IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY 1999 SESSION

FILED

October 22, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	C.C.A. No. 01C01-9711-CC-00545
	)	
vs.	)	Warren County
	)	
GARY THOMAS MOORE,	)	Hon. Charles D. Haston, Judge
	)	
Appellant	)	(Aggravated Assault, Reckless
	)	Endangerment)
.	)	

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OPINION FILED:_____

AFFIRMED

JAMES CURWOOD WITT, JR., JUDGE

OPINION

The defendant, Gary Thomas Moore, appeals from his Warren County conviction and from the resulting sentence by the trial court. A jury convicted the defendant of aggravated assault with a weapon, a Class C felony, and two counts of reckless endangerment, a Class E felony. After a sentencing hearing, the trial court imposed a Range I sentence of five years confinement for the assault conviction and one year of confinement in each of the reckless endangerment convictions, to be served concurrently in the Tennessee Department of Correction. In this appeal, the defendant raises the following issues: (1) whether the statutory violations of the jury selection procedures violated the defendant's due process rights and resulted in prejudice to the administration of justice; and (2) whether the trial court improperly sentenced the defendant. After a review of the record, the briefs of the parties, and the applicable law, we affirm.

In the early morning hours of November 22, 1995, at around 3:00 a.m., two police officers arrived at the defendant's home in an isolated area of Warren County. The officers went there to serve an arrest warrant against the defendant because, earlier that the evening, he had vandalized his wife's cousin's car. The defendant was drunk and thought that the police officers were his wife's cousin and friends coming to beat him up. Shots were fired. The defendant hit the officer's car with one shotgun blast and the officers shot

at the defendant, hitting him twice. The defendant had one bullet wound to the neck and another to the right arm, near the wrist. The defendant was angry and belligerent. He had to be handcuffed after he backhanded the paramedic tending him.

The defendant was charged with attempted second degree murder, aggravated assault with a weapon, and two counts of reckless endangerment. After a jury trial, he was convicted of aggravated assault with a weapon and two counts of reckless endangerment. The defendant received an effective sentence of five years confinement.

I. Jury Selection Process

The defendant questions the validity of the jury selection process. He claims that the failure to follow statutory procedures denied him a fair trial and was prejudicial to the administration of justice. We disagree. The statutory violations, while unnecessary, were not flagrant and unreasonable to the extent that the administration of justice was prejudiced.

One of the jury commissioners in the case at bar had her 1984 oath but not her appointment spread upon the minutes of the court. The other two commissioners did not have either their appointments or oaths spread upon the minutes, although each had taken the oath. None of the commissioners had their

reappointments spread upon the minutes. The clerk of the board of jury commissioners had not taken an oath and neither her appointment nor oath was spread upon the minutes. The trial court caused a *nunc pro tunc* order appointing the commissioners to be spread in the minutes, along with their oaths.

The defendant alleged in his motion to quash the indictment and the jury venire that the names on the venire list for one six-month period were weighted in favor of the residents of McMinnville, and almost all the names were of registered voters. The commissioners drew the venire from the jury box while the clerk was not present.

The clerk of the jury commissioners did not "post" the jury list but kept the list on a shelf, which required the public to ask to see it. Also, the list was not compiled until after the term of court began because the list was based on the jurors who actually appeared for jury duty.

In Tennessee, a board of jury commissioners is appointed by the circuit court. See Tenn. Code Ann. § 22-2-201(a) (1997). The commissioners, with the assistance of a clerk, compile a list of persons suitable for serving on a jury. Tenn. Code Ann. § 22-2-201(1997) (establishment of board of jury commissioners), -204 (clerk's duties), -302 (selection of names for jury list). The jury list names must

be in proportion to the population of each district in the county, and the voter registration records cannot be the sole or primary source of names. Tenn. Code Ann. § 22-2-302(a)(1) (1997). The commissioners, in the presence of the clerk, select a venire from the venire list by drawing names from the jury box. Tenn. Code Ann. § 22-2-304 (1997) (selection of names for jury service). After the names are selected, the clerk provides the names to the sheriff so that the venire can be summoned for jury duty. Tenn. Code Ann. § 22-2-305 (1997). The clerk is required to publish the jury list five days before the term of court. Tenn. Code Ann. § 22-2-306 (1997) (applies to all counties except Davidson and Hamilton, which require publication as soon as the panel has been summoned and selected). The list is published by posting a copy in the clerk's office for public inspection and by making copies available for distribution. Id.

