Id. at 831.

An offer of plea agreement made by the state is revocable until it is accepted by the trial court. See Mabry v. Johnson, 468 U.S. 504 (1984). In State v.



Darrell Braddock, No. 02C01-9707-CR-00279 (Tenn. Crim. App., at Jackson, May 5, 1998), a panel of this court ruled as follows:

While withdrawing a plea bargain offer prior to its acceptance by the trial court may be unacceptable if the withdrawal is premised on some invidious basis such as race, gender, or religion, victim impact is not a prohibited basis for withdrawing an unapproved plea bargain offer.

Slip op. at 8.

The ruling in Braddock supports the position of the state. In our view, the state had a valid basis for the withdrawal of its plea offer by virtue of the defendant's hesitancy to plead guilty without assurance that the state had carefully considered the wishes of the victim as to the degree of punishment.

## II

Next, the defendant argues that the facts for the especially aggravated kidnaping were "essentially incidental" to the facts supporting the conviction of attempted second degree murder and should be set aside. While the defendant concedes that the victim was detained for over an hour, he argues that the use of a deadly weapon, his threat to slit her throat, and his admonition to "make peace with her maker" indicated an intention to murder not kidnap.

The defendant relies on State v. Anthony, 817 S.W.2d 299 (Tenn. 1991). In Anthony, our supreme court determined that dual convictions of armed robbery and aggravated kidnaping violated Art. I, §8 of the Tennessee Constitution when "the confinement, movement, or detention is essentially incidental to the accompanying felony." Our high court ruled that a conviction for kidnaping in addition to the underlying felony violated principles of due process unless the accompanying circumstances were "significant enough, in and of [themselves] to

warrant independent prosecution." Id. at 306. Our supreme court held that forcing three employees, who were emptying trash, to lie on the ground during a robbery was incidental to the robbery. The kidnaping conviction was set aside. Another employee, who was confined to a restroom during the course of the robbery, was also adjudged not to be a victim of kidnaping.

In the companion case to Anthony, State v. Martin, the defendant grabbed one victim and then directed that victim and another first into a laboratory and then into the men's restroom. Because the defendant did not lock the door and the entire episode lasted only about four minutes, our high court ruled that the detention of the two victims was an integral part of the robbery and that dual convictions could not stand. The test identified in Anthony was in two parts:

- (1) whether the confinement, movement, or detention was merely incidental to the accompanying felony; and
- (2) whether the detention or movement substantially increased the risk of harm over and above that necessarily present in the accompanying felony.

Id. at 305.

Here, the conduct of the defendant in detaining the movement of the victim was more than incidental to his stated objective and substantially increased the risk of harm. Initially, the assault continued for almost two hours. The defendant struck the victim several times, repeatedly threatened her life, and inflicted stab wounds to her head and her hand. He smashed her head into a mirror, dragged her throughout the residence, and forcibly detained her in the residence while he apparently contemplated whether to kill her or allow her to bleed to death. The longer the period of her detention the more likely she was to suffer either harm or death. In that regard, there was more than sufficient evidence to support a separate conviction for kidnaping.

### III

Next, the defendant argues that the evidence was insufficient to support a conviction for attempted second degree murder. He claims that the state was unable to prove that he intended to commit an act which would result in the death of the victim. He submits that none of his acts of aggression resulted in life-threatening injuries or qualified as a substantial step in accomplishing the death of the victim.

Second degree murder is the knowing killing of another. Tenn. Code Ann. § 39-13-210 (1990). A criminal attempt may be accomplished when the defendant acts in any of the following ways:

(1) Intentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;

(2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or

(3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

Tenn. Code Ann. § 39-12-101. In order to constitute a "substantial step," "the person's entire course of action [must be] corroborative of the intent to commit the offense." Id.

