

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 24, 2007 Session

STATE OF TENNESSEE v. CHARLES EDWARD GRAHAM

**Appeal from the Criminal Court for Knox County
No. 80738 Richard R. Baumgartner, Judge**

No. E2005-02937-CCA-R3-CD - Filed January 24, 2008

After a jury trial, Appellant, Charles Edward Graham, was convicted of reckless aggravated assault, tampering with evidence, possession of marijuana¹ and failure to provide proof of financial responsibility. The trial court sentenced Appellant as a career offender to twelve years for reckless aggravated assault, fifteen years for tampering with evidence, six years for possession of marijuana and to pay a \$100 fine for failure to provide proof of financial responsibility. The trial court ordered the sentences for reckless aggravated assault and tampering with evidence to run consecutively to each other and concurrently to the remaining sentences, for a total effective sentence of twenty-seven years. After the denial of a motion for new trial or, in the alternative, a judgment of acquittal, Appellant filed a timely notice of appeal. In this Court, Appellant presents the following issues for our review: (1) whether the trial court erred in charging the jury with reckless aggravated assault as a lesser included offense of vehicular assault; (2) whether the evidence was insufficient to convict Appellant of reckless aggravated assault and tampering with the evidence; (3) whether the trial court erred by enhancing Appellant's conviction for simple possession to a Class E felony; (4) whether the trial court improperly denied the motion for judgment of acquittal; (5) whether the trial court erred by denying the motion to disqualify the Assistant District Attorney; (6) whether the trial court improperly denied a continuance; (7) whether the trial court erred by allowing the State to impeach Appellant with charges that were more than twenty-five years old; and (8) whether the trial court improperly sentenced Appellant as a career criminal. After a review of the record, we conclude that: (1) Appellant failed to establish actual prejudice as a result of the denial of a continuance; (2) the trial court did not abuse its discretion in refusing to disqualify the Assistant District Attorney; (3) Appellant waived the issue regarding impeachment by prior convictions for failure to cite to the record or to authority; (4) Appellant waived the issue regarding jury instructions by failing to object to the inclusion of the instruction at trial; (5) the evidence was sufficient to support the convictions; (6) the trial court properly denied the motion for judgment of acquittal; (7) the trial court properly sentenced Appellant as a career criminal based on his prior convictions; (8) the trial court properly ordered consecutive sentencing based on the conclusion that Appellant was a dangerous offender;

¹The transcript of the trial and sentencing hearing indicate that Appellant was found guilty of possession of marijuana and sentenced to six years for this offense. However, the record does not contain a judgment form for possession of marijuana.

(9) we are without jurisdiction to determine whether the trial court improperly enhanced Appellant's conviction for possession of a controlled substance because there is no judgment of conviction in the record for that crime. Finding no error, we affirm the judgments of the trial court but remand for correction of the judgment with respect to failure to provide proof of financial responsibility.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Robert L. Vogel, Knoxville, Tennessee, for the appellant, Charles Edward Graham.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Randall E. Nichols, District Attorney General; Ta Kisha M. Fitzgerald, Marsha Mitchell, and Philip Morton, Assistant District Attorneys General, for the appellant, State of Tennessee.

OPINION

Between 12:30 a.m. and 1:30 a.m. on May 27, 2004, Eleanor Frances Hail was sitting in her truck on Magnolia Street in East Knoxville after leaving her job as the custodial supervisor for GCA Services Group at Pellissippi State in East Knoxville, Tennessee. Ms. Hail was parked on the side of the street when she noticed a red Mercury Sable driving very slowly up the street. The vehicle drifted from the left lane to the right lane, then began coming closer and closer to her truck. The vehicle barely missed hitting the front quarter panel of her truck on the right side. Even though she should have been able to see the driver of the vehicle if he or she was sitting up straight, Ms. Hail was unable to see the driver of the vehicle. The vehicle drove past her, turned around and pulled in behind her truck before it stopped.

Ms. Hail drove away shortly after the vehicle stopped. She went to a nearby Conoco station to buy a snack and a drink before going to her next job. When Ms. Hail exited the Conoco station, she drove down Asheville Highway. As she approached the area where Asheville Highway splits off to Rutledge Pike, she noticed that there had been an accident. She identified the red Mercury Sable that was involved in the accident as the same vehicle that almost hit her while she was parked on Magnolia Avenue.

Misty Cosson was driving in the same area in East Knoxville in the early morning hours of May 27, 2004. Ms. Cosson was acting as a designated driver for two friends. As she approached the intersection of Magnolia and Winona, Ms. Cosson saw what she described as a maroon-colored Taurus sitting on the side of the road. The vehicle abruptly pulled out in front of her and began swerving and speeding up. Because of the erratic driving by the driver of the maroon vehicle, Ms.

Cosson followed the vehicle and keyed 911 into her cell phone but did not actually dial the phone. She was not positive that anything was wrong with the driver, so she decided to follow the vehicle for a while before calling 911. When Ms. Cosson approached the split in the road at Rutledge Pike, she saw a blue vehicle sitting in the Hardee's parking lot waiting to pull out. The driver of the maroon vehicle drove over the curb and onto the sidewalk, heading straight toward the blue vehicle. Ms. Cosson could see that the driver of the blue vehicle was trying to get out of the way by hitting the gas pedal. The blue vehicle managed to pull forward about two feet before it was hit by the maroon vehicle. Ms. Cosson called 911 and stopped at the scene to see if anyone was injured. Appellant got out of the maroon vehicle and was walking back and forth, asking if the person in the blue vehicle was okay. The driver of the blue vehicle, Investigator Chris Wells of the Knoxville Police Department, was lying face first outside of the passenger side of his vehicle. Investigator Wells was screaming in pain. He was transported to the hospital where he was treated for severe injuries. As a result of the accident, Investigator Wells was unable to walk for three months and does not recall anything about the crash.

