

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs November 13, 2013

STATE OF TENNESSEE v. LARRY MCNUTT

Appeal from the Criminal Court for Shelby County
No. 11-02363 W. Otis Higgs, Jr., Judge

No. W2012-02114-CCA-R3-CD - Filed February 20, 2014

A Shelby County jury found the Defendant, Larry McNutt, guilty of reckless endangerment and aggravated assault. The trial court merged the two convictions and ordered the Defendant to serve an effective fifteen-year sentence as a Career Offender. On appeal, the Defendant claims that: (1) the State solicited unfairly prejudicial testimony in violation of a pretrial ruling; (2) the trial court improperly admitted hearsay evidence; (3) the trial court improperly precluded the defense from cross-examining the victim about his desire not to prosecute the Defendant; (4) the trial court improperly admitted evidence of the defense witness's prior convictions; (5) there is insufficient evidence to support the jury's verdict; (6) his sentence is excessive; and (7) the cumulative effect of these errors violates his due process rights. After a thorough review of the record and applicable law, we affirm the trial court's judgments and remand for correction of the reckless endangerment judgment form.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the Court, in which ALAN E. GLENN and ROGER A. PAGE, JJ., joined.

Stephen Bush, District Public Defender; and Phyllis Aluko (on appeal), and Rusty White (at trial), Assistant District Public Defenders, Memphis, Tennessee, for the appellant, Larry McNutt.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Senior Counsel; Amy P. Weirich, District Attorney General; and Pamela Fleming, Assistant District Attorney General, for the appellee, State of Tennessee

OPINION

I. Facts

This case arises from the assault of Jessie Lewis, the victim. For his role in this crime, a Shelby County grand jury indicted the Defendant for alternate theories of aggravated assault: aggravated assault causing serious bodily injury and aggravated assault with a deadly weapon. At trial, the parties presented the following evidence: Jessie Lewis, the victim, testified that, at approximately 9:00 p.m. on October 29, 2010, he was “shooting craps” on “Dexter” near his home in Memphis, Tennessee. The victim recalled that he won between eight and ten dollars that night. After collecting his winnings, the victim began his walk home.

The victim testified that, as he walked, the Defendant approached him, asking for money. The victim explained to the jury that he had known the Defendant “all [his] life.” In response to the Defendant’s request for money, the victim told the Defendant, “[N]o, I don’t have it like that.” The victim said the Defendant then cut the victim twice with a box cutter. After he was cut, the victim continued to his home where he called for an ambulance.

The victim testified that he spoke with the police at his home about the incident before emergency responders transported him to the hospital for medical treatment. He said that he received four stitches for the wound on his head and twenty stitches for the wound on his neck. The victim said that, several days later, he met with a police sergeant and once again recounted the encounter between him and the Defendant. The victim identified the Defendant in a photographic line-up for police. He also identified photographs of his scars taken at the police station.

On cross-examination, the victim agreed that he and the Defendant had engaged in a fight earlier in the day. The victim denied smoking crack with the Defendant on the day of this incident or attacking the Defendant with a baseball bat.

Tion Shabazz, a Memphis Police Department officer, testified that he responded to an assault call at approximately 9:30 p.m. on October 29, 2010. When Officer Shabazz arrived at the victim’s residence, he observed a large cut on the victim’s neck and another cut on his head. Officer Shabazz said that the victim did not appear to be under the influence of drugs or an intoxicant and that the victim communicated the events surrounding his injuries. Officer Shabazz recalled that the victim told him that the Defendant approached the victim and asked for two dollars. When the victim refused, the Defendant cut the victim with a box cutter.

Kimberly Hearn, a Memphis Police Department officer, testified that, while

responding to a disturbance call on November 8, 2010, she was approached by the victim, who was not involved with the disturbance call. The victim told Officer Hearn that the Defendant, who was responsible for attacking him on October 29, was in the area. The victim showed Officer Hearn the scar on his neck and then pointed out the Defendant. Officer Hearn confirmed the information with the supervising officer, Sergeant Kevin Williams, and then the Defendant was transported to the bureau.

