IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

AUGUST 1999 SESSION

FILED

December 16, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	C.C.A. No. 03C01-9812-CR-00447
Appellee,	)	
	)	Loudon County
v.	)	
	)	Honorable E. Eugene Eblen, Judge
MOLLY L. MILES,	)	
	)	(Voluntary Manslaughter)
Appellant.	)	

FOR THE APPELLANT:

MARY KATHERINE LONGWORTH
303 Cedar Street
P. O. Box 501
Loudon, TN 37774
(At Trial and On Appeal)

PEGGY J. S. MONGER
303 Cedar Street
P. O. Box 501
Loudon, TN 37774
(On Appeal Only)

JAMES H. SIMPSON
Third National Bank, Suite 300
P. O. Box 626
Lenoir City, TN 37771-0626
(At Trial Only)

FOR THE APPELLEE:

PAUL G. SUMMERS
Attorney General & Reporter

MARVIN S. BLAIR, JR.
Assistant Attorney General
425 Fifth Avenue North
Nashville, TN 37243-0493

CHARLES HAWK
District Attorney General

DARYL ROGER DELP
Assistant District Attorney General

FRANK A. HARVEY
Assistant District Attorney General
P. O. Box 703
Kingston, TN 37763-0703

OPINION FILED: _____

AFFIRMED AND REMANDED

ALAN E. GLENN, JUDGE

O P I N I O N

The Loudon County Grand Jury indicted the defendant, Molly L. Miles, for first degree murder in the shooting death of Steven Dotson. She pleaded nolo contendere to voluntary manslaughter, a Class C felony, and was sentenced to four years in the Tennessee Department of Correction as a Range I standard offender. The defendant timely appealed, presenting the following issues for our review:

I. Whether the trial court erred in imposing the length and manner of serving the sentence; and

II. Whether defendant's due process rights under the Constitution of the United States and the Constitution of the State of Tennessee were violated.

We affirm the trial court as to length of sentence and remand the case to the trial court for additional findings as to alternative sentencing.

FACTS

The victim, age 44, was shot in the abdomen by the defendant, age 24, with a 12-gauge shotgun in the early morning hours of July 15, 1996, in his farmhouse on Highway 70 near Lenoir City. By the time police and paramedics arrived on the scene at approximately 2:00 a.m., he was dead.

Lewis Dotson, the victim's older brother, lived next door, and they shared a driveway. He testified at the sentencing hearing that the defendant had moved in with his brother about three weeks before the shooting. He testified that he had seen the defendant firing the shotgun on four or five occasions, "just shooting. Not target shooting; just blasting." The victim was with her "sometimes" during these episodes, according to Dotson. He testified that the victim worked for Lenoir City Utilities Board and "had to be at work very early in the morning. And Molly didn't want to let Steve sleep at night. She didn't want him to go to bed. And it would make her very angry. And it -- we -- we live right across the driveway, and we could see all of this."

In the early hours of July 15, Dotson "heard the shots" and then the defendant ran into his house, telling him to call 911 because his brother had been shot. He asked the defendant if she had shot him, and she said that she had. Although he knew that the defendant did drink alcoholic beverages, it was not apparent to him that she had been drinking that day.

Nancy Deadrick, a 27-year-old, unemployed nurse who lived with Lewis Dotson, testified that the victim and the defendant had been dating for a few months. Deadrick also testified to the following events:

> And then she came to live on the farm because she said she was pregnant. And Steve said that he would marry her. And they were real excited about this pregnancy. She called me and a couple of more people, but she did call me around 11:00 or midnight one night to tell me that she was pregnant. And I talked with Steve after she told me. And he said that he was okay about it, and that he would do the right thing, that he would be responsible. And they were going to marry, and she was going to move in the next week. And she did come with her stuff the next week.