Officer Peter Franzen of the Knoxville Police Department responded to the call regarding the wreck with injuries. He was notified that the victim was a police officer. When Officer Franzen arrived on the scene, Appellant's vehicle was partially on the shoulder of the road and partially in the roadway at an angle. The victim's vehicle was near the right-hand side of the roadway, off the roadway and on the curb.

Officer Shane Watson of the Knoxville Police Department also responded to the crash. Officer Watson was initially notified that there was a reckless driver on Magnolia. The call was then upgraded when the wreck occurred. Officer Watson arrived on the scene and began to collect information for the accident report. Officer Watson asked Appellant for his driver's license, and Appellant handed him a credit card. Appellant was eventually able to locate his driver's license. Officer Watson had to repeatedly ask Appellant questions to get him back on track because Appellant kept repeating that he did not mean to hurt anyone.

While Officer Watson was questioning Appellant, Appellant was drinking something out of a small bottle. Officer Watson questioned Appellant about the beverage, and Appellant placed the bottle back into his car. Appellant told officer, Woody Bingham, that he was pulling out of Hardee's when the crash happened. Officer Bingham felt that Appellant's story was inconsistent with the damage done to the vehicles in the crash.

Appellant gave permission to Officer Watson to search his car. Appellant claimed he was not drinking and there was no alcohol in the car. Officer Watson leaned into the vehicle and noticed a half-empty bottle of Listerine mouthwash in the center console. When Officer Watson lifted the bottle, he saw a bag that contained what he thought was a marijuana cigarette. At that point, Officer Watson removed both items from the vehicle and placed them on the trunk of Appellant's vehicle. Officer Watson began to place Appellant under arrest. Officer Bingham assisted Officer Watson by turning Appellant around so that Officer Watson could pat him down for weapons. As the two officers began to handcuff Appellant, Appellant pulled away and grabbed the marijuana cigarette off

the trunk hood. Officer Watson grabbed Appellant's arm, and a tussle ensued. Appellant tried to crumble up the marijuana cigarette during the altercation.

The officers eventually gained control over Appellant and placed him inside Officer Bingham's patrol car. Once Appellant was inside the patrol car, the officers noticed that he smelled like Listerine and marijuana. Appellant was sweating, and his eyes were glassy, red and bloodshot. Appellant eventually fell asleep in the back of the patrol car. After getting Appellant into the patrol car, Officer Watson tried to collect the evidence again. The marijuana cigarette had been ripped open, and the marijuana inside had been pulled out. A further search of Appellant's vehicle revealed several partially smoked marijuana cigarettes in the console area. Based on Appellant's behavior, Officer Watson and Officer Bingham were under the impression that Appellant was under the influence of marijuana and unable to safely operate a motor vehicle.

Appellant was informed of the implied consent law. Appellant repeatedly refused to take the required test unless his lawyer was present. Officer Bingham took Appellant to jail and again informed him of the implied consent law. After refusing the implied consent test, Appellant fell asleep.

Appellant was indicted by the Knox County Grand Jury in November of 2004 for vehicular assault, driving under the influence, tampering with evidence, simple possession of a controlled substance, resisting arrest and failure to provide proper evidence of financial responsibility. At the conclusion of a jury trial, Appellant was found guilty of reckless aggravated assault as a lesser included offense of vehicular assault, tampering with evidence, possession of marijuana² and failure to provide proof of financial responsibility. The jury found Appellant not guilty of driving under the influence and resisting arrest. At a sentencing hearing, the trial court determined that Appellant was a career offender and sentenced him to serve twelve years for reckless aggravated assault, fifteen years for tampering with evidence, six years for possession of marijuana, and imposed a fine of \$100 for the failure to provide proof of financial responsibility. The trial court ordered the sentences for reckless aggravated assault and tampering with evidence to run consecutively to each other and concurrently to the remaining sentences, for a total effective sentence of twenty-seven years.

Subsequently, Appellant filed a motion for new trial, or in the alternative, for a judgment of acquittal. The trial court denied the motion, and Appellant followed by filing a timely notice of appeal. On appeal, Appellant argues that: (1) the trial court improperly denied a continuance; (2) the trial court improperly denied the motion to disqualify the Assistant District Attorney; (3) the evidence is insufficient to support Appellant's convictions for reckless aggravated assault and tampering with the evidence; (4) the trial court should have granted the motion for judgment of

²Again, there is no judgment form in the record for this conviction. In fact, this Court ordered the trial court to supplement the record with a "judgment for Appellant's conviction for possession of a controlled substance" along with a "video recording and DVD of Appellant's arrest." The trial court submitted the video recording and DVD but did not include a judgment of conviction for possession of marijuana. According to the transcript of the sentencing hearing, Appellant was convicted of possession of marijuana. This conviction was enhanced from misdemeanor simple possession to third offense possession of marijuana, a Class E felony, based on Appellant's prior convictions.

acquittal as to the convictions for reckless aggravated assault and tampering with the evidence; (5) the trial court erred by allowing the State to impeach Appellant with charges that were more than twenty-five years old; (6) the trial court improperly charged the jury with reckless aggravated assault as a lesser included offense of vehicular assault; (7) the trial court improperly determined that Appellant was a career offender; and (8) the trial court improperly enhanced Appellant's conviction for simple possession from a Class A misdemeanor to a Class E felony.

