IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs September 22, 2009

STATE OF TENNESSEE v. GREGORY LYNN HILL

Appeal from the Criminal Court for Knox County
No. 87625 Mary Beth Leibowitz, Judge

No. E2008-02521-CCA-R3-CD - Filed November 6, 2009

The defendant, Gregory Lynn Hill, appeals his Knox County Criminal Court convictions of two counts of aggravated assault and his resulting sentences. The defendant challenges the sufficiency of the convicting evidence. The defendant also avers that the trial court erred by denying his motion for a mistrial because the State's witnesses violated the rule of sequestration. *See* Tenn. R. Evid. 615. Further, the defendant argues that the trial court erred by denying his request for a jury instruction regarding defense of a third person and in sustaining the prosecution's objection to the testimony of defense witness Martin Hill as to the violent characteristics of one of the victims. As for the defendant's consecutive eight-year sentences, the defendant alleges that the trial court erred by improperly evaluating the enhancement and mitigating factors and by improperly imposing consecutive rather than concurrent sentences. Discerning no error, we affirm the judgments of the trial court.

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

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and D. KELLY THOMAS, JR., JJ., joined.

Bruce E. Poston, Knoxville, Tennessee (on appeal) and John Boucher, Knoxville, Tennessee (at trial) for the appellant, Gregory Lynn Hill.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Jason Hunnicutt, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On August 27, 2007, a Knox County grand jury indicted the defendant for four counts of aggravated assault. Counts 1 and 3 alleged that the defendant caused serious bodily injury to victims Rodney Jones and Andrew Veals, respectively, *see* T.C.A. § 39-13-102(a)(1)(A) (2006), and counts 2 and 4 alleged that he assaulted the victims respectively by use or display of a deadly weapon, to wit, a baseball bat, *see id.* § 39-13-102(a)(1)(B). After a two-day trial, a Knox County

Criminal Court jury convicted the defendant of aggravated assault in counts 2, 3, and 4 as charged, and it convicted the defendant of the lesser-included offense of felony reckless endangerment in count 1. The trial court merged the verdicts for counts 1 and 2 and counts 3 and 4, respectively, and ordered the defendant to serve two consecutive eight-year sentences in the Tennessee Department of Correction.

Trial

At trial, victim Andrew Veals testified that on March 13, 2007, he played in a dart league at a bar named Brownie's on Martin Mill Pike in Knoxville, Tennessee. Mr. Veals testified that he and his wife regularly visited that bar and that he had been frequenting Brownie's for between five and seven years.

Mr. Veals testified that on March 13 he arrived at the bar between 6:30 and 7:00 p.m. and that his wife, who also played in the dart league, drove separately. He said that, after the dart tournament ended, everybody in the league "scattered." Mr. Veals stated that his wife left between 9:00 and 10:00 p.m., about five minutes before he left the bar. Mr. Veals testified that others present at Brownie's at that time included Rodney Jones, Pat Reed, Steve Manning, bar owner Jerry Brown, and bartender Donna Tilson.

As Mr. Veals was leaving Brownie's via the front door, he walked onto a large flat stoop extending from the exterior of the building and noticed Ms. Tilson's vehicle backed up very close to the stoop. He also observed an unfamiliar black car near a dumpster with its engine running. He testified that the car "took off" once he stepped out the door. Mr. Veals noticed a man "layin' over . . . in [Ms. Tilson's] car goin' through it" with his feet hanging out the driver's side. He explained that the regular patrons of Brownie's had been experiencing constant car burglaries in early 2007, so he then said to the patrons of the bar, "Well, here he is right now, man. He's in Donna's car right now." Mr. Veals stated that Mr. Jones walked out the door after him. Mr. Veals walked around to the front of the vehicle while Mr. Jones walked to the back. Mr. Veals also testified that Ms. Reed and Mr. Manning stepped outside the bar. He maintained that he did not threaten the man in any way and that he did not pull him out of the vehicle. He identified the man in the vehicle as the defendant.