Deadrick further testified that, while "helping Steve clean the house," she found a discarded tampon in the trash. Deadrick went to the victim with this news, which Deadrick claimed indicated that the pregnancy was a ruse. When asked by General Delp, "Was there a rift or a problem that you could see developing as a result of this, what seems to be the parent falsehood?" Deadrick answered, "Only that he didn't want to marry her if she wasn't." Deadrick testified that she had seen the defendant "handling" guns, but when asked if she had seen the defendant firing them, Deadrick responded, "She told me about her firing." Deadrick also testified that the defendant would drive her car "in the field and do donuts."[1] General Delp questioned Deadrick, "Was this kind of behavior something that your family [sic] was used to?" Deadrick answered, "No." Deadrick testified that prior to the defendant's coming, the area where they all lived was a relatively quiet place.

On cross-examination, Deadrick responded to the following questions:

---

[1]We assume that the reference is to a "donut" created when a vehicle is driven in a tight circle, resulting in a circular impression on the ground.

Q. And I believe you've seen Steve out shooting guns, as well, haven't you?

A. Yes, I have.

Q. On many occasions?

A. Yes.

Q. And as a matter of fact, he had quite a collection of guns, and had even some knives?

A. Yes.

Q. He had an alcohol problem, didn't he?

A. Yes.

. . . .

Q. And do you know where he had met Ms. Miles?

A. Yes. They met in a mental institution.

Q. And had he been there for treatment?

A. Yes.

Q. For alcoholism?

A. Yes, ma'am.

Q. And were you aware that he'd wrecked his jeep prior to his death?

A. Yes, ma'am.

Q. I believe he wrecked it because he, too, had been doing donuts in the field, didn't he?

A. From what I understand, he turned over on the road somewhere.

Officer Johnny A. Brown testified at the hearing on the defendant's motion to suppress.[2] Officer Brown was dispatched to the residence on Highway 70 in response to a shooting. He described his arrival on the scene in the following words:

> Well, when I first pulled into the -- the driveway feeds to two houses. And Mr. Dotson's brother's house, the biggest house on the right when you got down there. And that's when I met Molly Miles. She was on the pavement of the driveway, in a very upset, emotion, screaming, hitting herself on the

[2]Defendant sought to suppress the statement she gave to Detective Jerry Rabern at the site of the shooting that he transcribed and she signed and a recording of her responses to questions posed by Detective Rabern. The motion to suppress was denied on May 11, 1998.

pavement.

After Officer Brown found the victim's body, his backup and paramedics secured the scene, and Officer Brown went back outside to where the defendant was. He testified that he could not "really make much sense out of her." According to Officer Brown's testimony,

> She was very emotionally upset. And I believed her to be drinking at the time. And she was throwing herself on the asphalt, and I was trying to keep her from doing that. And I said what happened. And she says I love him. You know, she kept saying I love him. I didn't mean to kill him. She said he told me the gun wasn't loaded, but I killed the man I loved. So I read her my Miranda Rights from my card, and did not ask her no questions. Waited for an investigator.[3]

Detective Jerry Rabern sat with the defendant in his car and transcribed a statement from her, which she signed after having reviewed it with him. The statement included a Miranda admonition and waiver form on the back that the defendant also signed. The statement the defendant gave Detective Rabern was:

> My boyfriend Steven Dotson had been drinking all day. I have been drinking also. I may have had five at the tops. Steve went to bed about 4 PM and then got up at 6 PM. He then took a short nap about 10 maybe 15 minutes. We had been fighting a few days ago and he blacked my eye about a month ago. After Steve got up he went to get another beer and I knew he had to go to work tomorrow and I told him he had had enough to drink. He continued to drink, he was very drunk. The guns were in the hallway and I was going to the bathroom. We were laughing and teasing and I had told him I could shoot better than him. I picked up the shotgun and pointed it at the wall in the living room and he started walking toward me. I pumped it thinking it was unloaded and I pulled the trigger and shot Steve. I ran next door to his brother's and told them to call 911.[4]

On cross-examination, Detective Rabern testified that the defendant was "hysterical many times in our conversations" and that she "would calm down for a couple of moments, but then she would go into hysterics. She tried to beat her head against the dashboard of

---

[3]We note that the presentence report contains an official version, taken from the "offense report," that does not conform to the facts as testified to by any witnesses or as relied upon by either the prosecution or defense. Therefore, we disregard that portion of the presentence report.

