IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs May 5, 2015

STATE OF TENNESSEE v. DAETRUS PILATE

Appeal from the Criminal Court for Shelby County
No. 12-01054 Lee V. Coffee, Judge

No. W2014-01593-CCA-R3-CD - Filed August 31, 2015

A Shelby County jury convicted the Defendant, Daetrus Pilate, of aggravated assault by use of a deadly weapon and evading arrest in a motor vehicle creating a high risk of death or injury, and the trial court sentenced him to a total effective sentence of nine years of incarceration. On appeal, the Defendant contends that: (1) the evidence is insufficient to sustain his convictions; (2) the trial court erred when it excluded photographs of him taken during his hospitalization after being shot during this incident; and (3) his sentence is excessive. After a thorough review of the record and the applicable authorities, we affirm the trial court's judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the Court, in which NORMA MCGEE OGLE and ROGER A. PAGE, JJ., joined.

Lauren Pasley, Memphis, Tennessee, for the appellant, Daetrus Pilate.

Herbert H. Slatery III, Attorney General and Reporter; Jonathan H. Wardle, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Katherine B. Ratton and Abby Wallace, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Facts

A. Trial

This case arises from a high speed chase that occurred on August 16, 2011. As a result of this chase, a Shelby County grand jury indicted the Defendant on charges of aggravated assault, evading arrest in a motor vehicle creating a high risk of death or injury,

and the reckless assault of Jose Pedraza. At his trial on these charges, the parties presented the following evidence: Officer Joseph Gurley testified that he was assigned to the Felony Apprehension Team. As part of this assignment, he would check for outstanding warrants in Shelby County and screen for felony warrants involving crimes against persons and cold cases. Using this criteria, a warrant was located for the Defendant, and he was targeted for apprehension. Officer Gurley recalled that there were six officers assigned to his team, and each of them rode with a partner in three cars. Officer Sission rode with Officer Gurley. In another car rode Officers Lewis and Fair, and in the third car rode Officer Pedraza and Detective Shaw.

Officer Gurley described how he got involved in this pursuit, stating that Officers Fair and Lewis called him and informed him that they had been attempting to apprehend the Defendant that day. They said that the Defendant was going to arrive at his home shortly, and they needed assistance with his apprehension. The officers informed Officer Gurley that the Defendant was in the car line waiting to pick up his children from school but that the school had not yet dismissed. All of the officers then drove to the school and drove past the Defendant, who was in a Jeep. Officer Gurley made eye contact with the Defendant, and the Defendant pulled his Jeep out of the car line shortly thereafter.

Officer Gurley testified that he turned around and began following the Defendant. The Defendant made a right-hand turn. Officer Gurley said that he turned in the same direct but encountered "a lot of traffic," causing him to be far behind the Defendant. He caught up to the Defendant and reactivated his blue lights. The Defendant slammed on the brakes of his Jeep, bringing the Jeep to a stop. Officer Gurley said that he stopped his vehicle, got out, and told the Defendant to step out of the Jeep and place his hands where the officer could see them. The Defendant put his Jeep into gear and sped away. Officer Gurley said that he got back into his police vehicle and pursued the Defendant. During the pursuit, the Defendant went through four or five different stop signs without stopping.

Officer Gurley testified that Officer Pedraza and Detective Shaw joined the pursuit. The Defendant turned onto the street where he lived and pulled into his own driveway. Detective Shaw exited his vehicle and approached the Defendant, "screaming" for him to shut off his engine and place his hands in the officers' sight. The Defendant turned the Jeep toward Detective Shaw and ran over the officer. Detective Shaw fired three shots at the Defendant's vehicle, and the pursuit continued toward the end of the street, where the Defendant stopped, got out of his vehicle, and laid on the ground with his hands behind him. Officer Gurley said that he noted that the Defendant had been shot.

Officer Gurley testified that the Defendant's son, who was approximately eighteen, was in the Defendant's Jeep with him. Once the officers took the Defendant into custody,

they noted that, inside his vehicle, were clothing and other items that made it appear as if the Defendant was preparing to move residences.

Officer Gurley identified a video recording of the pursuit taken with the equipment in his police cruiser. He estimated that the Defendant's Jeep was traveling around fifty-five to sixty miles per hour in a thirty-five mile per hour zone. On another stretch of road, the Defendant traveled seventy-five to eighty miles per hour in a forty-five mile an hour zone. Officer Gurley said that the video showed that the Defendant came to the intersection of a six-lane road and failed to pause or stop before turning straight into traffic. Officer Gurley noted that this pursuit took place around 3:20 p.m., around the time schools were being dismissed for the day.

During cross-examination, Officer Gurley testified that his information about the Defendant and the description of the Defendant's vehicle were given to him by Officers Lewis and Fair. Officer Gurley testified that Officers Lewis and Fair never joined the pursuit, so there were only two patrol cars that pursued the Defendant. Officer Gurley said that, during the pursuit, the Defendant slammed on his brakes in an effort, the officer believed, to make the officer rear-end him. The Defendant also stopped his Jeep and put his hands outside the window. The Defendant then put his hands back inside the Jeep, placed it into gear, and drove away.

