IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1995 SESSION

STATE OF TENNESSEE, Appellee,	)	No. 03C01-9502-CR-00050
v.	)	Sevier County
HUEY MATTHEW MOONEY, III, Appellant.	)	Hon. Rex Henry Ogle, Judge (Aggravated assault and Driving on a suspended license)

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OPINION FILED:_____

CONVICTIONS AFFIRMED; SENTENCE MODIFIED IN PART

Joe D. Duncan
Special Judge

O P I N I O N

The defendant, Huey Matthew Mooney, III, appeals his convictions for aggravated assault and driving on a suspended license. For his aggravated assault conviction, the defendant was sentenced as a Range I offender to the Department of Correction for six years, and for his suspended license conviction, he received a concurrent jail sentence of six months.

For clarification purposes, we note that there were two trials in this cause. At the first trial on October 17, 1994, the defendant was tried on a four-count indictment. Two counts charged the defendant with driving a motor vehicle while his driver's license was revoked or suspended, one count charged a motor vehicle registration violation, and the remaining count charged aggravated assault. All the offenses were alleged to have occurred on September 21, 1993, except for one of the suspended license violations that allegedly occurred on September 29, 1993. At the first trial, the defendant was convicted of the three motor vehicle violations, but the jury was unable to agree on the aggravated assault charge and a mistrial was declared as to that offense.

Subsequently, on November 28, 1994, another trial was held regarding the aggravated assault count of the indictment. This trial resulted in the jury finding the defendant guilty of aggravated assault.

Thus, we have before us for review the defendant's aggravated assault conviction from the second trial and his suspended license conviction from the first trial. The defendant does not contest in this appeal his other two misdemeanor convictions that occurred in his first trial.

In addition to his challenge to the sufficiency of the evidence regarding his aggravated assault conviction, the defendant also contends that the trial judge should have recused himself from these proceedings, and raises other issues regarding various rulings made by the trial court.

From our review of the record, we find no reversible error and the judgments are affirmed, with the defendant's aggravated assault sentence to be modified by reducing this sentence from six years to five years.

The state's theory in this case was that the defendant unlawfully and unjustifiably assaulted the victim, Steven B. LaFollette, by beating him about the head and eye, causing the victim to sustain serious bodily injuries. Further, the victim was not the aggressor in this encounter, and in fact, neither did anything to provoke the assault on him nor did he strike any blows to the defendant.

The defendant's theory was that the victim was the initial aggressor in this affair, that the defendant first struck him, and that his actions at the time were done in his own necessary self-defense. Thus, the defendant claimed that his actions were justified.

In reviewing an issue on appeal which challenges the sufficiency of the evidence, the evidence must be reviewed in the light of several recognized principles of law.

First, a jury verdict of guilty, approved by the trial court, accredits the testimony in favor of the state and resolves all conflicts in the evidence in favor of the state's theory. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Further, a guilty verdict removes the presumption of innocence and raises a presumption of guilt. Id.

657 S.W.2d at 410. Also, on appeal, after viewing the evidence in the light most favorable to the state, the relevant question is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 2789 (1979); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978); T.R.A.P. 13(e). Additionally, the issue of whether a defendant's actions are justified in defense of self is a question of fact for the jury. State v. Williams, 784 S.W.2d 660 (Tenn. Crim. App. 1989).

We will review the evidence in some detail, as such will be helpful not only in answering the defendant's evidentiary issue, but also in our consideration of some of his other issues.

The evidence in this case showed that the aggravated assault charge against the defendant arose out of an incident that occurred on September 21, 1993, at the Pigeon Forge Park in Sevier County. The defendant was at the park on that occasion, coaching a softball game. The victim, Mr. LaFollette, was the Parks and Recreation Director for Pigeon Forge, and he was at the park at the time, being engaged in his various duties. The defendant was twenty-nine years old, five feet, eleven and a half inches in height, and weighed two hundred thirty pounds. The victim was forty-two years of age, five feet, five or six inches tall, and weighed one hundred fifty-two pounds.

During the course of the softball game that was taking place at the park on this occasion, the defendant disputed one of the decisions made by one of the umpires. Rick Wear was the head umpire and was umpiring behind home plate. The defendant became very upset over what he believed was a wrong call by one of the other umpires. The defendant continued to argue over the call even after other players had completed their turn at bat.

On two occasions, Rick Wear told the defendant to go to the dugout, but the defendant continued to argue, and Wear told him once more to go to the dugout, and told him that if he didn't, he would eject him from the game. According to Wear's testimony, the defendant told him, "I'll stand where the f--- I want to." At that time, Wear ordered the defendant out of the game. Wear went on about his duties, and did not see the subsequent encounter that took place between the defendant and the victim.