[4]The State contends that, "[t]his defendant has entered her plea to voluntary manslaughter. That is not an accident. Criminally negligent homicide might be an accident. . . . In this particular case this is more of an intentional shooting."

my car at one time." Detective Rabern also testified that the defendant repeated over and over, "He told me the gun wasn't loaded," and she expressed remorse.

Defense counsel asked Detective Rabern about the tape made during the time he questioned the defendant in his car: "If we play this tape in its entirety, would you characterize this tape as describing an event that was accidental?" Over objection by the State, Detective Rabern responded in the following exchange with defense counsel:

> A. My personal opinion?
>
> Q. Yes, sir.
>
> A. Yes, sir, it was an accident.
>
> Q. It was an accident. And that's always been your personal opinion, hasn't it, Officer Rayburn [sic]?
>
> A. Yes, it has.
>
> Q. And you've always been totally honest about this thing, haven't you?
>
> A. Yes, sir.

The defendant's recorded statement to Detective Rabern included the following description of the events:

> He told me he had the guns unloaded. We were -- he'd been drinking the whole day, and he was drunk. (Cries). That's why I wanted my mom down here. He gave me a black eye about a month ago. And it was just -- we got so drunk, and we were just screwing around. You know what I'm saying. Just (indiscernible).
>
> And he swore to me -- his mom talked to him and his mom talked to me just a couple of days ago, and warned us about guns, 'cause we'd go out here and shoot the guns. And right afterwards he said, "I got all the guns unloaded." And he picked up his shotgun before, and it had been unloaded. And my mom also used a shotgun, so I didn't . . . (crying). . . . But I would never have laid a hand on that man. He was the only one that ever loved me. My mom has been through it. I mean, she's always stuck with my dad 'cause she loved him.

While in jail, the defendant, four days after the shooting, wrote a letter to the victim's mother and brother and to the brother's girlfriend, which was admitted as evidence. In this letter, the defendant wrote, "I'm sorry for your loss[.] I know that sounds lame but I am deeply sorry -- the whole thing was a stupid tragedy[.] All I've done is go over how it

could've been avoided[.]"

The presentence report showed that the defendant had no criminal record. The defendant admitted to two traffic tickets. According to the report, the defendant had no formal schooling after the ninth grade but received her GED through correspondence courses. The defendant has a history of mental illness. The presentence report indicated the following:

> The defendant has been treated for depression and suicidal tendencies since age 12. She was hospitalized in 1984, for depression, again in April 1991, and November 1991. From 1991 to 1994, she was hospitalized about six times for depression and suicide attempts. In September 1995, she was hospitalized for an overdose of Tylenol. Another hospitalization was necessary in April 1996, after an attempted suicide by taking an overdose of sleeping pills. The defendant is currently under the care of a doctor. She has been diagnosed as bi-polar, a mental disorder.

The defendant was in custody from July 15, 1996, to August 5, 1996, at which time she was released on $100,000 bond, posted by her father. The defendant has remained free on the same bond pending determination of this appeal and is living with her parents.

ANALYSIS

Review by this court of the length or manner of service of a sentence, including the denial of probation, is *de novo* with a presumption that the determinations made by the trial court are correct. See Tenn. Code Ann. § 40-35-401(d) (1997). "The presumption of correctness, however, only applies if the record demonstrates that the trial court properly considered sentencing principles and all relevant facts and circumstances." State v. Zeolia, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996) (citing State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991)). The burden of showing that the sentence is improper is upon the appealing party. See Tenn. Code Ann. § 40-35-401 Sentencing Commission Comments.

