

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER SESSION, 1999

**FILED**  
December 15, 1999  
Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE,	)	NO.M1998 00468 CCA R3 CD
	)	
Appellee,	)	
	)	
	)	DAVIDSON COUNTY
VS.	)	
	)	HON. CHERYL BLACKBURN
JAMES ALBERT ADAMS,	)	JUDGE
	)	
Appellant.	)	(Attempted Second Degree Murder)

ON APPEAL FROM THE JUDGMENT OF THE  
CRIMINAL COURT OF DAVIDSON COUNTY

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

**AFFIRMED**

**DAVID H. WELLES, JUDGE**

# OPINION

The Defendant, James Albert Adams, appeals his convictions and sentences for attempted second degree murder, aggravated burglary, and two counts of aggravated assault. He was indicted for attempted premeditated first degree murder, especially aggravated burglary, two counts of aggravated assault, and coercion of a witness. The State entered a nolle prosequi on the charge of coercion of a witness. The Defendant was then found guilty by a jury of the lesser included offense of attempted second degree murder, the offense of especially aggravated burglary as charged, and two counts of aggravated assault as charged. Because the trial court found that the Defendant could not be convicted of both attempted second degree murder and especially aggravated burglary due to a provision in the especially aggravated burglary statute,<sup>1</sup> it reduced the especially aggravated burglary conviction to a conviction for aggravated burglary. The Defendant conceded that he was a Range I offender as to all A felonies, a Range II offender as to all B felonies, and a Range III offender as to all C, D, or E felonies. At the sentencing hearing, the Defendant was sentenced to the maximum sentence in the range for all convictions: twenty years as a Range II offender for attempted second degree murder; fifteen years as a Range III offender for aggravated burglary; and fifteen years as a Range III offender for each of the aggravated assault convictions. The sentence for aggravated burglary was ordered to be served concurrently, but the other sentences were ordered to be served consecutively, for an effective sentence of fifty years incarceration.

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<sup>1</sup> See Tenn. Code Ann. § 39-14-404(d).

The Defendant now appeals both his convictions and his sentences, raising the following issues for review:

I. Whether the evidence is sufficient to support a finding by a rational trier of fact that the Defendant is guilty beyond a reasonable doubt of attempted second degree murder, aggravated burglary, and two counts of aggravated assault.

II. Whether the trial court erred in admitting as substantive evidence a letter and hand-drawn picture allegedly created by the Defendant over a month after the offenses for which he was on trial.

III. Whether the trial court erred by imposing excessive sentences within the range and by imposing consecutive sentences.

IV. Whether the trial court erred in refusing to transfer the case to another criminal court of competent jurisdiction, so as to avoid the “appearance of impropriety” and the “appearance of forum shopping” by an assistant district attorney general.

We find no reversible error and affirm the judgment of the trial court.

The proof at trial revealed that the Defendant had been involved in an “on and off” relationship with the victim of the attempted murder, Linda Lewis, since 1982. The Defendant and the victim lived together for a period of time, but then separated on June 10, 1996. The Defendant moved out of Ms. Lewis’ residence, taking his belongings with him, though he left behind his couch and television. Ms. Lewis retrieved the key to the residence from the Defendant. Though the Defendant no longer lived with Ms. Lewis, the two still had contact.

Ms. Lewis testified that on the morning of September 28, 1996, she was at home with her mother and her three daughters. The Defendant called her home several times, but she did not wish to speak to him. Her daughters told him that she did not want to talk to him, and on the last call she personally told him to quit calling. He said that he was “on his way,” and Ms. Lewis hung up the

phone. Her mother locked the screen door. Ms. Lewis was resting on the couch when she heard the locked screen door pulled open and her mother "hollering." Ms. Lewis' mother, Christine Lewis, ran from the kitchen into the front room where Ms. Lewis was resting, with the Defendant following her with a knife in his hand. Ms. Lewis testified that the knife was long and that she thought she had previously seen it at the Defendant's mother's house. She said the Defendant looked like a "maniac," but she had never seen him on drugs so she did not know if his appearance was drug-related. She said that she told the Defendant not to "stick" her mother. Two of Ms. Lewis' daughters were in the room, and the Defendant let them go past him and out the back door.

Ms. Lewis testified that the Defendant approached her and said, "I told you I was going to kill you, Bitch." He then started stabbing her. He stabbed her four or five times in the chest and cut her hand and finger. He continued stabbing her until she said, "I'm dying," at which point he stopped and went out the back door. Ms. Lewis went out the front door, where she saw the Defendant walking past her on the sidewalk. As he was walking down the sidewalk, he again said, "I told you I was going to kill you, Bitch."

Ms. Lewis was taken to Vanderbilt Hospital for a day and then moved to Centennial Medical Center for a second day. She did not think she was placed in intensive care, but she had to have three surgeries on her finger because of the damage caused by the knife wound. She testified that she still could not move her finger and she could not pick things up with her left hand.