Roger Whaley, an employee of the Pigeon Forge Parks and Recreation Department, was engaged in his duties at the park at the time, and the defendant approached him, complaining about being thrown out of the game. Whaley refused the defendant's request to put him back in the game. Whaley heard the defendant cursing. Whaley did not see the actual encounter that led to the victim's injuries, but soon he saw the victim who had "blood all over his head." Whaley called the police who arrived soon after the defendant left the scene in his car. The police pursued the defendant and soon apprehended him.

The victim, Steven B. LaFollette, gave this version of the incident:

The defendant came up to him at the park, was cursing, and wanted him to put him back in the game. LaFollette told him that the "best thing he could do was just go on home," further telling him that "we would never overrule an umpire." LaFollette thought the defendant had left, but soon saw him again. He heard the defendant say he was going to kill that "F-GD Rick Wear." LaFollette told the defendant, "If you want to continue to play ball here . . . you're going to have to watch your mouth."

Next, according to LaFollette, he turned to go to call the police, at which time the defendant attacked him from behind. He felt the defendant's hands on his shoulders, and then the defendant pulled his head back and began administering "hard

blows" to the area around his right eye. Someone pulled the defendant off of him, and as he fell the defendant hit him again in the head, which blow "busted" his head open.

LaFollette claimed that he landed no blows on the defendant, stating that he could not hit him even if he had wanted to, "because the defendant had me from behind."

As a result of the defendant's attack, the victim testified that he sustained serious bodily injuries. He was taken to the Sevier Medical Center where he received thirteen stitches to his head. His injuries were so serious that he had to be taken to the University of Tennessee Hospital where he was in surgery for several hours. His eye lid had to be stitched down for several days. His sinus cavities were crushed, he suffers from migraine headaches, and it is necessary to take daily medications to relieve his ailments.

According to the victim's oral surgeon, Dr. Jack E. Gotcher, the victim had "facial swelling and bruising as well as obvious bony injuries in and around his eye and cheek bone." Reconstruction work, using small bone plates, had to be done on the victim's cheek bone, and other plates were used during the surgical procedures "in the floor of the orbit or floor of the eye socket." Dr. Gotcher stated that the victim had "permanent numbness" on the right side of his face, and opined that "probably" additional surgery would be required.

Other evidence by the state included the testimony of two women, Brenda Huskey and Addie Reed. Both worked in the concession stand at the park and heard the defendant arguing about being thrown out of the game. Ms. Huskey heard the defendant say he was going to "F-ing kill somebody." Ms. Reed also heard the defendant cursing. She stated that the defendant was "mad," and that the victim was

“calm.” Neither saw the actual encounter between the defendant and the victim, but saw the victim afterwards and observed that he was “all bloody.”

Another witness, Howard Stoffle, testified that he heard the defendant talking to others about the umpire’s call, and he could tell from the tone of the defendant’s voice that he was upset. Stoffle heard someone say, “gosh, they’re fighting,” at which time he turned and saw that the defendant had the victim in a headlock and was hitting him with “rapid licks.” Stoffle described the force being used by the defendant as “hard,” and “you could hear it crack.”

Stoffle testified that he got between the defendant and the victim in an effort to stop the fight, at which time the defendant “squared off” like he was going to hit Stoffle. Stoffle added that the victim didn’t do anything to the defendant, because he “couldn’t.”

On cross-examination, Stoffle testified that he was an “evangelist,” preaching mostly in jails and prisons. He said he could tell the defendant was angry, but that the defendant wasn’t “yelling or screaming or cussing,” and added that he did not see the beginning of the fight. On redirect examination, Stoffle said he did not see the victim “doing anything at all,” because “he was in a position with a headlock and that there was no way he could defend himself.”

Another witness for the state, Lisa Tant, a student at the University of Tennessee, was at the ball park with her boyfriend. Prior to that occasion she did not know the victim by face but knew his name, and only learned later that he was a second cousin to her boyfriend.

According to Ms. Tant, she heard the defendant talking to the girl in the "score box." The defendant was very upset and was "using cuss words." She saw a "commotion out of the corner" of her eye, turned to look and saw the victim "walking away" from the defendant, at which time the defendant grabbed the victim's arm and "turned him around and hit him," and the victim went "down on the ground and Mr. Mooney hit him again while Steve was still on the ground." The victim was not able to defend himself or hit back, because he was "walking away" from the defendant when the defendant grabbed his arm and swung him around and hit him, knocking him to the ground.

The defendant testified in his own defense. The defense also offered testimony from the defendant's mother, his wife and a friend. Neither the defendant's mother nor his wife witnessed the difficulty at the ball park on this occasion.