When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing 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. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); Tenn. R. App. P. 13(e). On appeal, the state is entitled to the strongest legitimate

view of the evidence and all inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). This court must not reweigh nor reevaluate the evidence. Id. at 836. Nor may this court substitute its inferences for those drawn by the trier of fact. Likas v. State, 286 S.W.2d 856, 859 (Tenn. 1956).

Here, the defendant threatened to kill the victim, he beat her, and he inflicted knife wounds to her head and hand requiring twelve and fifteen stitches, respectively. As the photographs which were presented as exhibits at trial indicate, the victim bled profusely from her wounds. The proof established that the defendant held the victim captive and commented upon the likelihood of her bleeding to death. Under these circumstances, the jury had every reason to conclude that the defendant took substantial steps to end the life of the victim. In our view, a rational trier of fact could have logically concluded that the defendant was guilty of attempted second degree murder. Jackson v. Virginia, 443 U.S. 307 (1979).

#### IV

The defendant next argues that the trial court erred by refusing to suppress a statement made by the defendant to Officer Glenn James, who testified that when he arrived at the victim's residence and asked whether anyone had called the police, the defendant replied: "No, nobody in here, nobody here has called for the police." The defendant submits that he was in custody and the officer had not provided warnings as required by Miranda v. Arizona, 384 U.S. 436 (1966). The trial court determined that because the defendant was not in custody at the time he made the statement, the evidence was admissible.

Generally, Miranda warnings must precede a custodial interrogation. Berkemer v. McCarty, 468 U.S. 420 (1984). The test to be applied to determine if

an individual is in custody is whether a "reasonable [person] in the suspect's position" would have believed himself or herself to be "in custody." Id., 468 U.S. at 442; see generally State v. Cooper, 912 S.W.2d 756 (Tenn. Crim. App. 1995).

In State v. Anderson, 937 S.W.2d 851, 855 (Tenn. 1996), our supreme court held that whether a person is "in custody" depends on the totality of the circumstances. Factors which may be considered include time, duration, location and character of the interview, the tone and demeanor of the questioning officer, the manner in which the suspect was transported to the location of questioning, the number of law enforcement officials present, limitations or restraints placed on the suspect's movement, interaction between the suspect and the questioning officer, confrontation by officers with evidence of guilt, and the whether the suspect is informed that he or she may refuse to answer questions and may end the questioning at any time. Id.

In our view, the defendant was not in custody at the time the statement was made. Initially, Officer James was unaware as to whether he had driven to the residence to which he had been directed. The street numbers were not readily apparent. Because the lights were on at the victim's residence during the very early morning hours and the defendant, who could be seen because he was sitting on a couch in the lighted interior, Officer James first inquired of the defendant whether anyone had called the police. When the defendant answered as he did, the officer left the scene. None of the factors recognized in Anderson would tend to support the conclusion that the defendant was in custody. The record, in our view, supports the trial court's conclusion that the defendant was not in custody at that time. This issue, therefore, is without merit.

As his next issue, the defendant argues that the trial court erred by granting the state's motion in limine to prohibit the defense from questioning the victim about the presence of marijuana plants, seeds, and paraphernalia found by the police at her residence. The defendant submits that the proof was relevant for impeachment purposes to show that the victim had engaged in felonious or other bad acts. Defense counsel sought to ask the victim about her prior drug use in an effort to impeach her credibility.

The propriety, scope, manner and control of the examination of witnesses are matters which address themselves to the sound discretion of the trial court. Coffey v. State, 216 S.W.2d 702, 703 (1948); State v. Johnson, 670 S.W.2d 634, 636 (Tenn. Crim. App. 1984). Absent clear abuse, which has resulted in manifest prejudice to the accused, this court will not interfere with the trial court's exercise of its discretion in matters pertaining to the examination of witnesses. Coffey v. State, 216 S.W.2d at 703.

