

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL SESSION, 1995

FILED
November 22, 1995
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

VS.)

JAMES FREDERICK HELTON,)

Appellant.)

C.C.A. NO. 03C01-9406-CR-00220

ANDERSON COUNTY

HON. JAMES B. SCOTT, JR.
JUDGE

(Aggravated Assault)

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE
CIRCUIT COURT OF ANDERSON COUNTY

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OPINION FILED _____

CONVICTION AFFIRMED; REMANDED FOR RESENTENCING

DAVID H. WELLES, JUDGE

OPINION

This is a delayed appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure.¹ The Defendant was convicted by a jury of aggravated assault. The trial court sentenced the Defendant to four years in the Tennessee Department of Correction. We affirm the Defendant's conviction and remand for sentencing.

The Defendant and the victim were involved in a dispute over the boundaries of the victim's land. The dispute primarily concerned a chain link fence the victim put up and the fence's proximity to the road. On the morning of the day of the incident, the Defendant was returning home from the sawmill with a load of sawdust and drove his dump truck down the road and hit the victim's fence. The victim's wife saw the Defendant hit the fence. The victim went outside to fix the fence. While the victim was outside, the Defendant passed him as he was returning to the sawmill. When the victim saw the Defendant, he wanted to talk to him, but the Defendant did not stop. The victim got in his pick-up truck and followed the Defendant to the sawmill.

When he arrived at the sawmill, the Defendant backed his dump truck in to enable him to get the sawdust. The victim arrived at the sawmill shortly after the Defendant, and he pulled his truck about six feet in front of the Defendant's truck so that he was blocking the Defendant's truck. The victim then went over to the Defendant's truck to speak with him. He stepped up on the running board of the Defendant's truck, and the Defendant pulled out a gun. The Defendant fired three times. The first shot hit the Defendant's mirror. The second shot hit the victim on his left side. The third shot apparently hit the ground. The victim got in his truck and drove to a nearby business from which he called the police. In the meantime, the Defendant

¹The trial judge granted the delayed appeal in accordance with Tenn. Code Ann. § 40-30-120.

wrapped the gun in a towel and placed it in his truck bed. The sawdust that was being loaded covered the gun. When the police arrived they looked for the gun. Eventually, after unsuccessfully searching the surrounding area, they dumped the sawdust from the Defendant's truck and found the gun wrapped in a towel in the sawdust.

The Defendant was indicted by the grand jury for aggravated assault. He represented himself at his jury trial. He was convicted of aggravated assault. His motion for new trial was overruled. The Defendant then filed a direct appeal. The Defendant represented himself pro se on this direct appeal. This court affirmed the Defendant's conviction on direct appeal without considering the merits because the Defendant did not provide a transcript or brief the issues. The supreme court denied the Defendant's application to appeal from this court. The Defendant then filed a post-conviction petition. The trial court appointed an attorney to represent him. The trial court granted the Defendant a delayed appeal.

The Defendant argues eleven issues in his appeal: (1) That the evidence was insufficient to sustain a conviction for aggravated assault; (2) that the trial court erred in denying the Defendant's challenge for cause against Martin Marietta employees sitting on the jury; (3) that the trial court erred in allowing a police officer to testify as to medical conclusions with no predicate showing of expertise or declaration as an expert witness; (4) that the trial court erred in making improper comments on the evidence at trial; (5) that the trial court erred by berating the Defendant in front of the jury throughout the trial so to communicate to the jury the trial court's opinion on the credibility of the pro se Defendant and his theory of defense; (6) that the trial court erred by improperly limiting the Defendant's right to present his defense to the jury; (7) that the trial court erred in not setting out the elements of the crime charged in the indictment during the jury instructions; (8) that the trial court erred in not instructing the jury as to the lesser included offense of reckless endangerment; (9) that the trial court

erred in not properly applying the enhancement and mitigating factors to arrive at the sentence and not setting out the factors as required by Tennessee Code Annotated section 40-35-210(f); (10) that the trial court erred in refusing to allow the Defendant the opportunity to serve his sentence on probation; and (11) that the combination of the above errors further contributed to the denial of the Defendant's right to a fair trial.

I.