After the Defendant was arrested, he started sending Ms. Lewis letters from jail. One letter, dated November 13, 1996, included a hand-drawn picture of a woman with a knife through an eye entitled, "Booded [sic] Tears." Blood was drawn in red dripping from the knife wound to the eye. The letter and picture were introduced into evidence. Ms. Lewis testified that she received about twenty letters from the Defendant. In some of the letters the Defendant said that he was sorry, that he loved her, and that he did not know what he was doing. He asked her to come visit him at the jail. The letters also contained cursing, "ugly" things, and other pictures. One contained a picture of a gun, and another contained a picture of a dead body in a casket.

Ms. Lewis' mother, Christine Lewis, testified that she was washing collard greens in the kitchen when the Defendant "snatched the screen door open" and entered the kitchen with a knife. He called her an "old bitch" and scared her. She ran into another room, and he said, "I should have killed that old bitch." Christine Lewis did not see what happened between the Defendant and Linda Lewis because she went outside, but she testified that she saw the Defendant come out the back door and stand on the back porch. He stood there with his arms folded and said, "I killed the bitch." Christine Lewis waited with her daughter on the front porch for an ambulance. She said Linda Lewis was awake and could talk, but she was bleeding. On cross-examination, Christine Lewis said that the Defendant looked like he was "messed up" that morning when he came in. He looked like "he had done had something."

Linda Lewis' daughter, Shanta Lewis, testified that she was sleeping in her bed when she heard somebody screaming. She got up and went downstairs,

where she saw the Defendant standing over her mother. Shanta Lewis screamed, "Don't kill my momma," pushed the Defendant away from her mother, and then saw that he had a knife in his hand. When she pushed the Defendant, he went into the kitchen. Shanta Lewis tried to help her mother get up; then the Defendant came back in the room. Shanta Lewis sat on top of her mother to protect her, but the Defendant "took me over and stuck her again and went out the back door." After he left, Linda Lewis went out to the front porch, and Shanta Lewis stayed on the front porch with her mother until the ambulance came. She said the Defendant was "running down the sidewalk hollering he killed the bitch."

Officer Brock Parks testified that he responded to a "domestic in progress" and that he found the victim sitting on her front porch, bleeding heavily. There was "lots and lots of blood outside, around the scene." The inside of the house "was quite bloody . . . as well." Officer Parks talked to a witness, Tamika Rucker, who said she saw the Defendant run out of the house with a box cutter in his hand, yelling, "Next time, I'll kill you, bitch."

Officer Tracy Gatwood testified that he responded to a domestic disturbance involving a stabbing. He discovered the Defendant hiding under some boxes behind a dumpster, sweating profusely. He read the Defendant his rights, and the Defendant said that he understood them. The Defendant then stated that he stabbed his girlfriend because he was mad at her for "sleeping with somebody else." The Defendant also told Officer Gatwood that he would do it again if he got the chance.

Dr. Joan Schleicher, a clinical psychologist, testified for the defense. She testified that the Defendant suffered from a personality disorder and that “he best fits the paranoid personality disorder.” She said she “found many references to impulsivity” in the testing that she did. Dr. Schleicher offered her opinion that based on his personality disorder, it was “very unlikely” that the Defendant could have contemplated the murder of Linda Lewis in a state free of passion and that he did not have the capacity, while laboring under extreme emotional stress, to plan the murder of Linda Lewis or stop and think about what he was doing.

The defense also called Tamika Rucker, who testified that she saw the Defendant come out the back door of Linda Lewis’ residence. She thought he had something in his hand because she heard something, and she thought it might have been a gun or a box cutter. She heard him say either, “bitch, next time, I’m going to kill you,” or, “bitch, I should have killed you.”

Deborah Adams, the Defendant’s sister, testified that she lived with her brother and that Linda Lewis was his girlfriend. She said that on the evening before the stabbing, she saw Ms. Lewis and the Defendant in the hallway kissing. She saw Ms. Lewis quite frequently because Ms. Lewis would come to the house two or three times a week during the period of time before the stabbing. She testified that on the morning of the stabbing, Ms. Lewis called twice to speak to the Defendant, but he was not home. She gave him the message when he came home. She said that he looked like he had been drinking, but that he understood her when she told him that Ms. Lewis had called; except for the fact that he had been out all night, he looked normal.



Jalenska Cheatham, the Defendant's niece, testified that she visited the Defendant's house almost every day and that she saw Ms. Lewis there "a whole lot." She said that Ms. Lewis was there the night before the stabbing and that she and the Defendant "acted like they was going together, like a normal couple would." Another niece, Latalia Cheatham, also testified that she often saw Ms. Lewis with the Defendant and that she was "acting like a girlfriend."