Tennessee Rules of Evidence 608(b) provides as follows:

Specific instances of conduct of a witness for the purpose of attacking or supporting the witness's credibility, other than convictions of crimes as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness or concerning the character for truthfulness or untruthfulness of another witness as to which the character witness being cross-examined has testified. The conditions which must be satisfied before allowing inquiry on cross-examination about such conduct probative solely of truthfulness or untruthfulness are:

(1) the court upon request must hold a hearing outside the jury's presence and must determine that the alleged

conduct has probative value and that a reasonable factual basis exists for the inquiry....

\* \* \*

Generally, evidence of character or character traits is not admissible. Rule 404(a), Tenn. R. Evid. Rule 608 offers an exception to that general principle by allowing, in certain circumstances, character evidence to be utilized if limited to impeachment purposes. While Rule 608(a) authorizes reputation and opinion evidence on the issue of credibility, Rule 608(b) applies to specific instances of conduct which might tend to accredit or discredit the witness.

Here, the victim denied ownership of the marijuana. Typically, any extrinsic proof to the contrary is barred by Rule 608(b). Neil P. Cohen, et al., Tennessee Law of Evidence, § 608.4 at 264 (3rd Ed. 1995). Moreover, the evidence is admissible only if there is a reasonable factual basis for an inquiry into the specific instance at issue. Importantly, the conduct must be probative of a witness's truthfulness or untruthfulness. A number of cases indicate that the use of illegal drugs by a victim are not adequately probative of truthfulness to be admissible. See State v. Bledsoe, 626 S.W.2d 468 (Tenn. Crim. App. 1981); Hatchett v. State, 552 S.W.2d 414 (Tenn. Crim. App. 1977). Here, the presence of marijuana plants in the attic of the victim's residence had little probative value on the issue of impeachment. Also, there were other persons living in the residence at the time of the assault, thereby calling into question the factual nexus between the victim and the misconduct. In our view, the trial court properly exercised its discretion in excluding the evidence.

## VI

Next, the defendant argues that the trial court erred by allowing Tonya Terry, the next door neighbor of the victim, to testify to statements made by the victim shortly after the assault. When Ms. Terry saw the victim, she asked what had happened. In her reply, the victim made reference to "Steve" and to "her boyfriend," both of which implicated the defendant.

Rule 803(2), Tenn. R. Evid., includes an excited utterance as an exception to the rule against the admission of hearsay:

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

In order to establish an excited utterance, there must be a startling event which causes stress or excitement. The defendant submits that it was Ms. Terry who was under stress or excitement rather than the victim.

Just prior to the conversation, the victim had been stabbed and beaten. She had been held prisoner in her own home for almost two hours. Ms. Terry testified that the victim was "shaking" and in "real bad shock." She recalled that clothes worn by the victim were "drenched" in blood. In our view, all of this was proof that the victim was under stress or excitement at the moment the statements were made. Thus, the trial court properly classified the evidence as an excited utterance.

## VII

The defendant also argues that the trial court erred by allowing the victim to testify that the defendant had struck her on two different occasions in July



and August of 1996, within three months of the incident which resulted in these convictions. The defendant contends that the proof was not relevant and was unduly prejudicial.

The trial court ruled that the prior bad acts on the part of the defendant were admissible as substantive evidence to establish the motive for the crimes. The victim testified that she was struck once in July and once in August and "that was the reason that we stopped seeing each other." At the conclusion of the hearing held out of the presence of the jury, the trial court ruled that the evidence was admissible because the testimony established "why the defendant allegedly came to the home that night" and "the full story ... of what occurred, what brought this incident about." Part of the rationale for the ruling was that the defendant had telephoned the victim on the day prior to the assault and the victim indicated that she did not want to see the defendant because she was "scared." The trial court also observed that the probative value of the evidence clearly outweighed the danger of unfair prejudice.

Initially, the standard of review of the trial court's decision regarding the admissibility of the evidence was established in State v. DuBose, 953 S.W.2d 649 (Tenn. 1997). Where the trial court has complied with the procedural requirements of Rule 404(b), a decision will be upheld unless there has been an abuse of discretion; absent substantial compliance with the requisite procedure, the trial court "should be afforded no deference." Id. at 652.