Analysis

Denial of Continuance

Initially, Appellant argues that the trial court improperly denied his motion to continue the trial. Specifically, Appellant argues that while the trial court gave him a one-week continuance, "this was an inadequate amount of time to conduct a proper investigation" and that no one would have been "prejudiced by a reasonable continuance." Appellant lists several "factors" that support the continuance, for example: (1) the State's late disclosure of a witness and failure to disclose laboratory reports; (2) the State's failure to timely disclose Appellant's criminal history; (3) Appellant's offer to waive his right to a speedy trial; (4) Appellant's lack of opportunity to view the videotapes of the arrest prior to trial; and (5) the lack of prejudice that a continuance would cause to the State. The State contends that Appellant has waived the issue for failure to cite to the record. In the alternative, the State submits that the issue is without merit.

The State correctly notes that Appellant has failed to cite to the record to substantiate his claim, however, we choose to address the issue despite the deficiencies in Appellant's brief. The granting of a continuance rests within the sound discretion of the trial court. *State v. Odom*, 137 S.W.3d 572, 589 (Tenn. 2004). We will reverse the denial of a continuance only if the trial court abused its discretion and the defendant was prejudiced by the denial. *State v. Hines*, 919 S.W.2d 573, 579 (Tenn. 1995). In order to show prejudice, the defendant must demonstrate that a different result might reasonably have been reached if the trial court had granted the continuance or that the denial of the continuance denied the defendant a fair trial. *Id.* Moreover, a defendant who asserts that the denial of a continuance constitutes a denial of due process or the right to counsel must establish actual prejudice. *Odom*, 137 S.W.3d at 589. This Court has recognized that a continuance might be appropriate in order to afford a defendant a "reasonable opportunity" to locate a witness. *State v. Morgan*, 825 S.W.2d 113, 117 (Tenn. Crim. App. 1991). However, the burden rests with the defendant to show that a continuance might have reasonably resulted in locating the witness. *Id.*; *see also Brown v. State*, 489 S.W.2d 855, 857 (Tenn. Crim. App. 1972).

First, Appellant contends that the trial court erred in denying his oral motion for continuance made on July 25, 2005, immediately preceding trial. Specifically, Appellant argued that he needed a continuance due to the State's late disclosure of the TBI laboratory witness Jacob White. During discussion of the continuance, it was noted that counsel for Appellant was appointed to the case on February 25, 2005, and that the case was originally set for trial on April 5, 2005. On March 7, 2005, counsel for Appellant requested a continuance. The State opposed the continuance because the

witnesses had already been notified of the April trial date. The trial court granted the continuance on March 7, 2005, and moved the trial date to July 20, 2005. Appellant filed another motion to continue on July 8, 2005. On July 20, the trial court heard arguments on the motion. The court granted the Appellant an additional five days and reset the case to July 25, 2005. The trial court did not abuse its discretion in denying the continuance that Appellant orally requested at trial regarding the disclosure of the TBI laboratory witness Jacob White and additional witnesses. According to the record, Appellant was informed in open court on June 30, 2005, that the State was adding Jacob White as a witness and when informed of this witness, counsel for Appellant replied, "O.K." The trial was scheduled to begin on July 20, 2005. At the conclusion of the pretrial matters that were disposed of on July 20, 2005, the trial court determined that the presentation of the proof would begin on July 25, 2005. Appellant has failed to establish actual prejudice as a result of the denial of the continuance.

Next, Appellant contends that the trial court erred in denying a continuance because the State failed to timely disclose Appellant's criminal history. We disagree. The record indicates that the State provided this information with its career offender notice that was filed on February 28, 2005, and supplemented on April 26, 2005. Furthermore, counsel for the State informed the trial court that counsel for Appellant had been given copies of judgments of convictions with docket numbers, as well as copies of Appellant's out-of-state judgments of conviction. Appellant has failed to establish actual prejudice as a result of the denial of the continuance.

Appellant also argues that the trial court erred in denying a continuance because Appellant did not have time to view the redacted videotapes of the arrest and the events leading up to the arrest. In the State's response to the motion to continue, the State asserts that the videotapes were turned over to Appellant in January and early February and that they had not been redacted. In other words, Appellant had over five months to view the videotapes and has again failed to establish prejudice as a result of the denial of the continuance.

Next, Appellant contends that he obtained information at the last minute about the existence of three eyewitnesses to the accident that were not identified by the State. At the hearing, counsel for the State insisted that the only eyewitnesses to the event were those witnesses listed on the accident report. Furthermore, counsel for Appellant failed to name these new witnesses or show that the trial court's denial of the continuance established actual prejudice. This issue is without merit.

Disqualification of Attorney General

On appeal, Appellant argues that the trial court improperly denied a motion to disqualify the Assistant Attorney General and the entire District Attorney General's Office. Counsel for Appellant argued at a hearing that Appellant was associated with an organization named Citizens for Police Reform. Further, counsel for Appellant argued that two of the Assistant Attorneys General were on the advisory board of the organization in 2004 and that one of them remained on the board at the time of the hearing. Appellant argued that in their capacity as board members of the organization, the two Assistant Attorneys General were privy to confidential information about Appellant.