The defendant's mother testified that the defendant was blind in his right eye, having lost the sight of that eye when he was hit with a pole at the age of seven years. She described the defendant as being "jumpy," because when something is thrown at him, "he's got to adjust himself to that blind spot." She acknowledged that he had played baseball and softball all his life, and had played football throughout junior high and high school.

The defendant's wife, Jennifer Mooney, testified that the defendant was "protective over that eye." She stated that it was obvious to her that since "he only has that one eye, he needs to protect it, so he is protective against it." She stated that the defendant is a "good sports player and he knows what to expect, knows what's coming." On cross-examination, she acknowledged that the defendant had participated on one occasion in a boxing contest in Knoxville, characterized as a "Tough man

contest." On redirect examination, she stated that the participants in that boxing contest wore protective gear and boxed with gloves.

The defendant testified that he was presently living in Louisiana where he was engaged as a cement contractor, but that in September of 1993 he was a carpenter.

According to the defendant's testimony, he was at the ball park on the occasion in question, coaching one of the softball teams. The home plate umpire made what the defendant believed was a bad call, and the defendant was upset over the call, but he was not "yelling or screaming over the call." He told the umpire, "that was a bull-crap call," and the umpire said "you're out of the game." He tried to talk to LaFollette and Whaley to get them to go with him to the umpire to get the umpire to give him a reason for throwing him out of the game. The only foul language he used was the word "bullshit." Even though he was upset, he never threatened anyone's life, and did not curse as the state's witnesses had said.

Further, the defendant testified that at some point, the victim came up to him, raised his voice at the defendant, and threatened to throw him out of the league. That was when "everything happened." The defendant said that the victim was in his face, and that the victim "hit me with his hands like that and he was shaking his finger at me. And that's when I pushed back and I hit him and then I grabbed him and hit him a couple more times."

Additionally, the defendant stated that being blind in one eye, he had to "protect fingers to the eye." He said the victim was too close to him, that the victim hit him in the chest, and he had to defend himself because he was scared of losing his sight. The defendant explained that when he was in the "tough man" contest, he was

not “scared to get hurt,” because of the “sixteen ounce gloves” and the “protective head gear.”

On cross-examination, the defendant acknowledged that his eye problem had not kept him from engaging in sports. He had been a “linebacker” in football when he was in high school and had won various honors for his football prowess. He had played baseball and softball over the years. The boxing contest in Knoxville was “the bad man contest,” rather than “the tough man contest.” It is an elimination contest, and you box three one-minute rounds, a prize of fifteen hundred dollars is given to the ultimate winner. He participated in two matches on two successive nights, and he was not afraid of injuring his eye because of the protective head gear.

The defendant did not recall using any curse words other than the “BS” word, and had not ever had any problems with the state’s witnesses and could not understand why they would testify as they did. He reiterated that the victim was in his face, was shaking his finger at him, and that when the victim pushed him, he got the victim in a headlock and hit him several times.

The defendant’s other witness, David Brian Sutton, testified that he and the defendant were friends. He stated that the victim walked up behind the defendant, “said something to him, tapped him, Matt turned around and they started talking and going on. Steve was throwing his hands around . . . . I turned back around and Steve just went up real fast with his hands, like that . . . . He just come up, he hit his chest if he hit anything. . . . .” Then, according to Sutton, the defendant grabbed the victim, hit him three times, and when Sutton stepped between them, the defendant “swung one more time.” When Sutton told the defendant to “calm down,” the defendant started walking off.

On cross-examination, Sutton admitted that he and the defendant were drinking buddies. He conceded that he did not actually see the victim hit the defendant in the chest. He just saw the victim throw his hands up, and he couldn't tell if the victim hit him or not.

From all of the foregoing evidence, we readily conclude that the evidence is overwhelming to support the jury's verdict finding the defendant guilty of aggravated assault. The only question for the jury to determine was whether the defendant's actions on this occasion were done in his own necessary self-defense. The jury concluded that the defendant did not act in self-defense. We agree.

Unquestionably, the evidence is clear that the defendant was the initial, as well as the sole aggressor in this affair. The evidence leads us to the conclusion that the victim did not provoke this attack; rather, the defendant, being upset and angry over what he deemed to be a wrong call by the umpire, lost control over himself and in his rage, administered this beating to the victim.

We find no merit to the defendant's complaint about the evidence.

Next, the defendant contends that the trial judge, on his own motion, should have recused himself from these proceedings.

