

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 18, 2007

STATE OF TENNESSEE v. CHARLES L. ROCHELLE¹

**Direct Appeal from the Criminal Court for Davidson County
No. 2006-A-150 Cheryl Blackburn, Judge**

No. M2007-00367-CCA-R3-CD - Filed March 24, 2008

The defendant, Charles L. Rochelle, was convicted of aggravated robbery and aggravated assault. Prior to trial, he pled guilty to felony evading arrest while operating a motor vehicle. The defendant was sentenced to twelve years for aggravated robbery, ten years for aggravated assault, and to eight years for evading arrest. The defendant's sentences were ordered to run consecutively for a total effective sentence of thirty years. On appeal, the defendant argues: (1) that insufficient evidence existed to support his convictions, (2) that the trial court erred by permitting the state to enter the classified section of a local newspaper as rebuttal evidence, (3) that his sentences were excessive in length, and (4) that the trial court erred by imposing consecutive sentencing. Following our review of the parties' briefs, the record, and the applicable law, we affirm the judgments of the trial court.

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

J.C. McLIN, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Jeffrey A. DeVasher (on appeal), and J. Michael Engle (at trial), Assistant Public Defenders, Nashville, Tennessee, for defendant, Charles L. Rochelle.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. BACKGROUND

¹ We note that the defendant's name is spelled both as Charles L. Rochelle and as Charles Rochell in different parts of the record. For ease of reference, we will spell the defendant's name as it appears in the indictment.

Patricia Talley testified that she worked as a cashier at the Family Dollar Store in Goodlettsville, Tennessee on October 15, 2005, when the store was robbed. While stocking shelves in the store, she saw the defendant, who motioned with his finger for her to come over to him. The defendant walked alongside her down the aisle, and told her that his wife had asked him to get something, but he could not remember what he was supposed to get. As they reached the back of the store, the defendant told her he wanted money. She informed the defendant that she did not have the key to the office where the money was kept and that the manager was the only person with the key.

Ms. Talley testified that the defendant told her to call the manager, Virginia Swezea. When Ms. Swezea arrived at the back of the store, the defendant had a gun trained on Ms. Talley and told Ms. Swezea that he wanted her to open the door. Ms. Swezea opened the door and the three went up the stairs to the office. When the defendant told them again what he wanted, Ms. Swezea told him it was sitting in a drawer on top of the store safe. Ms. Swezea then picked up the money and handed it to the defendant, who stuffed it in his pocket. The defendant told Ms. Swezea that if that was not all the money he would “blow her head off.” Ms. Swezea informed the defendant that he had all the money. The defendant then told the two women to get on the floor under the desk and count to twenty. The defendant ran out of the store. Ms. Talley stated that they counted to twenty, got up, and called 911. Ms. Talley was shown a gun and identified it as the gun the defendant used during the commission of the robbery. She said that she was approximately five feet tall, and she admitted that at the preliminary hearing she testified that she thought the defendant’s height to be about six feet.

Ms. Talley testified that it was Ms. Swezea who spoke with the police over the phone and gave them a description of the defendant. She stated that the defendant had a “small gun,” but she did not know anything about guns. She described the defendant as wearing a sock hat, a dark hat, a dark jacket and dark pants. Ms. Talley testified that the defendant took approximately \$1,400. She stated that after the robbery she attended a preliminary hearing where the defendant appeared. She recalled that she was not able to identify the defendant based solely on facial identification, but after observing his mannerisms and hearing him speak, she was able to identify him as the man who had robbed the store.

On cross-examination, Ms. Talley admitted she told police officers that the defendant had short hair and brown eyes, but she had assumed this to be the case as the defendant wore a sock hat and sunglasses during the robbery. She stated that there was nothing outstanding or unusual about the defendant’s appearance on the day of the robbery. She testified that when she saw the defendant prior to trial at the preliminary hearing, it was the defendant’s walk and mannerisms that triggered her recollection of him as being the one who robbed the store. She also admitted that Ms. Swezea told her how much money was stolen. Ms. Talley also admitted that she had previously testified that the defendant’s gun was silver. She acknowledged that her testimony at that time was different than her testimony at trial, when she identified the black gun shown to her as the defendant’s gun.