Specifically, counsel for Appellant noted that a member of the organization provided a videotape to one of the Assistant Attorneys General that contained a one-act play that depicted a dramatization of Appellant's life story, for the purpose of demonstrating Appellant's involvement in the community and willingness to help others by speaking about his life experiences.

At the hearing on the motion, one of the Assistant Attorneys General confirmed that she received the videotape from a member of the organization. The videotape was presented to the Assistant Attorney General by a member of the organization, who hoped that the videotape would help Appellant's case. The member of the organization thought the videotape showed how Appellant was turning his life around by telling others about his life experiences. The Assistant Attorney General informed the member that she did not know Appellant and could not help him with anything. Further, the Assistant Attorney General informed the trial court that she was no longer "affiliated" with the organization but supported it. In fact, her last association with the organization was in 1998, while Appellant was in the penitentiary.

At the conclusion of the hearing, the trial court determined that there was nothing that would support a motion to recuse the Assistant Attorney General or the District Attorney General's Office. Specifically, the trial court noted that the Assistant Attorney General stated that her last involvement with the organization was in 1998, while Appellant was incarcerated; the Assistant Attorney General had never met Appellant and had never had a conversation about Appellant with anyone from the organization.

The determination of whether to disqualify the office of the District Attorney General in a criminal case rests within the discretion of the trial court. Appellate review of such a ruling is limited to whether the trial court has abused its discretion. *See State v. Culbreath*, 30 S.W.3d 309, 312 (Tenn. 2000); *State v. Tate*, 925 S.W.2d 548, 550 (Tenn. Crim. App. 1995).

After thoroughly reviewing the record, we conclude that this issue is waived. Appellant fails to make any citations in his brief to the record to support his contentions. *See* Tenn. Ct. Crim. App. R. 10(b) (stating "Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."). Therefore, Appellant has waived our review of this issue.

Further, even if Appellant had not waived this issue, he is not entitled to relief on this issue. At the hearing on the motion, the trial court stated, "I have not heard anything that would, in my mind, justify the disqualification of [the Assistant Attorney General or the District Attorney General's Office]." We agree. No evidence has been presented to us that shows that the trial court abused its discretion with regard to this issue.

Impeachment of Appellant

Next, Appellant contends that the trial court erred by granting the State's motion to allow impeachment of Appellant on charges that were more than twenty-five years old. Specifically,

Appellant argues that he “felt he could not take the stand” because the State got permission to impeach Appellant with three convictions from 1977 for aggravated robbery. The State argues that Appellant has waived the issue for failure to cite to authority or the record and, in the alternative, that the trial court properly ruled that the State could impeach Appellant with the convictions if he took the stand because Appellant was still incarcerated on these charges in 1995 and, thus, the convictions fell within the ten-year limit as set forth in Tennessee Rule of Evidence 609(b), which prescribes the age of prior convictions permissible for impeachment.

In his brief, Appellant makes no citations to the record and cites no authority to support his argument. Rule 27(a)(7) of the Tennessee Rules of Appellate Procedure provides that a brief shall contain “[an] argument . . . setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record . . . relied on.” Tennessee Court of Criminal Appeals Rule 10(b) states that “[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this Court.” *See also State v. Sanders*, 842 S.W.2d 257, 259 (Tenn. Crim. App. 1992) (determining that issue was waived where defendant cited no authority to support his complaint). This issue is waived. Moreover, as the trial court found, the record reflects Appellant was not released from incarceration for these offenses until 1995. Thus, the impeachment with the prior convictions was not time barred.

Jury Instructions

Appellant claims that the trial court improperly charged the jury with reckless aggravated assault as a lesser included offense of vehicular assault. Specifically, Appellant argues that vehicular assault and reckless aggravated assault are both Class D felonies and rather than being a lesser included offense, reckless aggravated assault is a “separate, equally serious charge.” The State disagrees, arguing that Appellant waived the issue for failure to object to the charge at trial. In the alternative, the State argues that the trial court properly instructed the jury.

Our review of a trial court’s charge to the jury regarding lesser included offenses is de novo with no presumption of correctness. *State v. Moore*, 77 S.W.3d 132, 134 (Tenn. 2002). In *State v. Burns*, 6 S.W.3d 453 (Tenn. 1999), the following test for determining whether an offense is a lesser included offense of another was established by our supreme court:

An offense is a lesser-included offense if:

- (a) all of its statutory elements are included within the statutory elements of the offense charged; or
 - (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing
 - (1) a different mental state indicating a lesser kind of culpability; and/or
 - (2) a less serious harm or risk of harm to the same person, property or public interest;
- or

(c) it consists of

- (1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
- (2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
- (3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b).

Burns, 6 S.W.3d at 466-67. An instruction on a lesser included offense must be given if the trial court, viewing the evidence most favorably to the existence of the lesser included offense, concludes (a) that “evidence exists that reasonable minds could accept as to the lesser-included offense,” and (b) that the evidence “is legally sufficient to support a conviction for the lesser-included offense.” *Id.* at 469. “If a lesser offense is not included in the offense charged, then an instruction should not be given, regardless of whether the evidence supports it.” *Id.* at 467. The failure to instruct the jury on lesser included offenses requires a reversal for a new trial unless a reviewing court determines that the error was harmless beyond a reasonable doubt. *State v. Ely*, 48 S.W.3d 710, 727 (Tenn. 2001). In making this determination, the reviewing court must “conduct a thorough examination of the record, including the evidence presented at trial, the defendant’s theory of defense, and the verdict returned by the jury.” *State v. Allen*, 69 S.W.3d 181, 191 (Tenn. 2002).

