

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 20, 2005 Session

STATE OF TENNESSEE v. THOMAS W. COTHRAN

**Direct Appeal from the Circuit Court for Hickman County
No. 02-5100CR-II Russ Heldman, Judge**

No. M2005-00559-CCA-R3-CD - Filed November 29, 2005

This is a direct appeal as of right from four aggravated vehicular homicide convictions, three vehicular assault convictions, and one DUI third offense conviction. The Defendant, Thomas W. Cothran, received consecutive sentences totaling one hundred twelve years, eleven months and twenty-nine days. The Defendant argues five issues on appeal: (1) the evidence was insufficient to support his convictions for aggravated vehicular homicide and vehicular assault; (2) the DUI conviction should merge with the vehicular assault and aggravated vehicular homicide convictions; (3) the trial court erred in admitting expert witness testimony concerning the extrapolation of blood alcohol content; (4) the State's failure to preserve evidence violated his due process rights; and (5) the trial court imposed an excessive sentence. We vacate the misdemeanor DUI conviction, fine and sentence, but affirm the judgments of the trial court as to all of the remaining convictions and sentences.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed in Part;
Reversed in Part**

DAVID H. WELLES, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and J.C. MCLIN, JJ., joined.

Michael Joseph Flanagan, Nashville, Tennessee, for the appellant, Thomas W. Cothran.

Paul G. Summers, Attorney General & Reporter; Elizabeth B. Marney, Assistant Attorney General; Ron Davis, District Attorney General; and Michael J. Fahey, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The convictions at issue in this case stem from a horrific motor vehicle accident that occurred the night of July 19, 2002. The Defendant lost control of his truck while driving on Interstate Forty (I-40) in rural Hickman County, crossed the median and careened head-on into a minivan, killing four individuals and seriously injuring three. The Defendant was indicted by a Hickman County grand jury in a seventeen-count indictment in December of 2002, and received a jury trial in December of 2003.¹

The record reflects that the victims, a family of seven, were driving east on I-40 from west Tennessee on their way to Maryland to visit the children's grandparents when the accident occurred shortly after 9:00 at night. The Defendant, a truck driver by profession, was traveling westbound on I-40 in a 19,000 pound garbage truck on his way to California. Mr. Donald Person testified that he was traveling eastbound on the same interstate that night and saw the Defendant's truck "acting erratically" on the opposite side of the interstate. Mr. Person slowed, and as he did he witnessed the garbage truck side-swipe another truck then suddenly cross the median, go "airborne," and hit the minivan traveling just in front of him.

Mr. Oscar Maynez, a professional truck driver, testified that he was following the garbage truck west-bound when he observed it "bump" the truck it was attempting to pass. Only moments earlier Mr. Oscar Maynez had been attempting to pass the Defendant's garbage truck himself when it cut in front of him, forcing him to apply his engine brakes and "back off." As he did, he saw the garbage truck signal right as if to pull back in behind the other truck in an aborted attempt to pass, but in doing so it side-swiped the truck and then started "going all over the road." Mr. Oscar Maynez stated that the Defendant "started fish-tailing, going crazy," and then "ran into the median . . . almost flipped over . . . then he got control again [and] he went airborne onto the east bound side."

Mr. Miles Faulkenham, a professional truck driver from Nova Scotia, Canada, testified that he was driving an empty tractor-trailer rig west-bound on I-40 that night, and first saw the Defendant in his rearview mirror as the Defendant attempted to pass him. Mr. Faulkenham stated that the Defendant approached fast, pulled up along side his rig, struck him on the side of his trailer, then "started to weave" and ultimately lost control and crossed the median.

Immediately after the accident, several eye witnesses stopped their vehicles and ran to the crash site. Mr. Person stated that he saw the Defendant climb out of his overturned truck, and as he did he "threw something out of the truck," which Mr. Person later determined to be a beer can. When Mr. Person tried to talk to the Defendant, the Defendant was "incoherent," and did not know where he was. Mr. Person also testified that he "smelled alcohol" on the Defendant; saw a twelve-pack of Old Milwaukee's Best beer near the garbage truck; and observed the State

¹ The Defendant was indicted for four counts each of vehicular homicide based on creating a substantial risk of death, vehicular homicide based on intoxication, and aggravated vehicular homicide. See Tenn. Code Ann. §§ 39-13-213(a)(1), 39-13-213(a)(2), and 39-13-218. The Defendant was also indicted on three counts of vehicular assault based on intoxication. See Tenn Code Ann. § 39-13-106. Finally, the Defendant was indicted on one count of misdemeanor DUI and one count of DUI third offense. See Tenn. Code Ann. §§ 55-10-401 and 55-10-403.

