IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 21, 2010 Session

STATE OF TENNESSEE v. MARVIN BOBBY PARKER

Appeal from the Circuit Court for Bedford County
No. 16677 Lee Russell, Judge

No. M2009-02448-CCA-R3-CD - Filed January 6, 2011

Appellant, Marvin Bobby Parker, was indicted by the Bedford County Grand Jury for two counts of aggravated assault, three counts of reckless endangerment, and one count of assault. After the denial of pretrial diversion, Appellant's case proceeded to a jury trial. Following a lengthy trial, Appellant was convicted of reckless aggravated assault, two counts of assault, and one count of reckless endangerment for a series of incidents that took place on June 7, 2008, at the Duck River Speedway after a race. Appellant was found not guilty of two counts of reckless endangerment. As a result of the convictions, Appellant was sentenced as a Range I, standard offender to three years for reckless aggravated assault with all but 59 days of the sentence suspended, the remainder of the sentence to be served on community corrections. Further, Appellant was sentenced to eleven months and twenty-nine days for each remaining misdemeanor sentence. The misdemeanor sentences were ordered to run concurrently to each other but consecutively to the reckless aggravated assault sentence, for a total effective sentence of four years. After the denial of a motion for new trial, Appellant sought a review of his convictions and sentence in this Court. The following issues are presented on appeal for our review: (1) whether the district attorney abused his discretion in denying pretrial diversion; (2) whether the trial court properly denied a motion to sever; (3) whether the trial court properly instructed the jury; (4) whether the evidence was sufficient to support the convictions; (5) whether the trial court properly sentenced Appellant. After a review of the record, we determine that: the trial court properly upheld the denial of pretrial diversion; the trial court properly denied the motion to sever; and the evidence was sufficient to support the convictions for reckless aggravated assault and assault as challenged by Appellant. Further, we determine that the trial court properly instructed the jury. However, because the trial court imposed consecutive sentencing without making the proper findings and ordered Appellant to community corrections even when Appellant was ineligible for such a sentence, we reverse the matter and remand to the trial court for a new sentencing hearing. Accordingly, the judgments of the trial court are reversed and remanded.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed in Part; Reversed in Part; and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Neil Campbell, Franklin, Tennessee, for the appellent, Marvin Bobby Parker.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; Charles Crawford, District Attorney General; and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The events at issue herein that form the basis for Appellant's convictions occurred at the Duck River Speedway, a dirt racetrack, on June 7, 2008. Appellant drove a car in the "late model" race that night. The Smotherman family, including James Smotherman, Sr., James "BJ" Smotherman, Jr., and Chad Smotherman, also had a car in the late model race. The Smotherman's car was driven by Jamie Lewis.

After the race, Gary Epperson, also known as "Guru," a member of the Smotherman pit crew, stopped Appellant to talk to him about his driving during the race as his race car exited the track and headed toward pit row. The events that unfolded from that point on were in great dispute during the lengthy five-day trial. The undisputed facts indicated that shortly after the conversation between Mr. Epperson and Appellant, Appellant's car moved forward at a rapid pace, did a donut, and headed back toward the area of pit row occupied by the Smotherman family. Testimony from the State at trial indicated that Appellant's vehicle struck Chad Smotherman, who was thrown face first into a parked car and suffered injuries. The State's witnesses also testified that the car nearly hit Matthew Taylor Duke and James Smotherman, Sr. and that Appellant later assaulted the owner of the race track, James Hastings.

As a result of the incident, Appellant was indicted by the Bedford County Grand Jury in a multi-count indictment for the aggravated assault that caused serious bodily injury of Chad Smotherman, the aggravated assault with a deadly weapon of Matthew Taylor Duke, the reckless endangerment of James Smotherman, Sr., the reckless endangerment of James Smotherman, Jr., the reckless endangerment of Gary Epperson, and the assault of James

Hastings. Appellant's brother, Michael Parker, was also indicted for his involvement in the incident.

Prior to trial, Appellant filed an application for pretrial diversion. The District Attorney denied pretrial diversion. Appellant filed a writ of certiorari to review the denial of diversion. The trial court denied the writ of certiorari, finding that the District Attorney did not abuse his discretion in denying diversion.

State's Proof

At trial, the State presented the following proof. James "Bud" Smotherman, Sr. testified that he is a self-employed dump truck driver who hauls gravel. In his spare time, Mr. James Smotherman, Sr.[1] is a racing enthusiast who owns both a late model racecar and super-stock racecar with his son, James Smotherman, Jr., also known as "BJ." Chad Smotherman, Mr. James Smotherman, Sr.'s other son, helps out sometimes with the racecars.

Mr. James Smotherman, Sr. recalled an episode a few weeks prior to June 7, 2008, at the Winchester Racetrack where Appellant's brother, Mr. Parker was driving the practice lap around the track and collided with the Smotherman car. Mr. James Smotherman, Sr. was not angry about the collision that caused minor damage because it was a "racing thing."

On June 7, 2008, the Smothermans were at the Duck River Speedway to race cars. They wore matching t-shirts. The people involved in the "late model" race wore gray shirts, and the people involved in the super-stock car race wore tan shirts. Mr. James Smotherman, Sr. testified that on June 7, everyone involved with Smotherman racing was wearing a gray shirt. The Smothermans rented two areas in pit row, referred to as "pit pads" for their cars. The two pit pads were side-by side near the concession stand on the back straightaway of the racetrack. Mr. James Smotherman, Sr. testified that after the super-stock race, the car was parked on one of the pit pads waiting to be loaded onto the trailer at the end of the night. The car was parked so that the back of the car was facing pit row.

Jamie Lewis was driving the late model car owned by the Smothermans. Mr. James Smotherman, Sr., Mr. James Smotherman, Jr., Chad Smotherman, and Gary Epperson, one of the pit crew, were standing near the fence by the pit pad watching the race. Mr. James Smotherman, Jr., testified that Appellant was driving a car in the race and was continually "beating and banging on" the Smotherman car during the race. Mr. Chad Smotherman explained that "rubbing[']s racing a lot of times." At one point during the race, a caution flag

[1] The trial included the testimony of several members of the Smotherman family. In order to avoid confusion, they will be referred to by their first and last names.

was issued. Appellant pulled his car in front of the Smotherman car and bumped the Smotherman car. At one point, during a red flag, Appellant collided again with the Smotherman car, so much so that the hood of Appellant's car was torn off during the collision. Mr. James Smotherman, Jr. saw Appellant make a "little bit" of contact with the Smotherman car during the race while under the caution flag and the red flag. Mr. James Smotherman, Jr. thought that Appellant's actions seemed intentional. Appellant's actions during the race angered Mr. James Smotherman, Sr. and Mr. Epperson.

Mr. James Smotherman, Sr., Chad Smotherman, and Mr. James Smotherman, Jr. saw Mr. Epperson approach Appellant's vehicle as he exited the race track. Mr. James Smotherman, Sr., was approximately 60 to 90 feet away. He witnessed Mr. Epperson put both of his hands on Appellant's car door and lean into the car. He could not hear any conversation that occurred because the engine of the car was running. Mr. James Smotherman, Sr. testified that he did not see Mr. Epperson touch Appellant during the encounter. Further, Appellant stayed in the car with his helmet on and the visor shield pulled down. According to Mr. James Epperson, Sr., several onlookers approached the car but were not "close" enough to Appellant's car to make contact with Appellant.

Mr. James Smotherman, Jr. saw Mr. Epperson gesture with his hands to Appellant to indicate that he should slow down. Mr. James Smotherman, Jr. saw the exchange between Appellant and Mr. Epperson. He could not hear what they were saying but did not observe Mr. Epperson touching Appellant.

Mr. Epperson testified that he motioned for Appellant to stop his car after the race. Mr. Epperson stated that he asked Appellant why he was beating on the Smotherman car. Mr. Epperson admitted to using swear words while talking to Appellant. Appellant did not respond. Mr. Epperson insisted that he did not touch Appellant during the encounter and that there was no one standing around Appellant's car at that time.

