IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
AUGUST SESSION, 1996

FILED

March 19, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9505-CR-00144
Appellee	)	
	)	GRAINGER COUNTY
vs.	)	
	)	Hon. Ben W. Hooper II, Judge
DONALD RAY MUNSEY,	)	
	)	(Agg. Burglary; Arson;
Appellant	)	Public Intoxication)

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OPINION FILED: _____

AFFIRMED IN PART; REVERSED IN PART

David G. Hayes
Judge

OPINION

The appellant, Donald Ray Munsey, appeals his convictions by a Grainger County jury for aggravated burglary, a class C felony, arson, also a class C felony, and public intoxication, a class C misdemeanor. The trial court imposed concurrent sentences of six years incarceration in the Tennessee Department of Correction for the aggravated burglary and the arson convictions. Additionally, the trial court imposed a sentence of thirty days incarceration in the Grainger County Jail for the public intoxication conviction and ordered that the appellant serve the sentence concurrently with the sentences for the felony convictions. On appeal, the appellant raises the following issues:

(1) Whether the State withheld from the appellant exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), and Tenn. R. Crim. P. 16;
(2) Whether the trial judge complied with Tenn. R. Crim. P. 33(f);
(3) Whether the evidence adduced at trial is sufficient to support the jury's verdicts; and
(4) Whether the appellant's sentences are excessive.

Following a review of the record, we reverse the appellant's conviction for public intoxication and otherwise affirm the judgments of the trial court.

I. Factual Background

On January 17, 1995, the Grainger County Grand Jury returned an indictment charging the appellant with aggravated burglary, arson, and public intoxication. The appellant's case proceeded to trial on April 11, 1995. At trial, the State established that the appellant's brother, Steve Munsey, had rented a house from the victim, Bertie Hodge. At some point, the appellant began living with his brother in the rental house. Subsequently, Ms. Hodge learned that numerous individuals were residing at the house without her permission, and she

initiated eviction proceedings. On December 10, 1994, at approximately 11:39 a.m., Deputy Todd Loveday with the Grainger County Sheriff's Department executed a "Writ of Possession of Personal Property," removing the occupants' belongings from the house and placing them in the front yard. While Deputy Loveday was at the home, a man sent by Ms. Hodge changed the locks on the house. Before leaving the home, the Deputy confirmed that all appliances in the house had been turned off, and he secured the doors and windows.

At approximately 3:40 p.m. in the afternoon, Sandy and Darren Bean, acquaintances of the appellant, drove past the rental house. They observed the appellant's car parked in front of the house.[1] Ten or fifteen minutes later, the Beans again drove past the house and noticed smoke rising from the house. The appellant's car was gone. The Beans notified Ms. Hodge about the fire. Ms. Hodge called the Sheriff's Department, and the Beans returned to the burning house and attempted to extinguish the fire. At this time, they noticed that a window had previously been broken.

Approximately twenty or thirty minutes later, after the fire had been extinguished, the Beans drove to Jessie's Market and Deli, located less than five minutes from the rental house. The appellant's car was parked outside the Market, and the appellant and his girlfriend were inside. Subsequently, Deputy Loveday, who had been contacted concerning the fire and had spoken to the Beans, arrived at the market. He encountered the appellant and his girlfriend as they were leaving the store. The Deputy informed the appellant that he was investigating the fire at Ms. Hodge's rental house and advised the appellant of his constitutional rights.

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[1]Lawrence Morgan, a local farmer who employed the appellant's family, testified as a rebuttal witness for the State. He stated that his farm is one or one and one half miles from Ms. Hodge's rental house. On the day of the offense, sometime after 3:00 p.m., he too passed by the rental house and observed the appellant's car parked outside. He did not see the appellant.