The defendant first raised this issue in his motion for a new trial. It is the defendant's insistence that since the victim in this case was employed by the City of Pigeon Forge, and since the incident occurred on the property of that city, then the trial judge should have recused himself from the proceedings because, prior to becoming a judge, he was a city attorney for the City of Pigeon Forge. Also, he maintains recusal was in order because the trial judge's wife was a city attorney for Pigeon Forge during

the proceedings in question. Defense counsel explained his tardy motion to recuse was due to his lack of knowledge of these facts until after the defendant's trial had been held.

The determination of whether to recuse oneself rests within the sound discretion of the trial judge. State v. Hurley, 876 S.W.2d 57, 64 (Tenn. 1993); Caruthers v. State, 814 S.W.2d 64, 67-68 (Tenn. Crim. App. 1991); State v. Galloway, 696 S.W.2d 364, 367 (Tenn. Crim. App. 1985).

The general rule is that a trial judge should recuse himself whenever his or her impartiality might reasonably be questioned. Alley v. State, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994); Lackey v. State, 578 S.W. 2d 101, 104 (Tenn. Crim. App. 1978); Tenn. Sup. Ct. R. 10, Canon 3(C)(1).

Supreme Court Rule 10, Canon 3(C), lists the various criteria for disqualification of a judge. Canon 3(C)(1) states, in part, that:

> A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.
> >
> > (b) He served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
> >
> > . . . .

A comment under Canon 3(C)(1)(b) states, as follows:

> A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency

> within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might be reasonably questioned because of such association.

The defendant quotes in his brief the last sentence quoted in the above paragraph, and opines that it "appears to address" the present situation. We disagree, for the reason that we find nothing in this record that would indicate in any manner that the trial judge's "impartiality might be reasonably questioned," because of his prior association with the City of Pigeon Forge, or of his wife's association with that city. We do not see that the two situations alleged here for recusal meet any of the criteria for disqualification listed in Canon 3.

At the hearing on the motion for a new trial, the trial judge stated that prior to becoming a judge, he was not an employee of the City of Pigeon Forge, but had served as a contract attorney, prosecuting traffic offenses in city court. He stated that he did not consult with the Pigeon Forge Police Department about cases that were pending in criminal court. He added that his wife presently is a contract attorney for the city, working on an hourly basis. She does not prosecute cases in criminal court, but only prosecutes traffic cases in city court.

Further, it was developed at the hearing that neither the trial judge nor his wife were involved in the prosecution of the present case. The trial judge's sole participation in the present case was limited to his duties in presiding over the trial. The prosecuting attorney stated that he had never spoken to the trial judge's wife about the case. The victim said the same thing. The trial judge also stated that no one from the City of Pigeon Forge had tried to talk to him about the case and that he had not consulted with his wife about the case, and she had never talked to him about the case.

Clearly, there is nothing in this record to show any bias on the part of the trial judge in this case, and from what we have said above, there is not even an appearance of impropriety. We conclude that there was no basis for the trial judge to recuse himself in this case. This issue is overruled.

In another issue, the defendant says that the trial court erred in overruling his motion to strike the complete jury panel, because the panel had learned of previous charges against the defendant and about his previous trial.

This issue concerns a development that occurred before the entire jury panel. Prior to selecting the first twelve jurors to try the case, the trial judge was advising the entire panel of the nature of the case that was before the court for trial. The trial judge said:

> This is the case of State of Tennessee vs. Huey Matthew Mooney. In this case, Mr. Mooney is charged with Driving a Motor Vehicle Upon a Public . .

At this juncture, the prosecuting attorney interrupted and said, “If the court please, just Aggravated Assault.” The trial judge said, “I’m sorry.” The prosecuting attorney commented, “We’ve already handled that other.” The trial judge then remarked, “Okay, I’m sorry. So he is charged with the offense of aggravated assault.”

As we mentioned in the early part of this opinion, the indictment in this case charged aggravated assault, and two offenses of driving on a suspended license, as well as a registration violation. Those traffic offenses had been disposed of in the first trial. Obviously, the trial court was referring to the indictment, and just mistakenly began to state one of the traffic charges that was mentioned in the indictment.

Apparently, the defendant was not concerned at the first trial that the jurors in that trial would be prejudiced by their knowledge of his traffic violations because there is nothing in the record to show that any objection was made to trying these traffic offenses along with the aggravated assault charge. We do not see in the record any motion for severance of offenses that was made at that first trial.

At any rate, the trial judge was quickly advised of his error, and he immediately corrected himself by stating the correct charge. Further, the jury was not even advised of the name of the traffic offense that the defendant had been charged with. We see no way that this misstatement by the trial judge could have prejudiced the jury against the defendant. At best, this minor error was harmless.

