IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 9, 2023

STATE OF TENNESSEE v. HILTON LEE CHATMAN

Appeal from the Circuit Court for Lincoln County
No. 21-CR-3 Forest A. Durard, Jr., Judge

No. M2022-00377-CCA-R3-CD

Defendant, Hilton Lee Chatman, was charged in an eleven-count indictment on drug-related offenses. A jury convicted him of possession with intent to sell 0.5 grams or more of cocaine in Count 1; possession with intent to sell heroin in Count 3; possession of a firearm after having been previously convicted of a felony drug offense in Count 10; and possession of drug paraphernalia in Count 11. Defendant was found not guilty of the remaining seven counts of the indictment. The trial court sentenced Defendant as a Range II offender to a total effective sentence of twenty-four years and six months. On appeal, Defendant argues the evidence is insufficient to support his convictions, his sentence is excessive, his motion for new trial was erroneously denied, and the trial court failed to comply with Rule 11 of the Tennessee Rules of Criminal Procedure when it rejected his guilty plea. Following our review of the entire record, the briefs of the parties, and applicable authority, we affirm the judgments of the trial court.

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

JILL BARTEE AYERS, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and MATTHEW J. WILSON, JJ., joined.

Jonathan C. Brown, Fayetteville, Tennessee, for the appellant, Hilton Lee Chatman.

Jonathan Skrmetti, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Robert J. Carter, District Attorney General; and Amber Sandoval and Jeff Ridner, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

This case arose when Defendant was pulled over for a traffic stop and found in possession of a considerable amount of cash. He led officers to an apartment where more drugs, cash, and a weapon were found. The Lincoln County Grand Jury entered a true bill charging Defendant in counts 1 and 2 with possession with intent to sell and deliver 0.5 grams or more of cocaine; in counts 3 and 4 with possession with intent to sell and deliver heroin; in counts 5 and 6 with possession with intent to sell and deliver fentanyl; in counts 7 and 8 with possession with intent to sell tramadol; in count 9 with possession of a firearm with the intent to go armed during the commission of or attempt to commit a dangerous felony; in count 10 with possession of a firearm after having been previously convicted of a felony drug offense; and in count 11 with possession of unlawful drug paraphernalia.

Pretrial

Defendant's trial was originally scheduled for March 2, 2021. Defendant successfully moved for a continuance to a March 16, 2021 trial date. The record shows that instead of the trial, the trial court entered an order setting an August 9, 2021 trial date. The order further set a pretrial conference date, a deadline for pretrial motions, and stated, "The Court will not accept a settlement of this case unless the defendant pleads open or the State nolles the case."

On April 29, 2021, Defendant filed a motion to direct the State to reveal the identity of the confidential informant ("CI") in the case. The State revealed the CI's identity on May 3, 2021. Defendant thereafter filed a motion to direct the State to produce the CI's evidence. On June 10, 2021, the State moved to deny the motion because the evidence pertained to uncharged crimes which the State would be prohibited from introducing at trial as it would prejudice Defendant. This evidence was contained in a thumb drive purportedly documenting Defendant's involvement in a number of drug buys. The thumb drive or contents therein are not in the record. Pursuant to the trial court's prior scheduling order, a hearing was held on July 6, 2021, to address any pending pretrial motions. At that hearing, by request of the State, the trial court held that it would review the thumb drive to determine whether Defendant was entitled to it as part of its discovery request. The order setting review of the thumb drive was entered on July 6, 2021, with August 3, 2021, as the date the trial court would submit its ruling.

At a hearing on August 3, 2021, six days before trial, Defendant attempted to enter a guilty plea. The proposed plea petition is not part of the record. However, the record does contain the transcript from the hearing. The trial court rejected the plea, but left open "the opportunity" to "renegotiate":

> [Defendant], I have reviewed the Petition to Enter a Plea of Guilty. I'm just going to tell you I am not going to accept this plea. You waited until about [four] days before trial to do anything. You have [two] if not [four] prior felonies in this, and I'm not going to accept that. If you guys – for those reasons particularly since you waited so late, and my work on it is about finished, this could have been settled a couple of months ago and I would have probably been fine with it. But I'll give you the opportunity to go back to the well and see if you can renegotiate something.

An order was also entered that date reflecting that the parties reached an agreement regarding the thumb drive.

Trial

On May 1, 2020, Patrick Murdock, an investigator with the Lincoln County Sheriff's Department ("LCSD") conducted a traffic stop of Defendant based on Defendant's brake light being out. Investigator Murdock also had prior knowledge that Defendant's license was suspended. Defendant was the subject of a drug investigation, and Investigator Murdock had been alerted by Investigator Mike Pitts of the location where Defendant was driving. Defendant had a passenger in the vehicle with him. Following the stop, Investigator Murdock went to his vehicle to run Defendant's information. Investigator Mike Pitts then arrived at the scene followed by several other drug task force agents. Once Investigator Pitts arrived, he took over the case. Investigator Murdock did not issue *Miranda* warnings during the traffic stop, but he did go with other officers to the apartment Defendant shared with his girlfriend.

Investigator Mike Pitts, a narcotics investigator with twelve years of experience in the LCSD, was working with officers of the Seventeenth Judicial Drug Task Force, Kevin Martin and Stephen Daughtery on May 1, 2020, when he arrived to help Investigator Murdock with Defendant's traffic stop. He first spoke with the passenger, Scotty Thompson, and then turned his attention to Defendant. Investigator Pitts advised Defendant of his rights under *Miranda.* Defendant agreed to waive those rights and talked to Investigator Pitts.

Investigator Pitts asked Defendant whether he possessed any narcotics. Defendant revealed that he had just left an apartment where narcotics would be found. Defendant stated that he lived there with his girlfriend, Ms. Brown.[1] When asked about the quantity of narcotics, Defendant replied "a lot more than he needed to have." Defendant gave

[1] Ms. Brown's first name is not identified in the record. She is not a party to the case.

Investigator Pitts permission to search the apartment and agreed to accompany Investigator Pitts and another drug task force agent from the traffic stop to the apartment.

Investigator Pitts acknowledged that Defendant was not on the apartment lease but Defendant possessed a key which he used to unlock the only door to the apartment. Investigator Pitts and the task force agent followed Defendant into the apartment; other officers entered the apartment thereafter. Investigator Pitts stated that Defendant never renounced his consent to enter the apartment. Defendant directed the officers to where the narcotics were located:

> When we went into the apartment he told us there would be narcotics located in the kitchen. They would be located in some of the drawers in the kitchen as well as some containers that were also located in the kitchen. He told us of a black bag that was located behind the couch in the living room, as well as a firearm that he claimed – stated it was his firearm that would be located in the bedroom in a nightstand on his side of the bed.