Kevin Williams, a Memphis Police Department sergeant, testified that he participated in the investigation of an aggravated assault against the victim. Sergeant Williams said that he met with the victim, on November 5, 2010, approximately a week after the incident. He showed the victim a photographic line-up containing a picture of the Defendant, and the victim positively identified the Defendant as the perpetrator. Sergeant Williams recalled that the victim told him that the Defendant approached the victim after a dice game and asked for money. When the victim refused to give the Defendant money, the Defendant cut the victim with a box cutter. Sergeant Williams confirmed that he observed the injuries to the victim during their meeting a week after the incident.

Sergeant Williams testified about the Defendant's arrest in this matter. He said that Officer Hearn contacted him on November 8, 2010, about the victim's accusation that the Defendant had cut him with a box cutter. Sergeant Williams said that he instructed Officer Hearn to take the Defendant into custody and transport him to the "Robbery Office." Once there, Sergeant Williams advised the Defendant of his *Miranda* rights. The Defendant's statement, which was recorded in the form of officer's questions and the Defendant's responses, was then read into the record as follows:

[Q.] Did you participate in the aggravated assault of [the victim] that occurred on October 29th, 2010[,] at approximately nine p.m.?

A. Yes.

Q. How do you know [the victim]?

A. We grew up together.

Q. Were you armed with a weapon? If so, describe it.

A. It was a razor knife that I lay carpet with.

Q. Describe in detail the events prior, during, and after the aggravated assault.

A. Me, [the victim], and Phoebe were getting high on Hunter Street, so I had another little piece of dope left. [The victim] got mad because I would not give him any. Phoebe didn't say nothing. So [the victim] got mad, started calling me bitches and hoes. I sprung on [the victim] and I hit him with a razor. [The victim] went one way, then I went the other way.

Two hours later I'm on Dexter, and him and two of his nephews jumped out the truck and come at me with a bat. When he came at me with a bat, I hit him and knocked him down. I fell on top of him, then his nephew grabbed me from behind.

Q. Was [the victim] armed when you sliced him with a razor knife?

A. I didn't see nothing in his hands.

Q. Where did you slice [the victim] with the razor knife?

A. The left side of his face, above his eye.

Q. Did you slice [the victim] on the back of his beck [sic] with a razor knife?

A. No, I did not.

Sergeant Williams confirmed that the Defendant reviewed this statement and then added, "Two days later, [the victim] came and said he was sorry and to let it alone."

Reginald Partee testified on the Defendant's behalf. He stated that he witnessed the October 29, 2010 altercation involving the victim and the Defendant. Mr. Partee could not recall the exact time but stated that the incident occurred at night. He said that he and the Defendant were standing on Dexter when a red pick-up truck drove up. Mr. Partee said that two men were in the cab of the truck, and the victim was riding in the back of the truck. As soon as the truck stopped, the victim jumped out of the back of the truck carrying a baseball bat and walked toward the Defendant and Mr. Partee. He described what happened next as follows: "[The Defendant and victim] traded words, [the victim] aimed the bat like this going towards [the Defendant] and they tangled." At some point, the two men that were sitting in the cab of the truck, whom Mr. Partee recognized as the victim's nephews, broke up the fight between the Defendant and the victim. He said the victim's nephews told the victim to "get in the truck," and the three men left while the Defendant and Mr. Partee remained on Dexter.

On cross-examination, Mr. Partee agreed that the victim had “difficulty” walking due to arthritis but maintained that the victim “jumped” out of the back of the pick-up truck. Mr. Partee said that the Defendant “rushed” the victim as the victim approached “to protect himself.” He said that the victim did not hit the Defendant because he did not “get a chance.” Mr. Partee said that the victim’s nephews intervened once the Defendant was on top of the victim. Mr. Partee said that he did not see “any blood” following this incident. He agreed that he was convicted three times of theft of property and twice of aggravated robbery. He stated that he had never told police about what he observed on the night of October 29, 2010.

Barry Borner testified that he observed an incident between the victim and Defendant that occurred between 9:00 p.m. and 10:00 p.m. on October 29, 2010. Mr. Borner said that he was in his yard when he saw the victim and the victim’s nephew drive up in a truck. The victim got out of the back of the truck with a bat or stick and approached the Defendant. The Defendant charged the victim and knocked him to the ground. The two men “tussled for a minute” before the victim’s nephew got out of the truck, retrieved the victim, and drove away.