Jose Pedraza, an officer with the Shelby County Sheriff's Office, testified that, before this pursuit, he was driving with Detective Shaw. Detective Shaw received a phone call when he was on patrol during "rush-hour" when the traffic was "busy," asking if the officers could assist in the execution of a warrant for the Defendant. On their way toward the area from which the request originated, they heard over the radio that Officer Gurley and Officer Sisson had engaged in a pursuit. Officer Sisson gave directions of travel over the radio, and, listening to those directions, Officer Pedraza knew that he could intersect with the pursuit if he drove toward Shelby Drive. Officer Pedraza positioned his car on Shelby Drive with his blue lights activated, and the Defendant drove past him with Officers Gurley and Sisson in pursuit.

Officer Pedraza testified that he immediately made a U-turn and fell into line with the pursuit. The officer recalled that the Defendant pulled into a driveway and waved his hands seemingly to indicate his intention to stop. The Defendant was still "rolling forward" and not completely stopped. Detective Shaw approached the Defendant's Jeep yelling, "Sheriff's Department, let me see your hands, turn the vehicle off." Suddenly, the Jeep started backing down an inclined hill. Officer Pedraza said he and Detective Shaw had their weapons drawn because they deemed it necessary in light of the Defendant's erratic behavior.

Officer Pedraza recalled that the Defendant placed his Jeep into drive and sped away. The officers attempted to get out of his way but, as he was leaving, the Defendant ran over Detective Shaw's foot with his tire and hit Detective Shaw's hip with the back quarter panel of his vehicle. Detective Shaw fired three shots before he fell into Officer Pedraza, causing Officer Pedraza to also fall down. Detective Shaw and Officer Pedraza both ran back to their vehicle. By the time that the officers had caught back up with the Defendant, he had already stopped and surrendered. In the Jeep with the Defendant was his eighteen or nineteen-year-old son. Officer Pedraza recalled that the Defendant had suffered a gunshot wound to his back.

During cross-examination, Officer Pedraza testified that when officers followed the Defendant into his driveway they blocked him so that he could not leave. The officer said that the video recording equipment on his cruiser was full and not working, and the video taken by Officer Gurley's car did not capture Detective Shaw's attempt to break the Defendant's passenger seat window. Officer Pedraza explained that Detective Shaw had tried to break the window before the Defendant put his Jeep into drive and left his house. At that point, when the Jeep was approaching Detective Shaw and Officer Pedraza, Detective Shaw fired at the Jeep three times. Officer Pedraza said that he did not fire his weapon because Detective Shaw was in the line of sight that he had to the Defendant's Jeep. Officer Pedraza said that he was unaware that there was a passenger in the Jeep with the Defendant until the Defendant was taken into custody because the windows of the Defendant's Jeep were darkly tinted.

Officer Pedraza said that, once the Defendant surrendered, officers handcuffed him, not realizing he was injured. They did not remove the handcuffs upon learning that he was injured because they deemed him a "flight risk."

Tobey Shaw, a detective with the Shelby County Sheriff's Office, testified that at the time of this incident he was a member of the Felony Apprehension Team. Detective Shaw testified that on August 16, 2011, he received a call from another team member asking for help apprehending the Defendant. As a result of the call, Detective Shaw, who was riding with Officer Pedraza, went to an area where the Defendant was believed to be and waited for further instructions. They heard another call informing them that a chase had ensued. The two officers then proceeded to the Hickory Hill area of Shelby Drive. As they were driving, the Defendant passed them traveling in the opposite direction. Officer Pedraza turned to follow the other police cruiser in which Officers Gurley and Sisson were riding.

Detective Shaw described the route of the police chase. He said that the Defendant pulled into his own driveway, and Officers Gurley and Sisson pulled up to the side of the Defendant's Jeep. Officer Pedraza pulled their patrol car parallel with the house, and

Detective Shaw exited the vehicle quickly with his gun drawn. As he was standing in the Defendant's yard, Detective Shaw repeatedly ordered the Defendant to "shut the car off." The Defendant backed up a "little bit," turned his Jeep toward Detective Shaw, and "gunned [the] vehicle towards [Detective Shaw]." The detective testified that had he not moved out of the way, the Defendant would have hit him "dead-on." Detective Shaw recalled that he was on the passenger's side of the Defendant's Jeep, and the officer was hitting the Defendant's car window. The Jeep hit him on his right side and ran over his foot and ankle. The Jeep then sped away, and Detective Shaw aimed at the Jeep and discharged his weapon three times.

Detective Shaw said he got back into the police cruiser with Officer Pedraza, who pursued the Defendant. The Defendant came to a stop shortly thereafter. By the time the detective arrived at the scene, Officers Gurley and Sisson had the Defendant in custody. Detective Shaw said that he was unaware that the Defendant had a passenger with him and did not learn about the Defendant's son until after the Defendant was apprehended.