The complete statements of the trial court regarding the length and manner of serving the sentence are the following:

> Well, as both of you know, we have to start on the sentencing with the assumption that the defendant is in the minimum category for sentencing. And as you know, General,

> there cannot be a maximum in that without enhancing factors. And in this case there have been no enhancing factors by law.
>
> The extremeness of the situation makes the Court feel that it's also not an absolute minimum. I realize that the three to six years are divided into minimums and maximums. And therefore the Court is going to set the sentence at four years.
>
> The extremeness of the situation, the impact on the family, and the history of the defendant, as given to the Court by the presentence investigation, would all make the Court conclude that this should be a sentence to serve. This defendant has some jail time. I'm not sure exactly, from reading this, what amount that is. By law she would be entitled to credit for that jail time.
>
> I will set the report date to the Loudon County Jail for 8:00 o'clock in the morning, October the 5th. As you know, you have 30 days in which to file your appeal.
>
> One of the things that puts that also in the minimum, of course, is the statement of one of the investigating officers that he felt like it was an accident. That was not the statement of the other investigating officers. So the Court does not feel this would be an exact minimum.
>
> So the sentence will be four years to serve.

Later, at the hearing on a motion for a new trial, the trial court overruled the motion for the following reasons:

> The Court has felt like the totality of the circumstances in this situation, including the use of a deadly weapon and the factors of alcohol involved, call for more than the minimum sentence.
>
> Under the guidelines the Court did not feel that the maximum within that range was appropriate, but the increase of the year was. And the Court feels that this should be a sentence to serve from the totality of the circumstances also in that portion.

The defendant filed five mitigating factors with the sentencing court, pursuant to Tennessee Code Annotated § 40-35-113:

> 1. Defendant immediately notified a next door neighbor and sought help for the victim after the incident.
>
> 2. Defendant was only twenty-two [sic] years of age at the time the incident occurred.
>
> 3. Defendant has no prior criminal record except for a couple of speeding tickets which she received several years ago.
>
> 4. Defendant expressed regret for the death of Mr.

Dotson.

5. The Defendant's involvement in the crime occurred under such unusual circumstances that it is unlikely that a sustained intent to violate the laws motivated her conduct.

Mitigating factors offered by the defendant were not addressed in the record, therefore, we review the length and manner of service of the sentence *de novo* with no presumption of correctness. We will consider (1) the evidence, if any received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any mitigating or statutory enhancement factors; (6) any statement that the defendant made on her own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; see also State v. Moss, 727 S.W.2d 229, 238-40 (Tenn. 1986) (noting that "[s]uch consideration assists in the fair and consistent treatment of defendants"); State v. Byrd, 861 S.W.2d 377 (Tenn. Crim. App. 1993).

I. Length of Sentence

The defendant argues first that she should have been classified as an especially mitigated offender rather than a Range I offender.

An especially mitigated offender is defined in Tennessee Code Annotated § 40-35-109. The sentencing court may, within its discretion, find the defendant is an especially mitigated offender and reduce the sentence below the statutory Range I minimum sentence if the following two criteria are met: (1) the defendant has no prior felony convictions; and (2) the court finds mitigating, but no enhancement factors. See id. § 40-35-109(a). The defendant argues that the court erred in applying as an enhancement factor, "[t]he defendant possessed or employed a firearm . . . during the commission of the offense." Tenn. Code Ann. § 40-35-114(9). The defendant argues that this is an essential element of the offense as charged in the indictment and therefore cannot be considered for enhancement purposes. See id. § 40-35-114; see also State v. Pride, 667 S.W.2d 102, 106 (Tenn Crim. App. 1983).

The test for determining if an enhancement factor is also an essential element of the indicted crime is whether the same proof necessary to establish the enhancement factor would also establish an essential element of the crime. See State v. Jones, 883 S.W.2d 597, 601 (Tenn. 1994). The use of a deadly weapon is not necessarily implied in the charge of first degree murder, the crime charged in the indictment of the defendant. See State v. Jackson, 946 S.W.2d 329, 334 (Tenn. Crim. App. 1996), perm. app. denied (Tenn. 1997) (use of a deadly weapon can be an enhancement factor for attempted first degree murder, use of a deadly weapon not an essential element of the crime); State v. Butler, 900 S.W.2d 305, 312-13 (Tenn. Crim. App. 1994) (use of a deadly weapon not an essential element of murder second degree). We hold that the trial court properly applied the use of a firearm as an enhancement factor and, as a result, was precluded by statute from sentencing the defendant as an especially mitigated offender.