At trial, the Deputy described the appellant's condition:

> I observed that [the appellant] had the odor of an alcoholic type beverage about him. That he had sort of stuttered type speech. His eyes were a little watery, a little bit off balance. He gave me the impression of him being slightly intoxicated or under the influence of something.[2]

The Deputy additionally noticed that the appellant had suffered various cuts on his hands, which were bleeding a very small amount. Upon closer examination, Deputy Loveday observed small fragments of broken glass between the appellant's fingers.[3] According to Deputy Loveday, the appellant claimed that he had cut his hands while he was changing the battery in his car. However, when the Deputy examined the battery, he noticed a layer of dust or oil on the battery and the absence of tool marks on the battery. The appellant then claimed that he had cut his hands on the engine's fan. The fan also appeared to be untouched. The appellant next stated that he had installed a fan belt, but the belts appeared to be worn. Finally, the appellant informed Deputy Loveday that he had cut his hand striking his girlfriend. The appellant denied setting fire to Ms. Hodge's rental house, but admitted to Deputy Loveday that he had passed by the house at approximately 10:00 a.m., and had seen the furniture outside the house. Loveday arrested the appellant, charging him with aggravated burglary, arson, and public intoxication.

Arson Investigator Roy Chinault with the State Fire Marshall's Office examined Ms. Hodge's rental house on December 14. He concluded that the fire had been intentionally ignited from four different locations inside the house: two bedroom closets, the living room, and the kitchen. In all four locations, the

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[2]Following the appellant's arrest, at approximately 4:55 p.m., Deputy Loveday administered a breathalyser to the appellant. A printout from the intoximeter reflects that the appellant's blood alcohol content was .26 percent.

[3]At trial, the appellant denied having any cuts or glass fragments on his hands on the day of the offense. Connie Strange, the appellant's girlfriend, testified that the appellant had skinned his knuckles while working on his car earlier that day. However, she disputed the presence of glass fragments on the appellant's hands. Finally, the appellant's brother, Harvey Munsey, testified that the appellant had skinned his knuckles while working on his car. Mr. Munsey observed, "[H]e wasn't bleeding that bad. Just scratched."

perpetrator had used a vinyl material as an accelerant. Deputy Loveday testified that, when he executed the eviction order on the morning before the fire, the material was stored in two bedroom closets.

The appellant testified at trial. He stated that, at the time of the offense, his brother, Harvey Munsey, was living in a dairy barn on Lawrence Morgan's farm. The appellant and his girlfriend, Connie Strange, spent the night prior to the offense at his brother's barn. On the day of the offense, the appellant helped his brothers, Harvey and Bill, and his sister-in-law, Rachel, work on the tobacco crop, and he worked on his car at his brother's barn. At approximately 3:30 p.m. or 3:35 p.m., Harvey Munsey gave the appellant twenty dollars and sent him and Connie Strange to the store in order to purchase beer and cigarettes.[4] The appellant and his girlfriend first stopped at the Valley Market and purchased beer. The appellant stated that the drive from his brother's barn to the Valley Market is approximately fifteen or twenty minutes. He conceded that he passed by Ms. Hodge's rental house en route to the Valley Market but claimed that he did not stop at the house. After purchasing beer at the Valley Market, the appellant and Ms. Strange proceeded to Jessie's Market in order to buy cigarettes, as cigarettes were less expensive at Jessie's Market.

On cross-examination, the appellant testified that Deputy Loveday grabbed him as he was leaving Jessie's Market and threw him against a freezer, informing him that he was under arrest for arson. The Deputy then asked if he could examine the appellant's car. The appellant raised the hood of his car, permitting the Deputy's inspection.[5] The appellant was subsequently placed in the Deputy's vehicle. The appellant denied that he was subjected to a breathalyser.

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[4]The appellant testified that Ms. Strange drove his car.

[5]Ms. Strange testified that neither the appellant nor the Deputy ever looked underneath the hood of the appellant's car.

The appellant additionally introduced the testimony of Christine Hodge, who, on December 10, 1994, was working at the Valley Market. She stated that the appellant and his girlfriend entered the store at approximately 3:50 p.m. She did not notice anything unusual about the appellant's hands, but conceded at trial that she had no reason to pay attention to the appellant's hands. The appellant and his girlfriend left the store at approximately 4:05 p.m. They did not appear to be intoxicated at that time. Finally, Ms. Hodge testified that it is a fifteen minute drive to Jessie's Market from the Valley Market.