When the conversation was over, Mr. Epperson, Mr. James Smotherman, Sr., Mr. Chad Smotherman, and Mr. James Smotherman, Jr. saw Appellant spin his tires and take off at a high speed throwing "dirt and gravel." Mr. James Smotherman, Jr. saw Appellant give Mr. Epperson "the bird" as he sped off. Mr. James Smotherman, Jr. testified that this made him even more mad, so he threw his water bottle at Appellant's car, striking the left rear quarter panel of Appellant's car. Mr. Chad Smotherman threw a half-empty beer can at Appellant's car that bounced off the ground and hit the right rear quarter panel as he passed by.

According to Mr. James Smotherman, Sr., Appellant drove the car near where he was standing "turned it hard to the left, went straight up the embankment, plumb to the fence, cut

a donut, throwing stuff all over people that was [sic] still standing at the fence, and come straight down towards our pads [where we were standing]." Mr. James Smotherman, Sr. described the engine as "wide open" and claimed that he could hear the "rev limiter" indicating that Appellant was going extremely fast. Mr. James Smotherman, Sr. knew it was time to "get out of the way" and dodged to the right. His son Chad Smotherman dodged to the left. Mr. James Smotherman, Sr. was grazed on the arm by the car. Mr. James Smotherman, Sr. saw the car hit his son, Chad Smotherman. The impact threw Mr. Chad Smotherman onto the dash of the car. Appellant hit the parked stock car at the Smotherman pit pad. Chad Smotherman was thrown off of Appellant's car and landed "face first" into another car. Mr. Chad Smotherman corroborated this version of the events and testified that the last thing he remembered was hearing Appellant's rev limiter "popping off" shortly before he was hit by the car. Mr. James Smotherman, Jr. corroborated this version of the events but admitted that he did not see his brother Chad Smotherman get hit by the car. Mr. James Smotherman, Jr.'s wife, Mary Beth Smotherman, also corroborated this version of the events. Mrs. Smotherman testified that she saw Mr. Chad Smotherman get hit by the car and that she attended to his injuries until the ambulance came to the scene. Mr. Epperson claimed that he also saw Mr. Chad Smotherman get hit by Appellant's car.

Appellant's car came to a stop at that time, but Appellant continued to try to start the engine. Mr. James Smotherman, Sr. and Mr. Epperson tried to get Appellant out of the car and stop him from restarting the car. Other people approached the car at the same time. Mr. James Smotherman, Jr. reached into the engine and pulled out the "plug wires" so that Appellant could not start the car again. Somehow, Appellant was able to start his car and drive to his own pit area where he parked the car. No one on the Smotherman team recalled Appellant's steering wheel being removed from the car. Mr. James Smotherman, Jr. recalled that there were several people surrounding Appellant's car trying to get Appellant out of the car. Mr. James Smotherman, Jr. did not see anyone with a knife or anything that would have cut Appellant.

Mr. Epperson rode off on a nearby four-wheeler and informed medical personnel that an ambulance was needed. Mr. James Smotherman, Sr. stayed with his son Chad Smotherman until an ambulance arrived. Mrs. Mary Beth Smotherman, the wife of Mr. James Smotherman, Jr., testified that Mr. Chad Smotherman's nose was "flat from his forehead straight down to the end of where the cartilage was." Mr. Chad Smotherman was transported via lifeflight to Vanderbilt where he was treated for a bilateral nasal bone fractures and various abrasions. The nose fractures were noted as "age indeterminate" but Mr. Chad Smotherman did not report a prior broken nose at the hospital. At trial, Mr. Chad Smotherman admitted that he broke his nose in 2000 or 2001. Mr. Chad Smotherman eventually had plastic surgery to repair the damage to his nose. Mr. Chad Smotherman described the injuries as painful and informed the court that he had lost about 60 to 70

percent of his sense of smell. He was told that he may or may not regain his sense of smell. Mr. Chad Smotherman also complained of continued pain and numbness in his left leg but testified that he had not been to a doctor after he received an initial MRI because he did not have insurance.

Mr. James Smotherman, Jr. followed Appellant to his pit area after the collision. He saw Jim Hastings, the owner of the Duck River Speedway. Mr. Hastings had blood on his face and looked like he had been in a fight. Appellant's brother, Mr. Parker, was holding a metal bar in his hands that was about two feet long. Appellant did not have anything in his hands. Mr. James Smotherman, Jr. described Appellant as "irate." Two police officers arrived to intervene. Mr. James Smotherman, Jr. saw Appellant punch Mr. Hastings. The officers used pepper spray on Appellant and his brother, Mr. Parker.

Dean Travis, a friend of the Smotherman family, was at the track watching the race that night. Mr. Travis testified that he did not see any activity between Appellant's car and the Smotherman car during the race, he saw Mr. Epperson approach Appellant's car after the race and witnessed the encounter between the two men. Mr. Travis testified that Appellant sped off after the encounter, did a donut, and came full speed toward the Smotherman pit area, striking Chad Smotherman with his car. After the collision, Mr. Travis saw Mr. James Smotherman, Sr., Mr. James Smotherman, Jr., and Mr. Epperson near Appellant's car. He did not see any of them touch Appellant. Mr. Travis also saw Appellant eventually restart his engine and drive away after the collision.

Chuck Newby also testified about what he saw at the racetrack on the night of June 7, 2008. Mr. Newby often attended the races and had heard of Appellant and the Smotherman family but was not friends with either one of them. Mr. Newby drove in the late model race and noticed that Appellant was driving "pretty wild." During the race, Mr. Newby's car overheated. He was forced to park the car and watch the end of the race. During the end of the race there was a lot of "banging and carrying on." Mr. Newby saw Appellant's hood come off during the race. Mr. Newby saw Appellant exit the racetrack but did not witness the exchange between Mr. Epperson and Appellant. Mr. Newby also testified that he did not see a crowd around Appellant's car. As Appellant drove into the pit area, Mr. Newby saw Chad Smotherman shake his finger at Appellant. Appellant's car was not "wide open" at this time. Several seconds later, Mr. Newby heard Appellant's car go "wide open" and saw tires spinning. The car came up onto the embankment where Mr. Newby was standing with his wife. Mr. Newby testified that Appellant had a steering wheel in his car at that time. Mr. Newby saw people trying to "get away" from Appellant and saw the car strike Mr. Chad Smotherman. Mr. Chad Smotherman "flew" off Appellant's car when it hit a parked car, and Mr. Chad Smotherman landed on his face on a parked car.

Soon thereafter, Mr. Newby saw a crowd of people around Appellant's car. Appellant started his car again and drove off. He later saw officers subdue Appellant with pepper spray. Mr. Newby's wife, Kim, corroborated his version of the events.

On the night of June 7, 2008, Jamie Lewis was the driver of the car owned by the Smothermans. He testified at trial that several weeks prior to the night in question he was driving the late model car for the Smothermans at the Winchester race in a "hot lap." Appellant's brother, Mr. Parker was also driving in the hot lap at the Winchester race. Mr. Parker lost control of his car during the lap, hit the Smotherman car, and caused several hundred dollars worth of damage.

On the night of June 7, 2008, about two laps into the race, a caution flag was issued. Appellant cut in front of Mr. Lewis, clipping the front end of the car. Several turns later, the two cars hit again as Mr. Lewis was reestablishing his position in front of Appellant. Appellant hit the back of the Smotherman car this time. Mr. Lewis exited the track after the race from a different exit than Appellant. He saw Appellant's car and witnessed a "big commotion." When Mr. Lewis arrived at the Smothermans' pit pad, he was told that there was fighting going on and saw Mr. Chad Smotherman covered in blood.

According to Mr. Lewis, he took off toward Appellant's pit area after the police arrived. He saw Mr. Hastings on the ground. He then saw officers try to arrest Appellant and spray Appellant and Mr. Parker with pepper spray.

Amy Duke was working at the concession stand in the pit area on June 7, 2008. Her son, Matthew Taylor Duke, was in the pit area helping his dad, Carl Duke. Matthew Taylor Duke, who was in sixth grade at the time of trial, was standing near Mr. Chad Smotherman at the time Appellant's car came speeding into the area. Mrs. Duke saw the car hit Mr. Chad Smotherman. At first she thought that her husband or son had been hit by Appellant. Matthew Taylor Duke was in arm's reach of Mr. Chad Smotherman at the time of the collision and witnessed the collision occur.