Trooper conduct field sobriety tests. Based on his observations, Mr. Person concluded the Defendant was intoxicated, further stating: "It is my opinion [the Defendant] was impaired."

Mr. Oscar Maynez testified that when he first ran down the embankment where the minivan had come to rest after being hit, he "started hearing little kids crying, begging for help . . . crying for their mom and dad." He then saw the Defendant get out of his truck and "take a big ol' chug of beer." After the Defendant had taken this "long-ass chug" of Milwaukee's Best beer, he threw the empty can into the bushes. Mr. Oscar Maynez concluded that "it was obvious that [the Defendant] was drunk," stating that he smelled alcohol on the Defendant, and the Defendant "stumbled," and could not stand up straight.

Mr. Manuel Maynez, the brother of Oscar Maynez, testified that he was in the sleeper of the truck his brother was driving when the accident occurred. He exited the truck and arrived at the accident scene in time to see the Defendant climb out of his over-turned garbage truck and throw a beer can into the bushes. Mr. Manuel Maynez also stated that the Defendant had alcohol on his breath, but when asked, the Defendant denied he had been drinking. Mr. Manuel Maynez further described the Defendant moments after the accident as "stumbling" and "mumbling." At one point, he was forced to grab the Defendant and pull him to safety after the Defendant wandered out over the fog line and into a lane with on-coming traffic. Mr. Manuel Maynez concluded that the Defendant "was not sober."

Mr. Faulkenham also testified that he observed the Defendant shortly after the accident "walk with a limp or a slight stagger," and found several beer cans on the ground near the over-turned truck, which he gathered together, placed in the cardboard beer case he found, and handed to the first State Trooper to arrive at the scene. He stated that of the eight to ten beer cans he found, most were full, some were empty, and some were damaged. Mr. Faulkenham also testified that he smelled alcohol on the Defendant.

Mr. Mark Pierce, an EMS paramedic, testified that he just happened to be driving on I-40 that night and arrived on the scene shortly after the accident occurred. He rushed to the minivan, which he described as "severely damaged." He described what he found inside as "seven patients total, and four appeared to have expired. The three female patients that were in the rear seat of the vehicle were all -- appeared to be very badly injured." He determined the injuries to the three live victims were "life threatening," and immediately called for helicopter transport. Mr. Stewart Fuqua of the Tennessee City Volunteer Fire Department testified that he assisted in the extraction of the victims from the wreckage. Because of the extensive damage, he was forced to remove a passenger side door in order to remove the bodies of the two small boys who were sitting in the middle seat. Next, he removed the seat itself, and then was finally able to access the three living victims in the back seat, who were placed on two life flight helicopters. Mr. Fuqua also assisted in removing the two deceased adults from the front seats.

Trooper Mark Blasco of the Tennessee Highway Patrol was the first law enforcement officer to arrive on the scene. Trooper Blasco testified that he smelled alcohol on the Defendant's breath and asked if he had been drinking, to which the Defendant responded that he had "a beer" in Chattanooga and pointed in the opposite direction from Chattanooga. Trooper Blasco administered several field sobriety tests, including the finger-to-nose, one-leg-stand, and

walk-and-turn tests. Trooper Blasco testified that the Defendant performed “poorly” on the finger-to-nose test, could not perform the one-leg-stand, and missed several steps on the walk-and-turn test.² Trooper Blasco stated that it “was obvious [the Defendant] was greatly impaired,” and he placed him under arrest for DUI. The Trooper also stated that he found a cardboard Milwaukee’s Best beer case inside the garbage truck, which contained four unopened and cold cans of beer. He also found two nearly empty beer cans inside the cab of the overturned truck. Officer Blasco stated that he placed the cardboard case and beer cans on the hood of his patrol car, but the rotor-wash from the life flight helicopters blew the cans off his car, and when he returned he “made a mistake and then threw them away.”