The black bag was located behind the couch and contained $8,000 to $9,000 in cash. Investigator Pitts explained that in his experience the presence of a large amount of cash is usually consistent with the sale of drugs. Defendant also had "roughly a thousand" dollars in his front pants pocket.

Defendant informed officers that a gun was located in a nightstand in the bedroom on his side of the bed and that he had purchased the firearm from an individual. The Glock .40 caliber semi-automatic handgun was recovered from the nightstand; it was loaded with a bullet in the chamber.

Defendant also directed officers to the kitchen and told them that narcotics would be found in a kitchen drawer and in common kitchen containers. Investigator Pitts testified that several different bags of narcotics were found in the bottom of cereal boxes. In the kitchen, officers also found a digital scale, a plastic Pyrex dish, a measuring cup with white residue, and a fork. Investigator Pitts stated that a scale is used to weigh the drugs, and the Pyrex dish, the measuring cup, and a fork are commonly used to convert cocaine to crack cocaine by "whipping up" the cocaine similar to the act of beating eggs to make scrambled eggs. The narcotics, the cash, and the firearm were photographed. Eight photographs of the contraband were exhibited to Investigator Pitts testimony and shown to the jury. The digital scale, the Pyrex dish, and the measuring cup with white residue were also exhibited. Investigator Pitts testified that the digital scale had residue and appeared to be "heavily used." The gun, ammunition, and magazines found in the bedroom were also introduced as exhibits.

Investigator Pitts explained how crack cocaine is packaged. Crack cocaine is often referred to as "cookies" because the seller can "chip" off the amount of cocaine for sale much like one can do with a cookie. In this case, two whole cookies plus half to three-quarters of another cookie were found in the apartment. Investigator Pitts testified that this was a relatively large amount and large enough to be "chipped off" and resold. Powder cocaine was also found in the kitchen. Investigator Pitts explained that powder cocaine is usually compressed into the form of a brick and often called a "brick" just like its appearance. Like crack cocaine, powder cocaine can be broken off and resold. Regardless of the texture, Investigator Pitts testified that cocaine is commonly sold in grams, ounces, or kilograms.

Heroin was also found in the apartment. Investigator Pitts described how heroin can be in different colors from black, white, off-white, tan, dark gray, and blue. He explained that heroin tends to cost more than cocaine and is sold in "points." One point is one-tenth of a gram, two points is two-tenth of a gram, and so on. Heroin is not commonly purchased in large amounts except when someone is a seller. Investigator Pitts testified that heroin is very addictive, alone, or when combined with other controlled substances. All of the contraband and possible narcotics found in the apartment were sealed in individual bags, identified, and submitted to the Tennessee Bureau of Investigation ("TBI") for testing and analysis.

Investigator Pitts drove an undercover vehicle used for narcotics investigations and purchases of illegal narcotics. It was not equipped with a dashboard camera. Likewise, he was not equipped with a body camera. He explained that body cameras are only issued to patrol deputies. He testified that investigators like himself conduct most of their interviews in the LCSD interview room which is wired for sound and video and equipped to record twenty-four hours, seven days a week. He testified further that an investigator wearing a body camera would alert anyone in an undercover drug purchase that the buyer was an officer which would undermine the purpose of the undercover operation and endanger the undercover officer.

On cross-examination, Investigator Pitts testified that he arrived at the scene approximately five minutes after Defendant was pulled over. Another investigator and a task force agent were at the scene. Investigator Pitts confirmed that neither Defendant nor the passenger were free to leave when he arrived at the scene. Defendant and the passenger were already outside the car. Investigator Pitts conducted a pat-down search of Defendant and the passenger. The passenger had nothing; Defendant possessed a large amount of American currency. No drugs or weapons were found on either man. Investigator Pitts did not search Defendant's car. He recalled that a canine deputy was called to the scene. He "assumed" Defendant's car would have been searched had there been a positive alert for narcotics from the canine officer. He confirmed that no evidence from a possible search

of the car was presented or at issue in the trial. He estimated that the traffic stop lasted about twenty minutes. He recalled that there were four LCSD officers including himself at the scene, and a task force agent may have also been at the scene.

Investigator Pitts testified that he did not obtain a warrant to search the apartment because Defendant gave consent to do so. He added that he would have obtained a warrant had Defendant not given consent. He was aware that Defendant was not a lessee on the lease and knew this at the time Defendant gave his consent. He had learned from a utility company that Ms. Brown was the lessee of the apartment. Defendant's driver's license showed an Alabama address.

Investigator Pitts testified that he *Mirandized* Defendant. He acknowledged testifying at the preliminary hearing that either he or Agent Kevin Martin advised Defendant of his rights. His encounter with Defendant at the traffic stop was not recorded. He did not expect Defendant to consent to the search of the apartment; he had expected the interview to occur in the interview room of the LCSD. However, after the interview at the stop concluded, the officers went immediately to the apartment which was located a quarter mile or less from the traffic stop.

According to Investigator Pitts, Defendant "claimed ownership" of the contraband found in the apartment. The search of the apartment was not recorded. Investigator Pitts photographed the items which were found during the search of the apartment.

On redirect examination, Investigator Pitts reiterated that Defendant stated that he lived in the apartment with Ms. Brown and procured a key from his pants pocket to let the officers enter the apartment. He also reiterated that it was Defendant who told him where the drugs, money, and gun were located in the apartment and that all of those items were found where Defendant had indicated they would be.

Investigator Pitts stated that every officer who was at the traffic stop also went to the apartment. However, Drug Task Force Agent Stephen Daughtery was already in the parking lot of the Taylor Way apartments conducting surveillance of the apartment complex when Investigator Pitts and the others arrived. Agent Daughtery testified that he did not assist in searching the apartment but spoke briefly with Defendant who "seemed a little upset." When he asked Defendant if there was anything in the apartment, Defendant replied that there was a gun in the bedroom. Agent Daughtery conveyed this information to the officers conducting the search. Agent Daughtery testified that he was not present when Defendant was *Mirandized*. He asked Defendant about the gun after he learned from the other officers that Defendant had been advised of his rights and had agreed to talk.

Special Agent Lela Jackson, a forensic scientist with the TBI and an expert in the field of forensic chemistry, tested and analyzed the substances submitted by the LCSD. Special Agent Jackson explained that she first counts or weighs the substance and then conducts a series of tests to determine what type of substance it is. Two of the tests must confirm the identity of the substance. Special Agent Jackson testified that the substance previously marked and exhibited as crack cocaine consisted of a cocaine base and weighed 28.50 grams. An additional 41.69 grams of another substance that was packaged with the cocaine base was not tested because the cocaine base substance exceeded the statutory threshold amount of 26 grams.

Special Agent Jackson tested the substance previously marked and exhibited as heroin. The substance weighed 3.36 grams and indicated the presence of multiple controlled substances: heroin, fentanyl, and tramadol. Special Agent Jackson's official forensic chemistry report was admitted as an exhibit. On cross-examination, she testified that the TBI does not presently quantify the percentage of multiple substances so in this case, the percentages of heroin, fentanyl, and tramadol were not quantified in the second substance.