The defendant next argues that, although the court appropriately determined the potential span of years available for a Range I offender convicted of a Class C felony was three to six years, the court erred in imposing a sentence of four years. The defendant argues, specifically, that the sentencing court failed to address the mitigating factors submitted for consideration and applied inappropriate enhancement factors.[5]

The Criminal Sentencing Reform Act of 1989 provides sentencing judges with guided discretion in determining the length of sentence that is appropriate for a specific defendant. The court begins by presuming that the minimum number of years within the span is the appropriate sentence for a Class B, C, D, or E felony. See Tenn. Code Ann. § 40-35-210(c). "The court must begin the sentencing determination at the statutory minimum which is called the 'presumptive sentence' under subsection (c). If there are no enhancement or mitigating factors, then the court must impose the minimum sentence

[5]The defendant repeatedly points to the State's failure to file enhancement factors. The State is correct in the position it takes that such a statement is required only when the State believes that a defendant should be sentenced as a multiple Range II offender, a persistent Range III offender, or a career offender. See Tenn. Code Ann. § 40-35-202; see also State v. Billy Gene Earnest, No. 01C01-9412-CR-00434, 1996 WL 63878, at *13 (Tenn. Crim. App., Nashville, Feb. 13, 1996) ("It is not necessary that the state file a notice of enhancement factors under T.C.A. § 40-35-114 in order for the trial court to consider them at sentencing. The notice requirement of the sentencing act applies to the determination of offender status, not sentence length.").

within the appropriate range." Id. Sentencing Commission Comments. On the other hand,

> Should there be enhancement and mitigating factors for a Class B, C, D or E felony, the court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors.

Id. § 40-35-210(e). This weighing process balances the merits of the mitigating and enhancement factors. The Sentencing Commission Comments note that some jurisdictions give a specific numerical value to these factors but that the Tennessee Legislature wished to maintain "judicial discretion necessary to make individualized sentencing determinations." Id. Sentencing Commission Comments. Therefore, great importance is placed on the creation of a record that delineates "factual findings concerning the presence or absence of such factors." Id. It is mandatory for the court to consider evidence "offered by the parties on the enhancement and mitigating factors," Id. § 40-35-210(b)(5), but the sentencing court is free to consider, on its own initiative, any appropriate enhancement factors included in Tennessee Code Annotated § 40-35-114, or any appropriate mitigating factors, whether listed in § 40-35-113 or not. Tennessee Code Annotated § 40-35-210 "permits the court the greatest latitude in considering all available information in imposing the appropriate sentence and sentence alternative." Id. Sentencing Commission Comments. "The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record." State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995).

The trial court concluded that the defendant's "use of a deadly weapon" was one of the factors that "call[ed] for more than the minimum sentence. Tennessee Code Annotated § 40-35-114(9) specifically lists, as an enhancement factor, the use of a deadly weapon during the commission of the offense. Since it was uncontroverted that the defendant killed the victim with a 12-gauge shotgun, this factor was properly applied by the trial court. Additionally, the trial court stated that it considered, in setting other than the minimum sentence, the "extremeness of the situation" and the "totality of the circumstances," including the fact that "alcohol [was] involved." While these are not enhancement factors

in themselves, as circumstances of the crime, they may be considered by the trial court in the weight which it gives to the enhancement factors it finds to be applicable. See State v. Moss, 727 S.W.2d 229, 238 (Tenn. 1986) ("The weight afforded mitigating or enhancement factors derives from balancing relative degrees of culpability within the totality of the circumstances of the case involved."); State v. Anderson, 985 S.W.2d 9, 20 n.1 (Tenn. Crim. App. 1997), perm. app. denied (Tenn. 1998) ("[t]hough not a separate enhancement factor, a defendant's lack of truthfulness may be considered in determining the weight to be given to an applicable enhancement factor"); State v. Bilbrey, 816 S.W.2d 71, 77 (Tenn. Crim. App. 1991) (in its consideration of the "circumstances of the offenses," the trial court properly considered the fact that the defendant's "total theft nearly destroyed the victim's business").