On cross-examination, Mr. Borner said that he remembered the “scuffle” between the two men but that he could not remember the date of this incident. Mr. Borner said that he did not see the victim bleeding, although he had later heard that the victim “had been cut.” He said that an ambulance was at the victim’s house on the same night he witnessed the altercation. Mr. Borner agreed that he did not call police at the time of the incident and that, even after he was aware the Defendant had been arrested, he did not speak with police about the altercation he witnessed.

Phoebe James testified that she observed an incident between the victim and the Defendant that occurred on Hunter Street “while it was still light out,” at around 5:30 or 6:00 p.m., on October 29, 2010. Ms. James said that she, the Defendant, and the victim had gotten “high together” and that the two men were gambling. The victim lost all of his money to the Defendant. The victim asked the Defendant for “a hit.” The Defendant told the victim, he “didn’t have enough,” and then the Defendant and Ms. James started to walk away. The victim “said something crazy” and swung at the Defendant. The two men then began “tussling.” Ms. James said this went on for two or three minutes before she broke up the two men. She said that the victim then walked away through “the pathway.” She noticed “little droplets of blood,” so she called out to the victim. When he turned around, she observed a “little cut on his head.” She stated that she did not call the police about the incident because “[y]ou don’t call no police about no little cat fight like that.”

On cross-examination, Ms. James agreed that she had been smoking crack the night before and throughout the day of this incident. Ms. James said that she, the Defendant, and

the victim had been “smoking so fast” that she could not estimate how much they had smoked that day. Ms. James said that she did not see a box cutter at any time during the incident she observed. Ms. James testified that she had “about twenty theft” convictions.

Based upon this evidence, the jury convicted the Defendant of reckless endangerment and aggravated assault with a deadly weapon. The trial court merged the two convictions and ordered the Defendant to serve an effective fifteen-year sentence as a Career Offender. It is from these judgments that the Defendant now appeals.

II. Analysis

On appeal, the Defendant claims that: (1) the State solicited unfairly prejudicial testimony in violation of a pretrial ruling; (2) the trial court improperly admitted hearsay evidence; (3) the trial court improperly precluded the defense from cross-examining the victim about his desire to not prosecute the Defendant; (4) the trial court improperly admitted evidence of one of the defense witness’s prior convictions; (5) there is insufficient evidence to support the jury’s verdict; (6) his sentence is excessive; and (7) the cumulative effect of these errors violates his due process rights.

We note that the only issues raised in the Defendant’s motion for new trial were: (1) the trial court’s failure to grant a judgment of acquittal at the conclusion of the State’s proof; (2) insufficient evidence as to the aggravated assault conviction; and (3) the trial court erred in its duty as 13th juror when it did not set aside the jury’s verdict based upon the insufficiency of the evidence at trial.

Tennessee Rule of Appellate Procedure 3(e) requires that all issues raised on appeal must be “specifically stated” in a motion for a new trial, or the issue “will be treated as waived.” The grounds relied upon must be specified with reasonable certainty in a motion for a new trial to advise the trial court and opposing counsel of the alleged error relied upon and also to enable this Court to see that the alleged error was presented to the trial court for correction. *State v. King*, 622 S.W.2d 77, 79 (Tenn. Crim. App. 1981).

This Court may, however, review an issue which would ordinarily be considered waived if the Court finds plain error in the record. *See* Tenn. R. App. P. 36(b). The doctrine of plain error provides that “[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.” Tenn. R. App. P. 36(b).