In rebuttal, Dr. Samuel Craddock, a clinical psychologist with Middle Tennessee Mental Health Institute, testified for the State. As part of a team, he evaluated the Defendant to determine the Defendant's competency to stand trial. Later, his facility was asked to render an opinion as to the Defendant's culpable mental state. Though the Defendant was not cooperative, Dr. Craddock and his team were able to observe the Defendant and evaluate his mental state. They diagnosed the Defendant as depressed. While Dr. Craddock agreed with Dr. Schleicher that the Defendant "tends to be impulsive" and that "he is somewhat suspicious of other's [sic] intentions," he "did not see the symptoms worthy of a personality disorder." He gave his opinion that at the time of the stabbing, the Defendant did have the capacity to premeditate and to act in an intentional, knowing fashion.

I.

The Defendant first argues that the evidence was insufficient to prove his guilt beyond a reasonable doubt. Specifically, he argues that an element of aggravated assault, that the defendant knowingly placed the victim in fear of imminent bodily injury, was not proven beyond a reasonable doubt with respect to one of the victims, Shanta Lewis. He also argues that the culpable mental

state of “knowing,” which is required for a conviction of attempted second degree murder, was not proven beyond a reasonable doubt. Finally, he contends that as to the aggravated burglary, the essential element that the defendant acted recklessly regarding whether he had the victim’s effective consent to enter her residence was not proven beyond a reasonable doubt.

Tennessee Rule of Appellate Procedure 13(e) prescribes that “[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.” Tenn. R. App. P. 13(e). Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979). In addition, because conviction by a trier of fact destroys the presumption of innocence and imposes a presumption of guilt, a convicted criminal defendant bears the burden of showing that the evidence was insufficient. McBee v. State, 372 S.W.2d 173, 176 (Tenn. 1963); see also State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992) (citing State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1976), and State v. Brown, 551 S.W.2d 329, 331 (Tenn. 1977)); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Holt v. State, 357 S.W.2d 57, 61 (Tenn. 1962).

In its review of the evidence, an appellate court must afford the State “the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom.” Tuggle, 639 S.W.2d at 914 (citing State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978)). The court may not “re-weigh or re-evaluate the evidence” in the record below. Evans, 838 S.W.2d at

191 (citing Cabbage, 571 S.W.2d at 836). Likewise, should the reviewing court find particular conflicts in the trial testimony, the court must resolve them in favor of the jury verdict or trial court judgment. Tuggle, 639 S.W.2d at 914.

To prove that the Defendant committed an aggravated assault on Shanta Lewis, the State was required to prove that the Defendant (1) intentionally or knowingly caused Shanta Lewis to reasonably fear imminent bodily injury and (2) that he used or displayed a deadly weapon. See Tenn. Code Ann. §§ 39-13-101(a)(2), -102(a)(1)(B). Though it is not disputed that the Defendant used a deadly weapon, the Defendant argues that the State did not prove he intentionally or knowingly caused Shanta Lewis to reasonably fear imminent bodily injury. He points out that Shanta Lewis never testified she was afraid of the Defendant and that the Defendant's actions were directed towards Linda Lewis, not Shanta Lewis. The Defendant then concludes that there was no proof that he knowingly placed Shanta Lewis in fear.

In proving the existence of an assault, “[t]he element of ‘fear’ is satisfied if the circumstances of the incident, within reason and common experience, are of such a nature as to cause a person to reasonably fear imminent bodily injury. Thus, the apprehension of imminent bodily harm may be inferred . . . .” State v. Gregory Whitfield, C.C.A. No. 02C01-9706-CR-00226, 1998 WL 227776, at \*2 (Tenn. Crim. App., Jackson, May 8, 1998) (citation omitted). While Shanta Lewis did not specifically testify that she was afraid, her fear can be inferred from the circumstances of the incident. She testified that she came down the stairs and saw the Defendant standing over her mother. She screamed “don’t kill my momma” and pushed the Defendant away. At that point, she saw that he had a

knife. The Defendant retreated to the kitchen and then came back into the room. Ms. Lewis testified that “he took me over” and stabbed her mother again. Under these circumstances, a rational juror could infer that Shanta Lewis was in reasonable fear of imminent bodily injury to herself, as well as to her mother.

The Defendant further argues that the State did not prove he knowingly placed Shanta Lewis in fear because the proof shows that his attack was directed towards Linda Lewis, not Shanta Lewis. “A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result.” Tenn. Code Ann. § 39-11-302(b). Knowledge may be proven by circumstantial evidence. Poag v. State, 567 S.W.2d 775, 778 (Tenn. Crim. App. 1978). The evidence here established that the Defendant stabbed Linda Lewis with a knife. Shanta Lewis pushed the Defendant away and the Defendant retreated to the kitchen. Still armed with a knife, the Defendant returned, moved Shanta Lewis out of the way, and stabbed Linda Lewis again. This circumstantial proof shows the Defendant was aware of Shanta Lewis’ presence, and a reasonable juror could infer from this evidence that the Defendant was also aware that his conduct in approaching Shanta Lewis with a knife and moving her out of the way so he could stab her mother again was reasonably certain to cause her to fear imminent bodily injury. Therefore, the evidence was sufficient to support the conviction.