Defendant argues that the fact she went next door and sought help from the victim's brother should be considered a mitigating factor. The record shows that the closeness of the houses made awareness of activities in one house apparent to the occupants in the other. Nancy Deadrick testified that she and the victim's brother had intervened in the past in some of the late-night, domestic altercations between the defendant and the victim. The victim's brother testified that he heard the shot on the night of his brother's death. Therefore, the defendant's coming to the house next door was not the cause of the occupants' awareness that something had happened. The fact that the defendant asked the victim's brother to call 911 does not entitle her to have her sentence reduced under these facts. Cf. State v. Keel, 882 S.W.2d 410, 422 (Tenn. Crim. App. 1994) (finding that statements given to officers by defendant added no new information, did not assist police, and therefore could not reduce defendant's sentence).

The second mitigating factor offered by the defendant is her age. According to Tennessee Code Annotated § 40-35-113(6), age is a mitigating factor when it is the cause of a lack of "substantial judgment in committing the offense." Age is to be considered by the court in context. See State v. Carter, 908 S.W.2d 410, 413 (Tenn. Crim. App. 1995) (citing State v. Adams, 864 S.W.2d 31, 33 (Tenn. 1993)). In this case, no evidence was

offered to show that, at age 24, the defendant lacked the ability to appreciate the nature of her conduct. She had, in fact, obtained her GED and her handwritten letter reflected more than adequate proficiency in writing and intellectual ability. We do not conclude that, under these circumstances, the defendant's age caused her to lack "substantial judgment."

Third, defendant argues her lack of a criminal record should reduce her sentence. The State argues that the sentencing ranges as set out in Tennessee Code Annotated § 40-35-101 already take this factor into account. This court has determined that, although not among the enumerated mitigating factors of Tennessee Code Annotated § 40-35-113, considering a defendant's "remorse and lack of any criminal record whatsoever as mitigating factors is consistent with the purposes and principles of the Sentencing Act." State v. Bingham, 910 S.W.2d 448, 453 n.2 (Tenn. Crim. App. 1995). This defendant had two old traffic violations that were not even found in the records. We conclude that the lack of any criminal record could be considered a mitigating factor.

Fourth, the defendant argues that the remorse she expressed in her letter to the victim's mother, brother, and brother's girlfriend should have been considered as a mitigating factor. That letter was admitted into the record as an exhibit. As the State points out, a letter written from jail can be carefully crafted. The victim's brother testified that he had received and read the letter but did not believe it. The victim's brother also testified that, at one court proceeding, the defendant and her family were "cutting up, and laughing, and having a great time. I've seen no signs of remorse that was at all believable on her part." We conclude that this mitigating factor was not adequately shown.

Finally, the defendant argues that "[t]he defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct." Tenn. Code Ann. § 40-35-113(11). As the State pointed out a number of times, the defendant pleaded nolo contendere to voluntary manslaughter, defined in Tennessee Code Annotated § 39-13-211, as the "intentional or knowing killing of another in a state of passion produced by

adequate provocation sufficient to lead a reasonable person to act in an irrational manner." The State described the offense as "an intentional taking of the life of another, based upon some factors which we stipulated to the Court, which might cause someone to act based on passion, rather than reason, without any forethought, and so forth." The testimony of a seasoned detective, Detective Rabern, at the crime scene is persuasive, and we conclude that the circumstances of the shooting were indeed unusual and that it is unlikely that the defendant possessed any sustained intent to violate the law. This factor was appropriately considered a mitigating factor.

Finally, we balance the enhancing factor of use of a deadly weapon against the lack of any criminal record or sustained intent to violate the law in the case of voluntary manslaughter. Because of the seriousness of pointing a gun at another person, whether or not one believes it to be loaded, we conclude that the enhancing factor outweighs the mitigating factors and sustain the trial court's sentence of four years.

II. Method of Serving Sentence

The defendant contends that: (1) the trial court should have granted her an alternative sentence, and (2) her alternative sentence should be full probation. We analyze each in turn.

