IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 2000 SESSION

FILED

March 10, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**M1998-00118-CCA-R3-CD**
Appellee,	)	
	)	**Montgomery County**
v.	)	
	)	**Hon. Robert W. Wedemeyer, Judge**
DERRICK EUGENE STACKER,	)	
	)	**(Aggravated Assault)**
Appellant.	)	

FOR THE APPELLANT:

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AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

L. T. LAFFERTY, SENIOR JUDGE

OPINION

The appellant, Derrick Eugene Stacker, referred to herein as "the defendant," appeals as of right from a jury conviction for reckless aggravated assault, a Class D felony. At the conclusion of a sentencing hearing, the Montgomery County Circuit Court imposed a sentence of four (4) years in the Department of Correction. The defendant presents two appellate issues for review:

1. Whether the evidence presented at trial was insufficient to support a jury verdict of aggravated assault.

2. Whether the trial court erred in sentencing the defendant to serve a sentence of confinement with the Department of Correction and not imposing an alternative sentence such as community corrections or probation.

After a review of the trial record, briefs of the parties and applicable law, we AFFIRM in part, REVERSE in part, and REMAND to the trial court.

FACTUAL BACKGROUND

Stephen Charles Cornelison, Jr., assistant baseball coach at Austin Peay State University, testified that in February, 1995, he was a full-time student and baseball player at Austin Peay State University. On the night of February 6, 1995, Mr. Cornelison stated that he, Jeff Taylor, Lindy Chilcutt, and Rich Alias were watching a basketball game on TV in Mr. Cornelison's apartment. They attempted to order some pizza, but, due to the snowy and icy conditions of the roads, the pizza businesses would not make deliveries. Mr. Cornelison stated that he and Lindy Chilcutt decided to go get a pizza. As Mr. Cornelison and Lindy left the apartment, Mr. Cornelison noticed what he believed to be a gray Nissan pickup truck partially blocking his Jeep. Mr. Cornelison yelled to a tenant upstairs and asked him if the truck belonged to him or his roommate, and the tenant stated he did not know who the truck belonged to. Mr. Cornelison testified that he then called to Jeff and Rich and asked them if they recognized the truck, but neither of them knew whose truck it was. Mr. Cornelison, Jeff Taylor, and Rich Alias decided to slide the Nissan over by picking up its rear bumper. While at the rear of the truck, Mr. Cornelison stated that five (5) men ran out of an apartment yelling, "[W]hat are you messing with the truck for?" Mr. Cornelison stated that he and his friends moved back from the Nissan to the side of his Jeep. Mr. Cornelison testified that he advised the men that he and his friends were just trying to move the truck over to go get pizza and did not know who the truck belonged to.

Mr. Cornelison stated that four of the men calmed down, but the defendant continued to press the matter. Mr. Cornelison stated that while he was looking at another man, the defendant made a sudden move, like he was going to strike Mr. Cornelison. Mr. Cornelison asked the defendant, "Are you trying to hit me?"

Mr. Cornelison stated that the defendant pushed him. As he started to fall backwards, the defendant grabbed his jacket and struck him in the right eye. Mr. Cornelison testified that he sought treatment at Austin Peay's athletic training center, but he was referred to the Clarksville Memorial Hospital. From the Clarksville hospital, Mr. Cornelison was transported to Vanderbilt Hospital in Nashville. He testified that he underwent surgery to repair a torn retina of the right eye. Between the date of the assault and the day of trial, Mr. Cornelison had undergone two (2) surgeries, and a third surgery would be necessary. At the time of trial, Mr. Cornelison stated that he still has difficulty with his vision. In cross-examination, Mr. Cornelison denied that he saw the Nissan's motor running or that it had any lights on.