Mr. Hastings, the owner of the Duck River Speedway, knew both Appellant and the Smotherman family. He watched the late model race from the press box. Mr. Hastings saw Appellant run into the back of the Smotherman car during a caution lap. After the race, Mr. Hastings was notified that there was a problem involving an injury near pit row. Mr. Hastings called Officer James Wilkerson and Officer Mike Davis, the security officers for the racetrack, and told them to go to the area. By the time Mr. Hastings arrived, the ambulance was there, and Appellant was not at the scene.

Mr. Hastings was told to go to Appellant's pit area. When he arrived, he asked Appellant what was happening. Appellant blamed Mr. Hastings, telling him that it was his "fault." Mr. Hastings told Appellant he did not know what he was talking about. Mr. Hastings claimed that Appellant hit him a few times. Mr. Hastings tried to get off of the four wheeler that he was riding when he saw Appellant's brother, Mr. Parker, holding a two-foot-long metal pipe. According to Mr. Hastings, it appeared he was about to get attacked by both Appellant and his brother. Someone grabbed the pipe away from Mr. Parker before he could hit Mr. Hastings. Mr. Hastings got back on the four wheeler and rode back to the concession area to look for the security officers.

Mr. Hastings testified that he drove back to Appellant's pit pad. Mr. Hastings asked the officers to arrest Appellant for assault. Appellant replied, "I'll show you assault." Mr. Hastings testified that Appellant punched him in the head. The other State witnesses testified that it was actually Mr. Parker that hit Mr. Hastings in the back of the head. Appellant and Mr. Parker were arrested.

Officer Mike Davis was a part-time security officer for the Duck River Speedway. Officer Davis had been a police officer for Shelbyville, Tennessee for approximately seventeen years at the time of trial. When Officer Davis received the report that someone had been hit by a car in pit row, he and Officer James Wilkerson drove to the area. They heard multiple accounts of the story from people in the area near the commotion and were able to deduce that Mr. Chad Smotherman had been hit by Appellant's car.

Officers Davis and Wilkerson went to Appellant's pit area and saw Appellant's brother, Mr. Parker holding, a large iron pipe. Officer Wilkerson testified that Appellant was also holding a weapon, a large wrench. When the men refused to put down their weapons, Officer Wilkerson drew his service weapon. The men dropped their weapons.

According to Officer Wilkerson, Mr. Hastings drove up on his four wheeler and demanded that the Parker brothers be arrested for assault. After a verbal exchange between Mr. Hastings and the Parker brothers, Appellant and his brother attacked Mr. Hastings. Officer Davis grabbed Mr. Parker by the neck and pulled him away from Mr. Hastings, using pepper spray to subdue him. Appellant was controlled by Officer Wilkerson and also sprayed with pepper spray. Appellant did not make any complaints at that time that he had been attacked or injured. Appellant and his brother were treated by emergency personnel after being sprayed with pepper spray. After Appellant was treated, Officer Wilkerson noticed small claw scratches on Appellant's left side.

The State introduced testimony about the operation and control of Appellant's car. According to the State's witnesses, the car starts using a manual toggle switch. The engine

is shut off by flipping the switch. The car has two forward gears, high and low. The car has to be started in low gear and can be switched to high gear after reaching 3000 or 4000 revolutions per minute.

Appellant's Proof

Appellant presented his own proof at trial. Jacob France, a sixteen-year-old race car driver, testified that he drove in the late model race on June 7, 2008, and had to leave the race early due to a flat tire. He saw Appellant exiting pit row in front of him and noticed that Appellant stopped his car when a group of ten to fifteen people ran toward the car, some throwing water bottles. Mr. France saw people trying to pull Appellant out of the car. Mr. France saw Appellant's car take off in pit row with the engine wide open, do a donut, then crash into another car.

David Gentry, another race car driver, testified on Appellant's behalf at trial. Mr. Gentry won the late model race on June 7, 2008. At the end of the race, he exited the track to weigh his car. The top three finishers are required to weigh their cars at the conclusion of the race. Mr. Gentry then proceeded to pit row. He was in line behind Mr. France. Mr. Gentry testified that he also saw what he described as a group of twelve to twenty people "flogging all over" Appellant's car. He did not see anyone throw anything at Appellant, but Mr. Gentry could see that people were trying to get Appellant out of the car. Some of them had on red shirts. Mr. Gentry thought that the Smothermans often wore red shirts. Mr. Gentry did not see anyone on the hood of Appellant's car. Mr. Gentry saw Appellant's car take off suddenly, drive up the embankment, do a donut, and come back to the pit area. When Appellant's car came to a stop, Mr. Gentry headed over to Appellant's pit area to tell police that Appellant had not started the fight.

Dustin Seibers, a rookie class racer at Duck River Speedway, testified that he was watching the late model race from the concession stand on June 7, 2008. Mr. Seibers was waiting for a friend when he noticed the commotion on pit row near Appellant's car. Mr. Seibers saw someone climb up the front fender of Appellant's car onto the engine area. He later learned that it was Mr. Chad Smotherman that was on top of Appellant's car. Mr. Seibers could not tell if Mr. Chad Smotherman was on the car the whole time but did see him get thrown off onto another car when Appellant's car struck another car. A large crowd then attacked Appellant's car; Mr. Seibers saw people trying to drag Appellant out of the car. Appellant's car took off again, and Appellant drove to his own pit area.

Appellant testified in his own behalf. According to Appellant, he ran up underneath the car in front of him during the race. A caution flag came out, and Appellant drove in front of the Smotherman car, even though he admitted that if he followed racing protocol he

should have stayed behind the Smotherman car. The Smotherman car scraped the side of Appellant's car soon thereafter. Appellant exited the track after the race near turn two, driving into pit row in the same gear he had used during the race. Appellant saw Mr. Epperson approaching the car, signaling for Appellant to stop. He stopped the car. Appellant did not take the car out of gear, so the engine died when he stopped. He could not hear what Mr. Epperson was saying because he had on his helmet and ear plugs.

Appellant testified that he then saw Mr. Chad Smotherman running toward his car. Mr. Chad Smotherman threw an unidentifiable liquid at his car, some of which got on Appellant. Appellant described it as cool and odorless. Appellant testified that he noticed fumes that irritated his eyes when he put his helmet shield back down to cover his eyes. Appellant testified that he also saw Mr. James Smotherman, Jr. running down the embankment. Mr. James Smotherman, Jr. threw a bottle at Appellant that struck Appellant in the neck.

Appellant claimed that people reached into his car and tried to grab his safety straps. Appellant felt a "piercing, burning sensation" when someone ran a sharp object against his stomach. Appellant testified that his safety straps had cut marks on them after the encounter.

Appellant pushed the start button in an attempt to get away from the mob of people. The car rolled forward a bit before the engine started to go "wide open." Appellant heard the rev limiter engage, signaling that the car had reached the maximum "rpm" level. Appellant's car started to circle to the left, and Appellant realized that he had no control over the car. Appellant's car headed for the fence. Appellant thought he was headed straight for the fence and "came to" when people were trying to pull him out of the car. Appellant tried to push the start button to move the car, but someone repeatedly pushed his hand away. Appellant finally got the car started again and drove off, quickly realizing that he did not have a steering wheel. Appellant stated that it was easy to drive without a steering wheel by grabbing on to the hex nut where the steering wheel attached to the steering column. Appellant opined that someone had taken the steering wheel while he was being attacked.

Appellant made it to his pit area. Appellant described himself as "bumfuzzled" and grabbed a jack handle to protect himself because he was scared after people tried to get him out of his car. Mr. Hastings arrived and told Appellant to get out of the race track. Appellant admitted that he grabbed Mr. Hastings by the collar and told Mr. Hastings that he was "upset" while shaking him. Appellant testified that he let go of Mr. Hastings and went back to his trailer.