Next, the defendant claims that the trial court erred in not hearing his pretrial motions prior to conducting voir dire. The defendant specifically contends that one of these motions concerned his motion in limine, asking the trial court to exclude the evidence about his prior participation in the "tough man contest." The defendant argues that had he known prior to voir dire that the trial court would have allowed this evidence, he would have been able to question the jurors on this subject to determine if they would be prejudiced by reason of this evidence.

This motion in limine was nothing more than an attempt on the defendant's part to get an advance ruling on the admissibility of certain evidence. As a general rule, the admissibility of this particular type of evidence is a matter to be determined at the time the evidence is offered at the trial.

Nevertheless, the trial court should have made a ruling on this matter before the trial. That said, it should have been clearly evident to the defense that this evidence was proper and would be admissible at the trial, and that had the court made

a pretrial ruling, it would have been adverse to the defendant. In fact, it appears that this evidence came into the first trial without objection on the defendant's part.

The defendant claimed that one of the reasons he acted as he did on the occasion of this event was that he was apprehensive about the victim doing damage to his good eye because of his blindness in the other eye. Clearly, evidence about his prior participation in this type of boxing contest, as well as his participation in other contact sports over the years, would be a proper subject of inquiry for impeachment purposes, and the defense should have been cognizant of this fact.

While the trial court was in error in not ruling on this motion, as well as the defendant's other pretrial motions prior to the trial, under the specific facts and circumstances here, we find that no prejudice resulted to the defendant. Again, we caution all trial judges that all pretrial motions should be heard and ruled upon before the trial, unless the trial judge, for good cause shown, directs that the hearing be deferred and the merits of the motion determined at a later date. Tenn. R. Crim. P. 12(e). The phrase "before trial," used in the rule, means sometime earlier than the day the trial is to commence. State v. Aucoin, 756 S.W.2d 705, 709 (Tenn. Crim. App. 1988).

The defendant raises another issue that is somewhat akin to the prior issue, concerning the evidence relating to the "tough man contest." In this issue, the defendant argues that the evidence was inadmissible character evidence, and also contends that even if it was admissible relevant evidence, it should have been excluded because it was unfairly prejudicial to him. Thus, he maintains that the trial court erred in overruling his motion in limine to exclude this evidence.

For some of the same reasons stated in our ruling on the prior issue, as well as other reasons stated hereafter, we find this issue to be meritless also.

At the hearing, the trial court stated:

> I think that is admissible. It obviously goes to the weight as opposed to the admissibility of it, but at the previous hearing he came in and testified about his fears of having his eye put out, that he has one eye that I think he's legally blind in or . . . and so he testified that based upon his fears of certain alleged movements by Mr. LaFollette that he thought Mr. LaFollette was going to try to hurt him and that's the reason he did what he did. I think the fact that he has engaged in other activities, other, you know, for lack of a better term, violent activities certainly can be used to show that he wasn't afraid. And so for that reason the Court's going to let that in.

The defendant, his mother and his wife, all testified about his blindness in one eye, and about how he was always protective of his other eye. One of the defendant's main theories was that he acted on this occasion as he did because of his apprehension and fear of losing the sight in his other good eye.

Obviously, as we have indicated in ruling on the previous issue, the state was entitled to cross-examine the witnesses regarding this "tough man" evidence in an attempt to discredit the testimony about the defendant's concern for protecting his eye. The state was entitled to develop the evidence to show that it was inconsistent for the defendant to be concerned about protecting his eye, yet for him to participate in boxing and other athletic events which could have caused damage to his good eye.

The admission of this evidence was for the above purpose and was not used by the state as character evidence against the defendant. Also, the defendant's participation in this boxing event indicated his belief in his ability to defend himself. As such, it was an indication that the defendant, a much larger man than the victim, did not "have a reasonable belief" that there was "an imminent danger of death or serious

bodily injury" to him, as well as being an indication that the "danger creating the belief of imminent death or serious bodily injury" was not real or honestly believed to be real at the time, nor was it "founded upon reasonable grounds." T.C.A. § 39-11-611(a). These are elements which must be established when a defendant relies on the defense of self-defense.

The evidence was clearly admissible and its admission did not unfairly prejudice the defendant.

Another issue by the defendant challenges the admission of other evidence which he contends should have been excluded because it was irrelevant, speculative, without foundation and was inadmissible character evidence.