Trooper Jacob Blackwell of the Tennessee Highway Patrol testified that he retrieved the Defendant from the back of Trooper Blasco’s patrol car and transported him to the hospital to have a blood sample drawn sometime between 11:00 p.m. and 1:00 a.m. Trooper Blackwell stated that he smelled alcohol on the Defendant, and the Defendant stated to him that he had “a few” beers. Trooper Blackwell further testified that the Defendant signed an implied consent form before the blood sample was drawn, and that he personally delivered the Defendant’s blood sample to the TBI crime lab.³ Special Agent Jerry Dickey, an investigator with the Tennessee Highway Patrol, took the Defendant’s statement and attempted to interview him after the blood sample was drawn. However, when asked if he had been drinking, the Defendant stated: “I don’t want to answer that.” In the Defendant’s official statement for the Highway Patrol accident report, he wrote: “all I remember is the vehicle started swerving” and then “flipped over.”

Troopers Randy Robinson and Allan Brenneis, both of the Tennessee Highway Patrol Critical Incident Response Team, were certified as experts in accident reconstruction and testified that the evidence they collected showed no signs of a defect in the road or tire blow-out. Rather, the evidence, primarily the “yaw marks” left on the road by the garbage truck, indicate that it was going approximately sixty-nine miles per hour when erratic steering caused a weight shift; the truck started to slide toward the outside lane; then over-steering caused another weight shift; the truck then slid in the other direction and continued to travel across the median and into on-coming traffic. Trooper Robinson also testified that there was no sign of any braking.

Mr. Roger Edwards, the general manager of a Pilot Travel Center located just off the interstate highway near Rising Fawn, Georgia, testified that he is in charge of the store’s video surveillance tapes. The State played a tape for the jury purporting to show the Defendant making a purchase of a six-pack.⁴ Mr. Edwards testified that the tape contained footage of his store, taken at 5:30 p.m. on July 19, 2002, and that the only products his store sold bound by plastic into a six-pack were cans of beer. Trooper Jerry Dickey identified the customer in the video as the Defendant.

² The Defendant’s performance of these field sobriety tests was captured on video tape with the patrol car’s dashboard camera, and this tape was played for the jury at trial.

³ The Implied Consent Form, included in the record on appeal, indicates that the Defendant signed it at 11:30 p.m., approximately two to two and a half hours after the accident occurred.

⁴ Due to the quality of the video, no markings on the cans themselves were clearly discernable. However, the video clearly showed a customer purchasing a six-pack.

Special Agent John Harrison, a Forensic Scientist with the TBI, was certified as an expert in toxicology and retrograde extrapolation.⁵ Agent Harrison testified that the Blood Alcohol Content (BAC) of the Defendant's sample submitted to his lab was 0.0699%.⁶ Using retrograde extrapolation, Agent Harrison testified that, in his opinion, at the time of the accident, approximately two to two and a half hours prior to when the Defendant's blood was drawn, the Defendant's BAC would have been approximately 0.08%. Agent Harrison further testified that some individuals can be impaired with as little as a 0.04% BAC. On cross-examination, Agent Harrison admitted that a variety of factors could effect the "average" upon which he based his calculations.

Laura Hanlein, one of the surviving victims, testified that she was sleeping in the back seat of her family's minivan when she awoke to the violent accident. As a result of the accident, the ligaments in her neck and left knee were torn; she lost seven inches of her small intestine; she broke a finger and both of her wrists; and she suffered brain and lung injuries. She was ten years old at the time of the accident. Brandi Knowles, the mother of victim Bayli Hanlein, testified that Bayli suffered a broken leg which required pins; her colon was perforated; and she endured multiple surgeries and extensive therapy and counseling. Bayli was seven at the time of the accident. James Duck, father of victim Jessica Duck, testified that Jessica broke both of her legs requiring plates and screws; broke her right arm requiring screws and rods; injured her lungs; suffered from internal bleeding; and endured multiple surgeries. Jessica was eleven at the time of the accident. The death certificates of the four victims killed in the accident, Bradley Duck, Andrew Duck, Janet Hanlein, and Joseph Hanlein, Jr. were read into the record.