Mr. Veals testified that, once the defendant was alerted to Mr. Veals and Mr. Jones's presence, he exited the vehicle. Mr. Veals stated that the defendant wore latex gloves and wielded a "little leaguer's" aluminum baseball bat. He said, "[B]y the time I got to the front of [the car], he took a ball bat and just . . . busted me right in the side of the head." Mr. Veals explained that the defendant's striking him "jarred" him, "knocked [him] out," and "rattled [his] brain." He testified that he then fell to the back of the vehicle, where he could see the defendant hitting Mr. Jones. Mr. Veals testified that he then went back inside Brownie's where he lay unconscious by a pool table. He stated that the whole incident occurred in "just seconds."

Mr. Veals testified that, after he regained consciousness, the police came by the bar. He stated that his wife drove both him and Mr. Jones to the hospital. He explained that his head "looked like [he] was wearing a cantaloupe." He stated that the defendant's striking him did not

"break the skin" but that his head swelled heavily. Mr. Veals testified that at the hospital, the staff monitored him for "concussions and all that and everything else." He further testified that since the incident he had seen a doctor four or five times to treat recurring headaches and to monitor the injury.

Mr. Veals filed a police report and spoke with Investigator A.J. Leoffler at Brownie's approximately three days later. The officer presented him with a photographic lineup from which Mr. Veals successfully identified the defendant. Mr. Veals maintained that he only drank three or four beers the night of the incident, and he explained, "[W]e was throwin' in a league, and . . . you don't get drunk."

On cross-examination, Mr. Veals admitted that he did not know whether the defendant had permission to be in the vehicle. He admitted that he yelled at the defendant because he "wanted to catch him from breakin' in [Ms. Tilson's] car." He maintained that he never threatened the defendant, however.

Defense counsel asked whether Mr. Veals was "still aggressive" at the hospital and had to be restrained by hospital security. Mr. Veals explained that he suffered from a previous, unrelated rib injury and that, when hospital staff placed a neck brace on him it inflamed the preexisting injury. He said that hospital staff "threatened to . . . strap [him] if [he] did not wear that neck brace," so he left the hospital. The hospital staff then called Mr. Veals and promised not to use the neck brace, and he returned.

Rodney Jones testified that he and Mr. Veals had known each other between seven and 10 years. He said that he played in a pool league and a dart league at Brownie's and that he visited the bar approximately three times a week. He testified that he played in the dart league with Mr. Veals on March 13, 2007, and that the game ended at 9:00 or 9:15 p.m. Mr. Jones testified that he did not drink when playing darts, but that he had some beers after the game. He said, "[Mr. Veals] and I were sittin' there just foolin' around, and we decided to go outside and smoke a cigarette." When the men exited the bar, they observed the defendant "leanin' across the front seat–the front–the driver's door was open." Mr. Jones said that the defendant was "goin' through the glove box with white . . . latex rubber gloves on." He recalled Mr. Veals then saying, "[T]here he is in that car." Mr. Jones explained that during the previous six months patrons of Brownie's had $15,000 to $30,000 worth of property stolen from their cars. He also stated that he saw a black Grand Am in the parking lot.

Mr. Jones testified that the defendant then exited the vehicle and that his elbow hit the car's horn. He testified that as soon as Mr. Veals walked to the front of the vehicle, the defendant hit him with a baseball bat. When asked whether Mr. Veals threatened the defendant, Mr. Jones said, "He didn't have time to threaten [the defendant]." After the defendant struck Mr. Veals, Mr. Jones "proceeded . . . to grab" the defendant, but the defendant "came straight down on [Mr. Jones] with the ball bat." Mr. Jones testified that the smaller end of the bat struck his arm, which he had raised to protect himself, and that the larger end struck his head. He said that the blow caused a scar on his head and fractured his wrist, resulting in his wearing a cast for six weeks.

Mr. Jones testified that he then grabbed the defendant by the throat and squeezed and that he then tripped the defendant and took the bat. He hit the defendant two or three times with the bat, and the defendant ran away. Mr. Jones, who testified that he spent eight years with the National Guard, chased after the defendant, but he tripped over the stoop in front of Brownie's. He testified that he then continued to chase the defendant and caught up with him in an abandoned parking area. He told the defendant that he had his "toy," referring to the baseball bat, and the defendant responded, "Come on; I have somethin' for you." Mr. Jones testified that the defendant swung his fists at him, so he hit the defendant's left knee with the bat, causing him to fall. Mr. Jones stated that he then beat the defendant with the bat, and that the defendant "[d]idn't do much of nothin' but lay there." Mr. Jones testified that the "scuffle" ended when he became "worn out from hittin' [the defendant] with the bat." The defendant then ran into an alley, and Mr. Jones returned to the bar. He stated that he received medical attention for his injuries the next day.