According to Appellant, Mr. Hastings left the area but came back when he saw the officers walking toward Appellant. Appellant claimed that he was not armed and that the

officers did not draw their weapons. Mr. Hastings told the officers that he wanted Appellant and his brother arrested for assault. Mr. Parker stated that if he was going to jail for assault, he wanted a reason to go to jail. Appellant stated that he knew his brother was going to overreact, so he moved toward the officers to try to prevent his brother from getting into a fight. Appellant claimed that he and his brother tripped, falling into Officer Wilkerson. When they got up, Officer Wilkerson sprayed Appellant in the eye with pepper spray.

Appellant testified that he had cuts on his stomach that were examined by emergency personnel and that several days after the incident he observed blood on the driver's side window of his car. Appellant did not learn until later that he had hit someone with his car.

Jay George, a friend of Appellant, saw people hitting Appellant and trying to pull him out of his car when the race was over. Mr. George picked up a steering wheel off the ground after Appellant drove off. He assumed it belonged to Appellant. Mr. George claimed that he and his brother took the weapons away from Mr. Parker and Appellant prior to the arrival of the security officers. Further, Mr. George testified that Appellant never struck or swung at Mr. Hastings. Mr. George did not see either of the officers take out their service weapons. Mr. George admitted that Mr. Parker eventually took a swing at Mr. Hastings. Mr. George was unsure if he made contact. Mr. George witnessed the men being sprayed with the pepper spray.

Appellant's brother, Mr. Parker, also testified. Mr. Parker confirmed that he had a collision with Mr. Lewis at the Winchester race a few weeks prior to the incident at issue. Mr. Lewis was driving for the Smotherman family that night. Both cars were damaged in the collision.

On the night of June 7, 2008, Mr. Parker watched the race. When the race was over, Mr. Parker started to load tools into the trailer. When his brother did not arrive, Mr. Parker started looking around. He saw Appellant's car surrounded by a lot of people. Mr. Parker ran toward the car with a jack handle in his hand. Mr. Parker got to the car, reached in, and tried to press the start button so that Appellant could get out of the crowd. The car started, and Appellant drove to their pit area. Mr. Parker testified that Mr. Hastings then drove up on his four wheeler to tell the Parker brothers to get out of the race track. Mr. Hastings grabbed Appellant by the shirt. Mr. Parker denied threatening Mr. Hastings with the jack handle. Mr. Hastings left, and the officers arrived. Mr. Parker did not see the officers take out their weapons. Mr. Parker admitted that he tried to assault Mr. Hastings but was unsuccessful because he fell to the ground. Mr. Parker was sprayed with pepper spray.

Matthew Wilson, a friend of Appellant and Mr. Parker, watched the race that night from the entrance near pit row. After the commotion, Mr. Wilson saw about four beer cans

on Appellant's car and noticed blood around the driver's side window. Mr. Wilson also noticed that the throttle linkage, the connector from the pedal to the carburetor, was bent. Mr. Wilson testified that this would interfere with the connection between the pedal and the carburetor and could cause the car to malfunction. Mr. Wilson notified Appellant of the bent throttle linkage.

Appellant hired an expert in mechanical engineering to testify at trial. According to Roman Kickirillo, Appellant's car could go forward in high gear from a starting position if given enough throttle. There were several areas of damage on Appellant's car including the distributor cap and spark plug wires. The throttle linkage was also bent, which could cause the car to act as if "somebody had their foot on the gas pedal" and allow the car to take off with the engine wide open. Mr. Kickirillo testified that if the car were started with the engine wide open, it could cause the car to make a sharp left turn because the stock car is designed to have the right tires larger than the left to make it easier for the car to go around the track. Mr. Kickirillo did not drive Appellant's car. Further, he acknowledged that Appellant had the ability to stop the car when it started in high gear by flipping off the switch. The assessment by Mr. Kickirillo was made after discussing the events with Appellant.

At the conclusion of the trial, the jury convicted Appellant of the reckless aggravated assault of Mr. Chad Smotherman, the assault of Matthew Taylor Duke, the assault of Mr. Hastings, and the reckless endangerment of Mr. James Smotherman, Sr. The trial court held a separate sentencing hearing. The trial court determined that several enhancement factors applied to Appellant. In particular, the trial court noted that there was more than one victim, that Appellant possessed a deadly weapon in the commission of the crime, and that Appellant committed the offenses with no hesitation when the risk to human life was high. *See* T.C.A. § 40-35-114(3), (9), (10). The trial court found that no mitigating factors applied. The trial court sentenced Appellant to three years for reckless aggravated assault and eleven months and twenty-nine days for each of the three misdemeanor offenses. The trial court ordered Appellant to time served, with the remainder of the sentence to be served in community corrections for one year. The trial court determined that Appellant could seek traditional probation after the one-year community corrections period. Further, the trial court determined that Appellant was a dangerous offender and ordered consecutive sentencing. The trial court ordered the three misdemeanor sentences to run concurrently to each other but consecutive to the three-year sentence for reckless aggravated assault, for a total effective sentence of four years.

After the denial of a motion for new trial, Appellant appealed. On appeal, Appellant argues that the district attorney abused his discretion in denying pretrial diversion; the trial court improperly denied a motion to sever and improperly instructed the jury; the evidence was insufficient to support the convictions; and his sentence is improper.

Analysis

Denial of Pretrial Diversion

On appeal, Appellant argues that the District Attorney abused his discretion in denying pretrial diversion. Specifically, Appellant argues that the District Attorney failed to consider all relevant factors, improperly weighed factors, considered irrelevant factors, lacked substantial evidence to support the denial, and gave no explanation for the denial. Additionally, Appellant claims that the trial court improperly upheld the denial of diversion.

The Pretrial Diversion Act provides a means of avoiding the consequences of a public prosecution for those who have the potential to be rehabilitated and avoid future criminal charges. T.C.A. § 40-15-105. Those who are statutorily eligible are not presumptively entitled to diversion; rather, it is extraordinary relief for which the defendant bears the burden of proof. *State v. Curry*, 988 S.W.2d 153, 157 (Tenn. 1999); *State v. Baxter*, 868 S.W.2d 679, 681 (Tenn. Crim. App. 1993).

Tennessee Code Annotated section 40-15-105 provides that candidates who satisfy certain criteria may be eligible for pretrial diversion.[2] "The self-evident purpose of pre-trial diversion is to spare appropriately selected first offenders the stigma, embarrassment and expense of trial and the collateral consequences of a criminal conviction." *Pace v. State*, 566 S.W.2d 861, 868 (Tenn. 1978).

The decision to grant pretrial diversion rests within the discretion of the district attorney general. T.C.A. § 40-15-105(b)(3); *see Curry*, 988 S.W.2d at 157. The Tennessee Supreme Court has held that in determining whether to grant pretrial diversion, "the district attorney general has a duty to exercise his or her discretion by focusing on a defendant's amenability for correction and by considering all of the relevant factors, including evidence that is favorable to a defendant." *State v. Bell*, 69 S.W.3d 171, 178 (Tenn. 2002); *see also State v. Hammersley*, 650 S.W.2d 352, 355 (Tenn. 1983). Specifically, district attorneys should consider the following factors:

[2] Under the statute, a "qualified defendant" is one who has not previously been granted pretrial diversion; does not have a prior misdemeanor conviction for which a sentence of confinement is served; does not have a prior felony conviction within a five-year period after completing the sentence or probationary program for the prior conviction; and the offense for which the prosecution is being suspended cannot be a Class A or Class B felony, nor can it be certain Class C felonies (certain sexual offenses, driving under the influence of an intoxicant, vehicular assault or, beginning January 1, 2008, vehicular homicide). T.C.A. §§ 40-15-105(a)(1)(B)(i)(*a*)-(*c*).

> [1] circumstances of the offense; [2] the criminal record, social history and present condition of the defendant, including his mental and physical conditions where appropriate; [3] the deterrent effect of punishment upon other criminal activity; [4] defendant's amenability to correction; [5] the likelihood that pretrial diversion will serve the ends of justice and the best interests of both the public and defendant; and [6] the applicant's attitude, behavior since arrest, prior record, home environment, current drug usage, current alcohol usage, emotional stability, past employment, general reputation, marital stability, family responsibility and attitude of law enforcement.