Detective Shaw described his injuries saying that he started feeling the pain after officers apprehended the Defendant. He could not walk correctly and felt like his foot was "on fire." Because the detective could no longer walk, he called for an ambulance. He suffered a "severe sprain" and "gout" to his ankle from the incident.

Detective Shaw confirmed that the Defendant had personal items in his Jeep, making it appear as if he was attempting to flee. He further confirmed that the memory card of the video recording equipment located on his police cruiser was full. He stated that the memory card was full before their shift. The officers went to download the video, and the equipment malfunctioned. Detective Shaw spoke with his supervisor who told him to annotate their log to indicate that their memory card was full.

During cross-examination, Detective Shaw testified that he did try to push himself off the passenger's window as the Defendant turned into the yard, and he also tried to break the glass. The detective said that he was behind the Jeep when he shot at it. The detective agreed that, at the time he fired his weapon, he did not know whether there were any passengers in the Jeep. Detective Shaw indicated that he was unaware that the Defendant had been shot until after the Defendant surrendered.

For the Defendant, Laneigel Pilate, the Defendant's son, testified that he was eighteen years old at the time of this incident. He said that he was at the Defendant's house when the Defendant asked Mr. Pilate if he wanted to ride with him to pick up his siblings from school, which dismissed at 3:15 p.m. Mr. Pilate said he wanted to accompany the Defendant. Mr. Pilate said that he had with him his clothes and electronics, explaining that he usually stayed

at an apartment at "The Lakes," which was five to ten minutes from the Defendant's house.

Mr. Pilate testified that the Defendant drove them to the children's school, where he parked and waited. Mr. Pilate said that he was listening to music, and the Defendant said that the "kids can walk" and pulled out of the parking spot. Mr. Pilate looked back and saw a police Jeep in the distance. When it got closer and the lights were activated, Mr. Pilate told the Defendant to pull over. Mr. Pilate said that he asked the Defendant what was happening.

Mr. Pilate said that the Defendant drove back to his house and parked. Mr. Pilate thought that the chase had ended. He saw an officer on the right-hand side of the back fender approaching the Jeep. The Defendant then put the Jeep back into drive and drove the Jeep across the grass to the street. Mr. Pilate said that he heard gunshots being fired, so he "panicked" and bent down. Mr. Pilate did not recall an officer hitting the Jeep.

Mr. Pilate said that, when the chase ended, an officer pulled him out of the Jeep, threw him onto the hood, and then slammed him to the ground. He suffered bruises to his face. Mr. Pilate recalled that he was sitting, handcuffed, next to the Defendant, who was bleeding.

During cross-examination, Mr. Pilate said that the Defendant picked him up that day from his apartment at "The Lakes." Mr. Pilate wanted to spend the weekend at his father's house. When confronted with the statement he gave to the police after this incident, Mr. Pilate said that the Defendant was picking him up from the Defendant's house and taking him back to his apartment in "The Lakes." He said he had packed two black Hefty trash bags of clothing and also had some other backpacks and bags. Mr. Pilate recounted the chase with police. He recalled that the Defendant placed his car into park in the driveway of his own home. He said that, shortly thereafter, the Defendant took off again through a neighborhood. He ran through stop signs and was traveling "pretty fast."

The Defendant testified that he was driving at a high rate of speed while being chased by police officers. He contested, however, that he committed aggravated assault. The Defendant explained what had happened that day, stating that he came home at around 1:30 p.m. and a neighbor told him that police officers had been to his house. He said that his children were dismissed from school at around 2:00 p.m. The Defendant said he went to "the corner store" and purchased a cell phone, on which he placed a call to the Memphis Police Department asking if there was a warrant out for his arrest. He was informed that this information could not be disclosed.

The Defendant dropped off "Qwendolyn," the mother of some of his children, at his

house, unhooked a trailer he had attached to his vehicle, and picked up Mr. Pilate. Qwendolyn told him to pick up the children from school. The Defendant said that as he was parked at his children's school, he saw two Sheriff's deputy cars approach. He said that he knew that they were looking for him, and he did not want to be arrested. He said that he drove away from the police. The Defendant noted that Mr. Pilate told him that he could not get away from the police and and was becoming "hysterical." Mr. Pilate told him to "go on and stop." After the Defendant stopped his vehicle, the police pulled in behind him and then he took off again. The Defendant explained that he did so because he did not want the police to impound his truck, which was his livelihood. He intended to turn himself in to police but wanted to get his truck home first.

The Defendant said that, when he arrived at home, he began to think about how Qwendolyn lived there and that she was on "Section 8" and had six children, some of whom were his. Before moving into this house, she had been living in hotels and abandoned apartments with her six children. The Defendant said that he did not want Qwendolyn to lose her Section 8 voucher because the police had followed him to her house. With these thoughts in mind, he pressed the accelerator, realizing that the Section 8 voucher was more important than his truck. The Defendant said the Jeep did not move when he pressed the accelerator, and he realized it was because Mr. Pilate had placed the vehicle into park. At the time the truck was in park, so it did not move, so he placed the truck in a lower gear and dirt started "shooting up." The Defendant said that the officer then shot his weapon. At this time, the Defendant realized that he had involved his son in this matter. He told his son that he was going to drive a short distance away and turn himself in to police.