Virginia Swezea testified that she was the Assistant Manager of the Family Dollar Store. On the afternoon of October 15, 2005, she was waiting on customers at the front of the store when she was called to the back of the store by Ms. Talley. When she got to the back of the store, the

defendant was there with Ms. Talley, holding a gun to her throat. She complied with the defendant's instruction to open the office door. She testified that as she did this, the defendant pointed his gun at her. The three of them went upstairs to the office. Ms. Swezea pointed out the money in the drawer on top of the safe and the defendant told her to pick it up and give it to him.

Ms. Swezea testified that the gun the defendant used was a small revolver, and that she was familiar with the difference between a revolver and a semi-automatic. After she gave him the money, he put the gun in her face and asked her if that was all the money. She told him he had all the money and he said, "well, if you're lying to me, I'm going to blow your head off." The defendant then told her and Ms. Talley to get under the desk and count to twenty.

Ms. Swezea testified that after she and Ms. Talley got out from under the desk, she instructed Ms. Talley to call 911. She stated that she went to the front of the store, locked the doors, and told the remaining customers that if they had seen anything they needed to stay, and those customers who had not seen anything needed to leave. She described the robber to police as five-and-a-half feet tall, wearing a toboggan and a black zip-up hooded jacket. She stated that the defendant had the hood up, and was also wearing sunglasses and black pants. Ms. Swezea testified that she calculated how much money had been taken by reviewing the deposit log that she had filled out earlier that day when she brought the money from the cash register up to the office.

Ms. Swezea testified that she was present for the defendant's preliminary hearing. She stated that she was not confident that she would be able to identify the defendant on the basis of a facial identification. However, she stated that she knew the defendant was the person who had robbed her because she was able to observe his walk, his mannerisms and was able to hear him speak during the hearing. She testified that the gun shown to her matched the type and size of gun the defendant used in the commission of the robbery.

On cross-examination, Ms. Swezea testified that she could not remember which police officer she had given her statement to on the day of the robbery. She stated that her judgment of the robber's height was based on his being roughly the same height as her. Ms. Swezea also stated that the defendant had a unique walk that was "kind of a swagger."

Sergeant Charles Morrow testified that he was a police officer with the Goodlettsville Police Department and he attempted to stop a fleeing robbery suspect on October 15, 2005. He was alerted by fellow officers over the radio that the defendant was driving up Moss Trail on Rivergate Parkway. Sergeant Morrow stated that he pulled up to Rivergate Parkway, got out of his car and pointed his gun at the defendant. He stated that the defendant ducked down in the van, drove out onto Rivergate Parkway, hit a sign, and fled south on Interstate 65.

Sergeant Morrow testified that he followed the pursuit of the defendant by radio to an area in front of the University Court Apartments. When he arrived at the scene, the defendant's blue van was in the grassy area in the apartment courtyard, and a cruiser belonging to fellow Goodlettsville police officer Ken Hale was parked next to it. Sergeant Morrow stated that the foot pursuit of the defendant was ongoing at that time. He stated that he searched the defendant's van and found several items which he secured and later placed in the evidence room at the Goodlettsville Police

Department. Among those items was a fully loaded and cocked pistol. Sergeant Morrow also found a black jacket with a hood on it, three stocking caps, and clear rubber gloves. All of those items were located inside a backpack in the defendant's van. Sergeant Morrow testified that as he processed the van, Officer Hale and other police officers returned with the defendant and a quantity of cash. Sergeant Morrow took custody of the cash, counted it, and noted the amount to be \$1,365. Sergeant Morrow turned the cash over to the property room, along with the other items that were recovered.