State v. Markham, 755 S.W.2d 850, 852-53 (Tenn. Crim. App. 1988); *see also State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993) (quoting *Markham* but excluding "current alcohol usage").

Although an important factor for consideration, "[t]he focus on amenability to correction is not an exclusive one . . . ." *State v. Carr*, 861 S.W.2d 850, 855 (Tenn. Crim. App. 1993). Deterrence of both the defendant and others is also a proper factor to consider. *Hammersley*, 650 S.W.2d at 354. "In fact, the circumstances of the crime and the need for deterrence may . . . outweigh the other relevant factors and justify a denial of pretrial diversion." *Carr*, 861 S.W.2d at 855. The district attorney's analysis must be conducted "on a case-by-case basis, assigning due significance to all relevant factors." *Markham*, 755 S.W.2d at 853. Accordingly, "the circumstances of the offense and the need for deterrence may alone justify a denial of diversion, *but only if all of the relevant factors have been considered as well*." *Curry*, 988 S.W.2d at 158 (emphasis in original).

When denying an application for pretrial diversion, the district attorney general must clearly articulate the specific reasons for denial in the record in order to provide for meaningful appellate review. *Hammersley*, 650 S.W.2d at 355. Specifically, the Supreme Court has provided that a district attorney general's consideration of all of the relevant factors:

> entails more than an abstract statement in the record that the district attorney general has considered these factors. He must articulate why he believes a defendant in a particular case does not meet the test. If the attorney general bases his decision on less than the full complement of factors enumerated in this opinion he must, for the record, state why he considers that those he relies on outweigh the others submitted for his consideration.

State v. Herron, 767 S.W.2d 151, 156 (Tenn. 1989), *overruled in part on other grounds by State v. Yancey*, 69 S.W.3d 553, 559 (Tenn. 2002).

In the case herein, after submission of an application by Appellant, the State denied pretrial diversion because of the circumstances of the offense, deterrent effect of punishment upon other criminal activity, Appellant's refusal to accept responsibility for his actions affecting his amenability to correction, and the ends of justice and interests of the public. Ordinarily, if the application for pretrial diversion is denied, the defendant must appeal by petitioning the criminal court for a statutory writ of certiorari. T.C.A. § 40-15-105(b)(3). In the petition, the defendant "should identify any part of the district attorney general's factual basis he or she elects to contest. Such contests should be limited to matters that are materially false or based on evidence obtained in violation of the petitioner's constitutional rights." *State v. Pinkham*, 955 S.W.2d 956, 960 (Tenn. 1997).

"The only evidence that may be considered by the trial court is the evidence that was considered by the district attorney general." *Curry*, 988 S.W.2d at 157. A hearing is conducted only to resolve any factual disputes concerning the application, and the trial court should not hear additional evidence which was not considered by the prosecutor. *Id.* at 157-58.

A prosecutor's decision to deny diversion is presumptively correct, and the trial court should only reverse that decision when the appellant establishes an abuse of discretion. *Id.* at 158; *State v. Houston*, 900 S.W.2d 712, 714 (Tenn. Crim. App. 1995). The record must be lacking any substantial evidence to support the District Attorney General's decision before an abuse of discretion can be found. *Pinkham*, 955 S.W.2d at 960. "The trial court may not substitute its judgment for that of the District Attorney General when the decision of the District Attorney General is supported by the evidence." *State v. Watkins*, 607 S.W.2d 486, 488 (Tenn. Crim. App. 1980).

To seek relief from the District Attorney General's denial of pretrial diversion, one must file a petition for statutory writ of certiorari in the criminal court. The petition should identify any factual disputes with the District Attorney General. *Pinkham*, 955 S.W.2d at 960. It is the filing of the petition which vests authority in the criminal court to review the action of the District Attorney. Appellant herein filed a petition for writ of certiorari. In the petition, Appellant argued that the District Attorney failed to give "appropriate weight to [Appellant's] lack of a prior criminal record, his social history, his present circumstances, including employment, and related factors." Further, Appellant argued that the District Attorney failed to show that there would be a "deterrent effect" and failed to articulate his view of Appellant's amenability to rehabilitation. The trial court upheld the denial of diversion. In the order upholding the denial of diversion, the trial court noted that the District

Attorney's denial of pretrial diversion was "organized and precise," identifying the factors considered and "plainly" stated the weight given to each factor. The trial court determined that there was substantial evidence from which the District Attorney could make a decision. In other words, the trial court determined that the District Attorney did not abuse his discretion in denying diversion.

In our review of the trial court's denial of the writ of certiorari, we must determine whether the trial court's determination is supported by a preponderance of the evidence. *Curry*, 988 S.W.2d at 158; *State v. Houston*, 900 S.W.2d 712, 715 (Tenn. Crim. App. 1995). In the case herein, upon review of the record, it is obvious from the letter denying pretrial diversion that the District Attorney considered all of the relevant factors required by *Markham*, 755 S.W.2d at 852-53. These included the circumstances of the offense, Appellant's criminal record, Appellant's social history, the deterrent effect of punishment on other criminal activity, Appellant's amenability to correction, and the likelihood that pretrial diversion will serve the ends of justice as well as the best interests of the public and Appellant. The letter went through each of the factors in detail, concluding each section with a discussion of each factor and whether the factor weighed in favor of diversion or against diversion including the amount of weight that would be attributed to each factor.

On appeal, Appellant complains that his behavior since the arrest and the fact that he did not abuse drugs or alcohol were not considered by the District Attorney. These factors "may" be considered by the District Attorney but are not required. *See State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993). Along those same lines, Appellant's argument that the District Attorney failed to consider appellant's mental and physical condition must fail. The District Attorney was not required to consider Appellant's physical and mental condition unless it was "appropriate." *Curry*, 988 S.W.2d at 157. Appellant's physical and mental condition were not significant factors in the incident at issue.

Appellant also argues that the District Attorney abused his discretion by finding that Appellant was not amenable to correction because he "refuses to accept any responsibility for the events of that night." In Appellant's application for diversion, he claimed that he was "sorry for the events" but that "the lack of appropriate crowd management and security caused these series of events to unfold." It is well-settled that Appellant's lack of remorse can be considered in determining amenability to correction. *State v. Dowdy*, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994). The determination that Appellant is not amenable to correction is supported by the record.

Next, Appellant challenges the District Attorney's use of his underage drinking and speeding ticket as criminal behavior. While the District Attorney noted that Appellant was

less than candid about his past indiscretions, Appellant's lack of criminal history was actually used as a factor in Appellant's favor.

Appellant next argues that the District Attorney improperly weighed his social history by deeming it "mostly neutral" because although Appellant had been self-employed for many years, attended church, and was married; Appellant had been involved in a number of business-related lawsuits and had a reputation of being difficult to work with in a business setting. The determination with regard to this factor was supported by a preponderance of the evidence.

We conclude that the trial court's denial of the writ was supported by a preponderance of the evidence. In other words, the trial court properly found that the District Attorney did not abuse his discretion in denying pretrial diversion. This issue is without merit.

Denial of Motion to Sever

Appellant argues that the "trial court abused its discretion in finding mandatory joinder was required" or in the alternative that "permissive joinder was appropriate." Specifically, Appellant argues that the events that occurred on the race track or near pit row which gave rise to the indictments for aggravated assault that caused serious bodily injury of Chad Smotherman, aggravated assault with a deadly weapon against Matthew Taylor Duke, reckless endangerment of James Smotherman, Sr., reckless endangerment of James Smotherman, Jr., and reckless endangerment of Gary Epperson, did not have to be presented along with the proof introduced by the State to establish count six, the assault against James Hastings and vice versa because it occurred in a different place and involved different witnesses. The State disagrees, arguing that the trial court properly denied a severance of the assault on Mr. Hastings from the offenses that occurred at the Smotherman pit area because the offenses "arose from the same criminal episode because the events were closely connected in time and space."