The Defendant said that he never saw the officer that he hit. The Defendant's intent was to turn and leave but not to hit the officer. The Defendant said that he drove away and stopped a short distance later. He said he immediately exited his vehicle in an attempt to ensure the safety of his son. The police, he said, left him on the hot pavement where he felt his lungs filling with fluid. After a period of time, he crawled toward the sidewalk. The Defendant estimated that it took ten or fifteen minutes for the ambulance to arrive. The paramedics forced the officers to remove his handcuffs.

The Defendant said that he did not knowingly and voluntarily put an officer in fear. He said that he did not see any officers in the moment that he was turning his Jeep to leave his home. The Defendant said that there was no one in front of him as he was driving away from his residence, so he did not know he was placing anyone in danger.

During cross-examination, the Defendant agreed that he ran several stop signs but said that he had slowed down to look to see if someone was coming. The Defendant estimated that his speed through the residential areas was twenty-five to thirty miles an hour. The

Defendant said that, when he pulled into his driveway, Mr. Pilate put his Jeep in park. The Defendant said that he never heard officers screaming commands at him, noting that the windows of his truck were closed and the air conditioning was blowing. He said that, when he decided to leave the driveway, he did not contemplate that the police officers would fire their weapons at him. The Defendant said that, after he realized he had been shot by officers, he did not want to stop in the residential neighborhood because he thought police would kill him for causing the chase. He chose, instead, to wait and stop in a more public place.

The Defendant said that when he realized there was a warrant out for his arres,t he intended to turn himself in to police. He said that he first was going to take Mr. Pilate to Mr. Pilate's mother's house and that he then was going to park his truck at his own mother's house. His reasoning was that he wanted to have his truck and his trailer accessible so that he could begin working immediately after his release. Before he could do those things, however, he was apprehended by police.

Based upon this evidence, the jury convicted the Defendant of aggravated assault of Detective Shaw by use of a deadly weapon and evading arrest in a motor vehicle creating a risk of death or injury. The jury found the Defendant not guilty of the reckless endangerment of Officer Pedraza.

B. Sentencing

At the sentencing hearing, the State submitted the presentence report. It also argued that several enhancement factors applied, including: (1) that the Defendant had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish his range; (2) that the offense involved more than one victim; (3) that the Defendant had no hesitation about committing a crime when the risk to human life was high; and (4) that the victim was a law enforcement officer. *See* T.C.A. §§ 40-35-114(1), (3), (10), and (19) (2014). The Defendant countered that these enhancement factors did not apply. After stating that it had considered the relevant sentencing principles, including enhancement and mitigating factors, relevant statistical data for similar offenses, the presentence report, statements by the Defendant, and the Defendant's potential for rehabilitation, the trial court found that the Defendant was a Range I, standard offender. The trial court found that enhancement factor (1), that the Defendant had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish his range, applied to both convictions. *See* T.C.A. § 40-35-114(1). The Court reasoned:

> [The Defendant], on his arrest history, does have convictions. These are not necessarily very serious convictions when you look at what happens in Memphis, Shelby county, Tennessee, by all statistical data, somewhere

between the second and the fifth and sometimes the most violent metropolitan area in this country, but he does have a conviction on his record for driving while license revoked, canceled or suspended on September 28, 2009. He also has another conviction on his record on that same date, different date of offense, for driving while license revoked, canceled or suspended.

. . . .

Juvenile Court indicates they have no record for [the Defendant]. Part of criminal history or behavior – and I am not considering the pending charges against [the Defendant] for an indication of guilt for what the facts in this case indicated, what was also the subject of a motion in limine, was that [the Defendant] did have a warrant outstanding for his arrest for rape of a child, and that is what precipitated this high-speed chase. This is what precipitated Memphis Police Officers receiving information as to where [the Defendant] may have been located.

. . . .

[The Defendant] does have other convictions on his record, and he does have criminal behavior in addition to those necessary to establish the appropriate range. Again, the charge of rape of a child, I'm not giving that consideration for the purposes of making a determination as to whether or not there is criminal behavior, but I am giving it consideration knowing that [the Defendant] knew he had a warrant outstanding for his arrest and, based on that warrant, he decided he did not want to be arrested, and he continued to engage in criminal behavior by fleeing from these police officers, and I do give number one great weight in making that determination.

The trial court found that enhancement factor (3), that the offense involved more than one victim, applied to the aggravated assault conviction in Count 1 but not to the evading arrest conviction in Count 2. *See* T.C.A. § 40-35-114(3). It reasoned that this enhancement factor was implicit in the conviction for Count 2. As to its application to Count 3, the trial court stated:

[This enhancement factor] is sometimes implicit in an aggravated assault indictment but not in a case if there are other people that are present. If there are other people in the vicinity that could have been put at risk other than those named persons, that factor can, in fact, apply when there are persons present other than the victim in the immediate area.