By agreement, the parties stipulated that Defendant had a previous conviction for a felony drug offense which was entered on or about November 1, 2018, in Madison County, Alabama. Defendant elected not to testify.

Based on the evidence, the jury convicted Defendant of possession with intent to sell 0.5 grams or more of cocaine in Count 1, a Class B felony; possession with intent to sell heroin in Count 3, a Class B felony; possession of a firearm after having been previously convicted of a felony drug offense in Count 10, a Class C felony; and possession of drug paraphernalia in Count 11, a Class A misdemeanor. Defendant was found not guilty of the remaining seven counts of the indictment.

Sentencing

At the conclusion of Defendant's jury trial, the trial court set a sentencing hearing for September 21, 2021 and ordered a presentence report ("PSR"). While the record does not include a transcript of the September 21, 2021 hearing, it does include an order whereby the parties agreed to continue sentencing to October 26, 2021, because the PSR was "inadequate and incomplete." The order reflects that the trial court had contacted the Tennessee Department of Correction ("TDOC") about problems with the PSR which did not include a Strong-R Assessment or Defendant's personal statement and questionnaire, "among other deficits."

At the October 26, 2021 hearing, both parties noted that the PSR still had problems with Defendant's prior convictions. Entries regarding some of Defendant's prior convictions were duplicated, erroneous, or omitted. Defense counsel stated that it would be "hard with the way the [PSR] is" to proceed with sentencing. The trial court agreed, described the PSR as "garbage," and ordered Emily Williams, a manager in TDOC and supervisor of all the court specialist report writers and program liaisons for the Seventeenth Judicial District, to the stand.

Ms. Williams agreed that she and the court "have had conversations" about the state of the PSR. She acknowledged the trial court's frustration with the high turnover of court specialists and the resulting deficient and delayed PSRs. The trial court stated the importance of a complete and accurate report:

> Both sides deserve an accurate report. The [S]tate deserves one, and [Defendant] who is facing serious time in jail deserves a fair report too. So I mean if you were either side how would you feel if the Judge has to make a decision on my life and he can't even get an accurate report to make that decision.

The trial court *sua sponte* suspended sentencing because the PSR remained deficient. The court held that the report "should not be used to pronounce sentence . . . because of the cumulative errors it contains." The trial court ordered a new and complete report within ten days of the suspended sentencing hearing.

Sentencing was continued two more times from November 16, 2021, and November 23, 2021, to January 4, 2022. At the January 4, 2022 hearing, the trial court acknowledged delayed sentencing due to "some difficulties with the [PSR]," but declared that the parties were "in a posture to move forward[.]" Each side agreed on the record.

The State argued that Defendant should be sentenced as a Range II multiple offender. Prior to trial, the State had filed a notice of intent to seek enhanced punishment based on four prior felony convictions in Alabama.

The State moved to introduce the PSR, with "any correction or amendments be[ing] incorporated herein by reference," as an exhibit. The defense moved to introduce all versions of the PSR as part of the record. The trial court stated its preference to have "one working document" and to introduce the other versions as separate exhibits and entered as an exhibit the final PSR dated November 8, 2021, along with Defendant's handwritten personal statement, and the Strong-R Assessment. There was no objection to the PSR as admitted. The record includes the two earlier versions of the PSR dated September 14, 2021, and September 17, 2021.

Michelle Adcock, an employee in the Community Supervision Office in Murfreesboro, testified that she writes PSRs for the Sixteenth Judicial District. Ms. Adcock explained that writing PSRs is a "collaborative" undertaking but that the system only permits the report to be listed with one preparer. She listed herself as the preparer for purposes of recordkeeping. Ms. Adcock had no role in preparing the earlier versions of the PSR. Ms. Adcock read Defendant's personal statement from the PSR into the record. Defendant denied that the drugs and contraband found in Ms. Brown's apartment belonged to him: "Drugs found in my ex-girlfriend house that wasn't mine but being where I am they put me in possession of them with no proof and charged me with them."

During Ms. Adcock's testimony, the State identified Defendant's prior convictions all of which were in Alabama. On January 9, 2014, Defendant pled guilty to possession of marijuana and received a thirty-day sentence. On March 19, 2015, Defendant pled guilty to possession of marijuana in the first degree and possession of a controlled substance, hydrocodone. He received a twenty-four-month sentence suspended to probation for three years. Defendant violated his probation in that case and was ordered to serve the balance of his sentence. On September 26, 2013, Defendant was found guilty of domestic assault and driving without a license. He was sentenced to sixty days and placed on probation for twelve months. In the same case, he pled guilty to failure to appear. Because there was no certified copy of the judgment, the State chose not to rely on the failure to appear conviction. On August 4, 2016, Defendant pled guilty to unlawful possession of 26.9 grams of cocaine and was sentenced to ninety-six months or eight years, suspended to probation. The State maintained that this offense would be a Class B felony if committed in Tennessee. The PSR shows that Defendant's probation was revoked, and Defendant was reinstated to four-and-half-years on probation. A violation of probation warrant was issued by the State of Alabama on December 10, 2019. The State clarified that the warrant was still active. On November 1, 2018, Defendant pled guilty to unlawful possession with the intent to distribute 15.3 grams of cocaine. He received a sentence of ninety-six months or eight years, suspended to probation upon serving thirteen months. The State maintained that had Defendant been convicted of the same offense in Tennessee, it would have been a Class B felony. The State also maintained that Defendant was on probation for the November 2018 conviction when he committed the offenses in this case. Certified copies of the Alabama judgments were entered without objection.

Rachel Barber, an employee of the Tullahoma TDOC office, conducted a virtual interview of Defendant for the Strong-R risk and needs assessment. Ms. Barber stated that the questions for the assessment covered a variety of categories including but not limited to education, employment, and physical and mental health history. In terms of education, Defendant went as far as the eleventh grade. He expressed interest in obtaining his general educational development or GED diploma but had not obtained one. Ms. Barber was

unaware of Defendant's having been diagnosed with a chronic physical or mental health condition or illness. Defendant acknowledged his criminal history. Ms. Barber verified Defendant's criminal record by consulting TOMIS, but not NCIC. Ms. Barber testified that Defendant's Strong-R assessment classified his overall risk to reoffend as "high for drugs" meaning that he possesses a higher propensity for drug use or the handling, selling, or manufacturing of drugs.