A trial judge's decision with respect to a motion for severance of offenses is one entrusted to the sound discretion of the judge and will not be reversed on appeal absent an abuse of that discretion. *State v. Shirley*, 6 S.W.3d 243, 245 (Tenn. 1999). Additionally, "a trial court's refusal to sever offenses will be reversed only when 'the trial court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice for the party complaining.'" *Id.* at 247 (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)). The Tennessee Supreme Court has opined that:

> [B]ecause the trial court's decision of whether to consolidate offenses is determined from the evidence presented at the hearing, appellate courts should usually only look to that evidence, along with the trial court's findings of fact and conclusions of law, to determine whether the trial court abused its discretion by improperly joining the offenses.

Spicer v. State, 12 S.W.3d 438, 445 (Tenn. 2000). Rule 8(a) of the Tennessee Rules of Criminal Procedure requires mandatory joinder of offenses if the offenses are:

> (A) based on the same conduct or arise from the same criminal episode;
> (B) within the jurisdiction of a single court; and
> (C) known to the appropriate prosecuting official at the time of the return of the indictment(s), presentment(s), or information(s).

Tenn. R. Crim. P. 8(a). Rule 8(b) of the Tennessee Rules of Criminal Procedure governs permissive joinder of offenses. Pursuant to Rule 8(b):

> Two or more offenses may be joined in the same indictment, presentment, or information, . . . or consolidated pursuant to Rule 13 if: (1) the offenses constitute parts of a common scheme or plan; or (2) they are of the same or similar character.

Rule 14(b)(1) of the Tennessee Rule of Criminal Procedure governs severance of offenses. That rule provides:

> [I]f two or more offenses have been joined or consolidated for trial pursuant to Rule 8(b) the defendant shall have a right to severance of the offenses unless the offenses are part of a common scheme or plan and the evidence of one would be admissible upon trial of the others.

Tenn. R. Crim. P. 14(b)(1). A trial court may not deny a severance pursuant to Rule 14(b)(1) unless it concludes:

> [F]rom the evidence and arguments presented at the hearing that: (1) the multiple offenses constitute parts of a common scheme or plan; (2) evidence of each offense is relevant to some material issue in the trial of the other offenses; and (3) the probative value of the evidence of other offenses is not outweighed by the prejudicial effect that admission of the evidence would have on the defendant.

Spicer, 12 S.W.3d at 445 (internal citations omitted). Furthermore, "a defendant has an absolute right to sever offenses that are only of the same or similar character." *Id.* at 443.

There are three types of common scheme or plan evidence recognized in Tennessee: (1) offenses that reveal a distinctive design or are so similar as to constitute "signature" crimes; (2) offenses that are part of a larger, continuing plan or conspiracy; and (3) offenses that are all part of the same criminal transaction. *Shirley*, 6 S.W.3d at 248.

The "primary inquiry into whether a severance should have been granted under Rule 14 is whether the evidence of one crime would be admissible in the trial of the other if the two counts of indictment had been severed." *Id.* at 247 (quoting *State v. Burchfield*, 664 S.W.2d 284, 286 (Tenn. 1984)). However, Tennessee Rule of Evidence 404(b) excludes evidence of "other crimes, wrongs, or acts" committed by the defendant when offered only to show the defendant's propensity to commit those "crimes, wrongs, or acts" to ensure a defendant receives a fair trial. When offenses alleged to be parts of a common scheme or plan are otherwise relevant to a material issue at trial, however, then Rule 404 will not bar their admissibility into evidence. *See Bunch v. State*, 605 S.W.2d 227, 229 (Tenn. 1980).

The trial court herein held a hearing on the motion to sever. At that hearing, the trial court heard argument from both sides. Appellant's counsel argued that the incident that happened "up on the hill" between the Parker brothers and Mr. Hastings had nothing to do with the incident that happened "after the pit area issues were concluded." In other words, the assault charge involving Mr. Hastings was not part of a common scheme or plan with the other counts and should be severed. The district attorney argued that joinder of the offenses was mandatory because the events occurred so closely together in time and required many of the same witnesses. The trial court determined that it was:

> [A]n escalating series of encounters among a bunch of good old boys - - I don't know what else to say - - good old boys at the track over an hour and a half time period, where do you draw the line on what you keep out and what you get in?

In an order issued at a later date, the trial court denied the motion to sever because "the facts of this case and the facts of the case of State v. Michael Ray Parker[3] requires mandatory joinder of the cases for trial, and that even if they do not, the cases are appropriate for permissive joinder for trial."

Based upon the record before this Court on appeal, we find no abuse of discretion by the trial court in determining that the motion to sever should be denied. The trial court concluded that the facts required mandatory joinder and, in the alternative, were appropriate for permissive joinder. Implicit in the trial court's ruling is a finding that the events at the race track on June 7, 2008, all arose from the same criminal episode and that the evidence regarding the assault on Mr. Hastings would be admissible in a trial on the other charges and vice versa. We agree. Despite a lack of specific factual findings in its order, the trial court clearly conducted the proper analysis as set out above that: "(1) the multiple offenses constitute parts of a common scheme or plan; (2) evidence of each offense is relevant to some material issue in the trial of the other offenses; and (3) the probative value of the evidence of other offenses is not outweighed by the prejudicial effect admission of the evidence would have on the defendant" by referencing the facts of the case in its order. *Spicer*, 12 S.W.3d at 445.

Therefore, this issue is without merit.

Sufficiency of the Evidence

Appellant argues on appeal that the evidence is insufficient to support the convictions for reckless aggravated assault against Mr. Chad Smotherman and assault against Matthew Taylor Duke. Specifically, Appellant contends that the State failed to prove that Mr. Chad Smotherman suffered "serious bodily injury as a result of the underlying incident" and that the State failed to show that Appellant committed an assault on Matthew Taylor Duke because the evidence merely showed that the victim was "scared." The State, on the other hand, argues that Mr. Chad Smotherman's broken nose and leg injury constitute serious bodily injury, supporting the conviction for reckless aggravated assault. Further, the State contends that the evidence was sufficient to prove that Appellant assaulted Matthew Taylor Duke.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses

[3] Michael Ray Parker is Appellant's brother. He was indicted for his role in the events that took place at the speedway.

and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S.W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990).

A. Reckless Aggravated Assault

Reckless aggravated assault occurs when an individual, "Recklessly commits an assault [by intentionally, knowingly or recklessly causing bodily injury to another], and: (A) Causes serious bodily injury to another . . . ." T.C.A. § 39-13-102(a)(2). "'Serious bodily injury' means bodily injury that involves: a substantial risk of death; protracted unconsciousness; extreme physical pain; protracted or obvious disfigurement; or protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty." T.C.A. § 39-11-106(a)(34). "Bodily injury" can include a cut, abrasion, bruise, burn or disfigurement, physical pain, temporary illness, or impairment of the function of a bodily member, organ, or mental faculty. T.C.A. § 39-11-106(a)(2). "Reckless" is defined as:

> [A] person who 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.

T.C.A. § 39-11-302(c). In other words, in the case herein, the State had the burden of proving, beyond a reasonable doubt, that Appellant recklessly operated his vehicle as a deadly weapon and caused serious bodily injury to another.

Appellant's main argument with regard to the sufficiency of the evidence to support the conviction for reckless aggravated assault challenges the degree to which the victim suffered serious bodily injury, citing *State v. Sims*, 909 S.W.2d 46 (Tenn. Crim. App. 1995), as an analogous case. In *Sims*, the victim suffered a broken nose, facial laceration, and bruised cheekbone as the result of a robbery. *Id.* at 48. The victim was not given any pain medication and did not require surgery. The victim eventually had two teeth pulled several days later. *Id.* at 48-50. This Court, in determining whether the victim's injuries constituted "serious bodily injury," applied the doctrine of ejusdem generis to the statute defining "serious bodily injury," stating:

> According to the Sixth Edition of Black's Law Dictionary, ejusdem generis means when words follow an enumeration of classes of things the words should be construed to apply to things of the same general class as those enumerated. Therefore, the enumerated portions of the definition of serious bodily injury should be read as coming from the same class of injuries. We do not believe that the pain commonly associated with a broken nose is extreme enough to be in the same class as an injury which involves a substantial risk of death, protracted unconsciousness, protracted or permanent disfigurement or the loss or impairment of the use of a bodily member, organ or mental faculty.