This evidence concerned some of the testimony given by the umpire, Rick Wear. Wear had testified that he told the defendant three times to go to the dugout or he would eject him from the game. Wear and the defendant were two to three feet apart at the time. According to Wear, the defendant said to him, "I'll stand where the f--- I want to," at which time Wear "tossed him out of the game." After this testimony, the record shows the following:

> Q. Alright, Sir. How was his demeanor as he said that to you?
>
> A. Mr. Mooney was extremely mad. When I checked him out of the game, you know, there's a particular way umpires do that, I toss my hand up and say you're out of here. Mr. Mooney at that time continued to argue. I've dealt with violent people, I was a police officer for ten years, so I know what a violent person is. I know how to deal with violent people. I know at what point these people become angry.
>
> MR. LOWE (defense counsel): Objection, your honor. Irrelevant.
>
> THE COURT: He can obviously say that he was a police officer and has dealt with situations before, so..
>
> A. Okay. I was a police officer for ten years. I've dealt with situations where I have to talk face to face with people and I

> know when they're violent, at what point, you know, we have to do something to either defend ourself, arrest these people or whatever. Mr. Mooney was to the point where I felt like he was going to become violent. At that point I turned and walked away. I felt like if I hadn't walked away at that time, there would have been some type of physical contact.
>
> Q. What happened then?
>
> A. Mr. Mooney continued to argue. He told me he would be back.

In Tennessee, the admissibility and relevance of evidence is within the sound discretion of the trial court. When arriving at a determination to admit or exclude even that evidence which is considered relevant, trial courts are generally accorded a wide degree of latitude and will only be overturned on appeal where there is a showing of abuse of discretion. State v. West, 737 S.W.2d 790, 793 (Tenn. Crim. App. 1987); State v. Moffett, 729 S.W.2d 679, 682 (Tenn. Crim. App. 1986); Tenn. R. Evid. 401. We find no abuse of discretion in this case.

Initially, we note that at the trial, the defendant's only objection to this evidence was on the ground that it was irrelevant, and thus this is the only ground that has been properly preserved for appellate review. A trial judge will not be put in error on grounds raised for the first time on appeal when the objection at trial was based on another ground which was declared insufficient. State v. Brock, 678 S.W.2d 486, 490 (Tenn. Crim. App. 1984). In any event, all of the objections raised to this testimony are without merit.

Whether disputed testimony is relevant must be considered in the context in which it is given. Wear's testimony about his experience with "violent people" while he was a police officer was nothing more than an explanation of why he had turned and walked away in order to avoid trouble with the defendant. Wear stated that "I felt like if I hadn't walked away at that time, there would have been some type of physical contact."

Thus, his past experience as a police officer was relevant to show his state of mind at the time, and explained the actions he took in an attempt to avoid the difficulty which he perceived would take place, had he not walked away.

For the same reasons expressed above, we also find that the evidence was not speculative, was not without foundation, nor was it admitted as character evidence. We especially point out that the witness was not expressing his opinion as to whether the defendant was a violent person. He was merely speaking of his knowledge of "violent people" in the abstract. Concerning the defendant, the witness said that he felt like the defendant "was going to become violent," not that he was a violent person at that time.

We find no merit to this issue.

The defendant also claims that the evidence regarding his second charge of driving on a suspended license should have been excluded by the trial court. The defendant argues that the stop of his car was illegal, and therefore the evidence should have been suppressed.

The defendant has waived this issue for the reason that he did not file a pretrial motion to suppress this evidence. Motions to suppress evidence must be raised prior to trial. Tenn. R. Crim. P. 12(b)(3).

Our court has held that "[f]ailure to timely raise objections which must be made prior to trial constitutes a waiver of those objections, but the Court can for good cause grant relief from the waiver." State v. McCray, 614 S.W.2d 90, 94 (Tenn. Crim. App. 1981); see also State v. Randolph, 692 S.W.2d 37, 40 (Tenn. Crim. App. 1985). No good cause was shown in the present case.

In his final issue, the defendant contends that the trial court erred in denying him probation, and also claims that his sentence, as set by the trial court, was excessive.

In reviewing sentencing issues, including the alleged excessiveness of the sentence, as well as the granting or denial of probation, this court is obligated to conduct a de novo review on the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (1990); State v. Fletcher, 805 S.W.2d 785 (Tenn. Crim. App. 1991). We have interpreted this standard of review to mean that if the trial court properly considers the relevant factors, and the findings of fact by the trial court are adequately supported by the record, then we must affirm even if we as the reviewing court would prefer a different result. Id.

However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the appropriate sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The burden is on the defendant to show that the sentence imposed was improper.

In fixing a particular sentence, if the trial court fails "to state the mitigating and enhancement factors relied upon, there is no presumption of correctness on appeal," and in that event, appellate review is de novo upon the record. State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994).