This Court will grant plain error review only when: “(1) the record clearly establishes

what occurred in the trial court; (2) the error breached a clear and unequivocal rule of law; (3) the error adversely affected a substantial right of the complaining party; (4) the error was not waived for tactical purposes; and (5) substantial justice is at stake; that is, the error was so significant that it ‘probably changed the outcome of the trial.’” *State v. Hatcher*, 310 S.W.3d 788, 808 (citing *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000) (quoting *State v. Adkisson*, 899 S.W.2d 626, 642 (Tenn. Crim. App. 1994))). “If any of these five criteria are not met, we will not grant relief, and complete consideration of all five factors is not necessary when it is clear from the record that at least one of the factors cannot be established.” *Id.* (citation omitted). We need not consider all five factors when the record clearly establishes that at least one of the factors is not met. *Hatcher*, 310 S.W.3d at 808. It is the Defendant’s burden to persuade this Court that plain error exists and that the error “was of sufficient magnitude that it probably changed the outcome of the trial.” *State v. Hester*, 324 S.W.3d 788, 808 (Tenn. 2010).

A. Plain Error Review

The Defendant contends that his challenges to prejudicial testimony, admission of improper hearsay evidence, preclusion of cross-examination of the victim about his desire not to prosecute the Defendant, and improper admission of a witness’s prior convictions should be granted plain error review. The State responds that none of these issues necessitate plain error review. We agree with the State.

1. Prejudicial Testimony

The Defendant argues that the trial court should have ordered a mistrial after Sergeant Williams erroneously testified that the Defendant was already in custody at the time Officer Hearn contacted him about the victim’s assertion that the Defendant cut him. The State responds that the denial of the Defendant’s motion for a mistrial was not plain error. We agree with the State.

At trial, Office Hearn testified that she called Sergeant Williams when, unrelated to the disturbance call to which she had responded, the victim approached and told her the Defendant was in the area. She confirmed with Sergeant Williams the victim’s accusation that the Defendant had previously cut the victim and, as a result, she took the Defendant into custody. Thereafter, when Sergeant Williams took the stand, the State asked him if he had the opportunity to speak to the Defendant about the victim’s allegations. Sergeant Williams confirmed that he had, and the State asked, “And how did that come about?” Sergeant Williams stated that he received a call from Office Hearn, who had the Defendant in custody “in regard to another incident.”

The defense then asked to approach the bench and requested a mistrial, referencing the State's pretrial stated intention to "talk to the officers about not bringing this up." The State responded that Sergeant Williams's statement was a "misstatement" and that the Defendant was "never taken into custody on that other matter." The State asked that the trial court to allow Sergeant Williams to correct the misstatement. The trial court ruled that Sergeant Williams could correct his statement and that the trial court would instruct the jury to disregard the previous statement.

Sergeant Williams was again questioned about the circumstances under which he came into contact with the Defendant, and Sergeant Williams stated that Officer Hearn contacted him at the scene of an unrelated incident. The victim had approached Office Hearn regarding the October 29, 2010 incident with the Defendant. Sergeant Williams confirmed the information and told Officer Hearn to "go ahead and take [the Defendant] into custody and transport him down to the Robbery Office."

In this case, we conclude the Defendant has not shown the existence of plain error requiring our review. The State tried to establish how Sergeant Williams came into contact with the Defendant, and Sergeant Williams misstated that the Defendant was already in custody on an unrelated incident. When asked again, Sergeant Williams clarified that he requested the Defendant be taken into custody based on the October 29, 2010 incident. No further curative instruction was requested or given, and the trial proceeded. Moreover, the State presented a strong case against the Defendant. Although the Defendant and the victim disagree as to the course of events that led to the victim's injuries, the Defendant admitted he cut the victim with a box cutter. The record does not evince plain error. The Defendant is not entitled to relief on this issue.

2. Admission of Hearsay Evidence

The Defendant argues that the trial court improperly admitted hearsay evidence when it allowed Officer Shabazz and Officer Hearn to testify about the victim's out-of-court statement concerning the incident. The State responds that the Defendant has not shown plain error and, therefore, is not entitled to relief. We agree with the State.