Vehicular assault is committed when a person “[r]ecklessly causes serious injury to another person by the operation of a motor vehicle,” as “the proximate result” of being intoxicated. T.C.A. § 39-13-106(a). A person commits reckless aggravated assault when he or she “[r]ecklessly causes an assault as defined in § 39-13-101(a)(1), and: (A) Causes serious bodily injury to another; or (B) Uses or displays a deadly weapon.” T.C.A. § 39-13-102(a)(2) (2003).³ Thus, an examination of the two offenses leads us to the conclusion that reckless aggravated assault is a lesser included offense of vehicular assault under part (a) of the *Burns* test because all of the elements of reckless aggravated assault are included within the statutory elements of vehicular assault. *Burns*, 6 S.W.3d at 466-67. The test proscribed in *Burns* is the method for determining whether an offense is a lesser included offense of another offense, not the degree or class of offense as argued by Appellant. Therefore, it is inconsequential that both offenses herein are Class D felonies. Further, we note that, “because an indictment for an offense encompasses, by implication, all lesser included offenses,” the State had no need to “amend” the indictment to charge Appellant with reckless aggravated assault if reckless aggravated assault was a lesser included offense of vehicular assault. *Delbert Lee Harris v. State*, No. M2002-00777-CCA-R3-PC, 2003 WL 1337832, at *6 (Tenn. Crim. App., at Nashville, Mar. 19, 2003), *perm. app. denied*, (Tenn. Sept. 8, 2003) (quoting *State v. Elizabeth Davis*, No. E1999-00373-CCA-R3-CD, 2000 WL 1349263, at *7 (Tenn. Crim. App., at Knoxville, Sept. 19, 2000)).

³T.C.A. § 39-13-101(a)(1) states that an assault occurs when a person “intentionally, knowingly or recklessly causes bodily injury to another.”

Moreover, we conclude that Appellant has waived this issue. A trial judge is obliged to give the parties an opportunity to object to proposed lesser included offense instructions. If a party fails to object, then the inclusion of the lesser included offense may not be used in a motion for new trial or on appeal. T.C.A. § 40-18-110(d); *see also State v. Page*, 184 S.W.3d 223, 229-30 (Tenn. 2006) (holding that the waiver of a lesser included offense for purposes of plenary appellate review is constitutionally permissible). Furthermore, not only did Appellant fail to object to the inclusion of the jury instruction at trial, Appellant actually agreed to the instruction that he now alleges is error. This Court has no obligation to grant relief “to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.” Tenn. R. App. P. 36(a). Appellant has waived appellate review of the issue.

Sufficiency of the Evidence

Next, Appellant complains that there was insufficient evidence for the jury to find him guilty of reckless aggravated assault and tampering with evidence. Specifically, Appellant argues that there was insufficient evidence that his behavior was “reckless” because “the State’s case was based on the allegation that [Appellant] acted under the influence of either marijuana or alcohol, which was the root cause of the accident” and Appellant “was acquitted on the charge of DUI,” so there was no other proof in the record to support the finding that Appellant behaved “recklessly.” With regard to his conviction for tampering with the evidence, Appellant contends that it was impossible for the State to have provided the evidence, namely the marijuana, at trial that Appellant allegedly destroyed. Furthermore, Appellant argues that even if Appellant attempted to destroy the evidence, the testimony at trial was that all of the marijuana was recovered. The State counters that the evidence is sufficient to support the convictions.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and “approved by the trial judge, accredits the testimony of the” State’s witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption “and replaces it with one of guilt.” *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S.W.2d at 75. In making this decision, we are to accord the State “the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom.” *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own “inferences for those drawn by the trier of fact from circumstantial evidence.” *Matthews*, 805 S.W.2d at 779. Further, questions of witness

credibility, the weight and value of evidence, and resolution of conflicts in the evidence are entrusted to the trier of fact. *Odom*, 928 S.W.2d at 23.

As provided by statute, a person commits reckless aggravated assault when he or she “[r]ecklessly commits an assault as defined in § 39-13-101(a)(1), and: (A) [c]auses serious bodily injury to another; or (B) uses or displays a deadly weapon.” T.C.A. § 39-13-102(a)(2)(A), (B). A person commits assault who “[i]ntentionally, knowingly or recklessly causes bodily injury to another [.]” T.C.A. § 39-13-101(a)(1). “‘Serious bodily injury’ means bodily injury that involves: a substantial risk of death; protracted unconsciousness; extreme physical pain; protracted or obvious disfigurement; or protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty.” T.C.A. § 39-11-106(a)(34).

The reckless element of reckless aggravated assault is defined as follows:

“Reckless” refers to a person who acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person’s standpoint.

T.C.A. § 39-11-302(c). In other words, in the case herein, the State had the burden of proving, beyond a reasonable doubt, that Appellant recklessly operated his vehicle as a deadly weapon and caused bodily injury to another.

Additionally, to convict Appellant of tampering with evidence, the State needed to establish that Appellant, knowing that an investigation or official proceeding was pending or in progress, altered, destroyed, or concealed any record, document, or thing with the intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding.⁴ T.C.A. § 39-16-503(a)(1).

