

OPINION

The Defendant brings an appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. He was convicted on a jury verdict of aggravated assault. He was sentenced as a Range I standard offender to six years in the Tennessee Department of Correction, with said sentence to run consecutively to a nine-year sentence he was serving at the time. We affirm in part and reverse in part the judgment of the trial court.

The Defendant argues two issues in this appeal. The first issue is whether there was sufficient evidence to convict the Defendant of aggravated assault and to find that he was not acting in self-defense. The second issue is whether the trial court erred in improperly applying enhancement factors and in failing to apply mitigating factors and in ordering a consecutive sentence.

The victim and the Defendant were both inmates at the Williamson County Jail. The victim was on clean-up duty. The clean-up crew had just finished in one dormitory and were moving to the next dormitory. The victim was the first one through the door to the next dormitory. He was carrying a broom. The Defendant's back was to the victim. When he turned around and saw the victim, the Defendant hit the victim in the face. The victim fell to the floor and the Defendant began to kick him. The victim sustained a broken nose, broken cheek bones, and the loss of five teeth.

I.

The Defendant first argues that the evidence is insufficient to support his conviction. When an accused challenges the sufficiency of the convicting evidence, this court must review the record to determine if the evidence adduced during the trial was sufficient "to support the findings by the trier of fact of guilt beyond a reasonable doubt." T.R.A.P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (Tenn. 1956). This court is required to 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. State v. Herrod, 754 S.W.2d 627, 632 (Tenn. Crim. App. 1988).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). In State v. Grace, 493 S.W.2d 474 (Tenn. 1973), the Tennessee Supreme Court said, "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." Id. at 476.

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, id., the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record and the inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt. Matthews, 805 S.W.2d at 780.

There were several witnesses at trial. The State presented the testimony of the victim and two law enforcement officers who were working at the jail at the time of the incident. The first witness was the law enforcement officer who was in charge of the clean-up crew of which the victim was a part. He testified that on the day of the incident, the crew had been cleaning up one dormitory and were moving to the next one. The officer said that the victim was the first person through the door to the next dormitory. He said that a few seconds after the victim went through the door, he heard the victim screaming and calling for help. The officer said when he got into the dormitory he saw the victim curled up in a fetal position in the corner. He testified that the Defendant was standing over the victim with his fists clenched, a flushed face and that he looked upset or mad. The officer testified that he then pulled the Defendant away from the victim, held him back and called for backup. The officer testified that the Defendant complained that he had hurt his hand. The only injury sustained by the Defendant was broken skin on the knuckles of his right hand. No other bruises or abrasions were on the rest of the Defendant's body.

The next witness for the State was the victim. He testified that a few days before the assault he was on clean-up duty and he found a cigarette butt on the floor of the dormitory where the Defendant lived. Smoking is prohibited in the Williamson County

Jail facility. The victim testified that when he found the cigarette butt, he stated that there was a cigarette butt on the floor, but he did not say this specifically to the officer who was with the crew. The victim testified that the Defendant heard him say that there was a cigarette butt on the floor and called the victim a "dry snitch." The victim testified that the Defendant then took off his shirt and wanted to fight. The victim testified that the two men subsequently shook hands and that ended the confrontation. The victim then testified that he saw the Defendant in the cafeteria after the cigarette altercation and the Defendant gave him an apple, so he thought the problem was over.

The victim then testified concerning the incident in question in the case sub judice. He stated that he was on the clean-up crew, and they were moving from one dorm to the next. He stated that he was the first one through the door and into the next dorm. He said he was carrying a trash bag and a broom. He testified that he was walking back to the shower to sweep when the Defendant started coming towards him and hit him in the face. The victim testified that he fell to the ground because he was in severe pain. He testified that he was kicked, but that he could not remember if the Defendant had kicked him because he blacked out while he was on the floor. He testified that as a result of this altercation he received a broken nose, both his cheekbones were broken, and he lost five teeth. He stated that he did not go after the Defendant with the broom.

The final witness for the State was another law enforcement officer who worked at the Williamson County Jail. This officer responded to the first officer's call for backup. He testified that when he arrived at the scene the victim came out of the dormitory with his face cupped in his hands and there was a steady flow of blood. The officer stated that the victim said, "Why did he do that? Why did he hit me?" when he came out of the dormitory. This officer escorted the victim to the Williamson County

Medical Unit. He testified that he saw the victim's face in the jail and that the victim had teeth hanging down, and the victim had a lot of "jagged edges."