A. Alternative Sentence Presumption

We first determine whether the defendant is entitled to the statutory presumption that she is a favorable candidate for alternative sentencing. For a defendant to be entitled to this presumption, three requirements must be met: (1) the defendant must be an especially mitigated or standard offender; (2) the defendant must be convicted of a Class C, D, or E felony; and (3) the defendant must not fall within the population described in Tennessee Code Annotated § 40-35-102(5). See Tenn. Code Ann. § 40-35-102(5)-(6). The population included in (5) are "convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation." Id. The defendant in this case is a first-time offender of a Class C felony and thus is entitled to the presumption.

The State agrees with this conclusion, but, nevertheless, argues that this presumption operates only "in the absence of evidence to the contrary." Id. § 40-35-102(6). Where the statutory presumption of alternative sentencing holds, "the State has the burden of overcoming the presumption with evidence to the contrary." State v. Bingham, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995). "The burden may be a heavy one when the defendant has no history of criminal conduct." State v. Vincent Lasane, No. 02C01-9712-CR-00474, 1999 WL 569754, at *4 (Tenn. Crim. App., Jackson, Aug. 5, 1999). Guidance as to what may constitute "evidence to the contrary,"– evidence that the defendant is a member of the population for whom incarceration is a priority – is found in Tennessee Code Annotated § 40-35-103, which states:

> (1) Sentences involving confinement should be based on the following considerations:
>
> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

The defendant here does not fall within the parameters of either (A) or (C). As to (B), the State acknowledges on appeal that the record is "virtually silent with respect to this issue." The State points to the fact that the trial court found "[t]he extremeness of the situation" as the basis for denying alternative sentencing. Additionally, the trial court stated, "[T]he Court feels that this should be a sentence to serve from the totality of the circumstances."

This court has stated that in order for alternative sentencing to be denied on the basis of the seriousness of the offense, the circumstances must be "'especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree,' and the nature of the offense must outweigh all factors favoring a sentence other

than confinement." Bingham, 910 S.W.2d at 454 (quoting State v. Hartley, 818 S.W.2d 370, 374 (Tenn. Crim. App. 1991) (citations omitted)).

The legislature has declared that voluntary manslaughter is a Class C felony. This court has determined that "[t]o apply a different standard solely because a death is involved 'would fail to comply with the mandates of the 1989 [Sentencing] Act and would condone inconsistency and unjustified disparity in sentencing unrelated to the purposes of the Act.'" Bingham, 910 S.W.2d at 454-55 (quoting Hartley, 818 S.W.2d at 374). The fact of a death "cannot by itself constitute sufficient 'evidence to the contrary' under Tenn. Code Ann. § 40-35-102(6)." Id. at 455. The State offers the argument that the facts and circumstances pertaining to this case meet the criteria of circumstances that are "especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree." The record does not support this conclusion. However, sufficient findings were not made as to whether confinement is necessary either to avoid depreciating the seriousness of the offense or to deter others likely to commit similar offenses.

B. Alternative Sentence Options

The defendant argues that she is a suitable candidate for probation, or, in the alternative, for participation in the community corrections program.

Although probation is to be automatically considered by the trial court for eligible defendants (i.e., those with sentences actually imposed of eight years or less), see State v. Fletcher, 805 S.W.2d 785, 787 (Tenn. Crim. App. 1991), "the burden of establishing suitability for probation rests with the defendant." Tenn. Code Ann. § 40-35-303(b). This court has noted that there is "no bright line rule for determining when probation should be granted. To meet the burden of establishing suitability for full probation, the defendant must demonstrate that probation will 'subserve the ends of justice and the best interest of both the public and the defendant.'" Bingham, 910 S.W.2d at 456 (quoting State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990)). The following criteria have been

enumerated by this court as being appropriately accorded weight by the sentencing court when deciding whether the defendant is a suitable candidate for probation:

> (1) "the nature and [circumstances] of the criminal conduct involved," Tenn. Code Ann. § 40-35-210(b)(4);
>
> (2) the defendant's potential or lack of potential for rehabilitation, including the risk that during the period of probation the defendant will commit another crime, Tenn. Code Ann. § 40-35-103(5);
>
> (3) whether a sentence of full probation would unduly depreciate the seriousness of the offense, Tenn. Code Ann. § 40-35-103(1)(B); and
>
> (4) whether a sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes, Tenn. Code Ann. § 40-35-103(1)(B).