> And the Court does find that [the Defendant's] action in count one of this indictment did involve more than one victim. There are many, many, many other people that were put at risk when [the Defendant] continued to run at high rates of speed, continued to flee in a crowded, heavily populated neighborhood. This is not an isolated stretch of road. This is a neighborhood in which [the Defendant] fled from officers at some 80-85 miles per hour because he simply did not want to be arrested at the time, and he told the jury he would turn himself in later.

The trial court applied enhancement factor (10), that the Defendant had no hesitation in committing a crime in which the risk to human life is high, to the Defendant's sentence for aggravated assault but not the evading arrest conviction. *See* T.C.A. § 40-35-114(10). The Court stated:

> [This enhancement factor] is implicit, also, in aggravated assault because those factors normally would include those – in all those situations, that a risk to life is, in fact, high, but case law would, again, indicate if there are other people that the risk to life may be applied or persons other than the victims are in the area and are subject to the Defendant's criminal conduct – and that applies in aggravated assault cases and attempted murder cases, that, if the Defendant is convicted of a violent crime and there are other people present that could have been injured as a result of what this Defendant was . . . doing . . . that could, in fact, apply. And there are other people on the aggravated assault that were present, including his own son. His own son is in his car that was placed at risk of human life, that was – he had no hesitation in committing a crime in which the risk to human life was high, and that involved not only other people – police officers and pedestrians and folks as he ran red lights and stop signs – but it also involved his son, and that is not implicit in a finding where other people are present that he did, in fact, create a risk of death or injury to.
>
> [T]he Court gives that finding great weight . . . .

The trial court applied enhancement factor (19), that the victim of the offense was a police officer, to the Defendant's sentence for both aggravated assault and evading arrest. *See* T.C.A. § 40-35-114(19). It gave this factor "great weight." The trial court found that no mitigating factors applied. The trial court sentenced the Defendant to six years for the aggravated assault conviction and to three years for the evading arrest conviction.

The trial court went on to consider the factors relevant to a consecutive sentencing determination. It found that the Defendant was a dangerous offender whose behavior

indicated little or no regard for human life in that he had no hesitation about committing a crime in which the risk to human life was high. The trial court also found that the circumstances of the offense were "aggravated." The trial court stated:

> This is a high-speed chase through a residential neighborhood in which [the Defendant] ran multiple stop signs, ran multiple red lights, fleeing from the police with an eighteen-year-old child in this car . . . .

The trial court stated that consecutive sentences were necessary to avoid depreciating the seriousness of this offense and to protect the public from further criminal acts by the Defendant, as required by *State v. Wilkerson*, 905 S.W.2d 933 (Tenn. 1995). The trial court went on to state:

> This is a horrific crime that [the Defendant] directly – and, again, I can't under-emphasize that [the Defendant] directly threaten[ed], directly put at risk multiple people when [the Defendant] chose to take three police officers on a high-speed chase, ran over the foot and ankle of a police officer that put him out of commission for a while and ended up with these police firing shots in a residential neighborhood to try to get [the Defendant] to stop. His actions directly endangered police officers and other folks. Those shots that were fired by police officers, one of them struck [the Defendant]. Those shots could have also struck and could have injured other innocent people. It is not unusual in this community to have shots fired in which people, children, are shot while they are in their home because these bullets don't – as [they] say in the neighborhood, they don't have names on them, and when a bullet is fired from a high-powered nine millimeter pistol, [the Defendant] has directly put other people at risk of being shot because of his felonious [actions] and because of his dangerous acts.

Upon these bases, the trial court ordered that the Defendant's sentences run consecutively, for a total effective sentence of nine years. The trial court next addressed the relevant probation considerations and denied the Defendant probation.[1]

It is from these judgments that the Defendant now appeals.

II. Analysis

[1]The Defendant does not appeal the trial court's denial of probation. On appeal, he contends that the trial court misapplied three enhancement factors and erred when it imposed consecutive sentences.

On appeal, the Defendant contends that: (1) the evidence is insufficient to sustain his conviction for the aggravated assault of Detective Shaw; (2) that the trial court erred when it did not allow him to present to the jury photographs of him in the ICU after he had been shot; and (3) that the trial court erred when it applied three enhancement factors and when it imposed consecutive sentences because he does not meet the criteria of a "dangerous offender."

A. Sufficiency of Evidence

The Defendant contends that the evidence is insufficient to sustain his conviction for aggravated assault by use of a deadly weapon because the State did not present sufficient evidence that he "endangered" the detective. The Defendant alleges that the testimony of the officers present was inconsistent and that the State failed to offer a video recording to support its version of events. The State counters that the assessment of credibility is within the jury's province. We agree with the State.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see* Tenn. R. App. P. 13(e), *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). In the absence of direct evidence, a criminal offense may be established exclusively by circumstantial evidence. *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1973). The jury decides the weight to be given to circumstantial evidence, and "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citations omitted). "The standard of review [for sufficiency of the evidence] is the same whether the conviction is based upon direct or circumstantial evidence." *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

In determining the sufficiency of the evidence, this Court should not re-weigh or reevaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by

the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 479 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1996) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S .W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