Officer Ken Hale testified that he was a police officer with the Goodlettsville Police Department and was involved in the pursuit of the defendant following the robbery of the Family Dollar Store on October 15, 2005. Officer Hale stated that he responded to the scene and encountered the defendant's Chevrolet Lumina minivan about a block from the Family Dollar Store. The description of the vehicle and driver that Officer Hale received matched the defendant and his van. Officer Hale pulled behind the defendant and attempted to hail him to pull over. The defendant executed a u-turn and drove in the opposite direction. Officer Hale followed the defendant and activated his blue lights to stop the defendant. At that point, the defendant accelerated rapidly and took off.

Officer Hale testified that the defendant, in an attempt to escape, reached speeds of sixty or seventy miles per hour on a residential street with a speed limit of approximately thirty miles per hour. The defendant approached Rivergate Parkway. Officer Hale stated that Officer Morrow blocked the road with his cruiser and had his pistol aimed at the defendant. The defendant ducked down in the van and turned onto Rivergate Parkway. After entering Rivergate Parkway, the defendant crossed the eastbound and westbound lanes of traffic and made his way onto Interstate 65. As the defendant entered the interstate, he "shot from the right shoulder all the way across to the main two southbound lanes of 65." The defendant continued to accelerate on Interstate 65, and passed cars merging into a section of the interstate undergoing construction. The defendant then began passing cars on the shoulder at high rates of speed.

Officer Hale testified that at one point, the defendant nearly lost control of the van, and it began "fishtailing" badly. The defendant recovered control of the vehicle and accelerated to speeds of 100 to 110 miles per hour. As the chase progressed, the defendant continued to pass cars on the right shoulder of the interstate. At one point, the defendant moved all the way over to the left-hand shoulder and then made his way back over to the right shoulder. The defendant attempted to exit Interstate 65 at one or two exits, but was unable to stop in time. He re-accelerated to high speeds as he traveled along the shoulder of the interstate. Officer Hale testified that the defendant traveled onto Interstate 24 toward Murfreesboro, maintaining speeds of 100 to 110 miles per hour.

Officer Hale testified that the defendant drove to the Briley Parkway exit. As the defendant took the exit, the van careened into a concrete divider before shooting into the grass median on Briley Parkway. The defendant ignored four lanes of traffic and traveled to the right of the cars and onto the Thompson Road exit. He drove through a red light and over a sign as he continued onto Thompson Road. Throughout the pursuit, the defendant maintained speeds in excess of 100 miles per hour. At one point, Officer Hale saw smoke coming from under the hood of the defendant's van.

Officer Hale testified that the defendant turned right onto Nolensville Road from Thompson Road, driving at high rates of speed in either the turn lane or on the shoulder. Officer Hale stated that the defendant ran multiple red lights and frequently drove into oncoming lanes of traffic as the pursuit headed toward the fairgrounds area. As the pursuit continued along Nolensville Road, the defendant slowed to turn onto Lafayette Road, swerving around several cars. On Lafayette, the defendant slowed down and proceeded in the lane of oncoming traffic. The defendant approached Charles E. Davis Street where a housing development was located. In front of the housing development was an open courtyard area. The defendant drove up over the curb, onto the grassy area, and stopped.

Officer Hale testified that after the defendant stopped, he jumped out of the van and started to run. Officer Hale jumped from his car and pursued the defendant by foot. Officer Hale lost contact with the defendant and was unable to get his portable radio to work. Officer Hale returned to his cruiser and waited there until the first Metro police cruiser arrived. Approximately three minutes later, he was notified that the defendant was in custody.