At trial, the State called the victim first to testify about the course of the events on the night he sustained the injuries to his neck and head. The State later called Officer Shabazz, who responded to the scene, and asked Officer Shabazz what the victim had told Officer Shabazz about his injuries. The defense objected, and the trial court overruled the hearsay objection without specifying the basis for its decision. Officer Shabazz then responded that, on the night of the incident, the victim "advised that [the Defendant] asked him or demanded two dollars from him, and when he didn't give it to him, that's when [the Defendant] cut him

with a box cutter.” Thereafter, the State called Officer Hearn and asked her about the victim’s statement to her related to the October 29, 2010 incident. The defense again objected, and the parties approached the bench. The defense argued that the State was attempting to “bolster a witness.” The State responded that the statements were not hearsay, and the trial court overruled the objection. Officer Hearn then testified as follows:

[The victim] told me that he had just participated in a gambling game, dice game. He said he had won the money in the dice game, that he was getting ready to leave, and he was approached by [the Defendant] and that [the Defendant] asked him for two dollars and he said - - he told him to get out of his face because he said that [the Defendant] was crazy.

And [the victim] said after he told [the Defendant] to get out of his face, he wasn’t going to give him anything, he said that [the Defendant] then pulled out a box cutter and began cutting him.

Here, we need not determine whether the trial court erred in admitting these statements because we conclude that substantial justice does not require relief. *See Hatcher*, 310 S.W.3d at 808. Specifically, the Defendant has failed to establish that “the error was so significant that it ‘probably changed the outcome of the trial.’” *See id.* (quoting *Smith*, 24 S.W.3d at 282-83). The jury had before it the victim’s testimony regarding his encounter with the Defendant. Moreover, the Defendant admitted in his statement to police that he cut the victim. Therefore, this issue does not rise to the level of plain error, and the Defendant is not entitled to relief.

3. Motion in Limine

The Defendant argues that the trial court erred when it prevented him from cross-examining the victim about the victim’s reluctance to testify at trial. The State responds that the Defendant has failed to show plain error. We agree with the State.

Before trial, the State made the following motion:

[The defense] has indicated to the Court, as has [the victim], that the victim does not want to testify. I do not think that is relevant and I would ask the Court to instruct the defense not to ask [the victim] [whether] or not he wishes to testify or [whether] he wishes to pursue this matter.

The trial court stated that it would sustain the objection as to the specific question, “[D]o you wish to testify.” The defense asked if it would be proper to ask about the relationship

between the victim and Defendant, to which the trial court responded that it did not “see any objection to that question.”

The State correctly notes that the Defendant made no offer of the proof concerning the reluctance of the victim to testify. Further, the Defendant has not shown how the victim’s reluctance to testify might have changed the outcome of the trial. *See Hester*, 324 S.W.3d at 808. The victim’s willingness to testify is not an element of the crimes for which the Defendant was convicted. We conclude that this issue does not rise to the level of plain error. The Defendant is not entitled to relief.

4. Admission of Past Convictions

The Defendant argues that the trial court improperly admitted impeachment evidence of prior convictions. The State responds that the Defendant has failed to show that the record evinces plain error. We agree with the State.

One of the Defendant’s witnesses, Reginald Partee, testified, without objection, that he had a prior aggravated robbery conviction from May 1995, another aggravated robbery conviction from a date not stated, and three misdemeanor theft convictions from 2003, 2007, and 2008. The Defendant made no objection to these convictions at trial and now complains that both of the aggravated robbery convictions were not properly admitted pursuant to Rule 609(b) of the Tennessee Rules of Evidence. This rule provides that proof of a conviction older than ten years is inadmissible unless the Defendant is given notice and the trial court holds a hearing on the admissibility of the convictions.

Here, we need not determine whether the trial court erred in admitting these convictions because we conclude that substantial justice does not require relief. *See Hatcher*, 310 S.W.3d at 808. Specifically, the Defendant has failed to establish that “the error was so significant that it ‘probably changed the outcome of the trial.’” *See id.* (quoting *Smith*, 24 S.W.3d at 282-83). The jury had before it the victim’s testimony regarding his encounter with the Defendant and the Defendant’s admission in his statement to police that he cut the victim. Moreover, even if two of Mr. Partee’s five convictions involving crimes of dishonesty had been precluded, the three remaining theft convictions from 2003, 2007, and 2008 were admissible. Therefore, this issue does not rise to the level of plain error, and the Defendant is not entitled to relief.