The first hurdle which the defendant must clear is outlined in section 22-2-313, which requires that before the validity of any verdict can be questioned, any irregularities in jury selection must be specially pointed out and exceptions taken before the jury is sworn. Tenn. Code Ann. § 22-2-313 (1997). The defendant has met this initial burden. He raised these issues after the jury had been selected but before it had been sworn. See State v. Pat Bondurant, --- S.W.2d ---, No. 01S01-9804-CC-00064, slip op. at 9-10 (Tenn. Sept. 7, 1999) (because the defendant objected only to the selection of

the special venire, he waived the issues regarding selection of the original venire, but not the special venire).

A. Validity of the Board of Jury Commissioners' actions

The defendant claims that the three members of the board of jury commissioners had not been properly selected and impaneled in accordance with Tennessee Code Annotated section 22-2-202. He asserts that the circuit court had not entered any orders appointing any of the three commissioners. He also asserts that none of the board members had subscribed to the oath of office as required by section 22-2-203. Further, he asserts that neither the oaths of two of the board members nor the board members' reappointment were spread upon the minutes of the court as required by section 22-2-203. Finally, the defendant asserts that the clerk of the jury commission has not subscribed her oath of office as required by section 22-2-204.

Tennessee Code Annotated section 22-2-203(a) (1997) requires that before performing any of their duties, each member of the board of jury commissioners shall take the prescribed oath. Subsection (b) requires that the appointment and oath shall be spread upon the minutes of the court during the next term of court after the appointment. Tenn. Code Ann. § 22-2-203(b) (1997). The clerk of the circuit court is, by statute, the clerk of the board of jury commissioners. Tenn. Code Ann. § 22-2-204(a)(1) (1997). The clerk must also take

an oath before acting as clerk of the board. Tenn. Code Ann. § 22-2-204(a)(2) (1997).

We have previously held that the provision for spreading the oaths of jury commissioners on the minutes is directory and failure to enter them, if the commissioners are otherwise qualified, does not invalidate the actions of a grand jury. Bollin v. State, 486 S.W.2d 293, 295 (Tenn. Crim. App. 1972). It has been a long-standing rule in Tennessee that "one legally appointed to an office without qualifying by taking the oath or otherwise is an officer and his official acts will be valid as to the public and all third persons." Id. (citing Farmers and Merchants Bank v. Chester, 25 Tenn. 458 (1846)).

In the present case, the trial court remembered swearing in the commissioners, but the clerk testified that she did not take the oath when she took office in 1994. When these matters were brought to the attention of the trial court during the motion hearing, the trial court initiated corrective action by requesting the preparation of *nunc pro tunc* orders and oaths.

Because the offended rules were directory and the commissioners and the clerk were otherwise qualified, the actions taken by the board of jury commissioners were valid and any error is harmless.

B. Venire List Preparation

(1)

The defendant challenges the venire composition, alleging that it did not represent a fair cross-section of the community because the statutory requirements were not met. Defendants are constitutionally entitled to a venire which represents a fair cross-section of the community. Duren v. Missouri, 439 U.S. 357, 99 S. Ct. 664 (1979); State v. Evans, 838 S.W.2d 185, 192-3 (Tenn. 1992); State v. Thompson, 768 S.W.2d 239, 246 (Tenn. 1989); State v. Bell, 745 S.W.2d 858, 860 (Tenn. 1988).