Officer Hale indicated the exact course of his pursuit on a map and on an aerial photograph. Officer Hale also testified regarding the chase based upon a video taken from the dashboard camera on his cruiser. Officer Hale stated that he had a printout of the speeds of his own vehicle at various points during the pursuit. Officer Hale stated that after the defendant was apprehended, he looked inside the defendant's van just to make sure nothing dangerous had been left out in the open for someone to grab. Further, he noticed a backpack and a black hooded jacket across the bottom of the driver's seat. When police officers brought the defendant back to the van, Officer Hale took custody of the defendant. Sergeant Morrow took custody of the cash. On cross-examination, Officer Hale noted that the description of the defendant that was sent out over the radio listed the robber as five feet, four inches, "wearing sunglasses, black toboggan, and a black hooded hoodie."

The defendant testified that during the months prior to the robbery of the Family Dollar Store, he and his wife had one vehicle that they shared. The defendant and his wife had conflicting work schedules and needed an additional vehicle. The defendant stated that the gun found in the van was shared by his family. He testified that he lived in a dangerous housing project where robberies were frequent and the gun was used by his wife for protection. He testified that he had \$1,365 on his person on the day of the robbery because he was hunting for a second used car. He stated that he had looked through the newspaper and circled the addresses of people who were selling cars. The defendant testified that he was in Goodlettsville checking on two potential vehicles for sale on the day of the robbery.

The defendant testified that he had not been in the Goodlettsville Family Dollar Store on the day of the robbery. The defendant admitted that he pled guilty to evading arrest based on the police pursuit. He stated that he fled from police because he was scared, and because he had a history of bipolar and schizophrenic mental illness. He stated that he also suffered from Attention Deficit Disorder and personality disorders. He stated that he took medications to control these disorders, and he admitted that he was testifying at trial under the effects of those mind-altering medications. The defendant also testified that he had been convicted of two separate counts of theft of property

under \$500 in 1998. He admitted that in 2000, he was convicted of the theft of property with a value between \$500 and \$1000.

On cross-examination, the defendant testified that he did not have an expert who could testify as to his medical mental health history, or to what his mental health status was on the day of the robbery. He stated that he had looked for a car for a month-and-a-half, and every time he looked he took approximately \$1,400 with him, despite the fact that he lived in a dangerous neighborhood. The defendant also testified that he made phone calls to look at the cars that he was interested in on the day of the robbery. However, the defendant stated that despite having several months to prepare for trial, he was unable to obtain a copy of his cell phone records from that day, verifying that he had in fact made those calls.

The defendant testified that with regard to two or three of the cars listed in the newspaper, he did not call ahead but simply went to the addresses provided in the newspaper. When asked if he could produce a newspaper with a car listing that featured an owner's address, the defendant was unable to do so. The defendant stated that the reason that he panicked and fled from police was that he had the gun in his pocket and it was unregistered. The defendant also stated that the backpack that was found in the van belonged to one of his children.

The state moved on rebuttal to introduce a copy of the classified section of the Tennessean newspaper from the day of the trial to demonstrate that personal addresses were not placed in the advertisements for used cars. Despite an objection by the defendant, the trial court allowed the newspaper as rebuttal evidence.

Based on the foregoing evidence, the defendant was convicted of aggravated robbery and aggravated assault. He pled guilty to felony evading arrest while operating a motor vehicle prior to trial. The trial court sentenced the defendant to twelve years for aggravated robbery. He was sentenced to ten years for aggravated assault and to eight years for evading arrest while operating a motor vehicle and creating a risk of death or injury to innocent bystanders. The court ordered that the defendant's sentences run consecutively for a total effective sentence of thirty years.

II. ANALYSIS

A. Sufficiency

The defendant argues that there was insufficient evidence to sustain his convictions for aggravated robbery and aggravated assault. Specifically, the defendant contends that evidence does not establish his identity as the perpetrator, and does not eliminate other possible, reasonable explanations apart from the defendant's guilt.

Upon review, we reiterate the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to the appellate court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914

(Tenn. 1982). To meet this burden, the defendant must establish that no “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); *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); see Tenn. R. App. P. 13(e). By contrast, the jury’s verdict, approved by the trial judge, accredits the state’s witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value given to the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006). Likewise, we do not replace the jury’s inferences drawn from the circumstantial evidence with our own inferences. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002).