The Defendant further argues that the evidence is insufficient to support the conviction for attempted second degree murder. Second degree murder is “[a] knowing killing of another.” Tenn. Code Ann. § 39-13-210(a)(1). Thus, before the Defendant could be convicted of attempted second degree murder, the State

had to prove that the Defendant attempted to kill Linda Lewis and that he was aware that his conduct was reasonably certain to cause the death of Linda Lewis. See Tenn. Code Ann. §§ 39-11-302(b), 39-12-101(a), 39-13-210(a)(1). The Defendant argues that his conduct was not reasonably certain to cause death. In support of his argument, he states that there was no testimony indicating that Linda Lewis' stab wounds were potentially fatal and that testimony conflicted as to whether the Defendant told Ms. Lewis, "I told you I'd kill you," or, "Next time I'll kill you."

Whether Ms. Lewis' injuries were actually life-threatening is irrelevant. As this Court has recognized, the "victim of an attempted murder does not necessarily suffer particularly great personal injuries." State v. Harris, 978 S.W.2d 109, 117 (Tenn. Crim. App. 1997). What is important is whether the conduct of stabbing a person is reasonably certain to cause death. Regardless of whether the Defendant said, "I told you I'd kill you," or, "Next time I'll kill you," both statements indicate that the Defendant knew his actions in stabbing Linda Lewis were reasonably certain to cause death. The Defendant stabbed Ms. Lewis four or five times in the chest. He did not stop until Ms. Lewis said, "I'm dying." According to Christine Lewis, the Defendant stated, "I killed the bitch." This proof is more than sufficient for a rational juror to find that the Defendant knew his actions were reasonably certain to cause Ms. Lewis' death.

The Defendant also contends that the State failed to prove beyond a reasonable doubt that the Defendant recklessly entered Linda Lewis' residence without her effective consent and that, as a result, he could not be convicted of aggravated burglary. Aggravated burglary occurs when a person enters a

habitation without the effective consent of the property owner and commits or attempts to commit a felony, theft, or assault. See Tenn. Code Ann. §§ 39-14-402(a)(3), -403(a). The statute does not specify a required mental state for the entering of the habitation, though it does require that the person enter and commit or attempt to commit a felony, theft, or assault. See id. When a specific mental state is not given as an element of an offense and is not plainly dispensed with in the offense, the State must at least prove that the defendant acted recklessly. See id. § 39-11-301(b), (c). A person acts “recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person’s standpoint.” Id. § 39-11-302(c).

The Defendant argues that the State did not prove he was reckless because the proof did not establish that Linda Lewis had revoked her consent for him to enter her residence or that he was aware of and disregarded the risk that he did not have Ms. Lewis’ effective consent to enter her residence. The evidence, however, is to the contrary. The evidence shows that Ms. Lewis and the Defendant lived together for a period of time and that the Defendant then moved out, taking all of his belongings except for his couch and television, which he refused to remove. Ms. Lewis retrieved the key to the residence from the Defendant. On the day of the attempted murder, the Defendant called Ms. Lewis a number of times and was informed that Ms. Lewis did not wish to speak to him.

After he stated that he was coming over, Christine Lewis locked the screen door. When the Defendant arrived at Ms. Lewis' residence, he "snatched" open the locked screen door and entered, wielding a knife. He then proceeded to stab Linda Lewis. A rational jury could easily determine from this evidence that the Defendant did not have permission to enter the residence, that he was at least aware of the risk that he did not have permission to enter the home, and that he disregarded that risk and entered Ms. Lewis' residence with the intent to assault Ms. Lewis and did in fact assault her. Thus, the evidence is more than sufficient to support this conviction.

## II.

The trial court allowed the introduction as substantive evidence of a picture drawn by the Defendant of a woman with a knife through her eye and depicting blood spurting out of the knife wound, entitled "Booded [sic] Tears." The picture was sent by the Defendant to Linda Lewis, accompanied by a letter dated November 13, 1996, which was also introduced into evidence. After a hearing on the Defendant's motion to exclude this evidence, the trial court found that both the letter and picture were "highly probative of the defendant's purpose" and that their probative value was not substantially outweighed by the danger of unfair prejudice. We agree with the trial court that the letter was relevant and admissible, but conclude that the picture was erroneously admitted because it was of minimal relevance to the issues before the court and its probative value, if any, was substantially outweighed by the danger of unfair prejudice. However, we find that this error was harmless.

Tennessee Rule of Evidence 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evidence which is not relevant is inadmissible. Tenn. R. Evid. 402. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .” Tenn. R. Evid. 403. The trial court has the discretion to admit or exclude evidence under this balancing test, and its determination will not be overturned absent an abuse of that discretion. See State v. Cribbs, 967 S.W.2d 773, 793 (Tenn. 1998).