Viewing the evidence in a light most favorable to the State, there was testimony from two people that detailed Appellant’s erratic driving on the night of and just prior to the accident. Eleanor Frances Hail saw Appellant driving slowly up the street, drifting from one lane to another, before barely missing the front quarter panel of her parked truck. Not long thereafter, Ms. Hail came upon the scene of the wreck involving Appellant. The jury also heard the testimony of Misty Cosson, who also saw Appellant driving recklessly that night. Appellant pulled out in front of her car and began swerving and speeding up. Appellant’s driving so frightened Ms. Cosson that she actually keyed 911

⁴The trial court instructed the jury that, in order to find Appellant guilty of tampering with evidence, they had to find the existence of the following elements: “[1] that the defendant knew an investigation was pending; and [2] that the defendant destroyed marijuana with the intent to impair its availability as evidence in the investigation.”

into her cell phone and followed Appellant to see if his driving would improve before she called to report his erratic driving. When the two cars approached a split in the road, Ms. Cosson saw Appellant drive over the curb and crash into a blue vehicle that was sitting in the Hardee's parking lot waiting to pull out. Ms. Cosson called 911 at that point and came back to the scene to see if anyone was injured.

Officer Shane Watson removed the marijuana from Appellant's vehicle. According to Officer Watson, after officers showed the marijuana to Appellant, they laid it on the trunk of the vehicle and instructed Appellant to turn around and put his hands behind his back. Appellant complied with their requests. However, Appellant suddenly reached out and grabbed one of the marijuana cigarettes and attempted to crush it in his hands. The officers were eventually able to get the marijuana cigarette out of Appellant's hand, but it was broken into pieces. According to Officer Watson, they were able to recover most of the marijuana from the ground but were not able to retrieve all of the contraband.

After looking at the evidence in a light most favorable to the State, we conclude that the jury was presented with sufficient evidence to convict Appellant of tampering with evidence and reckless aggravated assault.

Denial of Motion for Judgment of Acquittal

Next, Appellant contends that the trial court erred by denying the motion for judgment of acquittal. The State contends that because the evidence was sufficient to sustain the convictions, the trial court did not err in denying the motion for judgment of acquittal.

According to Tennessee Rule of Criminal Procedure 29(a):

The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

This Court has noted that “[i]n dealing with a motion for judgment of acquittal, unlike a motion for new trial, the trial judge is concerned only with the legal sufficiency of the evidence and not with the weight of the evidence.” *State v. Hall*, 656 S.W.2d 60, 61 (Tenn. Crim. App. 1983). The standard for reviewing the denial or grant of a motion for judgment of acquittal is analogous to the standard employed when reviewing the sufficiency of the convicting evidence after a conviction has been imposed. *State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998); *State v. Adams*, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995). We have already determined in the case herein that the evidence presented to the jury was sufficient to convict Appellant of reckless aggravated assault and tampering with evidence. Consequently, the trial court did not err in denying the motion for judgment of acquittal as to these convictions. This issue is without merit.

Sentencing

Appellant makes several challenges to his sentence. First, Appellant contends that the trial court improperly imposed consecutive sentences. Appellant also challenges the trial court's determination that he was a career criminal. Finally, Appellant argues that the trial court improperly enhanced his simple possession charge from a Class A misdemeanor to a Class E felony. The State disagrees, arguing that the trial court properly sentenced Appellant as a career offender because six of Appellant's seven prior felony convictions qualified as separate felonies for the purposes of classification as a career offender and that the State properly notified Appellant of its intent to seek career offender classification. Further, the State contends that the trial court properly ordered consecutive sentencing based on T.C.A. § 40-35-115(b)(2) and (4).

A. Sentencing of Appellant as Career Criminal

First, Appellant complains that the trial court improperly classified him as a career criminal. Specifically, Appellant complains that the State only "presented proper certification [to the trial court] to support four prior convictions" that could have been used to enhance his sentence. The State contends that it provided Appellant with a notice, more than thirty days prior to trial, that listed seven felony convictions and that the evidence does not preponderate against the trial court's determination that Appellant is a career offender.

On February 28, 2005, the State filed a notice pursuant to T.C.A. §§ 40-35-202 and 40-35-108 listing six convictions for armed robbery with a conviction date of April 7, 1970, in York County, Virginia and one conviction for armed robbery with a conviction date of April 15, 1970, in the City of Williamsburg and County of James City, Virginia. Subsequently, on April 26, 2005, the State filed a "Supplemental Notice of Intent to Seek Enhanced Punishment" that listed the following convictions: (1) bank robbery on November 7, 1977, in the Eastern District of North Carolina; (2) bank robbery and commission of felony with a firearm on February 2, 1978, in the Eastern District of Virginia; (3) bank robbery and commission of a felony with a firearm on February 2, 1978, in the Eastern District of Virginia; (4) possession of a prohibited object by an inmate on April 17, 1995, in Central District Court of California; (5) possession of marijuana on August 28, 1974, in Richmond, Virginia; (6) escape on October 10, 1977, in North Carolina; (7) assault with a deadly weapon on October 10, 1977, in North Carolina; and (8) possession of cocaine on October 10, 1977, in North Carolina. At the sentencing hearing, the State admitted that it had secured certified copies of only seven of Appellant's prior convictions for armed robbery prior to the sentencing hearing. Consequently, the State did not seek to use any of Appellant's other convictions to raise his status to that of a career offender.