Regarding the issue of probation, especially mitigated or standard offenders convicted of a Class C, D, or E felony are presumed to be favorable candidates "for alternative sentencing options in the absence of evidence to the contrary." T.C.A. § 40-35-102(6). With certain statutory exceptions, none of which

apply in the present case, probation must be automatically considered by the trial court if the sentence imposed is eight years or less. Where a defendant is entitled to the statutory presumption of alternative sentencing, the state has the burden of overcoming the presumption with evidence to the contrary. Conversely, the defendant has the burden of establishing suitability for probation, even if the defendant is entitled to the presumption of alternative sentencing. T.C.A. § 40-35-303(b) (Supp. 1994). The obligation rests on the defendant to establish that probation will not only serve his best interest but is also in the best interest of society. State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990); State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978).

The nature and circumstances of the criminal conduct involved are to be considered in ruling on the question of probation. Other criteria to be considered are the defendant's potential or lack of potential for rehabilitation, including the risks that during the period of probation the defendant will commit another crime, whether a sentence of probation would unduly depreciate the seriousness of the offense, and whether a sentence other than probation would provide an effective deterrent to others likely to commit similar crimes. T.C.A. §§ 40-35-103(1)(B), (5); 40-35-210(b)(4).

Further, one factor may be sufficient for the trial court to deny probation. State v. Gentry, 656 S.W.2d 53, 55 (Tenn. Crim. App. 1983). Also, the circumstances of the offense, especially where violence is employed, may be appropriate considerations in the denial of probation. State v. Gennoe, 851 S.W.2d 833, 837 (Tenn. Crim. App. 1992).

At the sentencing hearing, the trial court pointed out the seriousness of the defendant's offense and the aggravating circumstances that were present in his commission of the offense. Among other things, the court said:

> I must say that except for murder cases that this court has tried, that I have never seen a more heinous attack on a

> fellow human being that's come through this court. You unmercifully and unprovoked, out of control, beat and like to have killed a man who was just doing his job. You left the ball field after objecting to a call and walked all around the park up there, looking to find somebody to fight. Now that's what the court thinks. Stated that you were going to "f---ing" kill somebody, as I recall the testimony.
>
> And you came into this court and stated that you did what you did to Mr. LaFollette because you were afraid of your eye, that he was going to hit you in the eye. That I totally reject; find it totally and completely without any merit whatsoever. The Jury totally rejected that.
>
> You are a strong, powerfully built man who has a history of engaging in strong physical labor and involved in sports, the tough man contests. Nobody in this courtroom believed that you were afraid of Steve LaFollette. And even if you were, and as I say, I reject that, but even if you were, you provoked any attack, you started it. You started it.
>
> And I say the damage that you did to this man is so outrageously excessive, his eyeball hanging out of its socket, you shattered his eye socket, the surgeries that this man has gone through, the damage that this man has gone through, that he will have to go through for the rest of his life, it is totally and completely out of proportion to any sense of human decency.

The trial court concluded that the defendant was not entitled to probation. We agree. The trial court properly exercised its discretion in denying probation to the defendant.

The defendant also claims that the sentence imposed was excessive. For his conviction of aggravated assault, a Class C felony, the defendant was eligible, as a Range I offender, for a sentence of not less than three (3) years, nor more than six (6) years. T.C.A. § 40-35-112(a)(3). The trial court imposed upon him the maximum sentence of six years.

Regarding the length of a particular sentence, the sentence imposed by the trial court is presumptively the minimum in the range unless there are enhancement

factors present. T.C.A. § 40-35-210(c). In State v. Jones, supra, the court said the following:

> The sentence imposed cannot exceed the minimum sentence in the range unless the state proves enhancement factors. If there are enhancement but no mitigating factors, then the court "may set the sentence above the minimum in that range but still within the range." T.C.A. § 40-35-210(d). If there are enhancement and mitigating factors, "the court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors." T.C.A. § 40-35-210(e).
>
> However, only those enhancement factors specifically authorized by statute may be used to increase a sentence. Further, there are two significant limitations on the use of enhancement factors that may be established by the proof -- enhancement factors must be "appropriate for the offense" and "not themselves essential elements of the offense." T.C.A. § 40-35-114. The obvious purpose of these limitations is to exclude enhancement factors which are not relevant to the offense and those based on facts which are used to prove the offense. Facts which establish the elements of the offense charged may not also be the basis of an enhancement factor increasing punishment.

883 S.W.2d at 601.

The appropriate statutory enhancing and mitigating factors are set forth in T.C.A. §§ 40-35-113 and -114. The nature and characteristics of the criminal conduct involved are to be considered along with the enhancing and mitigating factors. T.C.A. § 40-35-210(4) and (5).

In setting the maximum sentence of six years for the defendant, the trial court specifically found two applicable enhancing factors, one being that the defendant had a previous history of criminal convictions or criminal behavior, and the other being that the defendant had no hesitation about committing a crime where the risk to human life was high. T.C.A. § 40-35-114(1) and (10). In the opinion of the trial court, no applicable mitigating factors were present.