One commits the offense of aggravated assault with a deadly weapon when he or she intentionally or knowingly "causes another to reasonably fear imminent bodily injury" involving the use or display of a deadly weapon. T.C.A. §§ 39-13-101(a)(2), -102(a)(1)(B). "[A] person . . . acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result." T.C.A. § 39-11-302(a) (2010). "[A] person . . . acts knowingly with respect to the conduct or to the circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist." T.C.A. § 39-11-302(b). Furthermore, "[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." *Id*. A "deadly weapon" includes "[a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury." T.C.A. § 39-11-106(a)(5)(B). This Court has held that a motor vehicle can constitute a "deadly weapon" within the meaning of the statute. *State v. Tate*, 912 S.W.2d 785, 787 (Tenn. Crim. App. 1995); *State v. Leslie A. Pryor*, No. M2005-01429-CCA-R3-CD, 2006 WL 2563438, at *6 (Tenn. Crim. App., at Nashville, Aug. 31, 2006) ("[A] motor vehicle can be a "deadly weapon" for purposes of committing an aggravated assault."). "Bodily injury" includes "a cut, abrasion, bruise, burn or

disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." T.C.A. § 39-11-106(a)(2).

In the case under submission, the evidence, viewed in the light most favorable to the State, proves that the Defendant knew that there was an outstanding warrant for his arrest. He saw police vehicles approaching the elementary school where he was picking up his children. To avoid arrest, the Defendant left the parking lot and drove away from the school toward his home at a high rate of speed. The police activated their blue lights and began pursing the Defendant, who ran stop lights and stop signs, reaching speeds over eighty miles per hour in a residential neighborhood. The Defendant pulled his vehicle into the driveway of his own home, and officers exited their vehicles with their weapons drawn, yelling repeatedly at the Defendant to "shut off the car." Rather than comply with police orders, the Defendant decided to place the Jeep into drive and leave the scene. As he did so, he ran over the foot and ankle of Detective Shaw. This evidence is sufficient to support the jury's verdict that the Defendant intentionally or knowingly caused Detective Shaw to reasonably fear imminent bodily injury by the use of a deadly weapon, namely the Defendant's vehicle. The Defendant is not entitled to relief on this issue.

The Defendant conceded at trial and on appeal that he committed evading arrest by use of a motor vehicle. We agree. A conviction for evading arrest in a motor vehicle requires proof beyond a reasonable doubt that the Defendant "intentionally fle[d] by . . . means of [a motor vehicle] from anyone the [Defendant knew] to be a law enforcement officer." T.C.A. § 39-16-603(a)(1)(A). The Defendant testified that he saw police officers enter the parking lot of the elementary school. Assuming that they were looking for him, the Defendant left the parking lot. Officers pursued him, activating their blue lights, and the Defendant led them on a high speed chase rather than stop. After he came to a stop in his driveway, he again placed the Jeep into drive and sped away, surrendering only after he was shot by a police officer. This is sufficient proof to establish that the Defendant intentionally fled from the officers in a motor vehicle.

B. Photographs

The Defendant next contends that the trial court erred when it denied his request to admit into evidence photographs of the Defendant in the ICU after he had been shot. The Defendant alleges that he intended to question Detective Shaw, upon whose testimony the State's case hinged, about the Defendant's injuries. The State counters that the trial court correctly found that the photographs were irrelevant and unduly prejudicial. We agree with the State.

When deciding this issue, the trial court ruled that the photographs were not relevant

to any issue the jury must decide in this case. It found that allowing the photographs would be confusing. Tennessee courts follow "a policy of liberality" regarding the admission of photographs as evidence during a criminal trial. *State v. Banks*, 564 S.W.2d 947, 949 (Tenn. 1978). In order to admit the photographs, the trial court must first determine whether the photographs are relevant. Tenn. R. Evid. 401; *Banks*, 564 S.W.2d at 949. "'Relevant evidence' means 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." Tenn. R. Evid. 401. If the photograph is relevant, the trial court must next determine whether the probative value of the photograph is substantially outweighed by the danger of unfair prejudice. Tenn. R. Evid. 403; *Banks*, 564 S.W.2d at 951. "Unfair prejudice" is defined as "'[a]n undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Banks*, 564 S.W.2d at 951 (quoting Fed. R. Evid. 403, Adv. Comm. Note). The trial court possesses the sound discretion to determine the admissibility of photographs and will not be overturned on appeal absent a clear showing of an abuse of discretion. *Banks*, 564 S.W.2d at 949.

We conclude that the trial court did not abuse its discretion when it determined that the photographs offered by the Defendant were not relevant to any issue before the jury. The photographs, which show the Defendant's bullet wound and his appearance at the hospital, have no bearing on whether, at a time before he was shot, he committed the aggravated assault of Detective Shaw and evaded police in his motor vehicle. We disagree with the Defendant that the photographs could have been used to impeach Detective Shaw's credibility or recount of the events. Further, we agree with the trial court that any relevance that the photographs might have as to some collateral issue was substantially outweighed by unfair prejudice to the State by their admission. The Defendant is not entitled to relief on this issue.