B. Sufficiency of the Evidence

The Defendant argues that there was insufficient evidence to support his conviction for aggravated assault. The State responds that the Defendant’s admission to cutting the

unarmed victim, the photographs of the victim's injuries, and police testimony of the injuries provided sufficient evidence upon which a jury could find the Defendant guilty beyond a reasonable doubt of aggravated assault. We agree with the State.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); see Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999) (citing *State v. Dykes*, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990)). In the absence of direct evidence, a criminal offense may be established exclusively by circumstantial evidence. *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1973). "The jury decides the weight to be given to circumstantial evidence, and '[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.'" *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (quoting *Marable v. State*, 313 S.W.2d 451, 457 (Tenn. 1958)). "The standard of review [for sufficiency of the evidence] 'is the same whether the conviction is based upon direct or circumstantial evidence.'" *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

In determining the sufficiency of the evidence, this Court should not re-weigh or reevaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999) (citing *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956)). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978), superseded by statute on other grounds as stated in *State v. Barone*, 852 S.W.2d 216, 218 (Tenn. 1993) (quotations omitted). The Tennessee Supreme Court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of

witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523, 527 (Tenn. 1963)). This Court must afford the State of Tennessee the “strongest legitimate view of the evidence” contained in the record, as well as “all reasonable and legitimate inferences” that may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (quoting *Smith*, 24 S.W.3d at 279). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000) (citations omitted).

The Defendant was convicted of aggravated assault. Aggravated assault occurs when a defendant intentionally or knowingly commits an assault, as defined in Tennessee Code Annotated section 39-13-101, with the use of a deadly weapon. T.C.A. § 39-13-102(a)(1). “‘Deadly weapon’ means: [a] firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury; or [a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury[.]” T.C.A. § 39-11-106(a)(5)(A)-(B).

The evidence, viewed in the light most favorable to the State, shows that the victim, after winning money gambling, began walking home. The Defendant approached the victim and asked for money. When the victim refused, the Defendant cut the victim on the neck and head with a razor blade. The victim went home, called for medical help, and was transported to the hospital where he received twenty-four stitches to close the wounds. We conclude that this is sufficient evidence that the Defendant used a weapon to intentionally or knowingly cause bodily injury to the victim.

As to the Defendant’s contention that his claim of self-defense undermines the weight of the verdict, the jury heard from the Defendant’s witnesses that the victim approached the Defendant with a baseball bat. The jury also heard the victim recount the altercation between the parties. By its verdict, the jury discredited the defense witnesses in favor of the victim’s account of the assault. It is within the province of the jury to assess witness credibility and determine the weight and value to be given to the evidence. *Bland*, 958 S.W.2d at 659. The record supports the jury’s verdict that the Defendant, acting without a reasonable fear for his own safety, attacked the unarmed victim with a box cutter. The Defendant is not entitled to relief as to this issue.

C. Sentencing

The Defendant asserts that the trial court imposed an excessive sentence. The Defendant was indicted in Count 1 for aggravated assault causing serious bodily injury. The jury convicted the Defendant in Count 1 of the lesser included offense of reckless endangerment, a class A misdemeanor. The trial court merged the two offenses; however, on the judgment form in Count 1, the form indicates the Defendant was convicted of felony reckless endangerment rather than misdemeanor reckless endangerment. Because the Defendant was convicted of a misdemeanor with a maximum allowable sentence of eleven months and twenty-nine days, he argues that the six-year sentence should be amended to reflect the proper conviction and merger with Count 1. We agree.

Accordingly, we remand this case to the trial court for entry of an amended judgment reflecting the Defendant's conviction in Count 1 for misdemeanor reckless endangerment with a sentence of eleven months and twenty-nine days to be served at 75%. The judgment should also reflect the merger of Count 1 into Count 2, aggravated assault.

D. Cumulative Effect of the Errors

Finally, the Defendant contends that the cumulative effect of these errors requires that the case be reversed because he was denied his right to a fair trial. After reviewing the entire record, we conclude that the defendant was not denied a fair trial. The Defendant is not entitled to relief on this issue.

III. Conclusion

In accordance with the aforementioned reasoning and authorities, we affirm the judgments of the trial court and remand the case for correction of the judgment form in Count 1.

ROBERT W. WEDEMEYER, JUDGE