On cross-examination, Ms. Barber was asked about discrepancies between the Strong-R assessment and the PSR regarding Defendant's part-time employment at the Frito-Lay factory being included in the assessment, but not in the PSR. Ms. Barber explained that her participation in preparing the PSR was limited to uploading the overall calculated assessment of Defendant's risk to reoffend, not specific information about Defendant. She was also asked why Defendant's risk to reoffend was high concerning drugs when the assessment concluded he had low needs relevant to drugs and alcohol. Ms. Barber explained that the overall risk to reoffend is calculated from "the entirety" of his background which included drug-related charges. The Strong-R Assessment reflected that Defendant's needs for drug or alcohol use was low because he had "previously maintained abstinence from drug and alcohol use for six months or more in the community by relying on family who was willing to intervene and encourage abstinence."

Investigator Pitts testified about the rising drug activity in the community, particularly a recent spike in heroin use and drug overdoses in Lincoln County. He further testified that Defendant was the subject of an ongoing investigation when he was arrested on May 1, 2020, and that from his investigation, Defendant was not in the business of selling drugs to support a personal drug habit. Moreover, to his knowledge, Defendant had not been treated for drug withdrawal after he was incarcerated on May 1, 2020.

Emily Williams was called by the defense and testified about the previously addressed problems with the PSR.

The State argued that four enhancement factors applied: (1) Defendant had an extensive history of criminal behavior; (8) he failed to comply with conditions involving release into the community; (9) he possessed a firearm or deadly weapon during the commission of the offense; and (13) at the time the felony was committed, Defendant was on probation for his Alabama convictions. T.C.A. § 40-35-113. The State also argued for consecutive sentencing because (1) Defendant is a professional criminal who has knowingly devoted his livelihood to criminal acts; and (2) he is an offender with an extensive record of criminal acts. *Id.* § 40-35-115(b).

Defendant argued for the application of two mitigating factors: (1) his criminal conduct did not cause or threaten to cause serious bodily injury; and (10) Defendant

assisted authorities in locating contraband in the case. *Id.* § 40-35-114. Defendant acknowledged his criminal history which included prior felony convictions and probation violations and agreed that he was a Range II offender. Defendant also conceded that he was on probation for his Alabama convictions when he committed the underlying offenses. Defendant argued that enhancement factor (9) was not applicable because the jury had acquitted him of the charge of possession of a firearm with the intent to go armed during a dangerous felony.

The trial court concluded that Defendant was a Range II offender relying on Defendant's two prior cocaine convictions in Alabama wherein he received a ninety-six-month sentence. The trial court recognized that both convictions constituted Class B felonies in Tennessee. The trial court also found that Defendant had violated conditions of a sentence involving release into the community for two prior probated sentences in Alabama and that he was on probation in Alabama when he committed the instant offenses. Accordingly, the trial court applied enhancement factors (1), (8) and (13). The trial court agreed with the State that enhancement factor (9) "may have some application" since there was a weapon involved, but did not give it "anywhere near as great a weight" as factors (1), (8) and (13).

As for mitigating factors, the trial court was not persuaded by Defendant's argument that his conduct neither caused nor threatened to cause serious bodily injury. The trial court stated it "typically" does not apply the factor and chose not to do so where there was "a significant amount of drugs in this case." Similarly, the trial court did not apply the factor that Defendant assisted authorities in recovering evidence in the case. The trial court held that factor (10) is relevant in cases where a defendant assists authorities in "unrelated crimes" or where a defendant provides "meaningful" information about other suspects. Although the trial court declined to apply factor (10), the trial court concluded that the facts better supported the application of mitigating factor (13):

> I want to encourage defendants to cooperate with authorities and in this case, if I recall correctly, [Defendant] voluntarily opened the door and showed the officers where the drugs and the weapon were located. Of course that is always a dangerous job for the officers and cooperation of the defendant mitigates that to some extent.

Defendant's cooperation with the police was "counterbalance[d]" by the statement he gave to the probation officer for the PSR where he denied culpability and blamed his ex-girlfriend for the contraband found in the apartment.

For the cocaine and heroin convictions, the trial court started with a sentence of seventeen years for each conviction. However, the trial court applied mitigating factor (13) and reduced the length of both sentences:

> I am going to give [Defendant] a credit on the 17 years for his cooperation, he took this bad situation and he did not make it worse and he cooperated with law enforcement. So what I am going to do the two 17 year sentences, I am going to reduce by 2 and a half years apiece so that would be a total of 14 and a half years on each.

The trial court did not apply mitigating factor (13) when sentencing Defendant on the felon in possession of a firearm conviction and sentenced Defendant to the maximum sentence of ten years. As for the misdemeanor drug paraphernalia conviction, the trial court sentenced Defendant to eleven months, twenty-nine days at seventy-five percent.

The trial court imposed partial consecutive sentences finding Defendant to be a professional criminal who has knowingly devoted his life to criminal acts as a major source of his livelihood and an offender whose history of criminal activity is extensive with the latter factor carrying more weight based on the proof. *See* T.C.A. § 40-35-115(b)(1)-(2). The trial court made the following findings regarding both factors:

> Since age 18 [Defendant] has been getting a felony about every two and a half to 3 years it looks like, depending on how you look at these, and he has consistently gotten in some type of trouble, sometimes less severe than others, but during that period of time he has gotten and keeps getting himself in trouble for whatever reason. Plus, he was caught with a significant sum of money. The jobs that are listed in the Presentence Report and what we have proof in the record do not demonstrate that one would have $10,000 in cash on them.
>
> But even if I did not consider this I believe number 2 would apply because there is activity of criminal activity that has become extensive. And the reason why it has become extensive is because from the time he was 18 until the time he was caught with this at age 28, he has been incarcerated in Lincoln County Jail ever since. He has committed a lot of offenses in a short period of time. It is not like he was 58 or 68 and this was spread out over a great deal of time. The criminal history here is very compressed and [Defendant] was given several gifts by the Courts in Alabama. He was on probation for a serious felony drug offense and he committed yet another one, and the record as a whole demonstrates he is not going to conduct himself to the rules of society. During a short period of time he has gotten

> himself a number of convictions, and I am looking at all convictions is like 12 or 13 convictions from age 18 to age 28.
>
> So while I do find that there is some argument to be had as far as the devotion to criminal acts as a source of livelihood, I think that an offender whose record of criminal activity is extensive is probably more appropriate, I believe they both apply, the criminal activity being greater than the professional criminal status.

The trial court ordered the cocaine and heroin sentences to run concurrently with each other but consecutively to the firearm sentence. The drug paraphernalia sentence was ordered to be served concurrently with the firearm sentence.

At the conclusion of sentencing, the trial court addressed its prior ruling that Defendant could not enter a guilty plea past the ordered deadline:

> For those that are here, when I say that once the case is set for trial there is a good chance it may not get – I may not allow a settlement, I mean it. And I have had several of these cases lately, including [Defendant], I'm not punishing [Defendant], I could obviously have made things worse. But to the bar if you set it for trial, you better mean it.