The guilt of the defendant, as well as any fact required to be proved, may be established by direct evidence, by circumstantial evidence, or by a combination thereof. See *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). In fact, circumstantial evidence alone may be sufficient to support a conviction. *State v. Tharpe*, 726 S.W.2d 896, 899-900 (Tenn. 1987). However, the circumstantial evidence “must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt.” *State v. Crawford*, 470 S.W.2d 610, 612 (Tenn. 1971).

Aggravated robbery is defined in part as “the intentional or knowing theft of property from the person of another by violence or putting the person in fear” that is “accomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon.” Tenn. Code Ann. §§ 39-13-401; - 402. The defendant was also convicted of aggravated assault. A person commits aggravated assault when he or she intentionally or knowingly commits assault as defined below and causes serious bodily injury to another; or uses or displays a deadly weapon. See Tenn. Code Ann. § 39-13-102(a)(A), (B). A person commits assault who:

- (1) Intentionally, knowingly or recklessly causes bodily injury to another;
- (2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or
- (3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

Tenn. Code Ann. § 39-13-101(a)(1)-(3).

In challenging the sufficiency of the evidence, the defendant argues that the two key witnesses to the robbery based their identification of the defendant upon such personal characteristics as his mannerisms, speech, and walk. The defendant contends that the witnesses’ identification of the defendant as the robber occurred at pretrial hearings after the defendant had already been charged

in the case. In addition, the defendant argues that the witnesses gave differing physical descriptions of the robber. Ms. Swezea described the defendant's height as under five-and-a-half feet, and Ms. Talley described the defendant as six feet tall. One witness described the defendant's gun as being silver, but when shown a black gun at trial, she identified the gun she was shown as the defendant's.

From our review of the record, it appears that the jury was provided with sufficient direct and circumstantial evidence to find the defendant guilty of the charged offenses beyond a reasonable doubt. The jury was able to evaluate and take into account the witnesses' descriptions, the defendant's flight from police and subsequent apprehension, the amount of cash recovered after his arrest, and the gun and clothing in his possession at the time of arrest in making their determination that the defendant was the robber. The identity of the perpetrator is a determination for the trier of fact. *See State v. Strickland*, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993). Questions regarding inconsistencies, inaccuracies and omissions in the description of a defendant by a witness who is otherwise able to identify the defendant are questions of fact to be resolved by the jury. *See State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003). Because we do not replace the jury's inferences formed from the circumstantial evidence with our own inferences, we will not disturb the jury's verdict. *See State v. Reid*, 91 S.W.3d at 277. Therefore, the defendant is without relief as to this issue.

B. Rebuttal Evidence

The defendant argues that the trial court erred by permitting the state to enter a copy of the classified section of the Tennessean newspaper from the day of the trial into evidence on rebuttal. Specifically, the defendant contends that because he testified to having two newspapers in his possession when he was apprehended, and because the state did not inquire as to the identity of the newspaper used by the defendant, or whether the newspapers used were in general circulation or were specific to the sale of cars, admitting the newspaper into evidence constituted reversible error. Additionally, the defendant argues that the trial court committed reversible error by allowing the newspaper into evidence because the state failed to establish that the Tennessean never allowed individuals placing classified advertisements for cars to include their addresses in those advertisements.

This court has concluded that "any competent evidence which explains or is a direct reply to, or a contradiction of, material evidence introduced by the accused, or which is brought out on his cross-examination, is admissible in rebuttal." *Nease v. State*, 592 S.W.2d 327, 331 (Tenn. Crim. App. 1979); *see also State v. Smith*, 735 S.W.2d 831, 835 (Tenn. Crim. App. 1987). The state is given the right of rebuttal because "it does not and cannot know what evidence the defense will use until it is presented at trial." *State v. Thompson*, 43 S.W.3d 516, 524 (Tenn. Crim. App. 2000) (citation omitted). However, rebuttal evidence should only be introduced after the adverse party introduces the evidence to be rebutted, as "[o]ne cannot rebut a proposition that has not been advanced." *Cozzolino v. State*, 584 S.W.2d 765, 768 (Tenn. 1979), *abrogated on other grounds by State v. Reid*, 91 S.W.3d 247 (Tenn. 2002). Questions concerning the admission or rejection of rebuttal evidence address themselves to the sound discretion of the trial court. *See Beasley v. State*, 539 S.W.2d 820, 823 (Tenn. Crim. App. 1976). The trial court's decision will not be reversed on