The letter written by the Defendant to Linda Lewis is relevant because in that letter the Defendant basically admits to committing the crimes charged. He also makes statements about being intoxicated and on drugs when he committed the crimes, which is relevant to his culpable mental state. Though the letter does contain a rather inflammatory and prejudicial statement, we do not believe that the statement is so prejudicial that it outweighs the probative value of the letter. Therefore, the trial judge did not abuse her discretion in admitting the letter.

The picture, on the other hand, presents a different situation. The picture was drawn after the Defendant was in jail and was sent to Ms. Lewis with the letter forty-six days after the offense. While the picture may depict what the Defendant would like to do to Ms. Lewis, we do not believe a picture drawn over a month after the attack on Ms. Lewis is probative of the Defendant’s premeditation and intent on the date of the offense. We believe this picture is more in the nature of propensity evidence of the Defendant’s character, which is inadmissible to prove that he acted in conformity with his character. See Tenn.



R. Evid. 404(a), (b); State v. Tizard, 897 S.W.2d 732, 743-45 (Tenn. Crim. App. 1994). Moreover, even if the picture was relevant, its probative value is substantially outweighed by the danger of unfair prejudice. The picture is gruesome and would likely inflame a jury against the Defendant.

Though we find that the picture was erroneously admitted into evidence, we also find that its admission was harmless. The picture was admitted to show the Defendant's premeditation and his intent to kill Linda Lewis, which would have been proof that the Defendant was guilty of attempted first degree murder. The jury, however, acquitted the Defendant of attempted first degree murder and instead found him guilty of attempted second degree murder, which indicates that the jury discounted the evidence of premeditation and intent. In order to have found the Defendant guilty of attempted second degree murder, the jury must have found only that the Defendant "knowingly" attempted to kill Linda Lewis. See Tenn. Code Ann. §§ 39-12-101, 39-13-210. As already determined, the evidence presented at trial was more than sufficient to support the Defendant's conviction for attempted second degree murder and his other convictions. We do not believe that this picture more probably than not affected the verdict, so its erroneous admission was not reversible error. See Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b).

### III.

The Defendant complains that his sentences are excessive and that they should be served concurrently instead of consecutively. He was sentenced to the maximum sentence in the range for each offense. The applicable range for the attempted second degree murder was twelve to twenty years, and the applicable

range for aggravated burglary and each of the aggravated assaults was ten to fifteen years. The trial court ordered the sentences served consecutively, except for the aggravated burglary conviction, creating an effective sentence of fifty years.

When an accused challenges the length, range, or manner of service of a sentence, this Court has a duty to conduct a de novo review of the sentence 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).

When conducting a de novo review of a sentence, this Court must consider: (a) the evidence, if any, received at the trial and sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement made by the defendant regarding sentencing; and (g) the potential or lack of potential for rehabilitation or treatment. State v. Thomas, 755 S.W.2d 838, 844 (Tenn. Crim. App. 1988); Tenn. Code Ann. §§ 40-35-102, -103, -210.

If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court’s findings of fact are adequately supported

by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

At the sentencing hearing, the trial court went through the statutory enhancement factors, finding applicable factors for each conviction and setting forth the facts supporting those factors. The trial court specifically stated that it did not find any mitigating factors, though urged by the Defendant to do so. With respect to the attempted second degree murder conviction, the trial court found the following statutory enhancement factors:

(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;

...

(6) The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great;

...

(9) The defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense;

...

(11) The felony resulted in death or bodily injury or involved the threat of death or bodily injury to another person and the defendant has previously been convicted of a felony that resulted in death or bodily injury; . . . .

See Tenn. Code Ann. § 40-35-114. The Defendant argues that the trial court erred in applying factors (5) and (6) to the attempted second degree murder conviction. We disagree.

Factor (5) requires that the defendant treat the victim with exceptional cruelty. This factor is not an element of attempted second degree murder and

may be used to enhance the sentence. State v. Hall, 947 S.W.2d 181, 185 (Tenn. Crim. App. 1997). In so doing, the trial court should state what actions, apart from the elements of the offense, constitute “exceptional cruelty.” State v. Goodwin, 909 S.W.2d 35, 45-46 (Tenn. Crim. App. 1995). This Court has previously found that the “exceptional cruelty” factor is satisfied in an attempted murder when numerous wounds are inflicted. State v. Cedric E. Stampley, C.C.A. No. 02C01-9409-CR-00208, 1996 WL 465557, at \*8 (Tenn. Crim. App., Jackson, Aug. 16, 1996) (victim shot seven times). See also State v. Alexander, 957 S.W.2d 1, 6 (Tenn. Crim. App. 1997) (multiple stab wounds and blows from a claw hammer); State v. Michael Scott Farner, C.C.A. No. 03C01-9705-CR-0016, 1998 WL 612891, at \*3 (Tenn. Crim. App., Knoxville, Sept. 15, 1998) (multiple stab and slash wounds); State v. William R. Waters, Jr., C.C.A. No. 01-C-01-9404-CR-00145, 1994 WL 714246, at \*2 (Tenn. Crim. App., Nashville, Dec. 22, 1994) (firing of “several rounds” into body of victim). The trial court here found this factor to exist because the Defendant stabbed Ms. Lewis multiple times, left the room when confronted by Shanta Lewis, and then returned to stab Ms. Lewis again, while continually saying “I’m going to kill you, bitch. I should have killed you.” The trial court stated that this went beyond the cruelty necessary to establish the offense, and the evidence does not preponderate against this finding. Therefore, the trial court did not err in applying this enhancement factor.