Motion for New Trial

Defendant filed a timely motion for new trial alleging that his ten-year sentence for the firearm conviction was excessive because the trial court failed to apply mitigating factor (10); the evidence was insufficient to support his heroin conviction because the State failed to quantify the percentage of heroin found in the bag mixed in with tramadol and fentanyl; the evidence was insufficient to support all of his convictions because the State failed to prove he was in actual or constructive possession of the contraband; the State's delay in providing the defense a surveillance tape of Defendant "a few days prior to trial" prejudiced Defendant in timely entering a guilty plea; the trial court erred in ordering consecutive sentences; as the thirteenth juror, the trial court erred in not granting Defendant's motion for judgment of acquittal; and the trial court could not make an informed sentencing decision based on the Strong-R assessment and PSR which were contradictory and inconsistent, respectively.

Following arguments of counsel, the trial court denied the motion for new trial. This timely appeal followed.

Analysis

In his brief, Defendant raises four issues: (1) whether the trial court erred by not dismissing the charges due to lack of sufficiency of the evidence; (2) whether the trial court abused its discretion in sentencing; (3) whether the trial court erred by denying his motion for new trial; and (4) whether the trial court erroneously rejected his attempt to enter a plea.

In issue (3) wherein Defendant challenges the denial of his motion for new trial, Defendant re-argues the other three issues raised, including sufficiency of the evidence, but also raises a number of other sub-issues. A motion for new trial is the procedural vehicle by which a defendant preserves an issue for appeal. Our Rules of Appellate Procedure provide that:

> [I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.

Tenn. R. App. P. 3(e). Denial of a motion for new trial is not a stand-alone issue for relief such as a motion to suppress the evidence or a motion to sever offenses or defendants. Once the trial court acts as thirteenth juror and imposes a judgment, appellate review is limited to determining the sufficiency of the evidence. *State v. Moats*, 906 S.W.2d 431 (Tenn. 1995). Thus, we will limit our review of Defendant's issue (3) to the sufficiency arguments raised therein.

I. Sufficiency of the Evidence

Defendant argues the evidence was insufficient to support his convictions because there was no evidence linking him to Ms. Brown's apartment where the narcotics and firearm were found. He submits that he was only a visitor to Ms. Brown's apartment, not a party to the lease, and therefore was not responsible for what was found in the apartment. Defendant also argues that there was no fingerprint or DNA analysis of the firearm to show that he had "touched the firearm at any point in time." He adds that he lacked actual or constructive possession of the narcotics and firearm when he was arrested over a mile away from the apartment. He argues further that if he used a key to unlock the apartment, it was not part of the State's evidence at trial. Defendant faults the State for not calling Ms. Brown as a witness to demonstrate whether he lived there, had access to the apartment, and whether the drugs and firearm belonged to him. Finally, Defendant asserts that because TBI Agent Jackson testified that the mixture of heroin, fentanyl and tramadol was not

quantifiable, the State could not prove "intent to resale if there is not an amount present that would be indicative of a resale amount." The State responds that the evidence is sufficient to support Defendant's convictions. We agree with the State.

When a defendant challenges the sufficiency of the evidence, this court is obliged to review that claim according to certain well-settled principles. A guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt. *State v. Allison*, 618 S.W.3d 24, 33 (Tenn. 2021); *State v. Gentry*, 538 S.W.3d 413, 420 (Tenn. 2017). The burden is then shifted to the defendant on appeal to demonstrate why the evidence is insufficient to support the conviction. *State v. Jones,* 589 S.W.3d 747, 760 (Tenn. 2019).

The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). On appeal, "all reasonable and legitimate inferences from the evidence must be drawn in favor of the prosecution and all countervailing evidence discarded." *State v. Weems*, 619 S.W.3d 208, 221 (Tenn. 2021). As such, this court is precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. *Id.* (citing *State v. Stephens*, 521 S.W.3d 718, 724 (Tenn. 2017)). Questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *Allison,* 618 S.W.3d at 34; *Jones,* 589 S.W.3d at 760. "This standard of review is identical whether the conviction is predicated on direct or circumstantial evidence, or a combination of both." *State v. Williams*, 558 S.W.3d 633, 638 (Tenn. 2018) (citing *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011)).

In Tennessee, "[i]t is an offense for a defendant to knowingly . . . [p]ossess a controlled substance with intent to manufacture, deliver or sell the controlled substance." T.C.A. § 39-17-417(a)(4). Cocaine and heroin are identified as controlled substances under the statute. Cocaine is a Schedule II controlled substance, whereas heroin is a Schedule I controlled substance. *Id.* §§ 39-17-408(b)(4); -39-17-406(c)(11). Possession with the intent to sell 0.5 grams or more of cocaine is a Class B felony. *Id.* § 39-17-417(c)(1). Possession with the intent to sell a Schedule I controlled substance is a Class B felony. *Id.* § 39-17-417(b). Unlawful possession of drug paraphernalia is a Class A misdemeanor. *Id.* § 39-17-425(a)(1)-(2). Defendant was also convicted of unlawful possession of a firearm after having been convicted of a felony drug offense. *Id.* § 39-17-1307(b)(1)(B). This is a Class C felony. *Id.* § 39-17-1307(b)(3).

Possession may be actual or constructive. *State v. Robinson*, 400 S.W.3d 529, 534 (Tenn. 2013) (citing *State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 2001)). A person constructively possesses contraband when he has "'the power and intention at a given time

to exercise dominion and control over . . . [the drugs] either directly or through others.'" *Shaw,* 37 S.W.3d at 903 (quoting *State v. Patterson,* 966 S.W.2d 435, 444-45 (Tenn. Crim. App. 1997)). Mere presence in an area where drugs are discovered, or association with a person who is in possession of drugs, without more, is insufficient to support a finding of constructive possession. Constructive possession rests on the totality of the circumstances of each case and may be proven by circumstantial evidence. T.C.A. § 39-17-419 (possession may be inferred from "relevant facts surrounding the arrest"). Elements of possession for purposes of constructive possession are questions of fact for the jury[.]" *State v. Peters*, No. W2018-01328-CCA-R3-CD, 2019 WL 3775872, at *4 (Tenn. Crim. App. Aug. 9, 2019) (quoting *State v. Killebrew*, No. W2003-02008-CCA-R3-CD, 2004 WL 1196098, at *3 (Tenn. Crim. App. May 26, 2004)).