appeal in the absence of a clear abuse of discretion. *See State v. Kendricks*, 947 S.W.2d 875, 884 (Tenn. Crim. App. 1996).

In the instant case, the defendant testified that he was in the vicinity of the robbery because he was searching for a used car for his family. He stated that he had not called the owners of some of the cars listed in the newspaper but he had circled the addresses where the cars were located and was going to check them out on that basis. The defendant stated that he did not call the numbers for the cars he wanted to check out prior to going to those addresses to look at them. By providing this testimony, the defendant placed his credibility at issue. The state offered the newspaper to rebut the defendant's testimony by showing that a newspaper typically did not include a car owner's address in its used car advertisements. The trial court admitted the newspaper over the defendant's objection.

As indicated above, the standard of review for the admissibility of rebuttal evidence is whether the trial court committed an abuse of discretion. Here, the trial court allowed admission of the newspaper to rebut the testimony of the defendant. *See Kendricks*, 947 S.W.2d at 884. In addition, the defendant has not demonstrated an abuse of discretion by the trial court. Therefore, we fail to discern error under the abuse of discretion standard, much less under a standard of reversible error. *See Tenn. R. App. P. 36(b)*. The defendant is without relief as to this issue.

C. Sentence Length

The defendant challenges the length of his individual sentences. Specifically, the defendant challenges the imposition of the maximum sentence to each of the three convictions he received. The trial court sentenced the defendant as a Range I standard offender to twelve years for aggravated robbery, a Class B felony. *See Tenn. Code Ann. §39-13-402(b); 40-35-112(a)(2)*. He was sentenced as a Range II multiple offender to ten years for aggravated assault, a Class C felony. *See § 39-13-102(d)(1); 40-35-112(b)(3)*. The defendant was also sentenced to eight years for felony evading arrest while operating a motor vehicle and creating a risk of death or injury to innocent bystanders, a Class D felony. *See Tenn. Code Ann. § 39-16-603(b)(3); 40-35-112(b)(4)*. The court ordered that the defendant's sentences run consecutively for a total effective sentence of thirty years.

When an accused challenges the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." *Tenn. Code Ann. § 40-35-401(d)*. This presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999); *see also State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *Ashby*, 823 S.W.2d at 169. When conducting a de novo review of a sentence, this court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancement factors, (g) any statements made by the accused in his

own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103, -210. *See State v. Taylor*, 62 S.W.3d 400, 411 (Tenn. Crim. App. 2001). Enhancement factors may be considered only if they are "appropriate for the offense" and "not already an essential element of the offense." Tenn. Code Ann. § 40-35-114.

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. *See* Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. However, if the trial court followed the statutory procedure and gave proper consideration to sentencing guidelines and principles and if the trial court's findings of facts with regard to the imposed sentence are adequately supported by the record, "then we may not disturb the sentence even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

At the sentencing hearing, the trial court found that three separate enhancement factors applied to all three of the defendant's convictions. The trial court found that:

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

The defendant, before trial or sentencing, has failed to comply with the conditions of a sentence involving release into the community

At the time the felony was committed, one (1) of the following classifications was applicable to the defendant . . . Released on probation.

Tenn. Code Ann. § 40-35-114 (1), (8), (13)(C).