On cross-examination, Mr. Jones maintained that he never threatened the defendant when he first encountered him. He further stated that he did not believe Mr. Veals threatened the defendant but that he was "[t]ryin' to get him out of somebody's car that we knew . . . he wasn't supposed to be in." Mr. Jones opined that his beating the defendant was self-defense, and he testified that he had never been in any other altercations at Brownie's. Mr. Jones admitted there was no broken glass around the vehicle that indicated a break-in, but he explained that Ms. Tilman had left her vehicle unlocked so that a possible burglar entering her car he would not cause any damage to her vehicle.

Defense counsel asked if the defendant had a firearm, to which Mr. Jones responded that he only had the baseball bat. Defense counsel then pointed to a portion of the police report where he described the defendant as pulling a handgun. Mr. Jones explained that, during the incident, some children in the neighborhood set off a firework that sounded like a gunshot.

Patricia Reed testified that she played in a dart league at Brownie's three times a week and that she had known Mr. Jones for one year and Mr. Veals for two years. She stated that on March 13, 2007, she and Mr. Jones had won their dart game and left to go to another bar. She testified that they returned to Brownie's at 9:30 or 9:45 p.m.

Ms. Reed testified that she saw Mr. Veals and Mr. Jones walk outside the bar, and that she then went outside and saw Mr. Veals and the defendant fighting. She also observed a black car in the street next to the dumpster. Ms. Reed said that Mr. Veals lay on the ground and that the defendant was on top of him. She said the men were "[s]cufflin', throwin' each other–throwin' [Mr. Veals] over the car." Although she did not see the defendant strike Mr. Veals with the bat, she observed a "[b]ig ole knot" on his head. Ms. Reed then saw Mr. Jones pull the defendant off of Mr. Veals and the defendant strike Mr. Jones with the bat. She testified that she saw Mr. Jones take the bat from the defendant and hit him with it and that the defendant and Mr. Jones then "took off runnin'." Ms. Reed testified that she was only outside for "about a minute" and that "everything happened real fast."

Ms. Reed testified that, inside the bar, she later saw Mr. Veals, who lay unconscious for two or three minutes by the pool table. She stated that, when Mr. Jones returned to the bar he

was "scuffled up pretty bad" with a "big cut in his head." She believed that the bar's owner, Mr. Brown, called the police. She stated that she met with Investigator Leoffler on Sunday afternoon and identified the defendant in a photographic lineup. She maintained that neither Mr. Jones nor Mr. Veals possessed any weapons that evening. On cross-examination, Ms. Reed admitted that nobody at the bar knew whether the defendant had permission to be in the vehicle.

Steven Manning testified that he had been a friend of Mr. Jones for three or four years and of Mr. Veals for two or three years. He stated that on March 13, 2007, he arrived at Brownie's at approximately 7:30 p.m. Mr. Manning testified that he heard a car horn blow outside and that Mr. Veals seemed curious and stuck his head outside the bar. He testified that Mr. Veals then said, "Somebody's rumbling around through somebody's car," and that Mr. Veals said the man had a bat. Mr. Manning stated that he exited the bar after Mr. Veals and Mr. Jones. Although he did not see the defendant strike Mr. Veals, he saw the two "scuffling." Mr. Manning said,

> [I]t looked like [Mr. Veals] was kind of dazed a little bit, and [Mr. Jones] had just kind of got there and was telling [Mr. Veals] to grab a hold of the guy. And he was going to grab the bat, and that's kind of what happened. [Mr. Veals] kind of tackled the guy while [Mr. Jones] had a hold of the bat.