Connie Strange confirmed that she was with the appellant all day on December 10, 1994. On that day, the appellant worked on his car at his brother's dairy barn and helped his brothers and sister-in-law with the tobacco crop. At approximately 3:30 p.m. or 3:35 p.m., she and the appellant left the farm to purchase beer and cigarettes. Ms. Strange denied ever stopping at Ms. Hodge's rental house. On cross-examination, Ms. Strange denied that the appellant was intoxicated on December 10. She asserted that the appellant had drunk four beers during the day.

Finally, the appellant's brothers, Harvey and Bill, and his sister-in-law, Rachel, testified on behalf of the appellant. They confirmed that the appellant had been at the Morgan farm on the day of the offense, had worked on his car, and had helped his family with the tobacco crop. According to the appellant's brothers, he left the farm with his girlfriend anytime between 3:00 p.m. and 3:30 p.m. They testified that they had all drunk a few beers during the day.

The jury found the appellant guilty of aggravated burglary, arson, and public intoxication. On May 15, 1995, the trial court conducted a sentencing hearing. Both the State and the appellant relied upon the evidence adduced at trial and the pre-sentence report. In imposing the appellant's sentence, the trial

court found the following enhancement factors:

(1) the appellant has a previous history of criminal convictions or criminal behavior;
(4) a victim of the offense was particularly vulnerable because of age or physical or mental disability;
(6) the amount of damage to property sustained by the victim was particularly great; and
(15) the appellant abused a position of private trust.

Tenn. Code Ann. § 40-35-114 (1994 Supp.). Additionally, the trial court found the mitigating factor that the appellant's criminal conduct neither caused nor threatened serious bodily injury. Tenn. Code Ann. § 40-35-113(1) (1990).

II. Analysis

a. Exculpatory Evidence

The appellant first contends that, pursuant to his discovery requests,[6] the State should have furnished the appellant with photographs of the appellant's hands, taken soon after his arrest. In support of his argument, the appellant cites Tenn. R. Crim. P. 16(a)(1)(C) and Brady, 373 U.S. at 87, 83 S.Ct. at 1196-1197 (the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). The appellant asserts that the photographs were material to the appellant's defense, as the alleged cuts and glass fragments on the appellant's hands at the time of his arrest constituted circumstantial evidence that, on December 10, 1994, the appellant entered Ms. Hodge's rental house by breaking a window. The State argues that the photographs are such poor quality that they disclose nothing about the condition of the appellant's hands.

At the hearing on the appellant's Motion for New Trial, Deputy Loveday

[6]The record reflects that the appellant submitted timely requests for discovery pursuant to Tenn. R. Crim. P. 16 and Brady, 373 U.S. at 83, 83 S.Ct. at 1194.

testified that he had taken Polaroid photographs of the appellant's hands soon after his arrest. He further stated that the photographs are "badly" out of focus. Therefore, he never showed the photographs to either the prosecutor or defense counsel. In order to illustrate the poor quality of the photographs, Loveday testified that letters, spelling the words "Love to Fuck" and tattooed prominently on the appellant's fingers, could not be discerned on the photographs. The trial court made the following observations:

> [L]et the record reflect that the letters are quite visible, quite clear, by the naked eye in looking at [the appellant's] hands. ... [B]ut the photographs, well, they speak for themselves. You cannot see any of the tattooing of the lettering that I just saw with my own eyes. ... [W]ell, there is nothing that I see. ... [T]he photographs have absolutely no probative value at all.[7]

In State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995), our supreme court set forth the four prerequisites to a successful Brady challenge:

1. The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);
2. The State must have suppressed the information;
3. The information must have been favorable to the accused; and
4. The information must have been material.