The Defense offered no evidence, but made a motion for judgment of acquittal, which was denied. The jury found the Defendant guilty of four counts of vehicular homicide, three counts of vehicular assault, and DUI. Pursuant to the bifurcated trial requirements, see Tenn. Code Ann. § 39-13-218(c), the jury was presented with evidence that the Defendant had a record of prior driving while intoxicated offenses. The jury then found the Defendant guilty of aggravated vehicular homicide and DUI, third offense. The trial court imposed consecutive sentences of twenty-five years for each aggravated vehicular homicide conviction, four years for each vehicular assault conviction, and eleven months, twenty-nine days and a \$10,000 fine for the DUI third conviction. The Defendant timely filed a motion for a new trial, which was denied. This appeal followed.

ANALYSIS

On appeal the Defendant outlined five specific claims in his appellate brief: (1) the evidence was insufficient to support his aggravated vehicular homicide and vehicular assault convictions; (2) his DUI conviction should "be dismissed"; (3) the trial court erred in "allowing testimony concerning extrapolation of blood alcohol content"; (4) the State's failure to preserve evidence violated his due process rights; and (5) the trial court erred in issuing an excessive sentence. The State concedes that the DUI conviction must be merged into the other convictions. We find the Defendant's arguments unpersuasive as to each of his other claims.

⁵ At trial the Defendant's counsel objected to this witness being certified as an expert in retrograde extrapolation, but the objection was overruled by the trial court.

⁶ The Toxicology Request, part of the record on appeal, indicates that the Defendant's blood was drawn at 23:40 on July 19, 2002.

I. Sufficiency

The Defendant's first issue on appeal is whether there was sufficient evidence for any rational trier of fact to find beyond a reasonable doubt that he was guilty of aggravated vehicular homicide or vehicular assault. To support this claim the Defendant asserts that the State failed to prove, first, that he was impaired due to intoxication, and second, even if he was intoxicated, that the victims' deaths and injuries were the "proximate result" of the Defendant's intoxication.

Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

The Defendant was convicted of four counts of aggravated vehicular homicide, which requires the State to prove, in pertinent part, the "reckless killing of another by the operation of . . . [a] motor vehicle . . . [a]s the proximate result of the driver's intoxication," and that the "defendant has two (2) or more prior convictions for: Driving under the influence of an intoxicant." Tenn. Code Ann. §§ 39-13-213(a)(2) and 39-13-218(a)(1)(A). The Defendant was also convicted of three counts of vehicular assault, which occurs when a person "recklessly causes serious injury to another person by the operation of a motor vehicle," as "the proximate result" of being intoxicated. Tenn. Code Ann. § 39-13-106(a).

The Defendant argues that there was not "sufficient evidence to support a conclusion that he was intoxicated," and "[t]he evidence at trial produced disputed testimony as to what caused the defendant's vehicle to lose control." The State takes the position that because the Defendant has failed to "rely on apposite authorities and failed to make a proper argument from the facts adduced at trial" he has failed to comply with Rule 10(b) of the Tennessee Rules of Appellate

Procedure, but regardless, has also failed to show that the evidence does not support the jury's finding that the Defendant was intoxicated and that this was the proximate cause of the victims' deaths and injuries.

The Defendant first argues that there was insufficient evidence for a jury to find he was intoxicated. To the contrary, the record on appeal contains ample evidence that the Defendant was intoxicated: witnesses who were near the Defendant the night of the accident stated that he smelled of alcohol; witnesses testified the Defendant appeared to be intoxicated; the Defendant's truck and the ground around it was littered with beer cans; one witness testified he saw the Defendant drink some beer and then throw the can into the bushes immediately after climbing out of his over-turned truck; the Defendant told one trooper he had "a beer" and another that he had "a few" beers; the Defendant's poor performance on the field sobriety tests was attested to by the administering officer and was also shown to the jury at trial via video tape; the Defendant was viewed on video tape purchasing beer just hours before the accident; the Defendant admitted in an answer to a discovery request as part of a civil lawsuit against him that he had "some beers" the day of the accident; and an expert in toxicology testified that the Defendant had a BAC of 0.0699% several hours after the accident and opined that he had a BAC of at least 0.08% at the time of the accident. We conclude that the evidence presented was sufficient to support the finding beyond a reasonable doubt that the Defendant was under the influence of an intoxicant at the time of the collision.