C. Sentencing

The Defendant next contends that the trial court erred when it applied three enhancement factors, numbers (1), (3) and (10), and when it ordered that he serve his sentences consecutively, based upon a finding that he was a "dangerous offender." He contends that his effective sentence of nine years was inappropriate. The State counters that the trial court properly sentence the Defendant. We agree with the State.

In *State v. Bise*, the Tennessee Supreme Court reviewed changes in sentencing law and the impact on appellate review of sentencing decisions. The Tennessee Supreme Court announced that "sentences imposed by the trial court within the appropriate statutory range are to be reviewed under an abuse of discretion standard with a 'presumption of reasonableness.'" *State v. Bise*, 380 S.W.3d 682, 708 (2012). A finding of abuse of discretion "'reflects that the trial court's logic and reasoning was improper when viewed in

light of the factual circumstances and relevant legal principles involved in a particular case.'" *State v. Shaffer*, 45 S.W.3d 553, 555 (Tenn. 2001) (quoting *State v. Moore*, 6 S.W.3d 235, 242 (Tenn. 1999)). To find an abuse of discretion, the record must be void of any substantial evidence that would support the trial court's decision. *Id*.; *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). The reviewing court should uphold the sentence "so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Bise*, 380 S.W.3d at 709-10. So long as the trial court sentences within the appropriate range and properly applies the purposes and principles of the Sentencing Act, its decision will be granted a presumption of reasonableness. *Id.* at 707. We are also to recognize that the defendant bears "the burden of showing that the sentence is improper." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

In determining the proper sentence, the trial court must consider: (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 mitigating and enhancement factors set out in Tennessee Code Annotated sections 40-35-113 and -114; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and (7) any statement the defendant made in the defendant's own behalf about sentencing. *See* T.C.A. § 40-35-210 (2014); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The trial court must also consider the potential or lack of potential for rehabilitation or treatment of the defendant in determining the sentence alternative or length of a term to be imposed. T.C.A. § 40-35-103.

Pursuant to the 2005 amendments, the Sentencing Act abandoned the statutory presumptive minimum sentence and rendered enhancement factors advisory only. *See* T.C.A. § 40-35-114; T.C.A. § 40-35-210(c). The 2005 amendments set forth certain "advisory sentencing guidelines" that are not binding on the trial court; however, the trial court must nonetheless consider them. *See* T.C.A. § 40-35-210(c). Although the application of the factors is advisory, a court shall consider "[e]vidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114." T.C.A. § 40-35-210(b)(5). The trial court must also place on the record "what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, in order to ensure fair and consistent sentencing." T.C.A. § 40-35-210(e). The weighing of mitigating and enhancing factors is left to the sound discretion of the trial court. *State v. Carter*, 254 S.W.3d 335, 345 (Tenn. 2008). The trial court's weighing of the various enhancement and mitigating factors is not grounds for reversal under the revised Sentencing Act. *Carter*, 254 S.W.3d at 345 (citing *State v. Devin Banks*, No. W2005-02213-CCA-R3-DD, 2007 WL 1966039, at *48 (Tenn. Crim. App., at Jackson, July 6, 2007), *aff'd as*

corrected, 271 S.W.3d 90 (Tenn. 2008)).

1. Enhancement Factors

As stated above, when an accused challenges the length and manner of service of a sentence, this Court reviews the trial court's sentencing determination under an abuse of discretion standard accompanied by a presumption of reasonableness. *Bise*, 380 S.W.3d at 707. If a trial court misapplies an enhancing or mitigating factor in passing sentence, said error will not remove the presumption of reasonableness from its sentencing determination. *Id.* at 709. This Court will uphold the trial court's sentencing decision "so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Id.* at 709-10. Moreover, under such circumstances, appellate courts may not disturb the sentence even if we had preferred a different result. *See Carter*, 254 S.W.3d at 346. The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. T.C.A. § 40-35-401, *Sentencing Comm'n Cmts.*; *State v. Ashby*, 823 S.W.2d at 169.

The Defendant, a Range I offender, was subject to a sentence of three to six years for the Class C felony, aggravated assault. *See* T.C.A. 40-35-112(a)(3). He was subject to a sentence of two to four years for the class D felony, evading arrest by use of a motor vehicle. T.C.A. § 40-35-112(a)(4). The trial court, after finding that four enhancement factors and no mitigating factors applied, sentenced him to six years for the Class C felony and to three years for the Class D felony.

The trial court properly applied enhancement factor (1), that the Defendant had a history of criminal convictions or criminal behavior in addition to that necessary to establish his range, to both convictions. *See* T.C.A. § 40-35-114(1). The Defendant had two convictions for driving without a license, and he knew that there was a warrant out for his arrest at the time that he fled. The trial court did not err when it applied this enhancement factor.