At the sentencing hearing, the trial court determined that the State had given Appellant proper notice of its intent to use the prior convictions by supplying Appellant with the "information necessary prior to trial" and properly produced "certified copies" of the seven armed robbery

convictions at the sentencing hearing. After reviewing the certified copies of the convictions, the trial court determined that:

[E]ven though the convictions were entered at the same time in one judgment, the judgment clearly sets out that [there] are six different victims in the case as reflected by the certified copy of the judgment, and the second notice is for another conviction that occurred at a different time in a different court and shows that that was another robbery conviction. So there are seven certified - - seven robbery convictions that are certified.

Lastly, under the 108 [T.C.A. § 40-35-108] it says, “Convictions for multiple” - - so even if I considered that these took place at the same - - within a 24-hour period, it says that “Convictions for multiple felonies,” under 40-35-108(4), “committed as part of a single course of conduct within 24 hours constitute one conviction for the purpose of determining prior convictions; however, acts resulting in bodily injury or threatened bodily injury to the victim or victims shall not be construed to be a single course of conduct.” So I find that [Appellant] has seven prior felony convictions that would be classified as C or greater under our sentencing scheme.

A defendant is classified as a career offender if he meets two conditions: (1) the defendant has at least four Class A or Class B felony convictions; and (2) the defendant’s present conviction is for a Class A or B felony. T.C.A. § 40-35-108(a)(2). In calculating the number of prior felonies, the twenty-four-hour merger rule requires that “convictions for multiple felonies committed as part of a single course of conduct within twenty-four (24) hours constitute one (1) conviction for the purpose of determining prior convictions; however, acts resulting in bodily injury or threatened bodily injury to the victim or victims shall not be construed to be a single course of conduct.” T.C.A. § 40-35-108(b)(4).⁵ If the final calculation of the Defendant’s prior felony convictions classifies him as a career offender, the Defendant “shall receive the maximum sentence within the

⁵T.C.A. § 40-35-108(b)(4) was amended in 2005 to reflect the following with regard to multiple felonies committed within the same twenty-four-hour period:

Except for convictions for which the statutory elements include serious bodily injury, bodily injury, threatened serious bodily injury, or threatened bodily injury to the victim or victims, convictions for multiple felonies committed within the same twenty-four-hour period constitute one (1) conviction for the purpose of determining prior convictions;

The offenses herein, as well as Appellant’s trial, occurred prior to June 7, 2005, which was the effective date of the 2005 amendments to T.C.A. § 40-35-108. *See* 2005 Tenn. Public Acts ch. 353, § 22. However, Appellant’s sentencing occurred after the amendment to T.C.A. § 40-35-108. According to the Compiler’s Notes appearing after T.C.A. § 40-35-108 and 2005 Tennessee Public Acts Chapter 353, section 18, “offenses committed prior to June 7, 2005, shall be governed by prior law, However, for defendants who are sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, the defendant may elect to be sentenced under the provisions of the act by executing a waiver of such defendant’s ex post facto protections.” There is no waiver executed by Appellant in the record herein. Thus, the 2005 amendments to T.C.A. § 40-35-108 do not apply to Appellant.

applicable Range III.” T.C.A. § 40-35-108(c). The designation of a defendant as a career offender may be appealed by either party. T.C.A. § 40-35-108(d).

The record does not preponderate against the trial court’s finding that Appellant is a career offender. According to the certified copies of the convictions submitted by the State at the sentencing hearing, there were three armed robberies that occurred on November 5, 1969, and three armed robberies that occurred on October 31, 1969. The seventh armed robbery conviction occurred on a separate date. All seven of the armed robberies had different victims and presumably, by their nature, “threatened bodily injury to the victim or victims” as required by T.C.A. § 40-35-108(4). This issue is without merit.

B. Consecutive Sentences

Appellant also contends that the trial court improperly ordered his sentences for aggravated reckless assault and tampering with the evidence to run consecutively to each other.⁶ The State counters that the trial court properly imposed consecutive sentences.

A trial court may impose consecutive sentencing upon a determination that one or more of the criteria set forth in T.C.A. § 40-35-115(b) exists. This section permits the trial court to impose consecutive sentences if the court finds, among other criteria, that (2) “[t]he defendant is an offender whose record of criminal activity is extensive; . . . (4) [t]he 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.” T.C.A. § 40-35-115(b)(2), (4). The decision to impose concurrent or consecutive sentences, however, is a matter entrusted to the sound discretion of the trial court. *State v. Blouvet*, 965 S.W.2d 489, 495 (Tenn. Crim. App. 1997). If the trial court rests its determination of consecutive sentencing on the basis of a defendant’s status as a “dangerous offender,” the court must make two additional findings. *State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002). First, the trial court must find that an extended sentence is necessary to protect the public from further criminal conduct by the defendant, and, second, it must find consecutive sentencing to be reasonably related to the severity of the offenses. *State v. Wilkerson*, 905 S.W.2d 933, 939 (Tenn. 1995). Although such specific factual findings are unnecessary for the other categories enumerated in T.C.A. § 40-35-115(b), the imposition of consecutive sentences is also guided by the general sentencing principles that the length of a sentence be “justly deserved in relation to the seriousness