The Defendant also argues that even if he was intoxicated, this was not the proximate cause of the victims' deaths and injuries. While our supreme court has stated that proximate cause is "an essential element of criminally negligent homicide," it has also held that "causation in criminal cases generally is a question of fact for a properly instructed jury," and "a jury's determination of the causation issue will be reviewed under the familiar sufficiency of the evidence standard and will not be disturbed by an appellate court so long as the evidence is sufficient to support the jury's determination." State v. Farner, 66 S.W.3d 188, 203-04 (Tenn. 2001).

In this case, the jury was "properly instructed." Our highest court has held that proximate cause in criminally negligent homicide cases "is generally established in Tennessee by showing that the victim's death was the natural and probable result of the defendant's unlawful conduct." Farner, 66 S.W.3d at 203. The jury in this case was instructed: "'Proximate result' is defined to mean a result, which in natural and continuous sequence, is a product of an act occurring or concurring with another, which, had it not happened, the result would not have occurred."

The jury considered evidence that presented a clear question of fact as to whether the Defendant's intoxication was the proximate cause of the victims' deaths and injuries. The State's evidence showed that the Defendant drifted out of his lane of traffic and side-swiped another truck, then over-steered, causing his truck to slide sideways, and finally careened across the median and slammed into a minivan head-on, killing four people and seriously injuring three others. As addressed above, the State's evidence also showed that the Defendant was intoxicated at the time of the collision. The Defendant contested the validity of this evidence which presented a question of fact for the jury to determine. The jury, as was its prerogative, found that the victims' deaths and injuries were the "proximate result" of the Defendant's driving while

intoxicated. Viewing the evidence in the light most favorable to the State, we find the evidence supports the finding. See also State v. Stowers, 649 S.W.2d 607, 608 (Tenn. Crim. App. 1983) (holding that the “evidence was sufficient to show the proximate cause of the collision was the operation of a vehicle by the defendant while intoxicated” where the evidence showed that the defendant “drove his vehicle across the center line” hitting the victim’s vehicle, and the “defendant was intoxicated at the time”). This issue is without merit.

II. DUI Conviction

The Defendant next argues that driving under the influence is a lesser included offense of both aggravated vehicular homicide and vehicular assault by intoxication. He argues that his DUI conviction should therefore be dismissed. The State concedes that the DUI conviction should be merged into the greater offenses. We agree.

It is well established that the double jeopardy guarantees of the Fifth Amendment to the United States Constitution, and Article I, section 10 of the Tennessee Constitution, protect individuals from the imposition of multiple punishments for the same offense. See North Carolina v. Pearce, 395 U.S. 711, 717 (1969); State v. Denton, 938 S.W.2d 373, 378 (Tenn. 1996). The proper remedy for such situations is a merger of the two convictions into one by vacating the conviction on the lesser offense. See State v. Zirkle, 910 S.W.2d 874, 889 (Tenn. Crim. App. 1995).

This Court has previously held that double jeopardy prohibits separate convictions for DUI and vehicular assault arising out of the same act of causing serious bodily injury while operating a motor vehicle while intoxicated. See State v. Rhodes, 917 S.W.2d 708, 713-14 (Tenn. Crim. App. 1995). Likewise, this Court has also held that double jeopardy would prevent simultaneous convictions for DUI and aggravated vehicular homicide because the “evidence essential to the vehicular homicide by intoxication conviction is inclusive of the evidence necessary to prove DUI.” State v. George Blake Kelly, No. 01C01-9610-CC-0048, 1998 WL 712268, at *10 (Tenn. Crim. App., Nashville, Oct. 13, 1998). Accordingly, we vacate the Defendant’s conviction for DUI, third offense, having found that the trial court erred in failing to merge it into the Defendant’s convictions for vehicular assault by intoxication and aggravated vehicular homicide.

III. Expert Testimony on Extrapolation of Blood Alcohol Content

The Defendant argues in his third issue on appeal that the trial court erred in allowing testimony concerning extrapolation of his blood alcohol content. Specifically, the Defendant asserts that the State’s witness, Agent Harrison, while properly certified as an expert in toxicology, failed to qualify as “an expert in the area of retrograde extrapolation.” The State argues only that the Defendant has waived this claim because his motion for a new trial phrased the issue as a violation of the rule that hypothetical questions may not be based on assumed facts.