The defendant alleged that 54 percent of the venire were residents of McMinnville and that McMinnville residents comprised only 35 percent of the county's population. These *allegations* aside, the record is devoid of any proof about the percentage of Warren countians who live inside the City of McMinnville. Assuming *arguendo* that non-city dwellers constitute a "distinctive group" for purposes of determining unlawful under-representation that results from systematic exclusion, see Thompson, 768 S.W.2d at 246, but see State v. Nelson, 603 S.W.2d 158, 161-63 (Tenn. Crim. App. 1980), the record nevertheless establishes no basis for concluding that this group was deficiently represented. The references in the record to the population of McMinnville as opposed to the rest

of Warren County and to the make-up of the venire with respect to residency inside the city consist of unsworn claims in the defendant's motion to quash the venire and the indictment and of defense counsel's statements during argument on the motions. Although the state agreed to stipulate to the facts surrounding the terms of office of the jury commissioners, it specifically declined to stipulate the population figures and the residency breakdown. The trial court did not take judicial notice of any these figures, nor was it requested to do so. During the hearings on the defendant's motions, most of the parties' and the court's time was devoted to the issue of qualification of the jury commissioners. The defendant never presented evidence on the residency breakdown of the population or the venire. Accordingly, there is no basis for concluding that the trial court erred in rejecting this claim.

(2)

The defendant also challenges the preparation of the venire list because the jury commission, he alleges, violated the statute by using the voter registration list as the primary source for deriving the venire. See Tenn. Code Ann. § 22-2-302(a)(1) (1997). He alleges that 91 percent of the venire were registered voters. Although the state apparently acceded to this percentage figure and the trial court accepted

it as accurate, the defendant failed to even allege the percentage of eligible jurors in the county who were registered voters, and he offered no proof which would have demonstrated that registered voters appearing in the venire at 91 percent equates to using the voter registration list as a primary source for deriving juries. Accordingly, the record sets forth no basis for concluding that the trial court erroneously rejected this claim.

We find no merit in the defendant's challenges to the preparation of the venire list.

C. Venire Selection and Publication

The defendant claims that the statutory procedures contained in Tennessee Code Annotated section 22-2-302(c)(1) were not followed in choosing the jury venire from the jury box. He asserts that the board of jury commissioners substantially deviated from the statute when they opened the jury box without being duly appointed. Also, he asserts that substantial deviations occurred when the venire was selected without the clerk being present and when the clerk failed to properly post or make public the jury lists. The defendant argues that these were unjustifiable deviations from the statutory procedures.

Generally, before a criminal defendant may successfully challenge an indictment or venire because of

improper jury selection procedures, he must show that he was prejudiced or that the improper procedures resulted from purposeful discrimination or fraud. See State v. Coleman, 865 S.W.2d 455, 458 (Tenn. 1993); State v. Elrod, 721 S.W.2d 820, 822 (Tenn. Crim. App. 1986); Tenn. R. Crim. P. 52(a). However, our supreme court has held that "proof of actual prejudice is not required in circumstances . . . when the deviation is flagrant, unreasonable, and unnecessary." State v. Lynn, 924 S.W.2d 892, 898 (Tenn. 1996). See also Pat Bondurant, ---S.W.2d at ---, slip op. at 11-14.

Both Lynn and Pat Bondurant involved deviations in the procedure for selecting special venires. In Lynn, the clerk procured a special venire list by opening the jury box, not in open court, but in her office, and withdrawing the names outside the presence of the judge. Neither party was notified that a new venire was being drawn. The Lynn court determined that, unlike the "insignificant departure[s] from technical statutory requirements" that were featured in prior cases, the deviations in Lynn were "complete," a situation "in which the established statutory procedures for the selection of a jury were totally disregarded." Lynn, 924 S.W.2d at 895. The high court found that the failure to publish the new special venire "cast[] a further pall upon the integrity of the jury selection process in light of the trial judge's determination that the first venire was tainted [by jury tampering]." Id. at 898.

In Pat Bondurant, the trial judge asked the clerk to prepare a special venire. Apparently, one or more deputy clerks drew the names for the special venire from the jury box outside the courtroom and the presence of the trial judge. Deputy clerks then proceeded to look up telephone numbers for the names drawn and to call the persons to instruct them to appear for jury service. The supreme court applied Lynn and determined that the Pat Bondurant trial court "substantially, flagrantly, and unnecessarily deviated from the statutory procedures." Pat Bondurant, --- S.W.2d at ---, slip op. at 11-12.