⁶We note that our supreme court’s recent decision in *State v. Gomez*, ___ S.W.3d ___, No. M2002-01209-SC-R11-CD, 2007 WL 2917726, at *6 (Tenn. Oct. 9, 2007), in which the supreme court determined that the use of enhancement factors not found by a jury or admitted by a defendant violated the Sixth Amendment, does not affect our review of consecutive sentencing issues. Before our supreme court’s decision in *Gomez*, it had specifically noted that *Blakely v. Washington*, 542 U.S. 296 (2004), did not impact Tennessee’s consecutive sentencing scheme. *State v. Robinson*, 146 S.W.3d 469, 499 n.14 (Tenn. 2004). In addition, this Court has consistently found that *Blakely* does not affect consecutive sentencing determinations. See *State v. Earice Roberts*, No. W2003-02668-CCA-R3-CD, 2004 WL 2715316, at *15 (Tenn. Crim. App., at Jackson, Nov. 23, 2004); *State v. Lawrence Warren Pierce*, No. M2003-01924-CCA-R3-CD, 2004 WL 2533794, at *16 (Tenn. Crim. App., at Nashville, Nov. 9, 2004).

of the offense' and 'no greater than that deserved for the offense committed.'" *Imfeld*, 70 S.W.3d at 708 (quoting T.C.A. §§ 40-35-102(1) & -103(2)); *State v. Lane*, 3 S.W.3d 456, 461 (Tenn. 1999).

Appellant's presentence report indicates that Appellant's criminal history began at age sixteen and continued, with the exception of periods where Appellant was incarcerated, through the offenses at issue herein. At the time of sentencing, Appellant was fifty-one years old. His record contains seven convictions for armed robbery, three convictions for bank robbery, two convictions for commission of a felony with a firearm, one conviction for possession of a prohibited object by an inmate, one conviction for possession of marijuana, one conviction for escape, one conviction for assault with a deadly weapon, and one conviction for possession of cocaine. In fact, Appellant had so many prior convictions that he, as stated above, was found to be a career criminal for sentencing purposes. Consequently, the record amply supports the trial court's finding that Appellant was an offender whose record of criminal activity is extensive. *See* T.C.A. § 40-35-115(b)(2).

Additionally, while we acknowledge that the trial court failed to make the required *Wilkerson* findings on the record before sentencing Appellant to consecutive sentences as a dangerous offender, we note that the trial court found that two of the factors for permissive consecutive sentencing applied to Appellant. The trial court needed only to find one of the statutory factors in order to impose consecutive sentences upon Appellant. T.C.A. § 40-35-115, Sentencing Comm'n Comments. Further, this Court may uphold consecutive sentencing if we are able to make the *Wilkerson* determinations from the record on appeal. *See State v. Daronopolis R. Sweatt*, No. M1999-2522-CCA-R3-CD, 2000 WL 1649502, at *9-10 (Tenn. Crim. App., at Jackson, Nov. 3, 2000). The trial court stated that Appellant's "conduct on that night indicate[d] that [he is] a dangerous offender." In fact, the trial court felt that "anyone who, in my judgment, gets out and drives a vehicle while they are in the state that I believe you were in at that - - on that night is a danger to anybody on the roadway, is a danger to themselves, and I think it's [a] crime in which the risk to human life is unquestionably high." Thus, it appears from the trial court's findings that it felt consecutive sentencing was necessary to protect the public from further criminal conduct by the appellant, the second *Wilkerson* factor. *Id.* Further, while it was not expressly addressed by the trial court, consecutive sentences were reasonably related to the severity of the offenses. The trial court found that the police officer was "nearly killed" as well as "permanently and seriously injured" and that Appellant would "have to live with that the rest of his life." *Id.* Under these circumstances, we find that the imposition of consecutive sentencing was appropriate in this case. Consequently, this issue is without merit.

C. Enhancement of Simple Possession from Class A Misdemeanor to Class E Felony

Lastly, Appellant complains that the trial court improperly enhanced his conviction for simple possession of a controlled substance from a Class A misdemeanor to a Class E felony when his two prior misdemeanor convictions were over thirty years old. Specifically, Appellant argues that "the legislature could not have contemplated that someone who had not violated [T.C.A. § 39-17-418(e)] in 30 years would get an enhancement from a [misdemeanor to a felony]."

As noted earlier in this opinion, there is no judgment of conviction for possession of marijuana in the record of this appeal. In the absence of such a judgment in the record this Court is without jurisdiction to address any issue concerning the propriety of Appellant's sentence for possession of marijuana. See *James Burns v. State*, No. M2004-00793CCA-R3-PC, 2005 WL 850384, at *3 (Tenn. Crim. App., at Nashville, Mar. 29, 2005) (citing *State v. Howard C. Covington*, No. W2001-01575-CCA-R3-CD, 2002 WL 1592704, at *3 (Tenn. Crim. App., at Jackson, Jul. 16, 2002) (concluding that no final judgments were included in the record on appeal and this Court could not adjudicate the issues without a final judgment)).

D. Failure to Provide Proof of Financial Responsibility

Although not raised by either party on appeal, we note that the judgment reflects that Appellant was sentenced to thirty days in incarceration for the conviction for failure to provide proof of financial responsibility. The transcript reflects that the trial court merely assessed Appellant with a one hundred dollar fine and did not impose a sentence involving incarceration. Indeed, according to T.C.A. § 55-12-139(c), failure to provide proof of financial responsibility is punishable as a Class misdemeanor only by a fine of not more than one hundred dollars. Consequently, we remand to the trial court for correction of the judgment on this conviction.

Conclusion

For the foregoing reasons, the judgments of the trial court are affirmed and remanded for correction of the judgment on the conviction for failure to provide proof of financial responsibility.

JERRY L. SMITH, JUDGE