It may be inferred "from the amount of a controlled substance or substances possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled substance or substances were possessed with the purpose of selling or otherwise dispensing." T.C.A. § 39-17-419. "[O]ther relevant facts" that can give rise to an inference of intent to sell or deliver include the weight and street value of the drugs, the packaging of the drugs, the presence of a large amount of cash, and the presence of weapons. *See State v. Nelson*, 275 S.W.3d 851, 867 (Tenn. Crim. App. 2008) (sufficient circumstances from which the jury could reasonably infer that the defendant intended to sell the cocaine where defendant was spotted in a location known for illegal drug sales, in possession of cocaine inconsistent with personal use, coupled with $114 in cash and a check for an unspecified amount); *State v. Logan*, 973 S.W.2d 279, 281 (Tenn. Crim. App. 1998) (a large amount of cash found in conjunction with several small bags of cocaine provided sufficient evidence of intent to sell); *State v. Brown*, 915 S.W.2d 3, 8 (Tenn. Crim. App. 1995) (the absence of drug paraphernalia and the manner of packaging of drugs supported an inference of intent to sell); *State v. Matthews*, 805 S.W.2d 776, 782 (Tenn. Crim. App. 1990) (finding testimony of amount and street value of 30.5 grams of cocaine was admissible to infer an intention to distribute).

Viewing the proof in the light most favorable to the State and discarding all countervailing proof, the evidence shows that Defendant knew and informed officers that drugs, money, and a firearm were in the apartment where he lived with his girlfriend, Ms. Brown. Defendant told Investigator Pitts that he just left an apartment where narcotics would be found. Defendant gave permission to search the apartment and accompanied the officers to the apartment where he retrieved a key from his pants pocket, entered the apartment with the key, and let the officers inside. Defendant told the officers where the drugs, the cash, and the firearm were located in the apartment. Just as Defendant had indicated, officers found cocaine and heroin buried in cereal boxes, $8,000-9,000 in cash in a black bag hidden behind the couch, and a loaded .40 caliber Glock semi-automatic handgun in a nightstand next to the bed. Defendant told Investigator Pitts that the gun was

his and that he had purchased it. Regarding the 3.36 grams of the mixture of heroin, fentanyl and tramadol, as the trial court pointed out in denying the motion for new trial, "unlike [c]ocaine and [m]eth, [h]eroin does not quantify an amount for which it is said to be a B felony or a C felony type of situation. And as I recall the drug[s] were comingled somewhat together." Investigator Pitts testified that heroin is sold in points, with one point equaling one tenth of a gram. The jury was within its right to consider that weight and street value of the drugs, the packaging of the drugs, the presence of a large amount of cash, and the presence of weapons in determining intent to sell. The proof demonstrated that Defendant possessed the power and intent to exercise dominion and control over the apartment, as well as the drugs, cash, and firearm found inside.

The fact that Defendant's name was not on the lease did not undermine the State's evidence that Defendant exercised control and dominion of the apartment. *State v. Mooneyhan,* No. M2016-00476-CCA-R3-CD, 2018 WL 2247180, at *9 (Tenn. Crim. App. May 16, 2018) (jury could infer defendant was in possession of girlfriend's apartment and in constructive possession of stolen property therein where defendant was not on the lease, did not receive a key until a month after the property was stolen, but admitted to staying at the apartment, answered the door when police arrived and gave consent for a search). The fact that Defendant had a key to enter the apartment as if it were his home established that he had dominion and control of the apartment and not mere presence or association with the named lessee. *State v. Carpenter*, No. W2020-00896-CCA-R3-CD, 2021 WL 4771955, at *10 (Tenn. Crim. App. Oct. 13, 2021) (defendant possessed dominion and control of another man's apartment where he had a set of keys to the apartment, was seen entering and exiting the apartment as if it were his home, and used the apartment to sell drugs contrary to the owner's wishes), *perm. app. denied* (Jan. 13, 2022); *see also Peters*, 2019 WL 3775872, at *4 (Defendant had constructive possession of the gun found in the house where he did not live where defendant knew where the gun was located in the house, the gun was immediately accessible in the front bedroom, and defendant told officers his fingerprints would be found on the gun).

Defendant's reliance on *United States v. Scofield*, 433 F.3d 580 (8th Cir. 2006), *People v. Alicea*, 23 A.D.3d 572 (N.Y. App. Div. 2005), and *State v. Siner*, No. W2020-01719-CCA-R3-CD, 2022 WL 252354 (Tenn. Crim. App., Jan. 27, 2022) is misplaced because unlike those cases, the State presented proof of Defendant's knowledge of the drugs and contraband found in the residence and Defendant's control and dominion of the contraband found in the apartment. In *Scofield*, the government's proof did not establish that a co-defendant knew drugs were stored in the detached garage of a small house. *Scofield*, 433 F.3d at 586. While the co-defendant had access to the house and was often there, he was considered a "mooch" or "lay about" with no involvement in the actual sale of drugs according to the confidential informant. *Id.* at 585. The proof amounted to nothing more than "[p]roximity and association" and was insufficient to establish co-

defendant's conviction for intent to distribute. *Id.* Here, Defendant knew there would be drugs, cash, and a weapon in Ms. Brown's apartment and gave officers consent to enter and retrieve the contraband.

In *Alicea*, the defendant did not "reside in, occupy, or rent the apartment where the supply of crack cocaine was found." 23 A.D.3d at 572. Other individuals had access to the drugs found in the apartment and were arrested in the apartment. *Id.* at 572. Their arrest occurred three days after the defendant sold drugs in the building to an undercover officer. *Id.* at 573. The defendant's presence in the hallway outside the apartment was insufficient to prove his dominion and control over the cocaine found inside the apartment. *Id.* In this case, Defendant occupied the apartment with Ms. Brown and had a key to the only entrance to the apartment. He also informed the officers of the specific contraband located in the apartment.

In *Siner*, the defendant was the front-seat passenger in a car with two other people when the driver was pulled over for speeding. 2022 WL 252354, at *1. Marijuana and oxycodone were found in the center console underneath a pile of papers and other items, a marijuana cigarette was found on the front passenger floorboard, and a loaded gun was found under the front passenger seat. *Id.* at *7. This court held that the evidence was legally insufficient to establish the defendant had knowledge and control of the contraband found in the center console and the gun underneath the passenger seat where the items were not in plain view and "in a location under the control multiple persons." *Id.* at *6. Additionally, in *Siner,* the failure to dust the gun for fingerprints militated against the State's proof for felon in possession of a firearm where defendant did not claim ownership of the gun or the car and the gun was found underneath the front passenger seat and not in plain view. *Id.* at *7.

In this case, fingerprint or DNA analysis was rendered unnecessary by Defendant's admission that the gun belonged to him. Defendant knew there was a firearm in the apartment and told the officers where it would be found. The loaded firearm with the magazine was found in the nightstand next to the bed. Viewed in the light most favorable to the State, a rational trier of fact could find that Defendant had the power and intention to possess the firearm.

Furthermore, based on the amount of cocaine and heroin found in the kitchen, the presence of a digital scale, spoon, and Pyrex dish, instruments commonly used to weigh and manufacture narcotics, a loaded gun in the bedroom, and the large amount of cash in the apartment and on Defendant, the jury was free to infer that Defendant possessed the intent to sell the cocaine and heroin.