In both Lynn and Pat Bondurant, because the deviations were substantial, flagrant and unnecessary, they were an affront to the judicial process and resulted in reversals even though no specific prejudice had been shown.

(1)

In this case, the defendant asserts that because the commissioners were not properly appointed and sworn, their actions were unauthorized. However, as discussed previously, although the appointment of the commissioners and clerk was procedurally defective, their official actions were not invalid. Thus, the mere fact that irregularities occurred in

the process of qualifying and certifying jury commissioners does not impugn the venire selection process.

(2)

Next, we consider the defendant's complaints about operational deviations in selecting the venire. These are the absence of the clerk during the commissioners' draw of names from the jury box and the failure to timely and properly post the jury list.

Tennessee Code Annotated section 22-2-304(a)(1) provides that when the jury commission undertakes to select names for jury service, it "cause[s] to be drawn [from the jury box] in the presence of the board and the clerk, by a child under ten (10) years of age or by a person who is securely blindfolded, the number or names which the trial judge has directed for a regular panel of grand and petit jurors." Tenn. Code Ann. § 22-2-304(a)(1) (1997).

Tennessee Code Annotated section 22-2-306(b) (1997) requires that five days before the term of court, a true copy of the regular jury panel list shall be published. "A copy of such jury panel list *shall be posted in the clerk's office* for public inspection." Id. (emphasis added). Additionally, the

clerk shall make available copies of the jury panel list for general distribution. Id. The purpose of the statutory list is "to provide notice to the public that a venire has been selected. It promotes confidence in the judicial process by subjecting the process to public scrutiny. Public disclosure provides scrutiny which further secures that proper juror selection methods will be used." Lynn, 924 S.W.2d at 896-97.

First, we consider the clerk's testimony about the selection of names from the jury box. As clerk of the jury commission, she attended the opening of the box, and thinking the law required her absence during the drawing, she left the room during the commissioners' drawing of names, despite the statutory mandate that the names be drawn "in the presence of the board and the clerk." The clerk's practice of leaving the room during the drawing is a potentially serious deviation. She explained that two blindfolds were provided so that two blindfolded commissioners may draw names during her absence. If only two commissioners were present and both of them were blindfolded, there would be no one to witness the drawing to attest that all of the names were drawn by someone who remained blindfolded. However, the record does not establish that this circumstance ever occurred. Based upon the record in this case, we conclude that the clerk's absence from the drawing, although a deviation from prescribed procedure, was the result of a good faith effort to comply with the law and is not so flagrant as to excuse the defendant from showing

prejudice. Because he has shown no prejudice, he has failed to establish his claim.

Next, we consider the clerk's method of "posting" the jury list.

The clerk failed to post the list prior to the five-day period before the commencement of the court term. The clerk testified that the period of time allowed by statute from the drawing of names to the deadline for posting -- a fifteen day period, at most -- was insufficient time to allow for the name-drawing, preparation of the sheriff's list, and the execution and return of summons.

The list to be posted is the list of names who have been selected *and summoned*, see Tenn. Code Ann. § 22-2-306(a) (1997) (explaining that (for Davidson and Hamilton Counties) the posting occurs "immediately upon the drawing of the jury list *and as soon as the jury panel has been summoned*") (emphasis added), but Code section 22-2-306(b) requires the posted jury panel list to be amended "as new names are added." This provision contemplates the adding of names as more people from the original list are summoned. The clear implication is that the clerk is expected to post the list of selected and summoned jurors prior to the five-day deadline and to amend the list by adding newly summoned jurors, rather than waiting

beyond the deadline to post the names of jurors who show up at court.

Although code section 22-2-306(b) does not explain what "post[ing] in the clerk's office" means, it has been interpreted to mean "notice to the public that a venire has been selected." Lynn, 924 S.W.2d at 896-97. The clerk placed the copies of the list on a shelf adjacent to the public counter at the front of the clerk's office. Although the clerk intended that the list would be accessible to the public, it was not "posted" as required and was not placed on the shelf before the five-day deadline. Therefore, the practice deviates from the command of the statute.