Upon review of the record, it is apparent that ample evidence existed to support application of the enhancement factors. Factor (1), that the defendant had a previous history of criminal convictions, is illustrated by the record in the pre-sentence report, which lists at least two felony convictions, including one for theft of property with a value between \$500 and \$1,000, and another for robbery. The defendant also had misdemeanor convictions, including a driver's license violation and a conviction for destruction and tampering with governmental records. Evidence also existed to support application of factor (8), failure to comply with the conditions of a sentence involving release into the community.² Finally, the court found factor (13) to apply, that the defendant was on probation at the time he committed the offenses in the instant case. The defendant concedes the applicability of the enhancement factors found by the trial court in his brief to the court. The defendant also acknowledges that no mitigating factors were found to apply. The defendant asserts that although the enhancement factors apply, they do not necessarily require that he be sentenced to the maximum term for each conviction. It is apparent from a review of the record that the trial court

² It appears from a review of the record that the court applied certain enhancement factors based upon a violation of the defendant's probation for a prior conviction that occurred when he committed the offenses in this case.

considered all the relevant facts and circumstances. Because the defendant has only stated in conclusory fashion that his sentences were excessive but has failed to demonstrate that the trial court erred in imposing those sentences, he is without relief as to this issue. Accordingly, we affirm the sentences imposed by the trial court.

D. Consecutive Sentencing

Next, the defendant challenges the court's imposition of consecutive sentencing. Specifically, he argues that the trial court erred by imposing consecutive sentences on the basis that the defendant was a dangerous offender under the supreme court's holding in *State v. Wilkerson*, 905 S.W.2d 933, 938 (Tenn. 1995). The defendant contends that the state failed to establish that the defendant's sentence was reasonably related to the severity of the defendant's offenses as required under *Wilkerson*.

When a defendant is convicted of more than one criminal offense, the trial court may order that the sentences run concurrently or consecutively as guided by Tennessee Code Annotated section 40-35-115. Pursuant to this code section, a trial court may order consecutive sentencing if any of the following criteria are found by a preponderance of the evidence:

- (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
- (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
- (6) The defendant is sentenced for an offense committed while on probation; or
- (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b). If the trial court finds that the defendant is a "dangerous offender," it must also determine whether the consecutive sentences are reasonably related to the

severity of the offenses and serve to protect the public from further criminal conduct by the offender. *See Wilkerson*, 905 S.W.2d at 939 (Tenn. 1995).

The trial court imposed consecutive sentencing on the basis that the defendant met the qualification of Tennessee Code Annotated section 40-35-115(b)(4), that he was a dangerous offender, and under subdivision 40-35-115(b)(6), that he was on probation when he committed the offenses. With regard to the defendant's assertion that the trial court failed to establish that the defendant's sentence was not reasonably related to the severity of his offenses under *Wilkerson*, the trial court stated specifically:

[H]e also is a dangerous offender clearly by the facts of this case. And I would certainly refer anyone to that tape that we saw of the evading arrest and all the various people that were put at risk as he is driving down the interstate in such a manner, plus all through the streets of Davidson County. He is a person who has no regard for human life, and he does not hesitate in committing a crime in which that is true. I must go further then and consider whether or not the sentence [is] so reasonably related to the severity of the offenses. We have here a very - an armed robbery where he's armed and threatens to blow people's head off and makes them go into a room. He then flees, endangering everybody in his path. So I'm going to find that these sentences are consecutive to each other.

It is clear from the record that the court gave due consideration to application of the *Wilkerson* factors. Even if the trial court erred by finding the defendant to be a dangerous offender under Tennessee Code Annotated section 40-35-115(b)(4), the trial court clearly properly found that defendant's sentences should be served consecutively under Tennessee Code Annotated section 40-35-115(b)(4). We conclude that the trial court made sufficient findings of fact to support the imposition of consecutive sentencing. Therefore, the defendant is without relief as to this issue.

CONCLUSION

Based upon the foregoing authorities and reasoning, we affirm the judgments of the trial court.

J.C. McLIN, JUDGE