II. Sentencing

Defendant contends that the trial court erred in not mitigating the sentence for his conviction of being a felon in possession of a firearm because he cooperated with law enforcement in recovering the narcotics, cash, and firearm in Ms. Brown's apartment, and although a Range II offender, his criminal history was not extensive. He contends further that his sentencing was "botched" because the trial court relied on a PSR that was incomplete and riddled with erroneous information. The State argues that the trial court stated its reasons for the sentencing decision on the record and those reasons are consistent with the purposes and principles of sentencing. As for the PSR, the State contends Defendant has failed to show the trial court relied on any erroneous information in determining his sentence. We agree with the State.

When a defendant challenges the length, range, or manner of a sentence, this court reviews the trial court's sentencing decision under an abuse of discretion standard with a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). This presumption applies to "within-range sentencing decisions that reflect a proper application of the purposes and principles of the Sentencing Act." *Id.* at 707.

In determining the proper sentence, the trial court must consider: (1) the evidence, if any, received at the trial and the 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 involved; (5) evidence and information offered by the parties on the mitigating and enhancement factors set out in Tennessee Code Annotated sections 40-35-113 and -114; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement the defendant made in the defendant's own behalf about sentencing; and (8) the result of the validated risk and needs assessment conducted by the department and contained in the presentence report. *See* T.C.A. §§ 40-35-102, -103, - 210(b); *see also Bise*, 380 S.W.3d at 697-98. The trial court must also consider a defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-103(5).

To facilitate meaningful appellate review, the trial court must state on the record the factors it considered and the reasons for imposing the sentence chosen. *Id.* § 40-35-210(e); *Bise*, 380 S.W.3d at 706. However, "[m]ere inadequacy in the articulation of the reasons for imposing a particular sentence . . . should not negate the presumption [of reasonableness]." *Bise*, 380 S.W.3d at 705-06. The party challenging the sentence on appeal bears the burden of establishing that the sentence was improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. The weighing of various enhancement and mitigating factors is within the sound discretion of the trial court. *State v. Carter*, 254 S.W.3d 335, 345 (Tenn. 2008). This court will uphold the sentence "so long as it is within the

appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Bise*, 380 S.W.3d at 709.

Here, Defendant is simply challenging the trial court's weighing of a mitigating factor. The weighing of enhancement or mitigating factors is no longer grounds for reversal on appeal. *Carter*, 254 S.W.3d at 345. The trial court, in its discretion, chose to mitigate the sentences for the two drug offenses, but chose not to mitigate the sentence for the firearm offense. So long as the sentences are within the applicable range and consistent with the purposes and principles of sentencing, this court is bound by the trial court's decision. *Id.* at 345-46; *see, e.g.*, T.C.A. §§ 40-35-102; -103.

Possession of a firearm by a person with a previous conviction for a felony drug offense is a Class C felony. *See* T.C.A. § 39-17-1307(b)(3). The range of punishment for a Range II offender convicted of a Class C felony is six to ten years. *Id.* § 40-35-112(b)(3). The trial court sentenced Defendant to ten years. While it is the maximum sentence in the range, it is a sentence within the range – a range Defendant conceded was proper based on his felony convictions in Alabama. In addressing the sentence, the trial court stated that it considered the total effective sentence to be "commensurate with the purposes and principles of sentencing, particularly for those that have demonstrated a past of not cooperating, not conforming with the rules and laws of society." Because this sentence is within the proper range of punishment and imposed in a manner consistent with the purposes and principles of sentencing, Defendant has not overcome the presumption that his ten-year sentence or any of his sentences are reasonable. Finding no abuse of discretion, Defendant is not entitled to relief.

Further, Defendant is not entitled to relief on the state of the PSR that was ultimately admitted without objection at the sentencing hearing. Defendant has not demonstrated that the trial court abused its discretion by relying on the PSR, nor has he identified what information the trial court relied on that prejudiced Defendant. The record shows that there were issues in obtaining a complete and accurate PSR due to staffing issues at the TDOC. Sentencing was continued several times until the TDOC could submit a PSR that correctly and thoroughly conveyed Defendant's criminal history.

At the January 4, 2022 sentencing hearing, the trial court took issue with the form of the PSR in detailing Defendant's criminal record, but not to its content. Indeed, there was no objection to the prior felony convictions from Alabama nor the prior probation violations as set out in the report. As mentioned previously, Defendant contends his criminal history is not extensive but conceded at sentencing that he was a Range II offender. Contrary to Defendant's assertion, there was no contradiction or inconsistency between the Strong-R assessment that Defendant was high risk for selling drugs and low risk for the use of drugs or alcohol. The Strong-R assessment is in the record and clearly states the

differences in calculating the overall high risk to reoffend with a specific need regarding drug or alcohol treatment. Defendant had a low need for alcohol or drug treatment because he had "previously maintained abstinence from drug and alcohol use for six months or more in the community by relying on family who was willing to intervene and encourage abstinence." This is distinct from having a high risk to reoffend in the selling or manufacturing of drugs. This risk was determined from Defendant's entire background including family, education, and criminal history. Given Defendant's convictions for selling cocaine and heroin, the assessment of high risk to reoffend is not surprising. More importantly, at the hearing on the motion for new trial, the trial court stated that it did not rely heavily on the Strong-R assessment in fashioning Defendant's sentences due to the presence of other factors such as Defendant's extensive criminal history and a repeated failure to comply with conditions involving release into the community:

> . . . the Strong[-]R was in there. I'll be honest with everybody, I probably do not put much weight on it. I'm required to consider it, I don't think I'm required to put – I think I have the ability to choose what weight I decide to put on the Strong[-]R and this one did not have much reason for me to give it a great deal of consideration. I think there were other factors that were much more concerning in this case.

Because Defendant has failed to show the trial court abused its discretion in determining Defendant's sentences, he is not entitled to relief.

III. Rejection of Defendant's Plea Petition

On appeal, Defendant claims the trial court erred in rejecting his petition to enter a guilty plea because the court failed to comply with subsections (B) and (C) of Rule 11(c)(5) of the Tennessee Rules of Criminal Procedure. The State responds that this issue is waived because Defendant failed to raise it in the motion for new trial, and waiver notwithstanding, Defendant is not entitled to relief because the circumstances did not obligate the trial court to advise Defendant as set forth in Rule 11(c)(5).