We conclude, however, that this deviation, though unnecessary, is not flagrant. It does not approach the degree of deviation described by the supreme court in Lynn or Pat Bondurant, even when we consider the combined deviations cumulatively. Certainly, there has been no total disregard of the prescribed procedures. Consequently, the defendant is not excused from establishing prejudice, and having failed to establish it, his claims of a due process violation due to the manner of selecting the venire must fail.

We take this opportunity to encourage the trial court to investigate the jury selection process as permitted under Tennessee Code Annotated section 22-2-310 and take

appropriate corrective action.[1] We find that the violations, although not rising to the level of being prejudicial to justice, are unnecessary and should be immediately corrected.

II. Sentencing

The defendant challenges the length of the sentence imposed and also asserts that he should have received an alternative sentence. The defendant argues that the trial court improperly applied the enhancing factor of prior criminal history involving misdemeanors committed more than twelve years before trial. He also argues that the trial court failed to give serious consideration to the mitigating factors. The state responds that the trial court considered the enhancing factors and found three. The state conceded that one of the enhancing factors, that there was more than one victim involved, should not have been considered because there were separate convictions for each victim. The state argues that the sentence was proper because two valid enhancing factors remained and no mitigating factors were found. Finally, the state claims that the issue of alternative sentencing is waived because the defendant failed to include the court's sentencing "order" in the record.

We address the state's last claim first. The state claims that the record is not complete and is missing the court's sentencing order. An appellate court is precluded

[1] Lynn originated in the same trial court.

from considering an issue when portions of the record upon which the party relies are not included in the record on appeal. State v. Ballard, 855 S.W.2d 557, 560-61 (Tenn. 1993). In the case at bar, the record on appeal contains the transcripts and exhibits of the sentencing hearings, including the trial court's oral ruling. The record also contains the judgment forms, signed by the trial court, setting out the defendant's convictions and sentences. The state fails to point out what information a sentencing order contained in addition to that already in the record on appeal. The trial court made a very detailed record regarding enhancement and mitigating factors during the hearings. We conclude that the trial court did not create an order and that any reference to a sentencing ruling was a reference to the trial court's oral ruling or declaration of sentence, which appears in the record as a part of the transcript. Thus, we turn to the sentencing issues.

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 of the record with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997). 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 burden of showing that the

sentence is improper is upon the appellant." Id. In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. Id. If appellate review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, determines the range of sentence and then determines the specific sentence and the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-210(a), (b) (1997); Tenn. Code Ann. §40-35-103(5) (1997); State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

The record reflects that the trial court misapplied an enhancement factor. Additionally, the record does not indicate that the trial court considered alternative sentencing for the defendant. Accordingly, our review is *de novo* and the trial court's determination is not accompanied by the presumption of correctness.

(1)

The trial court applied enhancement factors (1) and (3). Tenn. Code Ann. § 40-35-114(1) (1997) (previous history of criminal convictions or criminal behavior) and (3) (the offense involved more than one victim). The trial court also used as an enhancement factor that the victims were police officers performing an official duty. See Tenn. Code Ann. § 39-13-102(d) (1997) (revised in 1998 to include probation officers and parole officers). The defendant does not contest the application of this third enhancement factor. The trial court considered the mitigating factors put forth by the defendant and found that none applied.

The defendant challenges the trial court's application of enhancement factor (1) and argues that it should have been given little weight or not considered at all. The presentence report was made an exhibit to the sentence hearing and reflects that the defendant's previous history of criminal behavior consisted of misdemeanors committed more

than twelve years before the incident here. His history included a traffic offense which was dismissed in 1987, a DUI conviction in 1984, a DUI conviction in 1979, possession of marijuana and a weapon with the intent to go armed in 1979, causing a public disturbance in 1977, and reckless driving in 1975 when he was nineteen years old. The record supports the enhancement of the defendant's sentence pursuant to Tennessee Code Annotated section 40-35-114(1). The trial court properly applied this enhancement factor. See State v. Hall, No. 03C01-9712-CR-00534 (Tenn. Crim. App., Knoxville, Apr. 30, 1999) (previous convictions that were not numerous and were for comparatively less serious offenses were given moderate weight).