Lindy Chilcutt testified that she, Steve Cornelison, Jeff Taylor, and Rich Alias were watching TV on February 6, 1995. When they were unable to order a pizza for delivery, she and Steve Cornelison decided to go and get the pizza. She stated that while outside, she saw Steve's jeep blocked by a gray truck. Steve yelled upstairs to locate the truck's owner, but nobody knew who owned the vehicle. She stated that Steve called Jeff and Rich so they could move the truck. In the past, they had done the same thing to her 1986 Ford Escort. Ms. Chilcutt testified that the three men were at the truck's rear, when five (5) men ran out of apartment number 2 yelling at Steve, Jeff, and Rich. She stated that the five men were cursing when Steve asked them why they did not use a parking place. She stated that things seemed to calm down, and then, all of a sudden, the defendant lunged at Steve. The defendant looked like he was taking a swing at Steve, but Steve slipped on the ice and fell to the ground. She stated that while Steve was on the ground, the defendant yelled at him and started kicking him. Ms. Chilcutt testified that Steve had done nothing to provoke the defendant. She stated that Jeff and Rich got Steve up and took him back into the apartment, where she saw that Steve's eye was swollen shut. She stated that they took Steve to Austin Peay's training room, but he was referred to the hospital's

emergency room. In cross-examination, Ms. Chilcutt testified that at one point, she recalled the defendant's shirt was off. She stated a guy named "Marcus" struck her in the back during the event.

Jeff Taylor testified that he, Lindy Chilcutt, and Rich Alias were at Steve Cornelison's apartment watching a basketball game between Austin Peay and TSU on the night of February 6, 1995. They were unable to get pizza delivered, so Steve and Lindy decided to go get the pizza. He stated that Steve called to him and Rich regarding a truck blocking Steve's jeep. Mr. Taylor testified that they were at the back of the truck and decided to pick up the rear of the truck and scoot it over. Before they could move the truck, he stated that five (5) men from next door ran outside and asked, in a hostile manner, what they were doing. Mr. Taylor stated that they tried to explain to the men why they were moving the truck, and everyone calmed down except the defendant. Mr. Taylor stated that the defendant, using constant profanity, yelled and screamed at Steve. Steve responded, "I saw that, why are you trying to do that?" He stated that the defendant lunged at Steve, and when Steve tried to avoid the lunge, he slipped and fell. Mr. Taylor testified that he could not say for sure whether the defendant actually struck Steve, but that the defendant did kick Steve numerous times. Mr. Taylor stated that they picked Steve up, and his eye was already swollen shut. Mr. Taylor stated that the trainer at Austin Peay referred Steve to the hospital.

Scott Thompson, of the Clarksville Police Department, testified that he went to the hospital on the night of February 6, 1995, in reference to a possible assault. Officer Thompson spoke with Steve Cornelison, who had several bruises, and a swollen right eye. In May, 1995, Officer Thompson stated that he went to the T and J Apartments and spoke to the defendant about the assault. He was told by the defendant that the victim had attempted to pull up the rear bumper of his truck, and, after a verbal altercation, a fight occurred.

Coretta Ramay testified on behalf of the defendant that she was living in the bottom apartment of the T and J Apartments on the night of February 6, 1995. She stated that the defendant, Marcus Dickson, and Gene Harper came to her apartment after dark. She stated that they were in the apartment for about an hour when she went to the door to see

if it was still snowing. She saw three (3) men at the rear of a truck, trying to turn it. She, the defendant, and the other two men went outside. She stated that the defendant, Marcus, and Gene asked the three men what they were doing to the truck. The three men stated that they were on their way to the store to get some beer and stuff. Ms. Ramay testified that she returned to her apartment. Later, she stated that she went to Cornelison's apartment and asked if he was doing okay. Mr. Cornelison stated that he was sorry over what happened, but if he saw the guy (the defendant) at her apartment and he looked the wrong way, he would hurt the defendant. She stated that the defendant visited her apartment after the incident, and the victim was sitting outside of his apartment. She stated that they did not exchange any words.

In cross-examination, Ms. Ramay testified that she and the defendant were dating at the time of the incident and, also, at the time of trial. She stated that the truck belonged to a friend of the defendant and that it could have been blocking the victim's jeep.