Id. at 49. The *Sims* court noted that pain is difficult to quantify or measure. *Id.* However, as this Court has stated, the subjective nature of pain is a question of fact to be determined by the trier of fact, in this case the jury. *State v. Eric A. Dedmon*, No. M2005-00762-CCA-R3-CD, 2006 WL 448653, at *5 (Tenn. Crim. App., at Nashville, Feb. 23, 2006).

We disagree with Appellant's argument. While the evidence of serious bodily injury was not as overwhelming as it could have been where the victim was hit by a car, we conclude that the evidence, in a light most favorable to the State, proved that Mr. Chad Smotherman certainly suffered extreme physical pain, which constitutes serious bodily injury. *See* T.C.A. § 39-11-106(a)(34). Unlike the victim in *Sims*, the evidence at trial proved that Mr. Chad Smotherman was flown via lifeflight from the accident scene to

Vanderbilt Hospital where he was treated for a bilateral nose fracture. Mr. Chad Smotherman described his pain level as an "8 out of 10." He required seven stitches and received Phentanol for pain at the hospital and Percocet upon his release. Mr. Chad Smotherman's nose was described by various witnesses as "splattered," "disintegrated," and "flattened." Mr. Chad Smotherman had plastic surgery to repair his nose two weeks after he was released from the hospital. Mr. Chad Smotherman now suffers from a loss of "60 to 70 percent" of his ability to smell. Mr. Chad Smotherman also had damage to two teeth and required a trip to the dentist to repair the damage. Finally, Mr. Chad Smotherman testified that he had continued pain and numbness in his left leg caused by nerves in his back that were stretched during the accident. The task of determining the severity of pain suffered is within the province of the jury as a question of fact. *State v. Barnes*, 954 S.W.2d 760, 765-66 (Tenn. Crim. App. 1997). This issue is without merit.

B. Assault

A person commits assault who "intentionally, knowingly, or recklessly causes bodily injury to another" or "intentionally or knowingly causes another to reasonably fear imminent bodily injury." T.C.A. § 39-13-101(a)(1)-(2).

Viewing the evidence from trial in a light most favorable to the State, the proof shows that Matthew Taylor Duke was within arm's reach of Mr. Chad Smotherman when Mr. Chad Smotherman was struck by Appellant's car. Matthew Taylor Duke testified that he saw the car coming toward him quickly and that he was scared. In fact, Matthew Taylor Duke answered affirmatively when asked if he was "afraid" that he "was about to get hurt real bad [sic] by [Appellant's] car?" The evidence was sufficient to support the conviction for assault. This Court has noted that the fear as contemplated by the assault statute is "the fear or reasonable apprehension of being harmed" rather than the fear of the actual perpetrator. *State v. Gregory Whitfield*, No. 02C01-9706-CR-00226, 1998 WL 227776, at *2 (Tenn. Crim. App., at Jackson, May 8, 1998), *perm. app. denied*, (Tenn. Dec. 7, 1998). The jury must have believed that the victim, a child, feared some harm from the actions of Appellant as evidenced by their finding that Appellant committed assault. Moreover, it is reasonable to infer that the fear experienced by an individual being threatened with a seemingly out of control race car headed straight toward him is a reasonable fear of imminent bodily injury. This issue is without merit.

Jury Instructions

Appellant next complains that the trial court failed to instruct the jury on the defenses of mistake of fact and self defense. Specifically, Appellant contends that the issues of self defense and mistake of fact were raised by the evidence presented at trial. Thus, the trial

court was required to instruct the jury. The State argues that Appellant has waived the issues by informing the trial court that an instruction on self defense was not merited and that the jury instructions would not contain any affirmative defenses. In the alternative, the State argues that there was no evidence to support the instructions.

It is well-established that a trial court has a duty to give a complete charge of the law applicable to the facts of the case. *State v. Harris*, 839 S.W.2d 54, 73 (Tenn. 1992). Anything short of a complete charge denies a defendant his constitutional right to trial by a jury. *State v. McAfee*, 737 S.W.2d 304, 308 (Tenn. Crim. App. 1987). However, Tennessee law does not mandate that any particular jury instructions be given so long as the trial court gives a complete charge on the applicable law. *State v. West*, 844 S.W.2d 144, 151 (Tenn. 1992). A charge is prejudicial error "if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law." *State v. Hodges*, 944 S.W.2d 346, 352 (Tenn. 1997).

The standard to allow inclusion of a statutory defense in the jury instructions is found in both case law and the statutes. The test to determine whether a trial court should have given a special instruction is whether "there is any evidence which reasonable minds could accept" to support such an instruction. *Johnson v. State*, 531 S.W.2d 558, 559 (Tenn. 1975). Under Tennessee Code Annotated section 39-11-203(c), the existence of the defense must be fairly raised by the proof if the defense is to be submitted to the jury. For a statutory defense to be fairly raised by the proof "a court must, in effect, consider the evidence in the light most favorable to the defendant, including drawing all reasonable inferences flowing from that evidence," because the trial courts and appellate courts must avoid judging the credibility of the witnesses when making this determination. *State v. Shropshire*, 874 S.W.2d 634, 639 (Tenn. Crim. App. 1993).

The Tennessee Rules of Appellate Procedure provide that:

> [I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for new trial; otherwise such issues will be treated as waived.

Tenn. R. App. P. 3(e). At the conclusion of the trial, before jury instructions were given, the trial court held a discussion with counsel for both sides. During that discussion, the trial court noted, "Counsel and I have spoken briefly this morning and everyone is in agreement that, . . we are not going to need charges on self-defense . . . ." Counsel for Appellant then

agreed that the jury instructions would not contain an instruction on self-defense. Appellant's failure to request this instruction results in a waiver of this issue on appeal. *See* Tenn. R. App. P. 3(e) and Tenn. R. App. P. 36(a) (stating "nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.").

Appellant correctly argues that neither self defense nor mistake of fact is an affirmative defense, as alleged by the State, and thus, Appellant was not required to seek the instruction if the proof fairly raised the defenses. Moreover, Appellant urges this Court to review the issues via plain error, as set forth in Tennessee Rule of Criminal Procedure 52[4] because of the failure of counsel to seek the instructions at trial. In order to seek review via a plain error analysis, the following five factors must be established:

> (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused [must not have waived] the issue for tactical reasons; and (e) consideration of the error [must be] "necessary to do substantial justice."

State v. Terry, 118 S.W.3d 355, 360 (Tenn. 2003) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (footnotes omitted)).

Looking first to Appellant's argument regarding self defense, Appellant has failed to establish all five factors necessary for plain error review. We determine that consideration of the issue is not necessary to do substantial justice. Appellant's theory at trial was that the incident was an accident. Appellant himself testified that he "felt that the way to get away from that area [where people were allegedly attacking him in his car] was to reach the start button of the car." The proof, therefore, does not establish that Appellant had to resort to self defense as self defense necessarily acknowledges that the defendant used force to protect himself. *See* T.C.A. § 39-11-611. Therefore, we will not review the failure of the trial court to instruct the jury with self-defense as plain error. Appellant is not entitled to relief on this issue.

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[4]Effective July 1, 2009, Tennessee Rule of Criminal Procedure Rule 52 was deleted in its entirety, and the plain error language is added to Rule 36(b) of the Tennessee Rules of Appellate Procedure.

Appellant argues that the proof fairly raised the defense of mistake of fact because he thought his car was in working order and should not have started "wide open." Again, mistake of fact is not an affirmative defense; it is merely a defense. Thus, if the evidence fairly raises mistake of fact, the trial court must instruct the jury to consider the defense and that any reasonable doubt on the existence of the defense requires acquittal. T.C.A. §§ 39-11-203, 502; *State v. McPherson*, 882 S.W.2d 365, 374 (Tenn. Crim. App. 1994). Ignorance or mistake of fact is "a defense to prosecution if such ignorance or mistake negates the culpable mental state of the charged offense." T.C.A. § 39-11-502(a). Here, mistake of fact would have to negate Appellant's "reckless" and "intentional" actions. Appellant did not raise the defense, because his theory at trial was that he was trying to get away from people who were attacking him by starting the car, in other words, he acted out of necessity. While Appellant testified that he was "shocked" and "startled" that the car started "wide open" and presented testimony from his hired expert that the car malfunctioned, starting with a "nearly wide open throttle," Appellant chose instead to focus on the theory that he was trying to escape attack from the people that surrounded his car after the race. Further, the proof from the expert indicated that it was possible for the car to start in high gear from a starting position if the driver gave sufficient throttle. In other words, Appellant could have taken off just as fast even if the car malfunctioned. The testimony was before the jury that Appellant tried to escape out of necessity and that the car starting in the high gear was an accident. The jury chose to discredit Appellant's theory of the case. Thus, consideration of the issue is not necessary to do substantial justice. Accordingly, we chose not to review the issue for plain error. This issue is without merit.