The state properly concedes that enhancement factor (3) does not apply to the defendant because he was convicted of separate offenses against each victim. See State v. McKnight, 900 S.W.2d 36, 54 (Tenn. Crim. App. 1995). The trial court improperly applied this enhancement factor.

The defendant asserts that mitigating factors (2), (3), (8), and (11) should apply. See Tenn. Code Ann. § 40-35-113(2) (1997) (defendant acted under strong provocation); (3) (substantial grounds exist tending to excuse or justify the conduct, though failing to establish a defense); (8) (suffering from mental or physical condition that significantly reduced the culpability for the offense but that

does not result from the voluntary use of intoxicants); (11) (the offense was committed under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the conduct). The trial court considered each of these mitigating factors and found none to apply.

The trial court found no strong provocation to support mitigating factor (2). The defendant claims that his actions were motivated by his extreme reaction to finding out that his wife was buying crack cocaine and possibly having an illicit affair. However, the defendant discovered this several hours before his confrontation with the police at his home. Any provocation inciting the defendant to act should have dissipated by the time of the incident. Accordingly, we agree with the trial court that mitigating factor (2) was not applicable. See State v. Garner, No. 02C01-9508-CR-00223 (Tenn. Crim. App., Jackson, May 19, 1997) (provocation to support mitigating factor (2) not found when victim had threatened to kill the defendant and the defendant had thought that the victim was reaching for a gun at the time of the shooting).

We disagree with the defendant that the trial court should have applied mitigating factor (3), that although failing to establish a defense, substantial grounds existed that tended to excuse or justify his criminal conduct. The defendant became enraged when he found out that his wife's

cousin was selling crack cocaine to his wife and that his wife was having an affair with either her cousin or another. The defendant took his rage out on the cousin's car. He went to visit his mother before going home. The defendant testified that, after 3:00 a.m., he was confronted at his home by two men whom he mistakenly thought were his wife's cousin and another coming to pay him back for damaging the car. The police officers were backlit by their headlights, which were shining on the defendant, and the officers did not illuminate their blue emergency lights. However, the officers' testimony at trial showed that they identified themselves as officers and talked with the defendant about the warrant before the defendant fired the shotgun at them. The trial court specifically found that it accredited the officers' testimony and discredited the defendant's testimony. We defer to the trial court's determination about credibility of witnesses. Given the trial court's findings, which are supported in the record, there is no basis for concluding that substantial grounds existed that tend to excuse the criminal conduct because the defendant feared he was about to be assaulted by vengeful in-laws. There was no error in declining to apply mitigating factor (3).

The defendant asserts that mitigating factor (8) applied because he was taking medication at the time and had a history of problems due to the medication. Evidence was presented that the defendant suffered serious side effects

from medication. However, he offered no evidence that, at the time of the incident, his mental or physical condition significantly reduced his culpability. He was drunk, but mitigating factor (8) specifically excludes the effects due to voluntary intoxication. We agree with the trial court that mitigating factor (8) does not apply. See State v. Hoskins, No. 01C01-9805-CC-00233 (Tenn. Crim. App., Nashville, Apr. 29, 1999) (rejecting application of mitigating factor (8) for lack of proof).

Finally, the defendant argues that the trial court should have applied mitigating factor (11), that the defendant committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct. In considering this mitigating factor, the trial court stated "that is simply not the case here. This man fired at these officers, and there was a stand-off there that lasted - I thought it was more than five minutes. . . . The defendant did not act under duress." Although the trial court found that the defendant "was so drunk; I don't believe he knew exactly what took place out there that night," the court found that the defendant was aware that the visitors were peace officers. In fact, the defendant in his trial testimony admitted as much, but he denied firing at the officers. In short, the record supports the trial court's rejection of mitigating factor (11).

Taking all factors into account *de novo*, the five-year aggravated assault sentence is justified. The reckless endangerment sentences were minimum sentences. We affirm the lengths of the sentences imposed.