Marcus Dickson, age 17, testified that the defendant was his cousin. Mr. Dickson stated that he had been in his sister's apartment most of the day of February 6, 1995. Mr. Dickson stated that the defendant and Gene Harper arrived at his sister's apartment, and the three of them went to Coretta Ramay's apartment. Mr. Dickson stated that Ms. Ramay came in the apartment and said someone was moving a truck. Mr. Dickson stated that he, the defendant, and Gene went outside, where the defendant and the victim got into an altercation. Mr. Dickson testified that the victim spit on the defendant, and they got into a fight. Mr. Dickson stated that he did not see how many punches were thrown or who hit who. During the scuffle, Mr. Dickson stated that the victim pulled the defendant's shirt off. In cross-examination, Mr. Dickson stated that the men at the truck said that they were just trying to move the truck, so they could get out. He stated that they did not hurt the truck. Mr. Dickson testified that he thought the defendant threw the first punch. According to Mr. Dickson, the truck's motor was running, and its parking lights were on.

Eugene (Gene) Harper testified that he and the defendant went to the T and J Apartments in a truck driven by the defendant. He stated that the defendant parked the truck behind Ms. Ramay's car, and they went inside of her apartment. He stated that the truck's motor was still running, and its parking lights were still on. He later testified that Ms.

Ramay said that somebody was out there moving the truck. Mr. Harper stated that he, the defendant, and Marcus Dickson went outside, where they saw the three men. Mr. Harper testified that "we were squared up to each other and like I said, words were thrown and all I remember is a guy spitting in Derrick's face and calling him an idiot, and Derrick lost it …. Derrick hit him." Mr. Harper stated that he grabbed one guy, but there was no fight between them. He stated that later in Ms. Ramay's apartment, she said the guy (victim) was bleeding. In cross-examination, Mr. Harper testified that when they came out of the apartment, the three men at the truck moved from behind the truck. Mr. Harper denied that the truck was blocking the victim's jeep.

Derrick Stacker, the defendant, testified that he had borrowed a truck from a friend, Kelly Stigar, and that he and Gene Harper went to Ms. Ramay's apartment. He stated that it was snowing and was slick. The defendant testified that he parked the truck "caty-corner" to a couple of vehicles, left the motor running and the parking lights on, and went into Marcus's sister's apartment. He stated that he, Gene, and Marcus went to Ms. Ramay's apartment. They were in the apartment about twenty (20) minutes when Ms. Ramay said that three guys were picking up the back end of the truck. He stated that the four of them went outside, and he asked the men what they were doing. According to the defendant, all three men spoke harshly. The defendant testified that he told Mr. Harper to back the truck up. After the truck was backed up, Mr. Harper joined him and Marcus when words were exchanged.

The defendant testified that "me and him was mostly the one[s] going at it, you know and then one thing led to another and he said -- called me an idiot . . . [and] I hit him." The defendant stated that both men fell to the ground, and the victim was holding his shirt. The defendant stated that he could not recall if he kicked the victim or not. The defendant admitted throwing the first punch. He stated that the men did not tell him why they were moving the truck. On the next day, the defendant testified that he went to Ms. Ramay's apartment and was going to apologize. The defendant saw the victim sitting on a plastic bench, wearing sunglasses and holding a bat. The defendant decided it was best not to speak to the victim while the victim had the bat.

SUFFICIENCY OF EVIDENCE

The defendant asserts that the evidence at trial was insufficient to support a verdict of reckless aggravated assault in that there was no expert medical testimony regarding the victim's eye injuries. The State counters that there is ample evidence in the record to support the jury's verdict.

Following a jury conviction, the initial presumption of innocence is removed from the defendant and exchanged for one of guilt, so that on appeal, the defendant has the burden of demonstrating the insufficiency of the evidence. *State v. Tuggle,* 639 S.W.2d 913, 914 (Tenn. 1982). It is the duty of this Court to affirm the conviction unless the evidence adduced at trial was so deficient that no rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Tenn R. App. P. 13(e)*; Jackson v. Virginia,* 443 U. S. 307, 317, 99 S. Ct. 2781, 2789 (1979); *State v. Cazes,* 875 S.W.2d 253, 259 (Tenn. 1994) . In *State v. Matthews,* 805 S.W.2d 776 (Tenn. Crim. App.), *perm. app. denied* (Tenn. 1990), this Court held this rule to be applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct evidence and circumstantial evidence. *Id.* at 779.