The standard of materiality is whether "'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Id. at 390 (Opinion on Petition for Rehearing)(citing Kyles v. Whitley, __ U.S. __, 115 S.Ct. 1555, 1566 (1995)). Additionally, Tenn. R. Crim. P. 16(a)(1)(C) provides:

> Upon request of the defendant, the state shall permit the defendant to inspect and copy or photograph ... photographs ... which are within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney general and which are material to the

[7]The trial court also stated, "for whatever its worth," "I doubt seriously that [the appellant] would have wanted to have gone to the jury and shown what was actually tattooed on his hands in comparison to what the pictures showed."

preparation of the defense ... .[8]

Assuming that all other prerequisites have been satisfied, we simply conclude that the photographs of the appellant's hands do not satisfy the standard of materiality under either Brady or Rule 16. This issue is without merit.

b. Tenn. R. Crim. P. 33(f)

The appellant additionally contends that the evidence weighed against the jury's verdicts, warranting a new trial pursuant to Tenn. R. Crim. P. 33(f). Rule 33(f) imposes upon the trial court judge the mandatory duty to serve as the thirteenth juror in every criminal case. State v. Carter, 896 S.W.2d 119, 122 (Tenn. 1995). However,

> Rule 33(f) does not require the trial judge to make an explicit statement on the record. Instead, when the trial judge simply overrules a motion for new trial, an appellate court may presume that the trial judge has served as the thirteenth juror and approved the jury's verdict.

Id. Only if the record contains statements by the trial judge indicating disagreement with the jury's verdict or indicating that the trial judge refused to act as the thirteenth juror may an appellate court reverse the trial court's judgment. Id. Otherwise, appellate review is limited to sufficiency of the evidence pursuant to Tenn. R. App. P. 13(e). See also State v. Burlison, 868 S.W.2d 713, 718-719 (Tenn. Crim. App. 1993). The record in the instant case does not reflect any failure by the trial judge to comply with Rule 33(f). Indeed, at the conclusion of the appellant's trial, in denying the appellant's motion to remain on bond pending a sentencing determination, the trial judge informed the appellant that he agreed with the jury's assessment of the appellant's credibility implicit in the jury's

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[8]As noted earlier, Deputy Loveday testified that, due to the poor quality of the photographs, he did not show them to the prosecutor and intended to dispose of them. However, the photographs were mistakenly included in the police file. A Rule 16 request places the burden on the prosecution to use reasonable diligence prior to and during the trial to discover the existence of requested material. See State v. Renner, No. 03C01-9302-CR-00034 (Tenn. Crim. App. at Knoxville, September 12, 1994), affirmed, 912 S.W.2d 701 (Tenn. 1995)(citing State v. Hicks, 618 S.W.2d 510, 514 (Tenn. Crim. App. 1981)). This duty extends not only to material in the prosecutor's immediate custody, but also to material in the possession of the police which is obtainable by an exercise of due diligence. Id. Similarly, under Brady, the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police. Kyles, __ U.S. at __, 115 S.Ct. at 1567.

verdicts. This issue is without merit.

c. Sufficiency of the Evidence

The appellant next challenges the sufficiency of the evidence supporting his convictions. A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant must establish that the evidence presented at trial was so deficient that no "reasonable trier of fact" could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of the two. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

This court has frequently remarked that a criminal offense may be established by circumstantial evidence alone if the facts and circumstances of the case are "'so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant.'" Id. at 779-780 (citing State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971). Nevertheless, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). See also State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). An appellate court may neither reweigh nor reevaluate the evidence when determining its sufficiency. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Accordingly, this court may not substitute its inferences for those drawn by the trier of fact from circumstantial evidence. State v. Boyd, 925

S.W.2d 237, 242 (Tenn. Crim. App. 1995), perm. to appeal denied, (Tenn. 1996)(citing Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956)). Questions concerning the credibility of witnesses and 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, and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990). "A jury verdict approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory." Williams, 657 S.W.2d at 410.