We begin our analysis by rejecting the State’s waiver argument. The record on appeal reflects that at trial the Defendant, through counsel, objected to the trial court’s certification of the witness as an expert in retrograde extrapolation. While the court overruled this objection, the issue was nonetheless properly preserved for appellate review. Additionally, while phrased somewhat differently, the Defendant again raised this same evidentiary issue in his motion for a

new trial.⁷ Accordingly, we conclude that the Defendant has not waived this claim, and we will address the merits of the issue.

When an expert witness's reliability is challenged, a court should look to such factors as the relevance and reliability of the testimony, the expert's qualifications in the subject at issue, and the connection between the expert's knowledge and the basis of the opinion offered. See State v. Stevens, 78 S.W.3d 817, 834-35 (Tenn. 2002). However, in Tennessee, the "qualifications, admissibility, relevancy and competency of expert testimony are matters which largely rest within the sound discretion of the trial court." State v. Ballard, 855 S.W.2d 557, 562 (Tenn. 1993). While such discretion is not absolute, this Court will overturn a trial court's ruling on such issues only when "the discretion is arbitrarily exercised." Id.

In this case we find no abuse of discretion. The evidence submitted to the trial court revealed that Agent Harrison, in addition to his unchallenged credentials as a toxicologist, has conducted extensive study in the field of alcohol absorption and elimination, also known as retrograde extrapolation. Agent Harrison began study in this field in 1988, and was involved in three formal scientific studies, one of which led to a published work. Agent Harrison further participated in several studies in which he worked directly with law enforcement personnel with regard to extrapolation. Agent Harrison also attended a graduate course taught by "some of the foremost experts in the nation, as well as in the world" in the field of extrapolating blood alcohol content. Additionally, Agent Harrison testified that he has been certified as an expert in retrograde extrapolation by various courts approximately forty times.

We conclude that Agent Harrison was qualified to opine on retrograde extrapolation, and that there was a straightforward connection between his extensive knowledge on the subject and the testimony he gave at trial. We also note that the Defendant has not alleged nor offered any evidence that retrograde extrapolation is either unreliable or irrelevant in cases such as his. Therefore, after reviewing the evidence in the record on appeal, we conclude that the trial court did not abuse its discretion when it certified Agent Harrison as an expert in both toxicology and retrograde extrapolation. This issue is without merit.

IV. Failure to Preserve Evidence

The Defendant also claims that his due process rights were violated by the State's failure to preserve evidence. To support this claim the Defendant argues that Trooper Blasco "discarded important evidence" when he threw away the beer carton and cans initially recovered at the scene of the accident. The Defendant further argues that because there was "conflicting testimony" at his trial concerning the number of cans and how many were empty, the State's

⁷ Agent Harrison explained that retrograde extrapolation is based upon studies of control groups administered measured doses of alcohol, and then documenting the elimination of alcohol from the group's blood streams over time. He explained that this technique, which is well accepted in the scientific community, works because while "alcohol is known to affect individuals differently, [] there are effects on the human being, in general." He further clarified on cross-examination that he would "speak in generalities today of how [alcohol] affects the average human being, but I won't speak in specifics of [the Defendant]." Based on this definition of retrograde extrapolation, we conclude that when the Defendant alleged that "[t]he toxicologist's testimony violated the rule that hypothetical questions may not be based upon assumed facts not in evidence" in his motion for a new trial, he was raising essentially the same admissibility of evidence issue he now raises in his third issue on appeal.

failure to preserve the physical evidence rendered his trial fundamentally unfair and violated his due process rights. The State argues that this issue has been waived.

In our view, the State's waiver argument is, again, not well taken. The State argues on appeal that because the Defendant first alleged a "failure to preserve evidence denied [the Defendant] access to favorable or exculpatory information" in his motion for a new trial, but on appeal phrased the issue as a denial of due process due to the State's failure to preserve evidence, the Defendant has "change[d] theories" on appeal. The State seemingly argues that the Defendant's initial claim regarding exculpatory evidence was a Brady claim, and therefore his more general due process claim on appeal is "different in kind and effect." We decline to adopt the State's reasoning, as the Supreme Court's Brady decision was itself essentially a due process ruling. See Brady v. Maryland, 373 U.S. 83, 86 (1963) ("We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment"). Accordingly, we will address the merits of this issue.