The Defendant also complains of the application of factor (6), that the personal injuries were “particularly great.” The trial court applied this factor because of the damage to Ms. Lewis' finger and because of Ms. Lewis' emotional distress after receiving the letters and pictures from the Defendant. While

“personal injury” includes both physical and emotional injury, see State v. Smith, 891 S.W.2d 922, 930 (Tenn. Crim. App. 1994), Ms. Lewis’ emotional injury stemmed from the letters she received after the commission of the offense, not from the attempted murder itself. Therefore, the emotional injury from the letters cannot be used to enhance the sentence for the attempted murder. However, Ms. Lewis testified that she had to have three surgeries on her finger, that she now has a rod in her finger, and that she cannot pick things up with that hand. Our supreme court has held that “proof of serious bodily injury will always constitute proof of particularly great injury.” State v. Jones, 883 S.W.2d 597, 602 (Tenn. 1994). “Serious bodily injury” includes “[p]rotracted loss or substantial impairment of a function of a bodily member, organ or mental faculty . . . .” Tenn. Code Ann. § 39-11-106(34). We believe the damage to Ms. Lewis’ finger falls within the parameters of “serious bodily injury” and “particularly great injury,” so as to justify the application of this factor.

The Defendant further argues that the trial court erred in refusing to consider either mitigating factor (8), that “[t]he defendant was suffering from a mental or physical condition that significantly reduced the defendant’s culpability for the offense,” or factor (13), “[a]ny other factor consistent with the purposes of this chapter.” Tenn. Code Ann. § 40-35-113(8), (13). In support of his argument, he states that “[t]here was ample testimony at trial, both in and out of the presence of the jury, that the defendant had a mental condition that significantly reduced his culpability for the offenses.” The trial judge acknowledged this testimony and dismissed its applicability, stating,

Whatever mitigation that the jury wanted to give Mr. Adams, they gave him with regard to the murder second instead of the attempted murder first. I think the testimony from all the witnesses is that it is more of a personality disorder from Mr. Adams than anything else. Therefore, I don't find any mitigating factors.

In her sentencing order, the trial judge stated, "Proof was presented by the defendant to show that the defendant had a personality disorder and was paranoid. However, the defendant was not psychotic." We believe the trial court properly considered this testimony and disregarded it after considering the credibility of the witnesses and the weight of the evidence. Therefore, having found that the trial court properly applied five enhancement factors and no mitigating factors after considering the principles of sentencing, we uphold the Defendant's sentence of twenty years as a Range II offender for the second degree murder conviction.

In sentencing the Defendant to the maximum sentence of fifteen years for each of the aggravated assault convictions, the trial court found no mitigating factors and the following enhancement factors:

(1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;

. . .

(11) The felony resulted in death or bodily injury or involved the threat of death or bodily injury to another person and the defendant has previously been convicted of a felony that resulted in death or bodily injury; . . . .

See Tenn. Code Ann. § 40-35-114. The Defendant challenges the application of factor (11), evidently because of the manner in which the prior felony conviction was introduced into the record. Prior to the sentencing hearing, the Defendant stipulated to his extensive criminal record. One prior felony conviction

was for aggravated assault, and the State sought to use that conviction to enhance the Defendant's sentence under factor (11). When the Defendant argued that the factor was inapplicable because there was no proof that the aggravated assault resulted in death or bodily injury, the State provided the case number for that conviction and requested that the case be provided to the court for clarification. The case file was brought to the court, and it revealed that the Defendant was indicted in May of 1992 for aggravated assault in that he "intentionally, knowingly , or recklessly did cause bodily injury to Linda Lewis by the use of a deadly weapon," which was a beer bottle. The Defendant pled guilty to the charges in the indictment. The trial court found that the indictment "speaks for itself" and filed it and the judgment as an exhibit to the record. We believe it was proper for the trial court to allow the introduction of this evidence at the sentencing hearing. This evidence clearly shows that the Defendant was previously convicted of a felony that resulted in bodily injury, so factor (11) was properly applied to enhance the Defendant's sentence.