The applicable rule applies as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The

conditions which must be satisfied before allowing such evidence are:

- (1) The court upon request must hold a hearing outside the jury's presence;
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and
- (3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Clearly, the trial court followed the procedural requirements in determining that the evidence was admissible. After concluding that the evidence was "clear and convincing" that the defendant had committed a prior bad act, the trial judge decided that the evidence established motive, the reason why the defendant committed the crimes.

That the defendant had struck the victim on two prior occasions was collaterally related to the motive. She had become fearful of the defendant as the result of those incidents and had terminated their relationship. The victim had refused to talk to the defendant on the day prior to the assault due to that fear. She left the telephone off the hook in order to avoid further communication. It was the state's theory that the victim's termination of the relationship in response to the two prior assaults led to the attempted murder. From all of this, it would appear that the evidence did help explain why the defendant committed the crimes and were probative for that reason. It is our view that the trial court did not abuse its discretion by the admission of the evidence.

## VIII

Next, the defendant argues that the trial court erred by the admission

of three color photographs taken of the victim shortly after the crimes. The defendant argues that the photographs, which included a police officer administering oxygen to the victim, were unfairly prejudicial.

Rule 403 of the Tennessee Rules of Evidence provides as follows:

**Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This rule was first adopted in State v. Banks, 564 S.W.2d 947 (Tenn. 1978). In adopting Federal Rule of Evidence 403 as its test for admissibility, our supreme court established a procedure by which the inflammatory nature of a photograph might serve as the basis for its exclusion. Id. at 951. Evidence which only appeals to sympathies, conveys a sense of horror, or engenders an instinct to punish should be excluded. State v. Collins, 986 S.W.2d 13 (1998).

Here, the photographs were not particularly gruesome. Obviously, the victim survived the attack. The photographs were probative as to the charge of attempted murder because they demonstrated the severity of the attack. In our assessment, the trial court did not err by concluding that the probative value outweighed the danger of unfair prejudice.

IX

Next, the defendant argues that the trial was fundamentally unfair due to the cumulative effect of the errors in the trial. See State v. James Clayton Young, Jr., No. 01C01-9605-CC-00208 (Tenn. Crim. App., at Nashville, May 22, 1998). Here, of course, the defendant has been unable to establish that the trial court

committed error. Other than the claims asserted in this appeal, all of which we have found to be without merit, there is no indication that the defendant was deprived of his right to due process of law.

X

Finally, the defendant argues that the trial court erred by the imposition of the twenty-five year sentence for especially aggravated kidnaping and that the trial court erred by ordering the sentence for second degree murder to be consecutively.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court 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); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's

potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987). The record in this case demonstrates that the trial court made adequate findings of fact.

Prior to the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case our supreme court ruled that aggravating circumstances must be present before placement in any one of the classifications. Later, in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), the court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. There were, however, additional words of caution:

[C]onsecutive sentences should not routinely be imposed . . . and . . . the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.

Taylor, 739 S.W.2d at 230. The Sentencing Commission Comments adopted the cautionary language. Tenn. Code Ann. § 40-35-115. The 1989 Act is, in essence, the codification of the holdings in Gray and Taylor; consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria<sup>1</sup> exist:

- (1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to

---

<sup>1</sup>The first four criteria are found in Gray. A fifth category in Gray, based on a specific number of prior felony convictions, may enhance the sentence range but is no longer a listed criterion. See Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments.

sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

(4) The 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;

(5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

(6) The defendant is sentenced for an offense committed while on probation;

(7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b).

In Gray, our supreme court ruled that before consecutive sentencing could be imposed upon the dangerous offender, as now defined by subsection (b)(4) in the statute, other conditions must be present: (a) that the crimes involved aggravating circumstances; (b) that consecutive sentences are a necessary means to protect the public from the defendant; and (c) that the term reasonably relates to the severity of the offenses.