The factor involving the defendant's previous history of criminal convictions is not in dispute. His prior convictions were for misdemeanors. In 1985, he was found guilty of disturbing the peace and was fined fifty dollars and sentenced to thirty days. In 1986, he was sentenced to thirty days and fined one hundred dollars upon his conviction for battery. In 1987, he was convicted of driving while intoxicated, and received a fine of one hundred dollars and a suspended sentence of six months, and in 1990, he was convicted of a battery, and he was placed on probation for two years. Thus, it was proper for the trial court to use this factor in considering whether to increase the defendant's sentence above the minimum sentence.

Also, enhancement factor (10), listed under T.C.A. § 40-35-114 -- that the defendant had no hesitation about committing a crime where the risk to human life was high -- was an appropriate factor to use in this case. The facts and circumstances surrounding the commission of this offense of aggravated assault show that this factor was not relevant to the establishment of the offense of aggravated assault, nor was it an element of aggravated assault. See State v. Jones, supra.

In the Jones case, the defendant was found guilty of aggravated assault. That case involved a purse snatching incident where the defendant pushed the victim down causing her to sustain serious bodily injury. The supreme court held that since "high risk to human life obviously is not required to establish aggravated assault causing serious bodily injury, enhancement factor (10) is not an element of the offense charged and is not precluded from consideration for enhancement purposes . . . ." 883 S.W.2d at 602, 603. However, in Jones, the court declined to apply this factor because "there is no evidence that the defendant's actions created a high risk to human life." Id. at 603.

Nevertheless, the facts in the present case are far different from the facts in the Jones case. We see no need to restate the aggravating facts in this case. The evidence we have set out in this opinion, along with the trial judge's comments and conclusions set forth above, well demonstrate that the defendant's actions created a high risk to the victim's life. Suffice it to say, the defendant gave the victim a brutal and vicious beating, his actions being far in excess of those actions that constitute the offense of aggravated assault. Except for the intervention of others, the defendant could well have been on trial for a higher offense than aggravated assault. Enhancement factor (10) was properly utilized in this case to increase the defendant's punishment.

Also, while it does not appear that the trial judge used it, the facts in this case would warrant the use of enhancement factor (5) under T.C.A. § 40-35-114. This factor is applicable where "The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense." While any offense of aggravated assault involves some cruelty, the cruelty in this case far exceeded the requisite amount.

Thus, we find that enhancement factors (1), (5), and (10) are applicable in this case.

The trial judge found that no mitigating factors were present. Notwithstanding that finding, the record does contain some facts that offer some mitigation.

The record shows that the defendant was twenty-nine years of age, had been married for five years, and had one child. At the time of the hearing, he was living in Louisiana, and was gainfully employed as a crew foreman by the C.B. King

Construction Company. The defendant had no prior felony convictions, but had four prior misdemeanor convictions, which we mentioned earlier in this opinion.

The defendant argues that he was entitled to some consideration on his sentence for several reasons, including his good work record, his social history, his repentance and remorse, and his willingness to pay restitution. The state suggests that the trial judge should have given some consideration to these factors in mitigation, pursuant to the "catch-all" mitigating factor in T.C.A. § 40-35-113(13), but says that enhancement factor (10) outweighs the mitigating evidence presented by the defendant.

It does appear that the defendant had a favorable work record. His Louisiana employer furnished a letter to the court favorably recommending him. Other information in the record indicated a stable family situation. His child had been born after the trial but before the sentencing hearing. He had stated his regret for the incident, and indicated his willingness to pay restitution, and once during a recess at the last trial he had expressed his remorse to the victim. Also, in his favor, as indicated heretofore, the defendant had no prior felony convictions. We agree with the state's suggestion that the trial judge should have given some consideration to these factors in mitigation.

From all of the foregoing, we conclude that the defendant is entitled to some consideration for these favorable factors in mitigation, but nevertheless, the aggravating facts and circumstances of this case, when considered in the light of the enhancement factors, dictate that his sentence should be set close to the maximum sentence. For all the reasons stated, we hold that five years would be an appropriate sentence for the defendant, and the judgment shall be modified to reduce his sentence from six years to five years.

In conclusion, we state that while we have found a couple of minor errors in this case, they quite clearly do not rise to the level of being reversible errors. The record affirmatively demonstrates that the defendant received a fair trial by the jury. Accordingly, the defendant's conviction of aggravated assault is affirmed, as modified above. Also, his conviction (in the first trial) of driving on a suspended license is affirmed.

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Joe D. Duncan, Special Judge

CONCUR:

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Joseph M. Tipton, Judge

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John K. Byers, Senior Judge