Mr. Manning stated that he could not see much of what was happening because the defendant ran between two cars, obstructing his view. He said, "I think after [Mr. Jones] took one swing the big guy that originally had the bat was up and running more or less." Mr. Manning stated that Mr. Jones followed the defendant and that Mr. Manning followed in his truck. He testified that he encountered Mr. Jones walking back toward the bar. He said that, back at Brownie's, Mr. Veals had a "rather large pump knot" on his head and that Mr. Jones had an injury to his head as well.

Investigator A.J. Leoffler testified that he investigated the March 13, 2007 assault on the Friday following the incident. He testified that the defendant was a known suspect and that he created a photographic lineup using the defendant's photograph. He met with the victims at Brownie's where he interviewed them about the incident. He testified that both victims identified the defendant from the photographic lineup. Investigator Leoffler observed that Mr. Veals had "a big grapefruit contusion on the side of his head." Investigator Leoffler also spoke with Ms. Reed on the night of the incident, and Ms. Reed also identified the defendant from a photographic lineup.

On cross-examination, Investigator Leoffler stated that he recalled witnesses reporting a handgun being present during the incident. He also admitted that, although he had the baseball bat in custody, no fingerprint evidence or blood testing had been taken from the bat.

The defense called Ms. Denise Swatzell, who testified that on March 13, 2007, she was parked in her car outside of Brownie's bar. She testified that she and the defendant were "seein' one another" although she was married to another man. Ms. Swatzell said she had been separated from her husband for 10 years. She testified that she and the defendant were parked in her vehicle in the parking lot of Brownie's and were kissing when approximately five men came to her vehicle.

Ms. Swatzell testified that the men said something about people breaking into their vehicles. She testified that one of the men was Mr. Veals, who she recognized from living around the area. She also identified one of the men as Mr. Jones. Ms. Swatzell testified that one of the men had a tire iron and another had the baseball bat. She stated that the men grabbed the defendant out of her car and started "jumpin' on him and stuff." She testified that the defendant then told her to leave and that she drove her vehicle over the street curb and circled the block. She stated that she believed the men would harm her. Ms. Swatzell testified that, when she returned she saw a heavyset male coming at her with the bat. The defendant then returned to her vehicle, and she left.

On cross-examination, Ms. Swatzell explained that she drove a black Grand Am and that she parked it by the dumpster in front of Brownie's; however, she maintained that her vehicle's engine was off and that her lights were off. She said that the defendant's face was bloody after his encounter with the men but that he would not allow her to take him to the hospital. She also said the defendant had large bruises on his back. She admitted that she did not see much of the fighting because she drove away.

The defense next called the defendant's brother, Martin Dwayne Hill. Mr. Hill attempted to testify to an incident in December 2007 involving Mr. Veals's propensity for violence. However, the trial court would not permit the evidence, and Mr. Hill was excused from the stand. Defense counsel made no attempt to obtain an offer of proof regarding Mr. Hill's testimony.

The defendant chose not to testify. Based on the evidence as summarized above, the jury convicted the defendant of both counts of aggravated assault for the offenses against Mr. Veals and of one count of aggravated assault and one count of felony reckless endangerment for the offenses against Mr. Jones.

Voir Dire on Sequestration Violation

After the State rested its case, defense counsel informed the court that he observed Mr. Veals, Mr. Jones, and Ms. Reed discussing the case and their testimony in the hallway. Because the court had ordered the "rule" for all witnesses, the defendant moved for a mistrial "just simply because there is an appearance of impropriety."

The court then called Mr. Jones and questioned him regarding the allegations. Mr. Jones maintained that he had not discussed the case with anybody and that he and Investigator Leoffler had been "sittin' out there talkin' about fishin' . . . but not the case." On cross-examination from defense counsel, Mr. Veals denied talking about his testimony with Mr. Jones, Mr. Manning, Ms. Reed, and Investigator Leoffler. Mr. Veals maintained, "We was sittin' out there bull shittin'. I mean it had nothin' to do with this case, nothin'."

The court also called Investigator Leoffler, who testified that he had been outside the courtroom for most of the afternoon. He stated that no witness had discussed their testimony and that, if they had, he would had stopped them. On cross-examination, Investigator Leoffler admitted that he had not been with the witnesses for "100% of the time," but he maintained that he had been there a majority of the time.