In State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995), our high court reaffirmed those principles, holding that consecutive sentences cannot be required of the dangerous offender "unless the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public (society) from further serious criminal conduct by the defendant." The Wilkerson decision, which modified somewhat the strict factual guidelines for consecutive

sentencing adopted in State v. Woods, 814 S.W.2d 378, 380 (Tenn. Crim. App. 1991), described sentencing as a "human process that neither can nor should be reduced to a set of fixed and mechanical rules." Wilkerson, 905 S.W.2d at 938.

The defendant asserts that the twenty-five year sentence for especially aggravated kidnaping was excessive because the applicable range was between fifteen and twenty-five years. Tenn. Code Ann. § 40-35-112(a)(1). The trial court found the following enhancement factors under Tenn. Code Ann. § 40-35-114:

- (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
- (5) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;
- (7) The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement;
- (8) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community;
- (10) The defendant had no hesitation about committing a crime when the risk to human life was high;
- (16) The crime was committed under circumstances under which the potential for bodily injury to a victim was great.

The defendant argues that the trial court did not appropriately weigh enhancement factors against the mitigating factors even though it found several mitigating factors applicable. He asserts that the mitigating factors acknowledged by the trial court should have resulted in a sentence "more in the range of twenty-one to twenty-three years." The defendant also argues that factors 10 and 16 should not have been utilized to enhance the conviction for aggravated kidnaping.

The state concedes that the trial court erred by concluding that the defendant had "no hesitation about committing the crime when the risk to human life was high" and that the crime was "committed under circumstances under which the potential for bodily injury to a victim was great...." Tenn. Code Ann. § 40-35-114(10), (16). Enhancement factors do not qualify to elevate the term of the sentence when they are essential elements of the offense. State v. Jones, 833 S.W.2d 597, 601 (Tenn. 1994); Tenn. Code Ann. § 40-35-114.

The trial court listed as mitigating factors that the defendant showed remorse in his statement to the investigating officers, that he had obtained his graduate equivalent diploma, that he had accumulated credits at a technical institute, and that he had served in the Navy and had been honorably discharged. Tenn. Code Ann. § 40-35-113.

The defendant, age forty-five, has a prior criminal history that began when he was fourteen years of age. The presentencing report includes several pages of prior offenses which include primarily misdemeanors, some felonies, and several alcohol-related offenses. He has a history of committing additional crimes, although misdemeanors, while on probation for other offenses. By beginning at the mid-range sentence of twenty years, and by giving little weight to the mitigating factors, the trial court imposed the maximum sentence possible, observing that the "enhancing factors heavily outweigh the mitigating factors." It is only because the trial court misapplied two of the factors that a minor modification of the sentence is in order. By use of the applicable guidelines, this court would impose a twenty-four year sentence.

The trial court also concluded that the defendant qualified as 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, and that he was an offender whose record of criminal activity is extensive. Tenn. Code Ann. § 40-35-115(2) and (4). Clearly, the defendant's prior criminal record was extensive. Ten pages of the presentence report, although primarily misdemeanors, are dedicated to listing his prior crimes. By our count, there are thirty-nine prior offenses. There has been no significant interval of law compliance during his entire adult life. Also, he qualified as a dangerous offender. The ferocity and duration of the assault and the cruelty exhibited by the defendant in both word and deed substantiate the trial court's conclusion in that regard. The aggregate sentence by virtue of the consecutive terms reasonably relate to the seriousness of the offenses.

IT IS THEREFORE ORDERED that the sentence for especially aggravated kidnaping be modified to twenty-four years. Otherwise, the judgment is affirmed.

---

Gary R. Wade, Presiding Judge

CONCUR:

---

David H. Welles, Judge

---

Joe G. Riley, Judge