In State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999), our supreme court concluded that the due process principles of the Tennessee Constitution require that the State's failure to preserve evidence that could be favorable to a defendant must be evaluated in the context of the entire record. Id. at 916-17. If there exists a duty to preserve the evidence, a reviewing court must conduct a balancing test based on the following three factors:

- (1) the degree of negligence involved;
- (2) the significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and
- (3) the sufficiency of the other evidence used at trial to support the conviction.

Id. at 917 (footnote omitted). These factors are provided to help a court resolve the central issue of "[w]hether a trial conducted without the destroyed [or lost] evidence would be fundamentally fair." Id. at 914. If the lost or destroyed evidence would render the trial fundamentally unfair, the trial court may dismiss the charges. Other options are to provide appropriate jury instructions or take other steps necessary to protect a defendant's right to a fair trial. Id. at 917.

We initially note that Ferguson addresses "the factors which should guide the determination of the consequences that flow from the State's loss or destruction of evidence which the accused contends would be exculpatory." Id. at 914 (emphasis added). The Defendant has failed to adequately address how the State's preservation of the twelve pack of beer recovered from his truck the night of the accident would be exculpatory. Nonetheless, we will address the three factors outlined in Ferguson.

In this case, the State did indeed have the duty to preserve the physical evidence, i.e., the beer carton and beer cans, but we find its failure to do so was the result of simple negligence rather than gross negligence. Second, in a case involving homicide and serious injury due to intoxication, evidence of beer cans would unquestionably be significant. However, when viewed in the context of the entire record, the secondary evidence of multiple witness testimony concerning the beer cans -- including the number, brand, and condition -- mitigates the loss of

the cans themselves. Additionally, the probative value of the cans would be limited; even if most of the twelve Old Milwaukee's Best cans recovered at the accident scene had been full, the State also submitted video evidence of the Defendant purchasing an additional six pack of beer several hours before the accident that was never accounted for. Finally, as addressed more fully above, the sufficiency of the remaining evidence that was presented at trial as to the Defendant's intoxication was substantial.

In summary, the Ferguson factors weigh favorably for the State. In our view the Defendant received a fundamentally fair trial even without the presentation of the beer cans. Accordingly, this issue is without merit.

V. Sentencing

In his final issue on appeal, the Defendant asserts that the trial court erred by imposing an excessive sentence. To support this claim the Defendant argues first that the trial court improperly enhanced his sentences beyond the presumptive sentences for his range. Additionally, the Defendant claims the trial court erred in ordering consecutive service of his sentences. We disagree with both assertions.

A. Standard of Review

Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; and (f) any statement the defendant wishes to make in the defendant's own behalf about sentencing. See Tenn. Code Ann. § 40-35-210(b); State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. See State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001).

Upon a challenge to the sentence imposed, this court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. See Tenn. Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then the presumption is applicable, and we may not modify the sentence even if we would have preferred a different result. See State v. Fletcher, 805 S.W. 2d 785, 789 (Tenn. Crim. App. 1991). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and principles of the 1989 Sentencing Act, and (2) the trial court's findings are adequately supported by the record. See State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that a sentence is improper is upon the appealing

party. See Tenn. Code Ann. § 40-35-401 Sentencing Commission Comments; Arnett, 49 S.W.3d at 257.

B. Enhancement Factor

The Defendant argues that the trial court improperly applied enhancement “factor number (2) of T.C.A. § 40-35-114” which he alleges allows enhancement if a defendant is “found to be the leader in the commission of an offense involving two or more criminal actors.” The Defendant further asserts that the “record contains no evidence to support this enhancement factor.” It appears that the Defendant has overlooked the fact that Tennessee Code Annotated section 40-35-114, as amended in 2002 by Public Act 849, § 2(c), effective July 4, 2002, added one enhancement factor and subsequently renumbered all of the original enhancement factors in the statute. Thus, for the time period during which the Defendant’s offenses were committed and during which he was sentenced, the enhancement factor pertaining to previous criminal history was subsection (2), and the enhancement factor for leaders in the commission of a crime involving two or more criminal actors was subsection (3). See Tenn. Code Ann. § 40-35-114(2) and (3) (2004).⁸

Moreover, the record on appeal clearly reveals that the trial court in this case enhanced the Defendant’s sentences because it found “the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, 40-35-114(2).”

The Defendant’s pre-sentence report showed that he had three prior convictions for alcohol related crimes. Accordingly, we find the trial court did not err in enhancing the Defendant’s sentence based upon his previous history of criminal convictions.