Bingham, 910 S.W.2d at 456.

In this case, the trial court did not deny probation because of any question as to the defendant's capacity to be rehabilitated. The presentence report indicates that the defendant has no criminal record of any kind. Nevertheless, the record is insufficient for our determining whether probation is appropriate. We, therefore, remand this issue to the trial court for consideration based on findings consistent with the statutory scheme described above.

Turning next to the Community Corrections Act, Tennessee Code Annotated § 40-36-106, we note that this defendant, while not eligible under § 40-36-106(a)[6], is not excluded from this program under § 40-36-106(c), which states:

> Felony offenders not otherwise eligible under subsection (a), and who would be usually considered unfit for probation due to histories of chronic alcohol, drug abuse, or mental health problems, but whose special needs are treatable and could be served best in the community rather than in a correctional institution, may be considered eligible for punishment in the community under the provisions of this chapter.

We have concluded that the defendant is eligible for probation, and likewise

[6]Individuals convicted of felonies involving the use or possession of a weapon are statutorily excluded. See Tenn. Code Ann. § 40-36-106(a)(4).

conclude that she is also eligible for community corrections sentencing. See State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996) (noting that in order to be eligible for community corrections sentencing under subsection (c), the offender must be eligible for probation). For a determination that an eligible offender is also suitable for placement in the program, the following findings of fact are required of the court:

> (1) The offender has a history of chronic alcohol, drug abuse, or mental health problems;
>
> (2) These factors were reasonably related to and contributed to the offender's criminal conduct;
>
> (3) The identifiable special need (or needs) are treatable; and
>
> (4) The treatment of the special need could be served best in the community rather than in a correctional institution.

See id. at 439.

Adequate findings were not made for us to determine whether the defendant should have been granted some form of probation or placed into the community corrections program. Accordingly, we remand the matter to the trial court so that such findings can be made.

III. Due Process Violations

The defendant argues that a number of errors occurred during the sentencing hearing which "when taken together amount to a violation of Defendant's right to due process." According to the defendant, these errors consist of the admission of hearsay testimony from the defendant's brother implying that stress resulting from the victim's death caused the brother to have two heart attacks and an alleged "medical" opinion from a lay person regarding the claimed pregnancy of the defendant. Additionally, the defendant objects to the victim's brother being allowed to testify that the victim allegedly said that the defendant "was making his life hell." Additionally, as errors entitling the defendant to relief, the defendant cites the sentencing process, concluding that the "sentence was enhanced from the minimum improperly and unlawfully and in violation of the Defendant's due process rights."

It is true that a "combination of multiple errors" may require a reversal, even though the errors, taken individually, do not. State v. Cribbs, 967 S.W.2d 773, 789 (Tenn. 1998). In view of our previous consideration of the sentencing issues raised by the defendant, and the remanding to the trial court for additional findings, we have dealt with the defendant's due process arguments with regard to the sentencing. With regard to the evidence allegedly received in error by the trial court, we note that Tenn. Code Ann. § 40-35-209(b) specifically provides that, at sentencing hearings, the "rules of evidence shall apply, except that reliable hearsay . . . may be admitted if the opposing party is accorded a fair opportunity to rebut any hearsay evidence so admitted." The defendant was allowed to present such evidence, as she wished. We do not conclude that the trial court erred in allowing this hearsay evidence at the sentencing hearing, or that the defendant's rights were prejudiced thereby. Accordingly, this assignment is without merit.

CONCLUSION

Under the facts in the record and our analysis, the length of the sentence is affirmed and this case is remanded to the trial court for additional findings and a determination, consistent with this court's opinion, whether the defendant should have been granted some form of probation or placed into the community corrections program.

_____
ALAN E. GLENN, JUDGE

CONCUR:

_____
JOSEPH M. TIPTON, JUDGE

_____
JOHN EVERETT WILLIAMS, JUDGE