This issue is waived for several reasons. First, Defendant claims for the first time on appeal that the trial court error in rejecting his plea. *See* Tenn. R. App. P. 3(e) ("no issue presented for review shall be predicated upon error . . . unless the same was *specifically* stated in a motion for a new trial; otherwise such issues will be treated as waived") (emphasis added). Should this court interpret the delay in receiving the surveillance footage as prejudicing Defendant's right to enter a plea, the issue would still be waived because he advocates a different theory on appeal. In the motion for new trial, Defendant alleged that he was prejudiced by the *State's* failure to provide timely discovery of surveillance footage showing him engaged in several drug buys on the day of his arrest

in this case. Defendant alleged that he received the footage "a few days prior to trial" and "past the time frame for (sic) plea period." Defendant did not argue that the trial court deprived him of the right to enter a plea, nor is there a citation to Rule 11(c)(5) as grounds for relief. Yet, on appeal, Defendant lays the blame squarely on the trial court for rejecting the plea petition and argues that his petition to enter a plea was timely because it was brought to the court's attention "within a week or so of reviewing the remaining discovery." *State v. Howard*, 504 S.W.3d 260, 277 (Tenn. 2016) ("a defendant may not advocate a different or novel position on appeal"); *State v. Adkisson*, 899 S.W.2d 626, 634-35 (Tenn. Crim. App. 1994) (a defendant may not assert one ground for relief in the trial court and then pursue a new or different theory on appeal). Additionally, the record is inadequate for this court's review. The transcript of the plea petition is not in the record. Without it, "a fair, accurate and complete account of what transpired with respect to the issues forming the basis of his appeal" is not before the court. Tenn. R. App. P. 24(a). Absent the necessary relevant material in the record, we cannot consider the merits of an issue and must "conclusively presume the judgment of the trial court was correct." *State v. Matthews*, 805 S.W.2d 776, 784 (Tenn. Crim. App.1990). As such, this issue is waived.

Moreover, even if we were to conclude that the issue is not waived, Defendant is not entitled to relief because the available record does not show an abuse of discretion by the trial court. The authority to accept or reject the plea agreement lies within the trial court's discretion. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *State v. Hawkins*, 519 S.W.3d, 40 (Tenn. 2017) *overruled on other grounds by State v. Ennix*, 653 S.W.3d 692, 700-01 (Tenn. 2022). In Tennessee, pleas are governed by Rule 11 of the Tennessee Rules of Criminal Procedure. The procedure for disclosing a plea agreement is set forth as follows:

> (A) Open Court. The parties shall disclose the plea agreement in open court on the record, unless the court for good cause allows the parties to disclose the plea agreement in camera.
>
> (B) Timing of Disclosure. Except for good cause shown, the parties shall notify the court of a plea agreement at the arraignment or at such other time before trial as the court orders.

Tenn. R. Crim. P. 11(c)(2). Timing is of paramount importance in disclosing a plea agreement as the parties "shall notify" the trial court "at the arraignment" or "as the court orders." *See Hawkins*, 519 S.W.3d at 39-40 (no abuse of discretion or prejudice where defendant failed to notify the trial court before trial of his desire to plead guilty as required under Rule 11(c)(2)).

Should a plea agreement be rejected, the trial court should do the following:

> If the court rejects the plea agreement, the court shall do the following on the record and in open court (or, for good cause, in camera):
>
> (A) advise the defendant personally that the court is not bound by the plea agreement;
>
> (B) inform the parties that the court rejects the plea agreement and give the defendant *an opportunity to withdraw the plea*; and
>
> (C) advise the defendant personally that *if the plea is not withdrawn*, the court may dispose of the case less favorably toward the defendant than provided in the plea agreement.

Tenn. R. Crim. P. 11(c)(5) (emphasis added). The plain language of subsections (B) and (C) contemplates a situation where the defendant has already entered a plea which the court has rejected.

A defendant has "no absolute right to have a guilty plea accepted. A court may reject a plea in exercise of sound judicial discretion." *Hawkins*, 519 S.W.3d at 40 (quoting *Santobello*, 404 U.S. at 262). A trial court's refusal to accept a guilty plea will be reversed if the trial court has abused its discretion. *Santobello*, 404 U.S. at 262; *Hawkins*, 519 S.W.3d at 40. "An abuse of discretion occurs when [a] trial court applies an incorrect legal standard or reaches a conclusion that is 'illogical or unreasonable and causes an injustice to the party complaining.'" *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007) (quoting *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006)). The trial court's discretion in rejecting a plea agreement is not however, absolute. *State v. Williams*, 851 S.W.2d 828, 831 (Tenn. Crim. App. 1992). For instance, a blanket policy of rejecting plea agreements where the defendant does not acknowledge guilt may constitute an abuse of discretion. *Id.* at 832. Rejection of a plea agreement based on an error of law constitutes an abuse of discretion. *Goosby v. State,* 917 S.W.2d 700, 706-07 (Tenn. Crim. App. 1995) (trial court abused its discretion in rejecting a plea agreement on the erroneous belief that the court could not sever the co-defendants).

The record establishes that the trial was originally scheduled for March 2, 2021. Defendant successfully moved for a continuance to a March 16, 2021 trial date. When the trial was continued again, the trial court entered an order setting the trial date and deadlines for pretrial motions and for settlement. Following a pretrial motion regarding the surveillance footage, the trial court scheduled a hearing on August 3, 2021, to rule on the motion. On that date, six days before trial, Defendant attempted to enter a guilty plea. The trial court rejected the plea, but left open "the opportunity" to "renegotiate":

> [Defendant], I have reviewed the Petition to Enter a Plea of Guilty. I'm just going to tell you I am not going to accept this plea. You waited until about [four] days before trial to do anything. You have [two] if not [four] prior felonies in this, and I'm not going to accept that. If you guys – for those reasons particularly since you waited so late, and my work on it is about finished, this could have been settled a couple of months ago and I would have probably been fine with it. But I'll give you the opportunity to go back to the well and see if you can renegotiate something.

In denying the motion for new trial on this issue, the trial court found no prejudice to Defendant's ability to enter a plea due to any delay in receiving surveillance footage that was not used in the trial. Under the circumstances, the trial court's refusal to accept Defendant's plea petition four days before trial, was consistent with its prior order and not an abuse of discretion. Simply put, Defendant did not comply with Rule 11(c)(2)(B) in that he failed to notify the court of his wish to enter a plea by the deadline imposed by the trial court. Because the plea petition is not in the record, the record does not establish whether Defendant admitted guilt to all eleven counts of the indictment or whether the decision to enter the plea was the result of plea bargaining as contemplated by Rule 11(c)(1) ("the plea agreement may specify that the district attorney general will: (A) move for dismissal of other charges; (B) recommend, or agree not to oppose the defendant's request for, a particular sentence, with the understanding that such recommendation or request is not binding on the court; or (C) agree that a specific sentence is the appropriate disposition of the case").

In terms of the trial court's alleged failure to advise Defendant under Rule 11(c)(5), the facts show that the trial court was not obligated to advise him because the trial court did not reject a plea agreement, but instead refused to consider a plea agreement presented past the previously ordered deadline. Defendant is not entitled to relief.

Conclusion

For the foregoing reasons, the judgments of the trial court are affirmed.

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JILL BARTEE AYERS, JUDGE