C. Consecutive Sentencing

The Defendant also claims that the trial court “made no factual findings that would support a determination that there were sufficient criteria to support consecutive sentences,” and infers that the court imposed a penalty that is not “reasonably related to the offense.” However, our review of the record on appeal leads us to conclude that the trial court did make the requisite factual findings necessary to support consecutive sentencing, and that the aggregate sentence imposed was indeed reasonably related to the Defendant’s offenses.

We begin by noting that it is within the sound discretion of the trial court whether to impose consecutive or concurrent sentences. See State v. Adams, 973 S.W.2d 224, 230-31(Tenn. Crim. App. 1997). Tennessee courts may order consecutive sentences in cases where it finds any of seven statutorily enumerated criteria to be applicable “by a preponderance of the evidence.” Tenn. Code Ann. § 40-35-115(b). In addition to these criteria, consecutive sentencing is also subject to the general sentencing principles that the overall sentence imposed “should be no greater than that deserved for the offense committed,” and that it “should be the least severe measure necessary to achieve the purposes for which the sentence is imposed.” The defendant’s “potential” for “rehabilitation” should also be considered. Tenn. Code Ann. § 40-

⁸ We note that the legislature has, again, recently amended the enhancement factors statute, and that “previous history of criminal convictions” is once again subsection (1). See Tenn. Code Ann. § 40-35-114(1) (2005). However, these changes went into effect June 7, 2005, after the Defendant in this case was sentenced. Therefore, the 2005 amendments to the enhancement factors statute do not apply in this case.

35-103(2), (4) and (5). Additionally, we are advised that “the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.” Tenn. Code Ann. § 40-35-115 Sentencing Commission Comments.

The trial court found two consecutive sentencing criteria applied: the Defendant “is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high,” and he was sentenced for an offense committed while he was on probation. Id. at § 40-35-115(b)(4) and (b)(6). As to the first criterion, our supreme court has mandated that:

the imposition of consecutive sentences on an offender found to be a dangerous offender requires, in addition to the application of general principles of sentencing, the finding that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed.

State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995).

In the case at hand, the trial court did make adequate findings that the Defendant was a dangerous offender and that an extended sentence was necessary to protect the public. The trial court, specifically referencing the Wilkerson standard, stated for the record:

[T]he defendant is a dangerous offender whose behavior has indicated, and indicates, little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high. . . .

The proof established that the terms imposed, in this court’s judgment, are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by this offender.

And the court goes farther [sic] to state that this sentence should be a deterrent to all who would choose -- and I think the word was correct from all the witnesses, it is a choice, you’re not forced into this situation, it is a choice, but for all those who choose to drink and drive a vehicle, whether it’s a truck or automobile, on the highways of this state, that this should be a deterrent and a warning to those that the courts have very little tolerance for this behavior.

We conclude the trial court’s findings are supported by the record. The Defendant was convicted for driving while intoxicated twice prior to committing the offenses at issue in this case, and once for reckless conduct involving alcohol. He continued to operate large trucks on crowded interstate highways while intoxicated. He is a dangerous offender. Moreover, the record establishes that he was on probation for a DUI conviction in Alabama when he committed the offenses at issue in this case. Accordingly, we find the trial court properly relied upon Tennessee Code Annotated section 40-35-115(b)(4) and (b)(6) in imposing consecutive sentences.

Furthermore, the Defendant’s act of committing essentially the same offenses for which he had a prior criminal record, only this time with consequences that included a horrific loss of

life, verifies that he has little potential for rehabilitation. An extended sentence is clearly warranted in the case at hand to protect the public from any further criminal conduct by the Defendant. Moreover, consecutive sentencing reasonably relates to the severity of the Defendant's offenses of four counts of aggravated vehicular homicide and three counts of vehicular assault by intoxication. Accordingly, we affirm the trial court's imposition of consecutive sentencing.

CONCLUSION

Based on the reasoning and authorities above, we vacate the Defendant's DUI conviction, eleven month and twenty-nine day sentence, and \$10,000 fine. We affirm the judgments of the trial court as to the Defendant's convictions for aggravated vehicular homicide and vehicular assault, and thus modify the aggregate sentence to one hundred twelve years.

DAVID H. WELLES, JUDGE