We conclude that the evidence amply supports the appellant's convictions for aggravated burglary and arson. See Tenn. Code Ann. § 39-14-403 (a) (1991); Tenn. Code Ann. § 39-14-301 (a)(1) (1991). However, we agree with the appellant that there is virtually no evidence in the record that, at the time of his arrest, he was under the influence of an intoxicant in a public place to the degree that he may have been endangered. Tenn. Code Ann. § 39-17-310 (a)(1) (1991). Tenn. Code Ann. § 39-17-301 provides:

> (a) A person commits the offense of public intoxication who appears in a public place under the influence of a controlled substance or any other intoxicating substance to the degree that:
>
> (1) The offender may be endangered;
>
> (2) There is endangerment to other persons or property; or
>
> (3) The offender unreasonably annoys people in the vicinity.

The indictment specifically charged the appellant pursuant to subsection (a)(1) of the statute.

The objective of the public intoxication statute is not to penalize the condition of being intoxicated in a public place, but to "proscribe and prevent" conduct flowing from the condition. See Tenn. Code Ann. § 39-11-101(1) (1991)(a general objective of the criminal code is to "proscribe and prevent conduct that unjustifiably and inexcusably causes or threatens harm to individual, property, or public interest for which protection through the criminal law is

appropriate")(emphasis added). The proof at trial established that, shortly after the appellant's arrest at Jessie's Market, the appellant's blood alcohol content was .26 percent. However, Christine Hodge, an employee of the Valley Market, testified that, shortly before his arrest, the appellant did not appear to be intoxicated. The arresting officer testified that the appellant appeared to be "slightly intoxicated." The appellant did not create any disturbance or engage in any altercations at the Valley Market or Jessie's Market. Contrast State v. White, No. 02C01-9501-CC-00025 (Tenn. Crim. App. at Jackson, September 20, 1995), perm. to appeal denied, (Tenn. 1996)(the evidence established that the appellant was potentially a danger to himself or others, as the arresting officer testified that the appellant had exited the passenger side of a vehicle and engaged in a heated debate with another individual). Moreover, it was undisputed at trial that the appellant's girlfriend, Connie Strange, was driving the appellant's car on the day of the offense. There is no evidence that Ms. Strange was intoxicated or otherwise unable to drive on that day. Contrast White, No. 02C01-9501-CC-00025 (when the driver of a vehicle was arrested for DUI, the intoxicated passenger was properly charged with public intoxication, because, had he been allowed to leave, he would have been a danger to himself). Accordingly, we reverse the appellant's conviction for public intoxication.

d. Sentencing

Finally, the appellant asserts that concurrent sentences of six years incarceration in the Tennessee Department of Correction for aggravated burglary and arson are excessive.[9] Specifically, while conceding that consideration of the appellant's criminal history was appropriate,[10] the appellant challenges the trial

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[9]Because we have reversed the appellant's conviction for public intoxication, we need not address the appellant's challenge to his sentence for that offense.

[10]The State correctly notes that any challenge by the appellant to the application of enhancement factor (1) would be futile, as the appellant has neglected to include in the record the pre-sentence report. See Tenn. R. App. P. 24(b) (it is the appellant's duty to ensure that the record on appeal contains all of the evidence relevant to those issues that are the bases of appeal). In the absence of the pre-sentence report, this court must presume that the trial court's

court's consideration of enhancement factor (4), concerning the vulnerability of the victim, factor (6), concerning the amount of property damage, and factor (15), concerning the appellant's abuse of a position of private trust. Tenn. Code Ann. § 40-35-114. The appellant asks that his sentences be reduced to three years. The State concedes that the record does not support the abuse of a position of trust, but argues that the remaining factors are applicable. Moreover, the State contends that enhancement factor (10), the appellant's lack of hesitation in committing a crime when the risk to human life was high, is applicable, and, therefore, the trial court erroneously found that the appellant's criminal conduct did not threaten serious bodily injury. Tenn. Code Ann. § 40-35-113, -114.

Review, by this court, of the length a sentence is *de novo* with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d) (1990). This presumption only applies, however, if the record demonstrates that the trial court properly considered sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If the trial court applies inappropriate factors or otherwise fails to comply with the 1989 Sentencing Act, the presumption of correctness falls. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). Again, the State concedes that the trial court improperly considered enhancement factor (15) in sentencing the appellant. Accordingly, the presumption of correctness does not accompany the trial court's determination.