The trial court erred when it applied enhancement factor (3), that the offense involved more than one victim, to the aggravated assault conviction. *See* T.C.A. § 40-35-114(3). The trial court noted that this enhancement factor is sometimes implicit in the conviction for aggravated assault but that such was not the case if there were other people present in that those other people could have been put at risk by the defendant's actions. According to *State v. Imfield*, 70 S.W. 3d 698, 705 (Tenn. 2002), there cannot be multiple victims for any one count referring to a particular person. The trial court, therefore, erred when it applied this enhancement factor.

The trial court properly applied enhancement factor (10), that the Defendant had no hesitation in committing a crime in which the risk to human life is high, to the Defendant's sentence for aggravated assault but not evading arrest. *See* T.C.A. § 40-35-114 (10). "Although factor (10) is inherent many cases of aggravated assault, it may appropriately be applied when there is a risk to the life of someone other than the victim." *See generally State v. Robert Jesus Porrata*, No. W2011-0749-CCA-R3-CD, 2012 WL 5199693, at *6 (Tenn. Crim. App., at Jackson, Oct. 22, 2012), *no perm. app. filed*. The Court stated that there were other people present that could have been injured as a result of the Defendant's actions, including the Defendant's own son who was a passenger in the Jeep. As the trial court found, the Defendant had no hesitation in committing a crime in which the risk to human life was high, including the risk to police officers, the Defendant's son, and other people in vehicles present when the Defendant ran red lights and stop signs and turned onto a six-lane road without stopping at a busy time of day. The trial court did not err in applying this enhancement factor.

The record reflects that the trial court considered the purposes and principles of the sentencing statute and sentenced appellant to within-range sentences for each of his convictions. *See Bise*, 380 S.W.3d at 709-10. While the trial court improperly applied one enhancement factor, we will not change the Defendant's sentence. *See Bise*, 380 S.W.3d at 709 (stating "[A] trial court's misapplication of an enhancement or mitigating factor does not remove the presumption of reasonableness from its sentencing determination"); *State v. Carter*, 254 S.W.3d 335, 346 (Tenn. 2008) (holding that, under the circumstances when a trial court misapplies an enhancement factor, this Court may not disturb the sentence even if it had preferred a different result). Therefore, we affirm the length of sentence set by the trial court for the sentences in this matter.

2. Consecutive Sentencing

The Defendant contends that the trial court erred when it found that he was a "dangerous offender" to support the imposition of consecutive sentences. The State counters that the trial court did not abuse its discretion when it ordered that the Defendant's sentences run consecutively. We agree with the State.

Our standard of review in an appeal of consecutive sentencing is whether the trial court abused its discretion, with a presumption of reasonable ness attached to the trial court's decision. *See Bise*, 380 S.W.3d at 706-08, *see also State v. Pollard*, 432 SW.3d 851, 859-61 (Tenn. 2013). The trial court may order multiple sentences to run consecutively if it finds by a preponderance of evidence that any one or more of seven different factors apply, including the two found by the trial court in this case. *See* T.C.A. § 40-35-115 (b)(1)-(7). One of those factors is 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). In order to find that a defendant is a dangerous offender, a court must also find that "(1) the sentences are necessary in order to protect the public from further misconduct by the defendant and (2) 'the terms are reasonably related to the severity of the offenses.'" *State v. Moore*, 942 S.W.2d 570, 574 (Tenn. Crim. App. 1996) (quoting *State v. Wilkerson*, 905 S.W.2d 933, 938 (Tenn. 1995)); *see also State v. Lane*, 3 S.W.3d 456, 461 (Tenn. 1999).

We conclude that the record supports the trial court's finding that the Defendant is a "dangerous offender." The Defendant, knowing that there was a warrant out for his arrest, saw police officers and assumed that they were coming to arrest him. He left the elementary school parking lot, and police officers pursued him, activating their blue lights. The Defendant decided that he wanted to leave his truck at his home rather than stop and led officers on a chase through a residential neighborhood, at a time when children were leaving school, at speeds of over eighty miles per hour. The Defendant recounted how his son, who was a passenger in his vehicle, was terrified by his father's actions but began to calm down as they arrived home. The Defendant or his son placed his Jeep into park, and police officers approached the vehicle with their weapons drawn and yelled for the Defendant to turn off the engine of the vehicle. The officer banged on the window of the Defendant's Jeep. The Defendant revved his engine, put his Jeep back into drive, and sped out of his driveway, running over one of the officers as he left. That officer discharged his weapon, and the Defendant was shot. The Defendant then, bleeding from his bullet wound, decided to surrender. The Defendant's son was also arrested by police officers, who were at the time unsure whether he was an accomplice in the Defendant's actions. This evidence supports the trial court's findings of the requisite *Wilkerson* factors. We conclude that the trial court did not abuse its discretion by finding the Defendant to be a dangerous offender.

II. Conclusion

After a thorough review of the record and relevant authorities, we conclude that the evidence is sufficient to sustain the Defendant's convictions and that the trial court did not err when it did not admit photographs from the Defendant at the hospital. We further conclude that trial court did not err when it sentenced the Defendant. Accordingly, we affirm the trial court's judgments.

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ROBERT W. WEDEMEYER, JUDGE