(2)

A defendant who "is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6) (1997). Our sentencing law also provides that "convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation, shall be given first priority regarding sentences involving incarceration." § 40-35-102(5). Thus, a defendant who meets criteria of section 40-35-102(6) is presumed eligible for alternative sentencing unless sufficient evidence rebuts the presumption. However, the act does not provide that all offenders who meet the criteria are entitled to such relief; rather, it requires that sentencing issues be determined by

the facts and circumstances presented in each case. See State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

The defendant is clearly eligible for alternative sentencing in general, Tenn. Code Ann. § 40-35-102(5), (6) (1997), but, having committed a violent offense, he not eligible for placement in a community corrections program. Tenn. Code Ann. § 40-36-106(a)(2), (3) and (4) (1997). The remaining possibility for alternative sentencing would involve some form of probation. See generally Tenn. Code Ann. § 40-35-104 (1997). The defendant is eligible for probation as an alternative to confinement. Tenn. Code Ann. § 40-35-102(6) (1997). The court is required to automatically consider probation an a "part of the sentencing determination at the conclusion of the sentencing hearing." Tenn. Code Ann. § 40-35-303(b) (1997). Moreover, the defendant is presumed to be a favorable candidate for alternative sentencing, but the presumption of suitability for alternatives to confinement may be overcome by evidence to the contrary. Tenn. Code Ann. §§ 40-35-102(6); -103(1) (1997). The burden rests with the defendant to show that he should be placed on probation. State v. Bingham, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995).

Our analysis of the appropriateness of alternative sentencing includes consideration of the factors enumerated in code sections 40-35-210(b) and -103(5). One of these considerations is the "nature and circumstances of the

criminal conduct involved." Tenn. Code Ann. § 40-35-210(b)(4) (1997); Ashby, 823 S.W.2d at 169. In addition, we utilize the considerations for ordering confinement that appear in section 40-35-103(1). One of these is semantically linked to the nature and circumstances of the offense. It is the consideration that confinement may be ordered when it is "necessary to avoid depreciating the seriousness of the offense." Tenn. Code Ann. § 40-35-103(1)(B) (1997).

The nexus between the nature and circumstances of the offense and sentencing to avoid depreciating the seriousness of the offense is well recognized. State v. Hartley, 818 S.W.2d 370, 375 (Tenn. Crim. App. 1991). The nature and circumstances of the offense may serve as the *sole* basis for denying probation when the acts are "especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree; and it would have to be clear that, therefore, the nature of the offense, as committed, outweighed all other factors. . . which might be favorable to a grant of probation." State v. Travis, 622 S.W.2d 529, 534 (Tenn. 1981); see also State v. Cleavor, 691 S.W.2d 541, 543 (Tenn. 1985). "This standard has essentially been codified in the first part of T.C.A. Section 40-35-103(1)(B) which provides for confinement if it is necessary to avoid depreciating the seriousness of the offense." Hartley, 818 S.W.2d at 375. Thus, the Travis qualifiers exist under the first clause of section 40-35-103(1)(B) to assist the

court in determining when the need to avoid depreciating the seriousness of the offense overcomes the presumption of suitability for alternative sentencing.

Although the trial court made no specific reference to alternative sentencing in general or probation in particular, it made findings which implicitly equate to a conclusion that the offense was especially shocking, reprehensible and offensive and that, accordingly, confinement is necessary to avoid depreciating the seriousness of the offense. The court said:

> The nature of the crime . . . is distressfully disturbing, that being trying to kill officers who were out there trying to do their jobs . . . . Mr. Moore, this is especially . . . heinous, because you were willing . . . to try to hold off these fellows who were there trying to do their job . . . . So, you are sentenced to five (5) years in the State Penitentiary.

The record supports the trial court's determinations resulting in the defendant's confinement in a penitentiary. We find no error in the sentences of confinement imposed by the trial court.

Finding no reversible error, we affirm the judgment of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE

CONCUR:

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JOSEPH M. TIPTON, JUDGE

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JOHN EVERETT WILLIAMS, JUDGE