The court chose to accredit the testimony of Investigator Leoffler and Mr. Veals and found that the witnesses "talked about fishing and other things" and did not violate the rule of sequestration of witnesses. It denied the motion for mistral.

Sentencing

On March 28, 2008, the trial court held a sentencing hearing to determine the sentence for the defendant's two aggravated assault convictions.[1] The State first asked that the defendant be sentenced as a Range II offender and submitted certified copies of the qualifying convictions. The State further argued as enhancement factors that the offense involved great risk to human life, that the defendant had a history of criminal conduct, and, relying on similar burglary charges pending with the Knox County grand jury, that the defendant had a pattern of such behavior. The State requested an eight-year sentence for each aggravated assault conviction. The State also argued that the extent of defendant's criminal record showed that he had devoted much of his life to criminal acts as his choice of livelihood and requested consecutive sentencing.

The trial court noted that, in Range II, the term of punishment for a Class C felony ranged from six to 10 years. The court found "no question that [the defendant] has the requisite prior violent convictions . . . to be necessary to meet the range." The trial court also noted that the defendant had convictions over and above the appropriate range. *See* T.C.A. § 40-35-114(1). The court applied to a "certain extent" the seriousness of the injuries inflicted upon the victims, specifically Mr. Veals. *See id.* § 40-35-114(6). The court also "to some extent" considered the defendant's use of a deadly weapon. *See id.* § 40-35-114(9). It also noted that the defendant had no hesitation in committing the offense when risk to human life was high and the victims were in a place they had a lawful right to be. *See id.* § 40-35-114(10). The court viewed as "very small factors" enhancement factors 11 and 12 involving injury to persons other than the intended victim. *See id.* § 40-35-114(11)-(12). The court concluded, "I have more than plenty convictions to place [the defendant] at the eight year range, in the mid range."

Regarding consecutive sentencing, the court found that the defendant had "spent most of his life engaging in criminal behaviors" and ordered consecutive sentences. *See id.* § 40-35-115(b)(1)-(2). The court further noted that the defendant had been revoked from parole twice and that he was not a good candidate for probation. The court entered judgments reflecting two consecutively-running eight-year sentences with the Tennessee Department of Correction on March 28, 2008.

The defendant filed a timely motion for new trial on April 24, 2008, which the trial court denied on May 29, 2008. The defendant filed a notice of appeal on November 9, 2008.

Issues on Appeal

[1] Counts 1 and 2 were merged into a single count of aggravated assault, and counts 3 and 4 were also merged into a single count of aggravated assault. Effectively, the defendant received one aggravated assault conviction for each victim.

The defendant presents six issues on appeal. The defendant first alleges that the convicting evidence was insufficient to support the verdict. Second, he challenges the trial court's denial of his motion for mistrial in light of "the State witnesses violating the rule of sequestration." Third, he argues that the trial court erred by failing to instruct the jury on "Defense of Another." Fourth, the defendant argues that the trial court erred in excluding from evidence the testimony of Martin Hill regarding the aggression of Mr. Veals. The defendant's last issues challenge his sentence, and he argues that the trial court failed to properly evaluate the applicable enhancement and mitigating factors and that the trial court erred in imposing consecutive sentences.

The State argues that the appeal should be dismissed because the defendant's notice of appeal was filed well outside the 30 days provided by Tennessee Rule of Appellate Procedure 4. Further, the State opposes the defendant's appellate issues on their merits.

I. Jurisdiction

The defendant did not file his notice of appeal until November 9, 2008, more than five months after the trial court denied his motion for new trial. The State correctly argues that such notice is untimely. However, the filing of a notice of appeal is not jurisdictional and may be waived in the interest of justice. Tenn. R. App. P. 4(a). The State, in asking us to dismiss this appeal, argues that "[h]ere, the defendant has provided no explanation to this [c]ourt for filing his notice of appeal more than four months after the 30-day period passed." However, upon our review of the record we find that the late-filed notice of appeal resulted from a disorganized transfer of this case from trial to appellate counsel. We note that appellate counsel filed a "Motion to Grant Waiver of Timely Filing of Notice of Appeal" in the trial court, which the trial court granted. We note that the trial court had no jurisdiction to grant the waiver of timely notice, which is explicitly reserved for the appellate courts. *See* Tenn. R. App. P. 4(a) ("The appropriate appellate court shall be the court that determines whether such a waiver is in the interest of justice."). Nonetheless, we believe the seriousness of the offenses and legitimate nature of the issues for review require our determining this appeal on its merits, and we waive timely filing of the notice of appeal.