This court does not reweigh or reevaluate the evidence, nor may we replace our inferences for those drawn by the trier of fact. *State v. Cabbage,* 571 S.W.2d 832, 835 (Tenn. 1978). Furthermore, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris,* 839 S.W.2d 54, 75 (Tenn. 1992), *cert. denied,* 507 U.S. 954, 113 S. Ct. 1368 (1993). A jury verdict accredits the testimony of the State's witnesses and resolves all conflicts in favor of the State's theory. *State v. Williams,* 657 S.W.2d 405, 410 (Tenn. 1983).

We believe that the evidence, taken in the light most favorable to the State, supports the conviction for reckless aggravated assault. The evidence supports the jury's finding that the defendant recklessly threw a punch after a verbal altercation, which resulted in the victim sustaining a serious injury to his right eye. Although, the State did not produce a medical expert as to the victim's eye injury, there is ample evidence in the record that the victim received a serious injury. At the time of trial, the victim had undergone two operations on his right eye, and a third operation would be necessary. The victim was still suffering from double vision. The evidence supports, beyond a reasonable doubt, that the

defendant committed reckless aggravated assault. There is no merit to this issue.

SENTENCING

The defendant asserts that the trial court failed to set forth in the record specific reasons for denying alternative relief to the defendant and imposing continuous confinement in the Department of Correction. The defendant requests that this Court apply a proper sentence or remand to the trial court for a new sentencing hearing, where the trial court may set out specific findings of fact and conclusions of law in support of any sentence imposed. The State concedes that the trial court failed to set forth in the record specific reasons for imposing a four (4) year sentence in the Department of Correction and suggests a remand for a new sentencing hearing for the sole purpose of consideration of alternative sentencing. We elect to remand this case to the trial court for a new sentencing hearing to determine the applicability of an alternative sentencing.

On March 29, 1996, the trial court conducted a sentencing hearing to determine the appropriate sentence to be pronounced against the defendant for his conviction of reckless aggravated assault. At the sentencing hearing, the State presented the pre-sentence report and the testimony of the victim's mother and father. The victim did not testify, but the defendant testified on his own behalf. In arriving at the sentence of four (4) years, the trial court found three enhancement factors and one mitigating factor. In addressing how the sentence should be served, the trial court ruled:

> What I am going to do is this. I am going to order a sentence starting today, I am going to order a local sentence as opposed to the Department of Corrections. . . . Mr. Stacker, after you have served one year on this case, day-for-day, starting today, I am going to require you to serve a second year of the four years in periodic confinement. It will be one year, day-for-day. The second year, you will be released for employment purposes. I am going to let you be released at 6:00 a.m. Monday through Fridays to report back to jail at 6:00 p.m. until you have served a second year of the four years. After that, if he hadn't caused any problems in the jail, the balance of this, you will be on intensive supervised probation by the State. I am going to order restitution in this case, based on the evidence that I have heard in the amount of twenty thousand dollars. . . . a hundred dollars a month. . . . [T]he jury assessed a fine and I am going to -- I think the jury was an exceptionally fair jury in this case, so I am going to impose the fine that they thought I should impose. That's twenty-five hundred dollars. So that will be part of the judgment in this matter.

At this stage, the State raised a question with the trial court as to its inability to draft

a proper judgment order. The State advised the trial court about its concern that the trial court was limited in ordering split confinement for not more than one year. The defendant concurred in the State's position. In response, the trial court ruled as follows: "All right, well -- he's not in here now, so I don't want to – I am just going to make it four years to serve with the Department of Corrections."

When imposing an alternative sentence, the trial court has the authority to consider split confinement. Tenn. Code Ann. § 40-35-306 in pertinent part states:

> (a) A defendant receiving probation may be required to serve a portion of the sentence in continuous confinement for up to one (1) year in the local jail or workhouse, with probation for a period of time up to and including the statutory maximum time for the class of the conviction offense.

We agree with the defendant and the State that the trial court could not impose a second year of split confinement. The trial court's judgment of sentence is reversed, and this cause is remanded to the trial court for a new sentencing hearing. The trial court shall set out findings of fact and conclusions of law in determining the merits of an alternative sentence on behalf of the defendant or its reason for denying such alternative sentence.

The trial court's judgment is affirmed in part, reversed in part, and remanded for a new sentencing hearing.

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L. T. LAFFERTY, SENIOR JUDGE

CONCUR:

_____
DAVID H. WELLES, JUDGE

_____
JERRY L. SMITH, JUDGE