The Defendant's first issue is whether there was sufficient evidence to convict him of aggravated assault. The Defendant argues that the evidence was insufficient for three reasons. The first reason is that the State did not prove the Defendant's intentions concerning the shooting beyond a reasonable doubt. The second reason is that the State did not refute the Defendant's claim of self-defense. The third reason is that the State did not offer competent proof of serious bodily injury.

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.

An individual is guilty of aggravated assault if the individual, "commit[s] an assault as defined in § 39-13-101, and: (A) Cause[s] serious bodily injury to another; or (B) Use[s] or display[s] a deadly weapon." Tenn. Code Ann. § 39-13-102(1). Assault is defined as, "[i]ntentionally, knowingly or recklessly caus[ing] bodily injury to another." Tenn. Code Ann. § 39-13-101(a)(1).

A.

The Defendant first argues that the State did not prove that the Defendant intentionally caused serious bodily injury to the victim. The Defendant testified in his own behalf at the trial. During his testimony concerning the incident, he stated that at the time of the first shot, he could not see because he had been hit in the head, but he aimed at where he knew the victim's head would be. The Defendant also stated that he fired the second shot and meant to hit the victim. During cross-examination the Defendant testified that the third shot was the shot that hit the victim. He stated that with the second shot he aimed for the victim's stomach, and he thought that he missed the victim. He testified that when he then fired the third shot, he moved the gun in closer to the area of the victim's belly button.

The Defendant argues in his brief that his intent was to dissuade the victim from punching him again, not to inflict serious bodily injury. However, we find it difficult to believe that someone aiming to shoot an individual in his head or stomach did not intend to inflict serious bodily injury. In the Defendant's own words, which the jury heard, he aimed for the victim's head and stomach when he fired the three shots. We conclude that there is sufficient evidence for a reasonable trier of fact to find that the Defendant intentionally caused serious bodily injury.

B.

The Defendant also argues that the State did not disprove that the Defendant's actions constituted self-defense. The State has the burden of negating any evidence that is submitted concerning any defense to an offense that is presented in a defendant's case. Self-defense is defined at Tennessee Code Annotated section 39-11-611. That section reads:

A person is justified in threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force. The person must have a reasonable belief that there is an imminent danger of death or serious bodily injury. The danger creating the belief of imminent death or serious bodily injury must be real, or honestly believed to be real at the time, and must be founded upon reasonable grounds.

Tenn. Code Ann. § 39-11-611(a).

There were only three witnesses to the incident, the Defendant, the victim, and a worker at the sawmill. The victim testified at the Defendant's trial. He told his version of what happened leading up to the incident. He stated that the morning of the incident the Defendant hit his fence with the dump truck. The victim said that the Defendant passed his house when he was outside fixing the fence. The victim testified that the Defendant ran over some cross-ties the victim had in his driveway, and then the Defendant made an obscene gesture at him. The victim stated that he then drove to the sawmill to speak with the Defendant. The victim could see the Defendant ahead of him on the road. When he arrived at the sawmill, the victim pulled his truck in front of the Defendant's dump truck.

The victim stated that he got up on the running board of the Defendant's truck to speak with him. He stated that his head and chest were looking into the window of

the truck. He asked the Defendant whether the Defendant wanted to pay for the fence to be fixed or whether he wanted to pay for the materials and have the victim fix the fence. The victim then testified that the Defendant became very angry and began cursing the victim, told him that the fence was too close to the road, and told him that he was not going to tolerate the fence anymore.

The victim testified that the Defendant put the truck into gear and jumped the truck forward. This made the victim lose his balance. The victim testified that up to this point he had not raised his voice at the Defendant, that he had not cursed at or threatened the Defendant, or had any physical contact with the Defendant. He testified that he did not reach into the Defendant's truck. The victim testified that when he lost his balance, he grabbed for the mirror on the truck. The victim stated that when he regained his balance and turned back around, the Defendant had a pistol pointed in his face. The victim testified that he smacked the gun to keep the Defendant from shooting him in the face. The gun fired at about the same time. The shot hit the mirror on the Defendant's truck.

The victim testified that he fell off of the truck after this shot was fired. He testified that when he hit the ground he was on his back, so he rolled over on his hands and knees to get away from the Defendant. The victim testified that the Defendant then shot him in the side. The victim stated that he had turned around, and he saw the Defendant pull the trigger. The victim said that the Defendant never opened the door, but rather shot out the window of his truck. The victim testified that the Defendant shot again, but the bullet hit the ground.

The Defendant also testified at trial and told his version of the incident. The Defendant testified that after he hit the victim's fence he went back up to his house. He testified that when he did not receive a call from the victim concerning the fence, he

thought that it would be safe to go back out. He stated that when he passed the victim's house the victim came out of his house and he was shaking his fists at the Defendant and cursing him. The Defendant testified that he was afraid that the victim was going to shoot him. He said that he continued to drive to the sawmill and forgot about the victim.

He stated that when he arrived at the sawmill, he looked up and saw the victim's pickup truck pulled in front of his dump truck. He testified that the victim jumped out of his truck and ran up to the Defendant's dump truck. The Defendant stated that the victim was pointing and yelling at him. The Defendant said that he tried to leave, but then realized that the victim's truck was blocking his way. The Defendant said that the victim then hit him in the side of the head. He testified that when he was hit, his foot slipped off of the clutch.

The Defendant said that when the victim hit him, he grabbed the gun that was laying in the seat beside him. The Defendant testified that he held the gun in front of his face because he could not see, and fired at where he knew the victim's head would be. The Defendant stated that the victim then jumped off of the running board of the dumptruck. The Defendant testified that he opened the truck door and stood on the running board. He said that the victim then began to walk toward him with his fists up. The Defendant said that he shot at the victim at this time. The Defendant testified that the victim was still coming towards him with his fist pulled back, and he shot at him again. The Defendant said that the victim fell back onto the ground at this point and said that the Defendant had hit him.

The third witness to the incident was a worker at the sawmill who was called by the Defendant. He stated that he was working at the sawmill the day of the incident. He testified that the he saw the victim pull his truck in front of the Defendant's truck.

He stated that he was 75 to 100 feet away from the trucks. He testified that he saw the victim standing on the Defendant's running board talking to him, and did not think anything about it. He said that he then heard three pops and saw the victim go to the ground like he fell or slipped. On cross-examination, the witness testified that the victim walked straight to the running board of the Defendant's truck. The witness stated that he did not see the victim wave his arms or stand by the truck and yell at the Defendant. He testified that he could not hear what was being said. The witness also stated that the victim's hands were next to the window of the truck.

The Defendant also introduced testimony that the victim and his family had attempted to ambush the Defendant and his family on the road which led to the Defendant's house. During the State's proof-in-chief, testimony from the victim and his family was introduced that denied these accusations. The Defendant also testified to the fact that the victim carried weapons in his truck. Officers who searched the victim's truck testified that there were indeed weapons in the victim's truck. They stated that these weapons were not easily accessible and that they were covered in dust. The officers also searched the area between the sawmill and the business to which the victim drove after the shooting, looking for a gun that the victim could have thrown out of his truck. They did not find anything.

We conclude that the State submitted evidence to refute the Defendant's claims of self-defense. There is sufficient evidence to find that the Defendant was not justified in using a gun in self-defense. The unbiased witness did not testify to what appeared to be a hostile confrontation. There is no evidence that the victim had a gun at the time he approached the Defendant. Therefore, we conclude that there is sufficient evidence to refute the Defendant's claim of self-defense as a defense to his aggravated assault charge.

C.

The Defendant's third issue under sufficiency of the evidence is that the State did not submit competent proof of serious bodily injury of the victim to convict the Defendant of aggravated assault under Tennessee Code Annotated section 39-13-102(a)(1)(A). Serious bodily injury is "(A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; or (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty." Tenn. Code Ann. § 39-11-106(33). The victim testified that as a result of the shooting, the doctors removed his gall bladder and spleen, seventy-five percent of his pancreas, patched two holes in his stomach, removed part of his liver, and patched a hole in his colon. This is sufficient to constitute serious bodily injury under Tennessee Code Annotated section 39-11-106(33)(E). Furthermore, it is clear that the Defendant used a deadly weapon during the assault which would allow for a conviction of aggravated assault under Tennessee Code Annotated section 39-13-102(a)(1)(B).

Therefore, the sufficiency of the evidence issue is without merit.

II.

The Defendant's second issue is that the trial court erred in denying the Defendant's challenge for cause against Martin Marietta employees sitting on the jury. The victim and his father-in-law, who was a witness at the trial, were employees of Martin Marietta and the Department of Energy in Oak Ridge. The Defendant exercised all of his peremptory challenges during jury selection and argued that other Martin Marietta employees should be challenged for cause and dismissed from the jury. The

trial court disagreed with the Defendant, and the jury was approved with Martin Marietta employees sitting in spite of the Defendant's objection.

The decision as to whether a juror should be excused for cause is in the sound discretion of the trial judge. Burns v. State, 591 S.W.2d 780, 782 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1979). Once a trial judge has decided that a juror is acceptable, the decision will not be reversed except upon a showing of a clear abuse of discretion. Id. We do not find a clear abuse of discretion in the case sub judice.

All of the prospective jurors were asked if they knew the participants. The majority did not know them. From reading the record, it appears that the trial judge dismissed the prospective jurors for cause if they knew the parties. The Defendant apparently used many of his peremptory challenges on prospective jurors who worked for Martin Marietta. The Defendant was given an opportunity to question the prospective jurors who worked for Martin Marietta about their ability to remain unbiased, but he declined this opportunity.

Martin Marietta employs a large number of people. It is very possible that the majority of Martin Marietta employees would not come into contact with each other. In addition, we are not convinced that having a common employer would affect an individual's ability to be unbiased. In Smith v. State, 566 S.W.2d 553 (Tenn. Crim. App.), cert. denied, id. (Tenn. 1978), this court held that the trial court did not abuse its discretion by not excusing for cause two jurors who were connected with a university where a student was abducted and raped. Id. at 558. This court stated that the university as an entity had no connection to the case. Id. The same is true concerning Martin Marietta in the case sub judice.

We conclude that the trial court did not abuse its discretion in not excusing the Martin Marietta employees for cause. Therefore, this issue is without merit.

III.

The Defendant's third issue is that the trial court erred in allowing a police officer to testify as to medical conclusions with no predicate showing of expertise or declaration as an expert witness. An officer who saw the victim after the shooting and before the ambulance came testified that, "[The victim] was in, I would have to say, grave physical condition. It was obvious that he was losing skin color; he was suffering; there was pain; his-- he was grimacing." The Defendant objected to this testimony on the grounds that the officer was not a medical expert. The trial court stated that the officer could testify as to what he saw. One question later, the trial judge again stated that the officer could not testify to medical conclusions.

We agree that the officer's statement that the victim was in grave physical condition could be considered a medical conclusion, however the rest of the officer's answer would constitute his observations of the victim. "As a general proposition the ordinary witness may testify only about facts about which he has first-hand knowledge, and avoid stating mere personal opinions." State v. Wiseman, 643 S.W.2d 354, 364 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1982). Therefore, there was no error in the admittance of the officer's observations of the victim losing color and grimacing. The admittance of the statement of the victim's "grave physical condition" and that the victim was in pain was error. However, after considering the entire record in this case, we are satisfied that this error is harmless beyond a doubt. T.R.A.P. 36(b); Tenn. R. Crim. P. 52(a).

Therefore, this issue is without merit.

IV.

The Defendant's fourth issue is that the trial court erred in making improper comments on the evidence during the trial. The Defendant argues five specific points under this issue: (1) The trial judge commented throughout the trial on the immateriality of defense proffered evidence even when the State made no objection; (2) the trial court improperly conducted its own examination of the alleged victim in an effort to assist the prosecution and communicated to the jury that the court was vouching for the witness's credibility; (3) the trial court improperly ordered the Defendant to stop questioning an officer about the shotgun possessed by the alleged victim and improperly commented in front of the jury that the Defendant could not use that shotgun as a basis for self-defense; (4) the trial court improperly sua sponte remarked that the Defendant's nerve injury being described by the Defendant was not a defense, a clear comment on the evidence; (5) the trial court improperly instructed the jury that absolute certainty was not demanded to "convict a criminal of a charge."

We have reviewed these instances and do not agree with the Defendant. The trial judge had difficulty keeping the evidence at trial on track. The Defendant continually attempted to introduce evidence that concerned the land boundary suit that preceded this trial, as well as other evidence which would have been irrelevant or cumulative. Evidence was allowed in to the extent that it was relevant. Whether evidence is relevant or not is in the discretion of the trial judge and this court will not interfere with this discretion unless there is clear evidence of abuse on the face of the record. State v. West, 737 S.W.2d 790, 793-94 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1987); State v. Moffett, 729 S.W.2d 679, 682 (Tenn. Crim. App. 1986), perm. to appeal denied, id. (Tenn. 1987). We do not find such an abuse in the case sub judice.

The examination of the victim that the Defendant calls into question consisted of the trial judge asking the victim questions so that the location of the injury would be clear to someone who was reading the record rather than watching the victim testify. We do not agree with the Defendant that the examination vouched for the witness's credibility. Therefore, the examination was not improper.

The Defendant also argues that in the trial judge's instructions to the jury, his statement that the absolute certainty was not required to convict a criminal of a charge communicated to the jury that the Defendant was guilty and his claim of self-defense was invalid. The portion of the jury charge complained of read, "Absolute certainty of guilt is not demanded by the law to convict a criminal of a charge, but moral certainty is required." The word criminal in this jury charge is not used so as to call the Defendant a criminal. This word is generic terminology used to instruct the jury as to the definition of reasonable doubt. We do not find that the use of the word criminal in a jury charge implies that a defendant is guilty. Therefore, the statement is not an improper comment by the trial judge.

This issue is without merit.

V.

The Defendant's fifth issue is whether the trial judge erred by berating the Defendant in front of the jury throughout the trial so to communicate to the jury the trial court's opinion on the credibility of the pro se defendant and his theory of defense. We have reviewed the entire record and the instances that the Defendant refers to in his brief. We do not find that the trial judge berated the Defendant or communicated its opinion concerning the Defendant's credibility. The Defendant continued to attempt to bring in irrelevant evidence at trial. The trial judge has the discretion to limit testimony that is irrelevant. West, 737 S.W.2d at 793-94; Moffett, 729 S.W.2d at 682. The trial judge also informed the jury that his statements to the Defendant to control the evidence was not a reflection of his opinion about the Defendant. The trial judge also reprimanded the State when it attempted to bring in irrelevant information. We conclude that the trial judge did not berate the Defendant, but rather was trying to keep the case under control, which was difficult because of the Defendant's manner of pro se representation.

This issue is without merit.

VI.

The Defendant's sixth issue is whether the trial court erred by improperly limiting the Defendant's right to present his defense to the jury. Whether evidence is relevant or not is in the discretion of the trial judge and this court will not interfere with this discretion unless there is clear evidence of abuse on the face of the record. West, 737 S.W.2d at 793-94; Moffett, 729 S.W.2d at 682. After reviewing the instances the Defendant complains about, we have concluded that the trial judge was properly exercising his discretion as to what evidence was relevant or cumulative at trial, as well

as holding the Defendant to basic rules of evidence as is required even of pro se defendants.

Therefore, this issue is without merit.

VII.

The Defendant's seventh issue is whether the trial court erred in not setting out the elements of the crime charged in the indictment during the jury instructions. The indictment read that the Defendant did unlawfully, "and intentionally cause serious bodily injury to [the victim], through the use of a deadly weapon, to wit: a gun, in violation of Tennessee Code Annotated section 39-13-102." In his instructions to the jury the trial judge included the culpable mental states of intentionally, knowingly and recklessly. The Defendant argues that the indictment limits the culpable mental state of the Defendant to intentionally. The Defendant argues that the instruction including knowingly and recklessly allowed the jury to choose a mental state other than that in the indictment, and therefore, the Defendant was convicted of an offense with which he was not charged.

In State v. Moss, 662 S.W.2d 590 (Tenn. 1984), our supreme court ruled on the issue of what constitutes a fatal variance in an indictment. The court stated:

A variance between an indictment and the proof in a criminal case is not material where the allegations and proof substantially correspond, the variance is not of a character which could have misled the defendant at trial and is not such as to deprive the accused of his right to be protected against another prosecution for the same offense.

Moss, 662 S.W.2d at 592. In the case sub judice, the allegations and the proof substantially corresponded, the Defendant could not have been misled as to what he

was being tried for, and it is not possible for the Defendant to be prosecuted again for the same offense because of the Defendant's complaint.

This court dealt with a case in which the defendant argued that the indictment failed to allege all the elements of the offense because it did not allege that the defendant's possession of cocaine was knowing. State v. Marshall, 870 S.W.2d 532, 536 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1993) This court held that the absence of that element in the indictment did not constitute a fatal variance. Id. at 538. This court stated, "An indictment, to be sufficient, need not always contain the language of the statute in order to allege the element of scienter required for the offense." Id. at 537. Therefore, the indictment did not need to contain all of the mental states listed in the statute to allege the other two mental states that are elements of aggravated assault.

This issue is without merit.

VIII.

The Defendant's eighth issue is whether the trial court erred in not instructing the jury as to the lesser included offense of reckless endangerment. An offense is a lesser included offense if the elements of the charged offense include, but are not the same as, the elements of the lesser offense. Howard v. State, 578 S.W.2d 83, 85 (Tenn. 1979). If there is evidence to support a conviction of a lesser included offense, then the lesser included offense must be charged by the trial judge. Id.

This court has held that reckless endangerment can be a lesser included offense of aggravated assault. State v. Rufus Steward, No. 02C01-9307-CC-00161, Gibson County (Tenn. Crim. App., Jackson, filed May 10, 1995). Reckless endangerment as

a misdemeanor, without a dangerous weapon, has been considered a lesser included offense of aggravated assault. Id. at 10. Reckless endangerment as a felony, with a deadly weapon, is a lesser included offense of aggravated assault with a deadly weapon. Id. In the case sub judice, we do not know if the jury convicted the Defendant of aggravated assault with a deadly weapon or aggravated assault by causing serious bodily injury. Both were clearly proven. The Defendant was only charged with one count, and the trial judge instructed the jury as to both forms of aggravated assault within the one count.

However, "where the record clearly shows that the defendant was guilty of the greater offense and is devoid of any evidence permitting an inference of guilt of the lesser offense, it is not error to fail to charge on a lesser included offense." State v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990), cert. denied, 498 U.S. 1074 (1991). We conclude that there is clear evidence to show the Defendant's guilt of aggravated assault, and there was no evidence to permit a conviction of reckless endangerment. Reckless endangerment contains the same elements as aggravated assault except that there is not necessarily an injury. In the case sub judice, there is no question that the victim suffered a serious bodily injury and that the Defendant intentionally caused that bodily injury. Therefore, the trial judge's failure to charge reckless endangerment does not constitute error. Furthermore, based on the proof contained in this record, if it was error, it was clearly harmless.

This issue is without merit.

IX.

The Defendant's ninth issue is that the trial court erred in not properly applying the enhancement and mitigating factors to arrive at the sentence and not setting out the

factors as required under Tennessee Code Annotated section 40-35-210(f). 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 the case sub judice, the record does not make such an affirmative showing. The trial judge did not set out the enhancing and mitigating factors as required under Tennessee Code Annotated section 40-35-210.

We recognize that the sentencing issue may now be moot. However, we remand this case to the trial court for resentencing. In so doing, the trial court should consider on the record the sentencing principles and all relevant facts and circumstances. The trial judge is required to place on the record the enhancement and mitigating factors it finds. Tenn. Code Ann. § 40-35-210(f). The record must also include specific findings of fact upon which application of the sentencing principles was based. Tenn. Code Ann. § 40-35-209(c).

X.

The Defendant's tenth issue is whether the trial court erred in refusing to allow the Defendant the opportunity to serve his sentence on probation. Because we are remanding for resentencing, we do not address this issue. We do note that, absent evidence to the contrary, the Defendant is presumed to be a favorable candidate for alternative sentencing options. Tenn. Code Ann. § 40-35-102(6).

XI.

The Defendant's eleventh issue is whether the combination of the above errors "further contributed to the denial of the Defendant's right to a fair trial." After considering the entire record, we do not find any reversible error on the trial judge's part in his trial of this case. The trial judge was very patient with the Defendant throughout the trial, while still maintaining control of the trial process. We conclude that there were no errors by the trial judge, nor a combination of errors, that deprived the Defendant of his right to a fair trial.

This issue has no merit.

We affirm the Defendant's conviction of aggravated assault. We remand for the purpose of sentencing.

DAVID H. WELLES, JUDGE

CONCUR:

DAVID G. HAYES, JUDGE

JOHN A. TURNBULL, SPECIAL JUDGE