Though the trial court applied only two enhancement factors to the aggravated assault convictions, it also specifically stated in its sentencing order that it gave great weight to enhancement factors (1) and (11) in all of the convictions, and those are the two factors applied here. We believe the trial court acted within its discretionary authority in imposing the maximum sentence in the applicable range for both aggravated assault convictions after considering the sentencing principles and the applicable enhancement and mitigating factors; therefore we uphold the sentences.

With respect to the aggravated burglary conviction, the trial court found the following enhancement factors:

(1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;

...

(9) The defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense;

...

(11) The felony resulted in death or bodily injury or involved the threat of death or bodily injury to another person and the defendant has previously been convicted of a felony that resulted in death or bodily injury;

...

(16) The crime was committed under circumstances under which the potential for bodily injury to a victim was great; . . . .

See Tenn. Code Ann. § 40-35-114. The Defendant challenges the applicability of factors (11) and (16) to this conviction. As previously determined, the prior felony conviction supporting the application of factor (11) to all of the convictions was properly introduced into the record and relied upon by the trial court. Factor (16), however, was improperly applied. Aggravated burglary is the burglary of a habitation. Tenn. Code Ann. § 39-14-403. It is “aggravated” only because it is the burglary of a habitation as opposed to some other type of structure. See id.; id. § 39-14-402. As this Court has previously noted, the General Assembly has enhanced the punishment for aggravated burglary and “[i]n doing so, the General Assembly recognized that the potential for bodily injury to the victim is great when these crimes are committed. Thus, a trial court should not apply this factor absent extraordinary circumstances.” State v. Smith 891 S.W.2d 922, 930 (Tenn. Crim. App. 1994). We do not believe extraordinary circumstances are present in this case which would allow the application of this factor. However, the trial court found the presence of three other enhancement factors, giving great weight to two of those factors, and it did not find any mitigating factors. We believe that



the maximum sentence for the aggravated burglary was appropriate considering the three enhancement factors.

Finally, the Defendant challenges the imposition of consecutive sentences. Pursuant to Tennessee Code Annotated § 40-35-115(b)(2), (4), the trial court ordered consecutive sentences after finding by a preponderance of the evidence that the Defendant is an offender whose record of criminal activity is extensive and that 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. While either of these factors would support consecutive sentencing, see Tenn. Code Ann. § 40-35-115(b), both factors are supported by the record.

The Defendant stipulated his prior criminal history. The presentence report reflects seven prior felony convictions and six prior misdemeanor convictions. These convictions range in time from April 1978 to May 1993 and include such crimes as assault, aggravated assault, escape, burglary, and sexual battery. The presentence report also reflects pending coercion of a witness charges stemming from the letters and pictures sent to Ms. Lewis, as well as twenty-seven arrests that did not result in convictions or have unknown dispositions. These arrests range in time from May 1978 to December 1993. Based on the Defendant's prior criminal record, the evidence does not preponderate against the determination that the Defendant is an offender whose record of criminal activity is extensive; thus this finding supports the imposition of consecutive sentencing. See State v. Lee, 969 S.W.2d 414, 418 n. 2 (Tenn. Crim. App. 1997) (trial court properly found record of criminal activity to be extensive when defendant was arrested

and/or convicted of at least twelve offenses, including felonies and misdemeanors).

Similarly, the evidence does not preponderate against the trial court's determination that 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. In support of its determination, the trial court considered the nature of the crime, the Defendant's comments to Linda Lewis that he was going to kill her, the Defendant's comments to Christine Lewis that he should have killed her, and the comments heard by Tamika Rucker that next time he would kill Ms. Lewis or he should have killed her. The trial court also considered the disturbing letters and pictures sent to Ms. Lewis from jail, from which it can be inferred that the Defendant still wanted to harm or kill Ms. Lewis after being arrested. Finally, the trial court considered the Defendant's statement to Officer Gatwood that he stabbed his girlfriend because she was "sleeping with someone else" and he would do it again if he got the chance. This evidence greatly supports the finding that the Defendant has no hesitation about committing a crime where the risk to human life is high and that he has little or no regard for human life.

Though the Defendant clearly falls within the definition of "dangerous offender," our supreme court has held that before an offender may be sentenced to consecutive sentences based on a finding that the offender is dangerous, "[t]he proof must also establish that the terms imposed are reasonably related to the severity of the offense committed and are necessary in order to protect the public from further criminal acts by the offender." State v. Wilkerson, 905 S.W.2d 933,

938 (Tenn. 1995). See also State v. David Keith Lane, No. 03-S-01-9802-CC-00013 (Tenn. Sept. 27, 1999) (holding Wilkerson factors apply only when sentencing pursuant to the dangerous offender category). The trial court found that the proof established these factors, and we agree. The Defendant broke into Ms. Lewis' home and tried to kill her. In the process of trying to kill Ms. Lewis, he assaulted Ms. Lewis' mother and daughter with a knife. He repeatedly stated that he either would kill Ms. Lewis or that he should have killed her. He told an officer that he would do it again. He sent Ms. Lewis disturbing letters and pictures from jail, indicating that he wanted to kill Ms. Lewis. Dr. Schleicher testified that the Defendant still has the same type of impulsive personality. He has refused any type of treatment for his mental condition. It was thus appropriate for the trial court to impose consecutive sentences because the Defendant is a dangerous offender and consecutive sentences are both reasonably related to the severity of the offense and necessary to protect the public from further criminal activity.