II. Sufficiency of the Evidence

The defendant argues that "[t]he [j]ury was provided with the self defense instruction. The burden was upon the Government to prove beyond a reasonable doubt that [the defendant] did not have that defense. It provided no evidence to do so." The State argues that the evidence supports the defendant's convictions and that the defendant did not act in self-defense. When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003). The rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *Winters*, 137 S.W.3d at 654.

In determining the sufficiency of the evidence, this court should neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Id.* at 655. 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. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, this court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id.*

As is applicable in this case, "[a] person commits aggravated assault who . . . [i]ntentionally or knowingly commits an assault as defined in § 39-13-101 and . . . [c]auses serious bodily injury to another" or "uses and displays a deadly weapon." T.C.A. § 39-13-102(a)(1)(A)-(B) (2006). "'Serious bodily injury' means bodily injury that involves . . . [a] substantial risk of death; . . . [p]rotracted unconsciousness; . . . [e]xtreme physical pain; . . . [p]rotracted or obvious disfigurement; or . . . [p]rotracted loss or substantial impairment of a function of a bodily member, organ or mental faculty." *Id.* § 39-11-106(34).

The defendant does not contest that he was involved in the altercation, but he argues that no reasonable juror could find beyond a reasonable doubt that the defendant did not act in self-defense. We disagree. The evidence established that Mr. Veals and Mr. Jones approached a vehicle while the defendant appeared to be burglarizing it. Although Mr. Veals admittedly raised his voice, the record repeatedly shows that he never threatened the defendant. The evidence, viewed in a light most favorable to the State, showed that within a very short time, and apparently without any verbal exchange, the defendant unilaterally decided to strike the unarmed Mr. Veals with a baseball bat, causing unconsciousness and a large "knot" on his head. Further, the jury clearly did not credit Ms. Swatzell's testimony regarding the victims' pulling the defendant out of her vehicle then beating him. The evidence as credited by the jury is clearly sufficient to support a verdict of aggravated assault for the injuries to Mr. Veals.

With regard to the defendant's offenses against Mr. Jones, Mr. Jones testified that, upon seeing the defendant attack his friend, Mr. Veals, he attempted to grab the defendant. The jury clearly found that the defendant was the initial aggressor against Mr. Veals. Thus, Mr. Jones's rush to Mr. Veals's attacker was instigated by the defendant's behavior, and a defendant may not use self-defense when he provokes the use of force. *See* T.C.A. § 39-11-611(d) ("That threat or use of force against another is not justified if the person provoked the other individual's use or attempted use of unlawful force . . . ."). The jury clearly did not credit the defendant's witnesses, and the evidence as presented supported the conviction of the defendant for the aggravated assault of Mr. Jones.

III. Mistrial Resulting from Violation of Tennessee Rule of Evidence 615

The defendant next argues that the State's witnesses, in violation of the rule of sequestration of witnesses, *see* Tenn. R. Evid. 615, discussed testimony regarding the case outside of the courtroom during trial. The defendant avers that the trial court should have granted him a mistrial as a result of the witnesses' misconduct. The State counters that the defendant failed to prove a violation of the rule of sequestration of witnesses and, therefore, the court properly denied his motion for a mistrial.

Prior to calling its first witness, all witnesses were placed under the "rule," which is embodied in Tennessee Rule of Evidence 615:

> At the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing. In the court's discretion, the requested sequestration may be effective before voir dire, but in any event shall be effective before opening statements. The court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibits created in the courtroom by a witness. . . . This rule does not forbid testimony of a witness called at the rebuttal stage of a hearing if, in the court's discretion, counsel is genuinely surprised and demonstrates a need for rebuttal testimony from an unsequestered witness.