This officer also stated that he saw the Defendant when he returned from taking the victim to get medical treatment. He testified that he walked into the laundry room and saw the Defendant. He testified that the Defendant was in the laundry room because they were trying to get the blood off of the Defendant's shoes. The officer said that there was blood on the toe of the Defendant's right shoe midway up to the instep. The officer testified that he did not see the injury to the Defendant's hand because there was an icepack on it. He also testified that he saw no abrasions or bruises on the rest of the Defendant's body.

The Defendant then put on his proof. The Defendant's first witness was an individual who was incarcerated for assault at the time of the incident. This witness testified that a few days before the incident in question, the victim was cleaning up the dormitory and he told the officer that he found a cigarette butt. The witness stated that later it looked like the Defendant and the victim were having words in the cafeteria. He said that on the day of the incident, the victim was in the dormitory and the Defendant turned around and saw the victim coming towards him with the broom. He said that the Defendant hit the victim once in the face, hit him again and kicked the victim twice. The witness said that the victim was carrying the broom in front of him with two hands. On cross-examination, the witness testified that the victim did not have the broom up like he was getting ready to hit someone. He also testified that the victim never hit the Defendant. The witness also testified that there was a great deal of blood on the victim's hands and that there were teeth on the floor. He testified that the Defendant kicked the victim on the lower part of his arms, but not his face.

The next witness was also incarcerated at the time of the incident. He was incarcerated for aggravated robbery. He testified that the victim came into the dormitory and as he got closer to the Defendant he raised the broom like he was going to hit the Defendant. He said that the Defendant then hit the victim, who fell to the floor and grabbed the Defendant's legs. The witness testified that the Defendant then began kicking to try to free his legs. This witness testified that before this incident he saw the Defendant and the victim have words in the cafeteria. On cross-examination, the witness testified that he was the Defendant's cousin. He testified that the Defendant did not have any bruises as a result of the altercation. The witness also testified that the Defendant kicked the victim one time and that the Defendant made contact that one time.

The Defendant's final witness was also incarcerated at the Williamson County Jail for aggravated robbery at the time of the incident. This witness testified that once the victim was inside the dormitory, he walked over and got a broom. He then said that the victim walked up behind the Defendant with the broom raised. The witness said that the victim did not have a chance to swing the broom, and the Defendant hit the victim once in the jaw area with his hand. On cross-examination, the witness testified that he knew the Defendant better than he knew the victim. He also stated that the Defendant hit the victim one time and the Defendant kicked the victim to get away because the victim had grabbed his legs.

We conclude that there is sufficient evidence upon which a reasonable trier of fact could base a conviction of aggravated assault. The jury is the sole arbiter of the credibility of witnesses. We conclude that viewing the testimony of the injuries received by the victim and the lack of injuries received by the Defendant, that a jury could conclude that the Defendant's conduct was not justified by self-defense in the case sub judice.

Therefore, this issue has no merit.

II.

The Defendant's second issue is that the trial court erred in improperly applying enhancement factors and in failing to apply mitigating factors and in ordering his sentence to be served consecutively to his prior sentence. The Defendant was sentenced to six years in the Tennessee Department of Correction to be served consecutively to the nine-year sentence he was serving when the incident occurred.

When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). 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." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper

weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify 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 trial judge was very meticulous in his discussion of the application of the enhancement factors. He stated each enhancement factor and stated why it applied. The trial court applied five enhancement factors. The trial court declined to apply any mitigating factors. The five enhancement factors were: (1) The defendant had a previous history of criminal convictions in addition to those necessary to establish the appropriate range; (2) the defendant treated the victim with exceptional cruelty; (3) the personal injuries inflicted upon the victim were particularly great (4) the defendant had no hesitation about committing the crime when the risk to human life was high; (5) the felony was committed while the defendant was incarcerated for a felony. Tenn. Code Ann. § 40-35-114(1), (5), (6), (10), & (14).

We now evaluate the application of the enhancement factors. The first enhancement factor, Tennessee Code Annotated section 40-35-114(1), was correctly applied. The Defendant was a Range I standard offender for sentencing purposes. His previous conviction for aggravated robbery would constitute previous criminal history that was not used to compute his range. The fifth enhancement factor, Tennessee Code Annotated section 40-35-114(14), was properly applied in this case. There is no question that the Defendant was incarcerated when this incident occurred.