Nevertheless, the appellant bears the burden of establishing that the sentences imposed by the trial court are erroneous. State v. Lee, No. 03C01-9308-CR-00275 (Tenn. Crim. App. at Knoxville, April 4, 1995). In determining whether the appellant has met this burden, this court must consider the factors

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assessment of the appellant's criminal history is accurate. See State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991); State v. Boring, No. 03C01-9307-CR-00224 (Tenn. Crim. App. at Knoxville, February 9, 1994).

listed in Tenn. Code Ann. § 40-35-210(b)(1990) and the sentencing principles described in Tenn. Code Ann. § 40-35-102 (1995 Supp.) and § 40-35-103 (1990).

Moreover, Tenn. Code Ann. § 40-35-210 provides that the minimum sentence within the appropriate range is the presumptive sentence. If there are enhancing and mitigating factors, the court must start at the minimum sentence in the range and enhance the sentence as appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors. Id. If there are no mitigating factors, the court may set the sentence above the minimum in that range, but still within the range. Id. See also State v. Dies, 829 S.W.2d 706, 710 (Tenn. Crim. App. 1991). "[T]here is no particular value assigned by the 1989 Sentencing Act to the various factors and the 'weight afforded mitigating or enhancement factors derives from balancing relative degrees of culpability within the totality of the circumstances of the case involved.'" State v. Marshall, 870 S.W.2d 532, 541 (Tenn. Crim. App. 1993)(citation omitted).

We conclude that the record supports the imposition of the maximum sentences authorized by law. Tenn. Code Ann. § 40-35-112 (a)(3) (1990). First, we agree that the victim in the instant case was particularly vulnerable. A victim is particularly vulnerable when she lacks the ability to resist the commission of the offense due to age, a physical condition, or a mental condition. State v. Boggs, 932 S.W.2d 467, 473 (Tenn. Crim. App. at Knoxville), perm. to appeal denied, (Tenn. 1996). The State bears the burden of proving the victim's limitations. State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993). In the instant case, the record reflects that the victim is eighty-six years old and confined to a wheelchair. Ms. Hodge testified at trial that, although her rental house is within sight of her home, she is unable to visit her rental house due to her physical

condition. Certainly, she would have been unable to extinguish the fire without assistance. Accordingly, she was particularly vulnerable to the appellant's burglary and attempted destruction of her property. Similarly, we agree that the damage sustained by Ms. Hodge was particularly great. At trial, the victim testified that her insurance proceeds amounted to two thousand dollars, but were insufficient to completely repair the damage caused by the appellant's conduct. Moreover, Ms. Hodge has lost the income, apparently one hundred and fifty dollars per month, which she formerly derived from leasing the house. These factors alone support the sentences imposed by the trial court.

Additionally, we agree with the State that enhancement factor (10) is applicable to both sentences under the circumstances of this case. See, e.g., State v. Buckland, No. 03C01-9408-CR-00294 (Tenn. Crim. App. at Knoxville, October 12, 1995), perm. to appeal denied, (Tenn. 1996)(certain factual scenarios may justify the application of enhancement factor (10) to a sentence for aggravated burglary); State v. Blanchard, No. 01C01-9403-CR-00099 (Tenn. Crim. App. at Nashville, July 6, 1995)(citing State v. Blair, No. 01C01-9406-CR-00191 (Tenn. Crim. App. at Nashville, December 22, 1994)(enhancement factor (10) may be applied in arson cases). The record reflects that the Beans and several other individuals assisted in extinguishing the fire. Accordingly, we decline to afford any weight to mitigating factor (1), that the appellant's conduct did not threaten serious bodily injury.

For the aforementioned reasons, we reverse the appellant's conviction for public intoxication and affirm the convictions and sentences for aggravated burglary and arson.

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DAVID G. HAYES, Judge

CONCUR:

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JOE B. JONES, Presiding Judge

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PAUL G. SUMMERS, Judge