Tenn. R. Evid. 615. "The sequestration rule prevents witnesses from hearing testimony of other witnesses and subsequently adjusting testimony." *State v. David Scarbrough*, No. E1998-00931-CCA-R3-CD, slip op. at 20 (Tenn. Crim. App., Knoxville, July 11, 2001), *perm. app. denied* (Tenn. 2002); *see also State v. Harris*, 839 S.W.2d 54, 68 (Tenn. 1992). "Rule 615 does not prescribe a specific sanction for its violation. Instead, courts retain the discretion to impose a variety of sanctions appropriate to the circumstances." *State v. Black*, 75 S.W.3d 422, 424 (Tenn. Crim. App. 2001) (citations omitted). "'The most severe sanction would be a mistrial or a ruling for or against a party on a particular issue. This draconian sanction should be used only in egregious cases, perhaps involving intentional violations of the rule for the purpose of creating perjured testimony.'" *State v. Dennis Burnette*, No. E2007-02258-CCA-MR3-CD, slip op. at 12 (Tenn. Ct. App., Knoxville, Aug. 14, 2009) (quoting Neil P. Cohen et al., *Tennessee Law of Evidence* § 6.15[b] (5th ed. 2005)).

Whether to grant a mistrial is an issue entrusted to the sound discretion of the trial court. *See State v. McKinney*, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996). "Generally a mistrial will be declared in a criminal case only when there is a 'manifest necessity' requiring such action by the trial judge." *State v. Millbrooks*, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). The burden of establishing the necessity for mistrial lies with the party seeking it. *State v. Williams*, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). "The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict." *Id.* On appeal, this court will disturb a trial court's denial of a motion for mistrial only when there is an abuse of discretion. *State v. Adkins*, 786 S.W.2d 642, 644 (Tenn. 1990); *Williams*, 929 S.W.2d at 388. An abuse of discretion occurs when the trial court applies an incorrect legal standard or reaches a conclusion that is "illogical or unreasonable and causes an injustice to the party complaining." *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006) (citing *Howell v. State*, 185 S.W.3d 319, 337 (Tenn. 2006)); *see also State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999).

In the instant case, the trial court held a jury-out hearing to determine whether the rule of sequestration of witnesses had been violated. After interviewing Mr. Veals and Investigator Leoffler and permitting defense counsel to cross-examine these witnesses, the trial court determined

that no such violation had occurred. We will not disturb the trial court's findings, and the record does not preponderate against the trial court's finding that any communication between witnesses during the trial involved general conversation unrelated to the case. Further, we will not disturb the trial court's exercise of discretion in denying the defendant's motion for a mistrial. The defendant failed to show that any violation of Rule 615 led to any abuse of the trial process.

IV. Jury Instruction on "Defense of Another"

The defendant next argues that the trial court erred by denying his request for a jury instruction on "defense of another." The defendant argues that evidence adduced at trial supported a jury instruction regarding the defendant's defending Ms. Swatzell from harm. The State argues that the evidence did not support the inclusion of the jury instruction for defense of another.

Our criminal statutes allow a defendant to claim defense of another as a defense when the defendant reasonably believes that another person is in danger and uses force permitted under our self-defense statute. *See* T.C.A. § 39-11-612(a). The defendant must "reasonably believe[] that the intervention is immediately necessary to protect the third person." *Id.* § 39-11-612(b).

The trial court has a duty "to give a complete charge of the law applicable to the facts of a case." *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn. 1986); *see* Tenn. R. Crim. P. 30. "The issue of the existence of a defense is not submitted to the jury unless it is fairly raised by the proof." T.C.A. § 39-11-203(c). The burden of showing that a defense is applicable rests upon the defendant. *Id.*, Sentencing Comm'n Comments. "To determine if [a defense] is 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.'" *State v. Bult*, 989 S.W.2d 730, 733 (Tenn. Crim. App. 1998) (quoting *State v. Shropshire*, 874 S.W.2d 634, 639 (Tenn. Crim. App. 1993)).