The Defendant specifically argues that the second, third and fourth enhancement factors were improperly applied. The second enhancement factor, Tennessee Code Annotated section 40-35-114(5), was properly applied. Exceptional cruelty is not an essential element of aggravated assault per se. State v. Lester

Bennett, No. 03C01-9403-CR-00104, Sevier County, slip. op. at 7 (Tenn. Crim. App., Knoxville, filed Dec. 8, 1994). The trial judge stated that he considered repeatedly kicking the victim about the head and face while he was on the ground, which resulted in lost teeth and a broken jaw, as exceptional cruelty. We agree with this assessment. Such cruelty is above that required to commit aggravated assault. The third enhancement factor, Tennessee Code Annotated section 40-35-114(6), should not have been applied in the case sub judice. It is an element of the offense of aggravated assault. State v. Jones, 883 S.W.2d 597, 602 (Tenn. 1994). Our supreme court has held that the "proof of serious bodily injury will always constitute particularly great injury." Id. The fourth enhancement factor, Tennessee Code Annotated section 40-35-114(10), was properly applied. The high risk to human life is not required to establish aggravated assault, and therefore, it is not an element of the offense. Jones, 883 S.W.2d at 602-03. This enhancement factor is applicable in this case. The Defendant's kicking the victim's head and face clearly is an action which constitutes high risk of human life.

The Defendant also argues that one mitigating factor applied in this case, that because of the defendant's age, he lacked substantial judgment. Tenn. Code Ann. § 40-35-113(6). The trial judge did not apply this mitigating factor because, in his opinion, the Defendant did not appear to lack substantial judgment because of the savagery of the crime. The Defendant was nineteen years old at the time of the incident. The Defendant argues in his brief that if the legislature meant for anyone to gain the benefit of this mitigating factor it is a nineteen-year old.

Our supreme court has held that before applying this mitigating factor a court should look at, "the defendant's age, education, maturity, experience, mental capacity or development, and any other pertinent circumstance tending to demonstrate the defendant's ability or inability to appreciate the nature of his conduct." State v. Adams,

864 S.W.2d 31, 33 (Tenn. 1993). We first point out that the Defendant was nineteen at the time of the incident. This is not an age that would inherently be considered so young that one would not be able to appreciate the nature of his conduct. The Defendant attended school through the tenth grade and obtained his GED after the incident in question. The results of the tests run on the Defendant as shown in his pre-sentence report indicate that the Defendant is of average intelligence and that he does not have any mental problems. We agree with the trial court that the Defendant did not demonstrate a lack of substantial judgment which was caused by his youth, and therefore, this mitigating factor should not apply.

Only one factor, that the injury inflicted was particularly great, was improperly applied. Therefore, all but one of the enhancement factors applied were proper in the case sub judice. The range of punishment for aggravated assault for a Range I standard offender is three to six years. The Defendant received six years. Because there are four enhancement factors which apply in the case sub judice, we conclude that the sentence imposed by the trial court is proper.

We now turn to the question of consecutive sentences. The trial court based the consecutive sentence on Tennessee Code Annotated section 40-35-115(b)(4). This subsection allows for consecutive sentences when 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." Tenn. Code Ann. § 40-35-115(b)(4). In ordering a consecutive sentence, the trial court stated that the need for deterrence in this case was also great.

We must conclude that the trial court erred in imposing a consecutive sentence on the Defendant in the case sub judice. A defendant cannot be given consecutive sentences based "solely" on being a dangerous offender. "The proof must also

establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender." State v. Wilkerson, ____ S.W.2d ____ (Tenn. 1995). We cannot conclude that the Defendant meets these criteria. The Defendant's record consists only of the aggravated robbery for which he was incarcerated at the time of the offense discussed herein. The record does not support a finding that the Defendant needs to be further incarcerated to protect the public from further criminal acts.

We agree with the trial court that there is a great need for deterrence in this situation. However, as this court has stated before:

There is some irony in the fact that consecutive sentences are expressly allowed in the trial court's discretion for offenses committed while on probation, see T.C.A. § 40-35-115(b)(6), and even mandated for felonies committed while on parole, see T.C.A. § 40-28-123(a), while no provision specifically addresses consecutive sentencing for an offense committed by a prisoner who remains incarcerated. Yet, given the present statutory provisions, the authority to impose a consecutive sentence because an offense is committed during imprisonment must await legislative action.

State v. Michael Blazer, No. 03C01-9405-CR-00185, Carter County, slip. op. at 3-4 (Tenn. Crim. App., Knoxville, filed Feb. 3, 1995).

Therefore, the Defendant's sentence must run concurrently to his existing sentence.

We affirm the Defendant's conviction and the Defendant's sentence of six years for the offense of aggravated assault. We conclude that the Defendant's sentence should run concurrently with his prior sentence and reverse the trial court's judgment that the sentences run consecutively.

DAVID H. WELLES, JUDGE

CONCUR:

GARY R. WADE, JUDGE

JOHN H. PEAY, JUDGE