Sentencing

Lastly, Appellant challenges his sentence. Specifically, Appellant argues that the trial court erred in imposing consecutive sentences and in failing to find the existence of mitigating factors. Appellant argued that he acted under strong provocation and that he had no "intent" and that the trial court should consider both as mitigating factors when fashioning the sentence. Further, Appellant argues that the trial court failed to make the findings required by *State v. Wilkerson*, 905 S.W.2d 933 (Tenn. 1995), prior to ordering consecutive sentencing. The State argues that the trial court properly refused to consider the mitigating factors but concedes that the trial court improperly ordered consecutive sentencing.

"When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of the issues. The review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "[T]he presumption of correctness '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. Carter*, 254 S.W.3d 335, 344-45 (Tenn. 2008) (quoting

State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991)). "If . . . the trial court applies inappropriate mitigating and/or enhancement factors or otherwise fails to follow the Sentencing Act, the presumption of correctness fails." *Id.* at 345 (citing *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992)). We are to also recognize that the defendant bears "the burden of demonstrating that the sentence is improper." *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination, a trial court, at the conclusion of the sentencing hearing, first determines the range of sentence and then determines the specific sentence and the appropriate combination 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 statistical information provided by the administrative office of the courts regarding sentences for similar offenses, (7) any statements the defendant wishes to make in the defendant's behalf about sentencing; and (8) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b), -103(5); *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995). When imposing the sentence within the appropriate sentencing range for the defendant:

> [T]he court shall consider, but is not bound by, the following advisory sentencing guidelines:
> (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
> (2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

T.C.A. § 40-35-210(c).

At the outset we note that Appellant committed the criminal offenses at issue in June of 2008, therefore, the 2005 amendments to the sentencing act apply to our review of his sentencing. The 2005 amendments to the sentencing act made the application of the enhancement factors advisory in nature. *See* T.C.A. § 40-35-114; *State v. Jackie Lynn Gray*, No. M2007-02360-CCA-R3-CD, 2008 WL 2579175, at *5 (Tenn. Crim. App., at Nashville, June 28, 2008), *perm. app. denied*, (Tenn. Dec. 29, 2008); *State v. Troy Sollis*, No. W2007-

00688-CCA-R3-CD, 2008 WL 1931688, at *3 (Tenn. Crim. App., at Jackson, May, 2, 2008). In fact, "[T]he 2005 amendments [to the sentencing act] deleted as grounds for appeal a claim that the trial court did not weigh properly the enhancement and mitigating factors." *Carter*, 254 S.W.3d at 344. After a review of the transcript from the sentencing hearing, it is clear that the trial court considered the nature and characteristics of the criminal conduct involved, Appellant's history and background, the mitigating and enhancement factors, and the principles of sentencing. *See id.* at 345-46.

Appellant does not complain about the trial court's application of enhancement factors. Instead, Appellant argues that the trial court should have applied several mitigating factors, including (2) "[t]he defendant acted under strong provocation," and (11) "[t]he defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct." T.C.A. § 40-35-113(2), (11). Appellant contends that the proof supported the application of the mitigating factors. We disagree. Multiple witnesses for the State testified that Appellant was unprovoked when he started his car with a "wide open" throttle and drove toward the Smotherman pit area. Further, the State's witnesses testified that Appellant's steering wheel was intact and that he had control over the car when he steered toward Mr. Chad Smotherman and the Smotherman pit area. This issue is without merit.

Consecutive Sentencing

Under Tennessee Code Annotated section 40-35-115(a), if a defendant is convicted of more than one offense, the trial court shall order the sentences to run either consecutively or concurrently. A trial court may impose consecutive sentencing upon a determination that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exists. This section permits the trial court to impose consecutive sentences if the court finds, among other criteria, that:

> (1) The defendant is a professional criminal who has knowingly devoted the defendant's life 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 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; . . . .

T.C.A. § 40-35-115(b). When imposing a consecutive sentence, a trial court should also consider general sentencing principles, which include whether or not the length of a sentence is justly deserved in relation to the seriousness of the offense. *See State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002). The imposition of consecutive sentencing is in the discretion of the trial court. *See State v. Adams*, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997).

As stated above, this section permits the trial court to impose consecutive sentences if the court finds, among other criteria, 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." T.C.A. § 40-35-115(b)(4). However, before ordering the defendant to serve consecutive sentences on the basis that he is a dangerous offender, the trial court must find that the resulting sentence is reasonably related to the severity of the crimes, necessary to protect the public against further criminal conduct, and in accord with the general sentencing principles. *See Imfeld*, 70 S.W.3d at 708-09; *State v. Wilkerson*, 905 S.W.2d 933, 938-39 (Tenn. 1995).

Prior to ordering consecutive sentencing, the trial court herein made the following findings with regard to consecutive sentencing:

> I do find that factor number 4 is present, that he's a dangerous offender, was on this particular occasion; and on this particular occasion, had little regard for human life and no hesitation where the risk to life was great.

It is obvious that the trial court failed to make the required *Wilkerson* findings on the record before sentencing Appellant to consecutive sentences as a dangerous offender. While this Court may uphold consecutive sentencing if we are able to make the *Wilkerson* determinations from the record on appeal, *see State v. James A. Mellon*, No. E2006-00791-CCA-R3-CD, 2007 WL 1319370, at *10 (Tenn. Crim. App., at Knoxville, May 7, 2007), *perm. app. denied,* (Tenn. Sept. 24, 2007); *State v. Daronopolis R. Sweatt*, No. M1999-2522-CCA-R3-CD, 2000 WL 1649502, at *9-10 (Tenn. Crim. App., at Jackson, Nov. 3, 2000), we are unable to do so in the case herein. Thus, the proper remedy is to reverse the imposition of consecutive sentencing and remand the matter to the trial court to revisit the

issue of consecutive sentencing. *See e.g. State v. Mark Anthony Foulk*, No. E2007-00944-CCA-R3-CD, 2009 WL 47346, at *16 (Tenn. Crim. App., at Knoxville, Jan. 8, 2009), *perm. app. denied*, (Tenn. May 26, 2009). Accordingly, the judgment of the trial court with respect to consecutive sentencing is reversed and remanded. On remand, the trial court should hold a new sentencing hearing during which the trial court should follow statutory sentencing guidelines.

Community Corrections

Lastly, although not raised by either party, we note that the trial court ordered Appellant to serve his sentence in the community corrections program. Tennessee Code Annotated section 40-36-106 lists the criteria for eligibility in the community corrections program. A defendant is eligible for participation in community corrections if she is "convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses *not involving crimes against the person* as provided in title 39, chapter 13, parts 1-5." T.C.A. § 40-36-106(a)(2) (emphasis added). Appellant herein was convicted of reckless aggravated assault, which is a "crime against the person as provided in title 39, chapter 13, parts 1-5." *See* T.C.A. § 39-13-102. Appellant is, therefore, statutorily ineligible for community corrections; therefore, the trial court erred in ordering that Appellant serve his sentence in a community corrections program. Because the trial court imposed an illegal sentence for Appellant's convictions, this case must be remanded for resentencing to some sentence other than to community corrections. Upon remand, the trial court should impose a sentence in accord with the statutory guidelines and should consider all relevant available sentencing alternatives.

Conclusion

For the foregoing reasons, Appellant's convictions are affirmed. However, the case is remanded to the trial court for a new sentencing hearing during which the trial court should revisit the issues of consecutive sentencing and community corrections in accordance with this opinion.

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JERRY L. SMITH, JUDGE