Our review of the record shows that the trial court considered the evidence in a light most favorable to the defendant. The defendant argued that, because the defendant told Ms. Swatzell to leave when he was being beaten by the men who approached her vehicle, the defendant was acting in Ms. Swatzell's defense when he struck the victims with the bat. On appeal, the defendant argues that "Ms. Swatzell was defenseless in the vehicle. [The defendant] was perfectly reasonable to fear for her safety and his urging her to flee confirms his fear." However, the trial court found, "If the jury were to believe that she was in her car and they took him out the door and she drove away, I'm not too sure he was defending anybody else but himself." We also observe that the evidence did not otherwise indicate the defendant's belief about the necessity of intervention. We will not disturb the trial court's findings. Further, we note that the jury clearly rejected the defendant's self-defense claim.

V. Exclusion of the Testimony of Martin Hill

The defendant next argues that the trial court erred in excluding evidence of Mr. Veals's propensity for violence. The defendant posits that Martin Hill, the defendant's brother, planned to testify that in December 2007, after the incident at hand, he observed Mr. Veals act

violently toward him. Apparently, the defendant planned to offer this proof pursuant to Tennessee Rule of Evidence 404(a)(2) to prove that Mr. Veals was the initial aggressor in the case at hand. However, we need not tarry long over the defendant's claim because he failed to make an offer of proof regarding the possibly beneficial testimony. Defense counsel made several statements about this evidence, but he never offered any proof to the trial court regarding the specific instance of conduct. Without this information, it is impossible to conduct a meaningful review of this issue. *See State v. Hall*, 958 S.W.2d 679, 691 n.10 (Tenn. 1997) ("Not only does [an offer of proof] ensure effective and meaningful appellate review, it provides the trial court with the necessary information before an evidentiary ruling is made. Indeed, generally, if an offer of proof is not made, the issue is deemed waived and appellate review is precluded."); *see also* Tenn. R. Evid. 103. The defendant has waived this issue.

VII. Sentencing Issues

The defendant challenges the trial court's weighing of enhancement and mitigating factors and argues that the court should have sentenced him to six-year sentences rather than eight-year sentences. The defendant also alleges that the trial court erred in ordering consecutive sentences. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the trial court's determinations are correct. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Id.* "The burden of showing that the sentence is improper is upon the appellant." *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id.* If appellate review reflects that the trial court properly considered all relevant factors and if its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The defendant argues that the trial court applied enhancement factors that are contained in the elements of the offense of aggravated assault, thereby subjecting the defendant to "double enhancement." *See State v. Poole*, 945 S.W.2d 93, 98 (Tenn. 1997) (stating that a trial court must "exclude enhancement factors 'based on facts which are used to prove the offense' or '[f]acts which establish the elements of the offense charged.'" (quoting *State v. Jones*, 883 S.W.2d 597, 601 (Tenn. 1994), *superceded by statute on other grounds as recognized in State v. Carico*, 968 S.W.2d 280, 288 (Tenn. 1998))). However, we note that the trial court's findings were based not only on the certified convictions exhibited by the State during the sentencing hearing, but also upon a presentence report. The record before us is devoid of the presentence report.

De novo appellate review of the defendant's sentences is substantially hampered by the absence of the presentence report from the appellate record. As we have remarked on many occasions, it is the appellant's duty to include in the appellate record materials which are necessary to convey a fair, accurate, and complete account of what transpired in the trial court relative to the issues raised on appeal. *See* Tenn. R. App. P. 24; *State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998). The presentence report is evidence which is considered by the trial court and therefore is

necessary to convey a fair, accurate, and complete account of the proceedings below. *See* T.C.A. § 40-35-210(b); *State v. Johnny Parker*, No. 03C01-9307-CR-00214 (Tenn. Crim. App., Knoxville, Nov. 22, 1994) (sentencing issue waived in absence of presentence report). In the absence of an adequate record on appeal, this court must presume that the trial court's rulings were supported by sufficient evidence. *State v. Oody*, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991); *State v. Summers*, 159 S.W.3d 586, 600 (Tenn. Crim. App. 2004), *perm. app. denied* (Tenn. 2005).

Conclusion

We find no error in the defendant's convictions, and we presume that the trial court correctly sentenced the defendant in light of his failure to submit to this court a complete record of the proceedings below. In light of the foregoing analysis, we affirm the judgments of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE