IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER 1994 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 03C01-9403-CR-00101
APPELLEE,	*	JEFFERSON COUNTY
VS.	*	Hon. J. Kenneth Porter, Judge
TONY WAYNE SNYDER,	*	(Conspiracy to Commit First Degree Murder, Aggravated Arson,
APPELLANT.	*	and Theft Over $1,000)
	*	

For the Appellant:

Edward C. Miller
Public Defender
P.O. Box 416
Dandridge, TN 37725

For the Appellee:

Charles W. Burson
Attorney General and Reporter
450 James Robertson Parkway
Nashville, TN 37243-0493

Christina S. Shevalier
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

James Gass
Assistant District Attorney
Sevier County Courthouse
Sevierville, TN 37862

OPINION FILED: _____

AFFIRMED

Gary R. Wade, Judge

OPINION

The defendant, Tony Wayne Snyder, appeals from his convictions for conspiracy to commit first degree murder, aggravated arson, and theft over $1,000. The trial court imposed consecutive, twenty-five year sentences for the conspiracy and aggravated arson convictions, to be served concurrently with a two-year sentence imposed for the theft offense. The effective sentence is, therefore, fifty years.

In this appeal of right, the defendant presents the following issues for review:

> (1) whether the trial court erred by allowing into evidence an audio tape recording the state acquired by placing an inmate in the defendant's cell with a tape recorder;
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> (2) whether the trial court erred by allowing a state witness to testify about admissions made by the defendant of his prior bad acts and his threats to commit future crimes;
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> (3) whether the trial court erred by admitting into evidence a statement made as the result of an illegal arrest;
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> (4) whether the trial court erred by allowing opinion evidence as to the arson; and
>
> (5) whether the trial court imposed an excessive sentence.

We affirm.

In the early morning hours of December 1, 1991, the defendant, Tony Wayne Snyder, set fire to the mobile home of his girlfriend's mother, the victim JoAnn Hinson, and drove away from the same in her 1985 Ford Tempo. When the smoke

alarm sounded, Ms. Hinson picked up her seven-year-old son, who was asleep in her bed, and searched for her sixteen-year-old daughter, Patty Hall. When she could not find her, Ms. Hinson dialed 911, then waited outside her burning residence for the arrival of the fire department. At some point, she noticed that her car was missing; and, because of her prior knowledge of the defendant, she immediately suspected that he and her daughter had taken the vehicle. When the firefighters arrived, the victim expressed her suspicions to Officer Bud McCoig of the Jefferson County Sheriff's Department. Shortly after Officer McCoig provided the dispatcher with a description of the vehicle, officers arrested the defendant. Ms. Hall, who was in the front passenger seat of the victim's car, admitted that she had asked the defendant to kill her mother and younger brother. She claimed that her motive for the killing was her mother's insistence that she perform household tasks such as babysitting for her younger brother.

At trial, Officer McCoig testified that he had answered a dispatch to the Hinson residence as a volunteer firefighter. Upon arriving at the scene, he noticed that there were separate fires in two of the bedrooms and that a blanket had been placed in front of the door to a third. These circumstances led Officer McCoig to suspect arson. Upon further inspection, the officer found a large kitchen knife and a red motorcycle helmet near a chair by the front door. When the fire was under control, Ms. Hinson told Officer McCoig that the defendant might have stolen her car.

After being advised of his Miranda rights, the defendant admitted that he had set fire to the residence and stolen the victim's car. The defendant claimed that he did so at the request of his girlfriend, Ms. Hall, and confessed that he had originally agreed to cut Ms. Hinson's throat and then set fire to her home. Fearing that the victim would wake up, however, the defendant chose to set the home ablaze, believing that she and her son would perish in the fire. Officer McCoig, who questioned the defendant, stated that the defendant had never asked for an attorney during the course of his interrogation and was neither threatened nor coerced into giving the statements.

While the defendant was awaiting trial, Phillip Denton, an inmate at the Jefferson County Detention Center, told Officer McCoig that the defendant had asked him to commit perjury; he claimed that the defendant wanted Denton to testify that Officer McCoig had coerced the confession. Denton also claimed that the defendant had made threats against Officer McCoig and his family, the Sheriff and his family, and a judicial officer. Thereafter, Officer McCoig made arrangements for Denton's conversations with the defendant to be tape recorded. In one of the taped conversations, the defendant offered Denton three packs of cigarettes and two dollars to testify falsely. In another, the defendant offered three cigarettes and forty cents.

At trial, Denton acknowledged that he had been serving a sentence for a fraudulent drug prescription at the

time of the defendant's arrest. He testified that he had been released for a time, but a subsequent arrest for public intoxication resulted in the revocation of his probation. Denton stated that as he was waiting to be booked on the more recent charge, the defendant offered him fifty dollars and drugs to testify that the police had coerced his confession; he claimed that the defendant threatened to harm him and his family if he refused the offer. Denton testified that he reported the incident to Officer McCoig a short time thereafter. Denton also testified that he had been wired twice, in February and in June, and that during each conversation the defendant attempted to "buy" his false testimony.

Ms. Hall acknowledged having conceived of the plan to kill her mother and younger brother. She admitted giving the defendant a knife and hiding him in a closet on the night of the fire. Ms. Hall related that the defendant woke her at about 3:00 a.m.; at that point, she took her mother's purse and a few items of personal property, then went to the car to wait for the defendant. The fire alarm sounded as the defendant got into the vehicle. When Ms. Hall asked whether he had been successful, the defendant replied that he was sure that he had killed both the victim and her son.

I & II

Claiming that the state obtained the information in violation of his Sixth Amendment right to counsel, the defendant challenges the admission of the two tape-recorded

conversations and asserts that the testimony of Phillip Denton should have been excluded. He alternatively contends that the evidence should have been excluded as irrelevant, prior bad acts. In our view, however, the record supports the trial court's determination that the purpose of the recording was to verify Denton's claim that the defendant had attempted to suborn perjury, a separate offense. See Tenn. Code Ann. §§ 39-12-101 & 39-16-705. While the defendant's Sixth Amendment right to counsel had attached as to the charged offenses, that right had not yet evolved as to subornation of perjury because no adversarial proceedings had been initiated. See Massiah v. United States, 377 U.S. 201 (1964). The mere fact that a defendant has the right to counsel on one charge, does not mean that the right has attached for all other crimes for which the defendant might be charged. United States v. Lisenby, 716 F.2d 1355, 1359 (11th Cir. 1983).

Because the defendant's Sixth Amendment rights had attached as to the charged offenses, but not as to the attempt to suborn perjury, we must determine what evidence of the defendant's attempt to suborn perjury, if any, was properly admitted without infringing upon his Sixth Amendment rights as to the initial charges. The United States Supreme Court decision in Maine v. Moulton, 474 U.S. 159, 179-180 (1985), provides some guidance:

> In seeking evidence pertaining to pending charges, however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused. To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason

> for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in Massiah. On the other hand, to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges.

In other words, if the defendant had made any incriminating statements about the first degree murder conspiracy, the aggravated arson, or the theft, those remarks would have been inadmissible. Id.; see also Massiah v. United States, 377 U.S. 201. Still, the Moulton court did not make clear whether evidence of the separate crime, where relevant, would be admissible in the trial on the prior charges wherein the defendant's Sixth Amendment rights had already attached.

The decision in Grieco v. Meachum, 533 F.2d 713 (1st Cir. 1976), is instructive. There, a defendant charged with first degree murder offered another inmate, already serving a life sentence, money to confess to the murder. The inmate reported the offer to the government, and in cooperation with the governmental authorities, elicited more incriminating evidence in three subsequent discussions. At trial, the statements made by the defendant to the inmate were admitted into evidence as "conduct tending to show consciousness of past crimes." United States v. Lisenby, 716 F.2d at 1358. The court based its decision upon the "separate offense" exception carved out by the Supreme Court in Hoffa v. United

States, 385 U.S. 293 (1966), and discussed in United States v. Missler, 414 F.2d 1293 (4th Cir. 1969), cert. denied, 397 U.S. 913 (1970); it ruled that the right to counsel provision did not preclude the admission because the statements were "primarily uttered in the commission of another substantive offense, subornation of perjury, and were only incidentally admissible in his trial on the pending indictment." Greico v. Meachum, 533 F.2d at 717; see also United States v. Moschiano, 695 F.2d 236 (7th Cir. 1982)(holding that Moschiano's right to counsel was not violated by admission of statements concerning a separate, but related crime, despite the attachment of his Sixth Amendment rights to the earlier crime); United States v. Louis, 679 F. Supp. 705 (W.D. Mich. 1988).

Here, the tape-recorded statements of the defendant did not include any information about the crimes with which he had already been charged. The defendant was not directly incriminated by the content. From all outward appearances, the purpose of the "wire" was to corroborate evidence of his attempt to get Denton to falsely testify. Thus, the admission of the statements, evidence of the defendant's guilt of a separate offense, did not compromise his right to counsel on the initial charges. See Greico v. Meachum, 533 F.2d at 717; see also Hoffa v. United States, 385 U.S. 293.

While we have found that the defendant's Sixth Amendment rights were not violated by the admission of his conversations with Denton, the defendant also argues that the statements should have been excluded under the Tennessee Rules

of Evidence as inadmissible character evidence. He asserts that his attempt to have Denton testify falsely in these proceedings might have been admissible for the limited purpose of impeachment, had he chosen to testify; but because he did not testify or otherwise put his character at issue, he contends that the evidence could not have been admitted for any purpose. The state argues that the defendant's attempt to "tamper" with evidence was admissible because it indicated "a guilty knowledge"; the state, however, has taken no position as to the admissibility of the various threats made by the defendant toward others in his conversations with Denton.

Tenn. R. of Evid. 401 provides the following definition for relevant evidence:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Tenn. R. of Evid. 402 declares that "all relevant evidence is admissible," unless specifically excepted, and that "[e]vidence which is not relevant is inadmissible." The procedure for determining whether character evidence is admissible, even if relevant, is found in Tenn. R. of Evid. 404(b) which provides as follows:

> (b) Other Crimes, Wrongs, or Acts--Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
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> (1) The court upon request must hold

> a hearing outside the jury's presence;
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> (2) The court must determine that a material issue exists other than conduct conforming with the character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and
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> (3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

We first address whether the trial court properly admitted the evidence of the defendant's attempt to have him testify falsely. The state claims that the evidence was not only relevant for the purposes of impeaching the defendant's character, had he testified, but also as substantive evidence of the defendant's guilt. We agree. "Any attempt to suppress or destroy or conceal evidence is relevant as a circumstance from which guilt of an accused so acting may be inferred." Hicks v. State, 533 S.W.2d 330, 334 (Tenn. Crim. App. 1975). Had the defendant succeeded in his attempt to have Denton falsely testify, the defendant's earlier admission to officers that he had set the fire and stolen the car would have been less valuable as evidence. As a result, we hold that the evidence of his attempt to suborn perjury was relevant and admissible as substantive evidence so long as it otherwise qualified under Tenn. R. Evid. 404(b). See Tenn. R. Evid. 401 & 402.

Although the trial court conducted the required hearing, the defendant claims that the tapes should not have been admitted because the trial court did not review the content before weighing their probative value. While it would

have been preferable for the trial court to have listened to the tapes beforehand, defense counsel made no specific request that this be done. Counsel had made representations about the content, however, and Officer McCoig had summarized the evidence on the tapes during the suppression hearing. Thus there was substantial compliance with the required procedure. Because the probative value of statements made to Denton outweighed any prejudicial effect, the trial court admitted the evidence within the terms of Rule 404(b).

We now turn to the admissibility of the threats made by the defendant toward Denton's family, Jefferson County law enforcement officials, and their families. Initially, those threats qualify as bad acts and are generally inadmissible as irrelevant. See Tenn. R. Evid. 404(b); State v. Burchfield, 664 S.W.2d 284 (Tenn. 1984). This evidence may be admitted only when offered to prove the motive of the defendant, his identity, his intent, the absence of mistake, opportunity, or when the acts are a part of a common scheme or plan. See e.g., Tenn. R. Evid. 803(3); Bunch v. State, 605 S.W.2d 227 (Tenn. 1980). The reason this type of evidence is so limited is the fear that once a jury learns that the defendant has previously committed "bad acts," it will assume that the defendant acted in conformity with his prior actions as to the crimes charged. This "propensity evidence" may often be so prejudicial as to relieve the state of their burden of proof.

None of the exceptions appear to apply here. The

only value of the testimony, in our view, was to establish the defendant as a "bad" person. The rules do not permit that. See Tenn. R. Evid. 402 & 404. Thus we must next determine whether the erroneous admission of the evidence, in the context of the entire record, had any affect upon the verdict. Tenn. R. App. Proc. 36(b). Clearly, it did not.

The evidence of guilt was simply overwhelming. The defendant was driving the victim's vehicle at the time of his arrest. See e.g., State v. Hamilton, 628 S.W.2d 742, 746 (Tenn. Crim. App. 1981)(possession of recently stolen property raises an inference of guilt). He confessed to the crimes. Ms. Hall confirmed that the defendant had set the fire, intending to kill her mother and brother. She acknowledged her participation in the theft of the vehicle and implicated the defendant. Moreover, the prejudicial effect of the inadmissible evidence was mitigated by curative instructions. The trial court instructed the jury to consider the defendant's conversations with Denton for credibility purposes only, and that they had no bearing upon his guilt or innocence. The trial court specifically cautioned jurors to "disregard the braggadocio, disregard the tough talk," because "all that stuff's just...got nothing to do with it." The strength of the evidence leads us to conclude that the error had no effect upon the results of the trial.

III

The defendant also asserts that his two pretrial admissions should have been suppressed as products of an

illegal arrest. He claims that law enforcement officials lacked probable cause to arrest him without a warrant. Again, we disagree.

Tenn. Code Ann. § 40-7-103(3) provides that an officer may make a warrantless arrest for a felony when "he has reasonable cause for believing the person arrested to have committed it." In State v. Jefferson, 529 S.W.2d 674, 689 (Tenn. 1975), our supreme court provided the following guidelines for determining whether sufficient cause exists for a warrantless arrest:

> In dealing with probable cause, one deals with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

(Citation omitted).

The defendant contends that he was stopped based upon nothing more than Officer McCoig's belief that the fire had been intentionally set and the victim's suspicion that the defendant might have been involved. The defendant claims that Officer McCoig did not possess the requisite skill to determine whether the fire was intentionally set and argues that the victim had merely speculated about the defendant's possible involvement.

Even if these assertions were entirely correct, Officer McCoig had been told by the victim that her vehicle had been taken without permission. The officer then passed the description along to his dispatcher. An off-duty, reserve

deputy overheard the report, happened to see the vehicle, and called for a marked patrol car to make the stop. The defendant was in the driver's seat. The victim's daughter was in the front passenger seat. These facts were more than sufficient to establish probable cause for arrest. See Tenn. Code Ann. § 40-7-103(3).

IV

Next, the defendant submits that the trial court erred by allowing Officer McCoig to render an opinion as to how the fire started because he did not possess the qualifications required of an expert. Again, we disagree.

Expert testimony is, of course, permissible under the Tennessee Rules of Evidence:

> If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Tenn. R. Evid. 702. In order to qualify as an expert, the witness must have experience, training, or education within an area of expertise beyond the scope of common knowledge. See Kinley v. Tennessee State Mutual Ins. Co., 620 S.W.2d 79 (Tenn. 1981). The trial judge has broad discretion in determining the admissibility of expert testimony. Baggett v. State, 220 Tenn. 592, 421 S.W.2d 629 (1967); see also State v. Oody, 823 S.W.2d 554 (Tenn. Crim. App. 1991). When the trial court has concluded that a witness qualifies as an expert, that decision will not be overturned absent an abuse of

discretion. State v. Rhoden, 739 S.W.2d 6 (Tenn. Crim. App. 1987).

The state points out that it did not actually attempt to qualify Officer McCoig as an expert and did not ask for his opinion about how the fire began. The officer did, however, in relating his general observations, state that certain items had been "set on fire." Because the defendant did not make a contemporaneous objection to any of those statements, the issue has been waived. State v. Rhoden, 739 S.W.2d 6.

The record suggests Officer McCoig might have qualified as an expert. He had twenty years experience as a volunteer fire fighter and had participated in several courses designed to assist in the determination of whether a fire was the product of arson. He was also in the unique position of seeing first hand the fire's several points of origin while it was in progress. His experience and training, coupled with his on site observations, were such that his conclusions could have "substantially assist[ed] the trier of fact." Finally, the evidence of guilt is overwhelming. When Officer McCoig arrived on the scene, he saw the residence on fire at more than one point. The testimony of Ms. Hall and the admissions made by the defendant served as compelling evidence of guilt.

V

Next, the defendant challenges the trial court's imposition of the maximum sentence for both the first degree

murder conspiracy conviction and that for aggravated arson. He contends that several enhancement factors were improperly applied and that mitigating factors were ignored. Additionally, the defendant submits that the trial court improperly ordered the convictions to be served consecutively.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that 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). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; State v. Smith, 735 S.W.2d 859, 862 (Tenn. Crim. App. 1987).

The trial court found the following six enhancement factors applicable to the defendant's conspiracy to commit first degree murder and aggravated arson convictions[1]: (1) the defendant was a leader in the commission of the offense; (2) the offense involved more than one victim; (3) a victim of the offense was particularly vulnerable because of age; (4) the amount of damage to property sustained by the victim was great; (5) the defendant employed a deadly weapon in the commission of the crimes; and (6) the defendant had no hesitation about committing a crime where the risk to human life was high. See Tenn. Code Ann. § 40-35-114 (2), (3), (4), (6), (9) and (10). The defendant disputes the applicability of each of these enhancement factors, except the second and the fourth.[2]

While the trial court made findings as to each enhancement factor, it applied them generally to all offenses, rather than considering each offense individually. See State v. Ashby, 823 S.W.2d at 169. Thus, our review must be de novo without the presumption of correctness.

The defendant initially claims that he was wrongly labeled the leader in the arson and the murder conspiracy because Ms. Hall suggested that the defendant commit the

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[1]The trial court did not specifically state that it was not applying the enumerated enhancement factors to the defendant's theft conviction, but, because the defendant was given the minimum sentence for that offense, we must assume that it did not.

[2]The defendant also claims that the trial court improperly applied the "abuse of a position of private trust" enhancement factor, however, the trial judge actually refused to apply this factor, stating as follows: "The Court does not find that [the defendant] was in a position of trust."

crimes and outlined a plan to carry them out. See Tenn. Code Ann. § 40-35-114(2). We disagree. For the factor to apply, one does not have to be the leader in the offense, but merely a leader in the commission of the offense. See State v. Angele Franklin, No. 03C01-9402-CR-00061 (Tenn. Crim. App., at Knoxville, September 27, 1995). This is true even when there are only two parties to the offense. Id. While Ms. Hall clearly planned the offenses, the defendant, some five years older, carried out the crimes. He consented to the plan, set fire to the victim's residence, and was driving the stolen vehicle at the time of his arrest. In our view, the trial court properly applied this factor to both the murder conspiracy and aggravated arson.

The defendant next asserts that the seven-year-old victim in this case does not qualify as particularly vulnerable based upon his age. See Tenn. Code Ann. § 40-35-114(4). He does not say why. We do not know why not. A sleeping, seven-year-old is particularly vulnerable to a house fire. Absent the assistance of his mother, the child would have likely perished. In our view, the factor applies to both crimes.

The defendant also suggests that the trial court erred by finding that the defendant possessed or employed a deadly weapon in the commission of these crimes. See Tenn. Code Ann. § 40-35-114(9). Ms. Hall testified that the defendant had both a knife and a hammer in his possession when he set fire to the residence. Officer McCoig testified that

he found a large kitchen knife by a chair near the front door. This evidence was sufficient to support application of the factor to both convictions.

The defendant next contends that the trial court erred by finding that he had no hesitation in committing crimes where the risk to human life was high. See Tenn. Code Ann. § 40-35-114(10). He argues that because he declined to cut the victim's throat with a knife, as suggested by Ms. Hall, that he was hesitant to commit the crimes. Again, we disagree. There was proof that the defendant decided not to cut the throat of the victim only because he feared that she might awaken. So, he chose to stuff a blanket around the bedroom door to be sure the victims did not discover the fire until it had progressed too far for them to escape. These facts do not suggest a hesitation to commit the crimes.

This factor is generally inapplicable to a conviction for conspiracy to commit first degree murder because the risk to human life is an element of the offense; the rationale is that risk to the intended victim is inevitable in any such conspiracy. See State v. Ralph Thompson, Jr., No. 03C01-9306-CR-00177 (Tenn. Crim. App., at Knoxville, June 15, 1994), perm. app. denied (Tenn. 1994) (concurring in results only); see also State v. Ivory Brown, No. 02C01-9303-CC-00036 (Tenn. Crim. App., at Jackson, December 3, 1993). Here, however, the life of the victim's seven-year-old son was also placed in danger. That would not have been an element of the offense. Thus, the factor was

properly applied to the conspiracy. See State v. John Eric Johnson, No. 01C01-9406-CR-00232, (Tenn. Crim. App., at Nashville, April 7, 1995), perm. app. denied (Tenn. 1995) (applying Tenn. Code Ann. § 40-35-114(10) to a conviction for second degree murder when persons other than the victim were in the zone of danger). The factor does not, however, apply to the defendant's aggravated arson conviction. In order to sustain a conviction for aggravated arson, "one or more persons" must be inside the structure when the fire is set or must suffer serious bodily injury as a direct result of the blaze. See Tenn. Code Ann. § 39-14-302(a). The risk to human life is inherent in the offense. Because the statute contemplates the presence of more than one person, the danger to the victim's son may not be used to enhance the sentence. See State v. Robert Gene Malone, No. 03C01-9110-CR-00307 (Tenn. Crim. App., at Knoxville, March, 31, 1992).