#### IV.

In his last issue, the Defendant argues that the trial court erred in refusing to transfer this case to another criminal court of competent jurisdiction. Before trial, counsel for the defense moved the trial court for "traditional docketing" of the Defendant's case so as to avoid the appearance of impropriety and the appearance of forum shopping. After a hearing, the trial judge denied the motion, finding no evidence of prosecutorial misconduct and stating that the Defendant would get a fair trial in her court because she had no knowledge about the case and would make all decisions based on the facts and the law.

The evidence presented at the hearing revealed that under “traditional docketing,” the Defendant’s case was originally destined to be assigned to Criminal Court, Division I, where Judge Thomas Shriver presided. Assistant District Attorney General Campbell, who was handling the case at that time, testified that she chose to directly present new coercion of a witness charges, which arose out of the Defendant’s letters and drawings sent to Ms. Lewis from jail, to the Grand Jury before she presented the other charges to the Grand Jury for indictment. She said that she made this decision because it is her practice to prepare discovery and draft pleadings at the time she prepares the indictments, and the discovery response for the coercion charges was shorter and easier to prepare. She felt this process was more expedient because the Defendant was incarcerated and would have started making speedy trial claims if she took the time to draft the discovery pleadings for the other charges before presenting the case to the Grand Jury. She also testified she was aware that by directly presenting new coercion of a witness charges, the Defendant’s case would be sent to Judge Cheryl Blackburn’s court in Division III. This was because the normal procedure for assigning direct presentments to the four courts had been suspended in order to even out the case load, and all direct presentments were being assigned to Judge Blackburn. General Campbell admitted that she is a woman, that Judge Blackburn is a woman, that the other three judges are men, and that the Defendant is a man. She also admitted that Judge Shriver, the judge who would have heard the Defendant’s case had she not chosen to directly present the new charges, had granted two new trials in cases she had prosecuted; however, she asserted that Judge Shriver’s grants of new trials occurred after the indictments in this case. She conceded that defendants generally believed the late Judge Shriver’s court to be “easier” than other courts.

The Defendant concedes that General Campbell gave a plausible explanation for her decision to move the Defendant's prosecution from one court to another and that it was not proven at the hearing that General Campbell was unethical, but he asserts that the case should have been removed from Judge Blackburn's court "so as to avoid the ugly specter of discriminatory treatment and forum shopping." We agree with the Defendant that attorneys and judges have the duty to avoid the appearance of impropriety, see Tennessee Code of Professional Responsibility Canon 9; Tennessee Code of Judicial Conduct Canon 2, but we find no evidence of impropriety or the appearance of impropriety in this case. The office of the district attorney general has the discretion to determine whether to prosecute a case and how to proceed with the prosecution. See Quillen v. Crockett, 928 S.W.2d 47, 50-51 (Tenn. 1996). General Campbell made the discretionary decision to directly present coercion charges to the Grand Jury, and that decision resulted in the Defendant's case being assigned to Judge Blackburn. The obvious facts that Judge Blackburn is a woman, that General Campbell is a woman, that the Defendant is a man, and that the late Judge Shriver was a man, do not create any impropriety or the appearance of impropriety. Neither do the facts that defendants generally believed the late Judge Shriver to be "easier" than Judge Blackburn or that General Campbell may have had some unpleasant experiences with Judge Shriver after this case was indicted. This issue simply has no merit.

Even if the Defendant had been able to show the existence of the appearance of impropriety, he has shown no prejudice. The test to be applied in reviewing a claim of prosecutorial conduct is "whether the improper conduct could have affected the verdict to the prejudice of the defendant." Harrington v.

State, 385 S.W.2d 758, 759 (Tenn. 1965). Similarly, a request to recuse a judge is subject to the discretion of the trial judge, and the issue for us “is not the propriety of the judicial conduct of the trial judge, but whether [s]he committed an error which resulted in an unjust disposition of the case.” State v. Hurley, 876 S.W.2d 57, 64 (Tenn. 1993) (citations omitted). Although the Defendant asserts he was assured the “harsh sentence” of the maximum in the range for each count due to the case assignment, he has made no showing that he was treated unfairly by Judge Blackburn or that he was in some way denied a fair trial. As previously determined, the Defendant’s sentences were proper considering the sentencing principles and the criminal conduct involved. Without some showing of prejudice to the Defendant, we have no cause to reverse the convictions. The record simply does not support a finding of improper conduct on the part of either the trial judge or the assistant district attorney.

Accordingly, the judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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JOHN EVERETT WILLIAMS, JUDGE