As to mitigating factors, the defendant claims that the trial court should have considered that he was acting under strong provocation; that he played a minor role in the commission of the crimes; that he lacked substantial judgment because of his youth; and that he was acting under the domination of his female co-defendant. See Tenn. Code Ann. § 40-35-113 (2), (4), (6) and (12).

The defendant was twenty-one at the time these crimes were committed and had no prior criminal record; thus, slight mitigation due to his youth might have been appropriate. The evidence, however, simply does not support

his claim that he was acting under strong provocation or that he was otherwise under the domination of Ms. Hall. While she originated the plan for the defendant to kill her mother and brother, the defendant readily agreed to participate. Due to the period of time between the initial planning and the carrying out of the crimes, the defendant had ample time to reconsider. Moreover, the defendant actually set the fire. Obviously, therefore, he also played more than a "minor role" in the commission of the crimes.

In summary, the trial court properly applied five enhancement factors to the defendant's conviction for aggravated arson and six to his conviction for conspiracy to commit first degree murder. One enhancement factor was improperly applied to the attempted arson conviction and some consideration should have been given one mitigating factor. In our view, the applicable enhancement factors carried great weight and the single mitigating factor warranted only slight consideration. Thus, the maximum sentence for each offense is still justified.

We turn now to the issue of consecutive sentencing. Consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria exists:

> (1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
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> (2) The defendant is an offender whose record of criminal activity is extensive;

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

Tenn. Code Ann. § 40-35-115(b). However, even if the court finds one of these factors applicable, aggravating circumstances must be present before consecutive sentences may be imposed. Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976).

The trial court determined that the defendant was a dangerous offender and thus qualified for consecutive sentences for conspiracy to commit first degree murder and aggravated arson. The defendant claims he did not qualify as a dangerous offender. Because the trial court did not consider on the record some of the applicable factors, our review must be de novo without the presumption of correctness.

In Gray, our supreme court had ruled that before consecutive sentencing could be imposed upon the dangerous offender, as now defined by subsection (b)(4) in the statute, other conditions must be present: (a) that the crimes involve aggravating circumstances; (b) that consecutive sentences are a necessary means to protect the public from the defendant; and (c) that the term reasonably relates to the severity of the offenses. More recently, in State v. Wilkerson, _____ S.W.2d _____ (Tenn. 1995), our high court reaffirmed those principles, holding that consecutive sentences cannot be required of the dangerous offender "unless the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public from further serious criminal conduct by the defendant." Slip op. at 13. The Wilkerson decision, which modified somewhat the strict, factual guidelines for consecutive sentencing adopted in State v. Woods, 814 S.W.2d 378, 380 (Tenn. Crim. App. 1991), described sentencing as "a human process that neither can nor should be reduced to a set of fixed and mechanical rules." Slip op. at 13-14 (footnote omitted).

Here, the defendant was twenty-one years old, had some prior work experience, and had no prior criminal record. Those facts weigh against the imposition of consecutive sentences. Nonetheless, that does not suggest that every youthful, first time offender with a work history is amenable to rehabilitation. There are other factors here which weigh strongly in favor of consecutive sentences. The defendant quit school upon completion of the tenth grade. The

defendant's subsequent attempt to elicit perjured testimony from Phillip Denton in conjunction with the trial of these offenses is particularly troublesome. Rather than accepting responsibility for his misconduct or exhibiting any degree of remorse, the defendant attempted to manipulate the results of his trial. That the defendant threatened to rape the Sheriff's daughter, injure Denton's family, and do harm to a variety of other law enforcement officials and their families is of considerable concern. That does not indicate an amenability to rehabilitation. It suggests a need to protect the public.

In summary, the circumstances surrounding the commission of these offenses clearly demonstrate that the defendant is a dangerous offender. After time for reflection, the defendant chose to set fire to a home containing two sleeping persons, one of whom was seven years old; he fully expected both victims to perish in the blaze. These circumstances qualified as particularly aggravated. The severity of the offenses warrants an aggregate sentence of fifty years. Finally, the violent nature of these offenses and the failure of the defendant to exhibit any rehabilitative qualities demonstrates the necessity for societal protection by lengthy incarceration. Thus, consecutive sentencing appears to be warranted.

Accordingly, the judgment is affirmed.

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Gary R. Wade, Judge

CONCUR:

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Joseph M. Tipton, Judge

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Robert E. Burch, Special Judge