IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 21, 2023

STATE OF TENNESSEE v. JASON LEE SCHUTT

Appeal from the Circuit Court for Lincoln County
No. 21-CR-57 Forest A. Durard, Jr., Judge

No. M2022-00905-CCA-R3-CD

A Lincoln County jury convicted the Appellant, Jason Lee Schutt, of alternative counts of possession of hydrocodone with intent to sell or deliver, a Class C felony. See Tenn. Code Ann. §§ 39-17-408(b)(1)(F), -417(a), -417(c)(2)(A). The trial court properly merged the above counts, and following a sentencing hearing, the Appellant was ordered to serve nine years and six months in confinement in the Tennessee Department of Correction. In this appeal, the Appellant contends that the evidence was insufficient to support his convictions because the alleged controlled substance was not verified by chemical analysis as hydrocodone, and that the trial court erred in denying alternative sentencing. Upon our review, we affirm the judgment of the trial court.

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

CAMILLE R. MCMULLEN, P.J., delivered the opinion of the court, in which KYLE A. HIXSON and MATTHEW J. WILSON, JJ., joined.

Joseph C. Johnson, Fayetteville, Tennessee, for the Appellant, Jason Lee Schutt.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglas, Assistant Attorney General; Robert J. Carter, District Attorney General; and Amber Sandoval, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The facts giving rise to the Appellant's conviction stem from a single drug transaction during which the Appellant sold ten hydrocodone pills to a confidential informant (CI) employed by the Lincoln County Sheriff's Department (LCSD) in exchange for $100 in cash. The entire drug transaction was video and audio recorded, and the Appellant is visible during the exchange. The sole issue presented pertaining to the

Appellant's challenge to the sufficiency of the evidence is whether the State carried its burden of proof in establishing the controlled substance was, in fact, hydrocodone because there was no chemical analysis of the pills offered at the Appellant's March 3, 2022 jury trial. Accordingly, we summarize the proof as relevant to this issue.

Investigator Mike Pitts testified that he had been employed with the LCSD for almost twenty-two years. Investigator Pitts detailed his training and certifications, which included completion of the Tennessee Law Enforcement Training Academy basic class, certification from the State of Tennessee as a post-certified officer, forty hours a year of continuing education training to maintain his certification, local, state, and federal narcotics investigation schools, and training in undercover operations. Investigator Pitts was responsible for the majority of the narcotics investigations in Lincoln County. He would often employ the use of a CI in his narcotics investigations and explained the procedure utilized to do so. Each time he used a CI, he took steps to verify that the information given by the CI was accurate and correct. A search of the CI's person and car for any contraband, as well as the CI's cellphone, would also be conducted prior to any undercover operation. In some circumstances, Investigator Pitts eliminated the use of the CI and conducted the "buy" himself.

On January 27, 2021, the date of this offense, Investigator Pitts utilized a CI and followed the above-described procedure. He met with the CI to prepare for a controlled purchase of hydrocodone from the Appellant. He also utilized the sheriff's department's undercover recording equipment, which was used for every controlled purchase. He testified that the time and date stamp on the equipment was not functioning properly and would automatically reset every time the equipment was powered off, thereby displaying the factory-set time and date, unless altered by the department. For this controlled buy, Investigator Pitts met with the CI, searched his person and vehicle for contraband, and then equipped them both with the video and audio equipment. He was prepared to purchase the hydrocodone with earmarked funds from the drug investigation unit. He and the CI then proceeded to meet the Appellant at a predetermined residence in Park City. In his undercover capacity, Investigator Pitts approached the location, and the Appellant came outside of the residence. Investigator Pitts parked the car in the front, and the Appellant walked to the passenger side of the car. The CI referred to the Appellant by his first name and introduced Investigator Pitts as "CJ." The Appellant walked to the side window and handed the CI a pill bottle that contained ten hydrocodone pills.

Investigator Pitts testified, and the video reflected, that during the controlled buy, the Appellant put the hydrocodone pills in Investigator Pitts' hands. In return, Investigator Pitts paid the Appellant $100 in cash. During the controlled buy, Investigator Pitts opened the pill bottle and poured the pills into his hands to confirm the substance he was purchasing was hydrocodone. Investigator Pitts identified the Appellant at trial as the person from

whom he purchased the hydrocodone pills. The entire transaction lasted less than twenty seconds. The video tape of the transaction with audio was admitted into evidence and played for the jury. A screenshot from the video showing the Appellant's face at the car was also admitted as evidence at trial and displayed to the jury. Investigator Pitts analyzed the numbers on the pills, M-367, and confirmed that they were hydrocodone. He conducted a "check" on the imprinted numbers on the pills and was able to "identify the pills with a picture, shape[, and] number[.]" Investigator Pitts suspected the pills were hydrocodone tablets based on the information he had already gathered "going into [the instant] controlled purchase[.]" Investigator Pitts agreed that the controlled drug buy unfolded as expected because he received the same number of pills for the same amount of money that had been prearranged. He identified the hydrocodone pills he purchased from the Appellant at trial, and they were admitted into evidence. Investigator Pitts submitted a request to the Tennessee Bureau of Investigation (TBI) to test the pills.

On cross-examination, Investigator Pitts said he had received "a lot" of specific training in identifying drugs. His training included completion of certain schools, on-the-job training, and "just by the narcotics themselves and experience, you know what they look like and it is confirmed when you send it to the lab." Based on his training and experience, he opined that the pills he purchased from the Appellant were hydrocodone. Investigator Pitts agreed, however, that he was not an expert in drug identification. He agreed he had previously identified a substance as one drug and then later found it to be something else. For example, he explained that "[t]hey could sell you baking soda, all of them look consistent and like the real drugs." He also agreed that he had previously misidentified various drugs including marijuana and methamphetamine. He did not conduct a field test on the pills he purchased from the Appellant. He performed only a "visual" examination of the pills. Investigator Pitts agreed that he "Googled" the number on the pills through "pill identifier." He denied that the reason he sent the pills to the TBI was because he was uncertain if they were in fact hydrocodone, and explained that he sent the pills to the TBI because they have more training and experience in this area.

Investigator Pitts testified that the CI involved in the instant case had worked as an informant since 2008 and had been paid $100 for his participation in this undercover operation. He said the CI did not have any criminal offenses "hanging over his head[,]" and he was not "working off" a charge. He was unaware of any preexisting relationship between the CI and the Appellant.

TBI Special Agent Lela Jackson was tendered as an expert in the field of forensic chemistry without objection. Agent Jackson testified that her job responsibilities included "perform[ing] analysis on controlled substances or things that are believed to be controlled substances, to identify them." She had been certified in the drug division for forensic drug chemistry for seven years, and she had previously testified in court as an expert in forensic

chemistry. She used the same steps and methodologies in her drug analysis as other experts in the field of forensic chemistry. Agent Jackson's curriculum vitae was admitted into evidence without objection. Agent Jackson confirmed that she received white tablets from the LCSD in this case to review and examine.

As part of her analysis, Agent Jackson looked at the writing on the tablets which contained an "actual imprint on the pill[.]" She visually determined that the writing on the tablets in this case was consistent with manufactured hydrocodone. She additionally observed the indentions and edges of the tablets and concluded they were consistent with other tablets that she had tested and identified as hydrocodone. She stated that she was looking at the "uniformity" of the tablet. She further explained that "with a pill press the abnormalities are apparent. If you look at a lot of tablets you can see different things that are markedly obvious." Agent Jackson did not observe any such "abnormalities" in her analysis of the instant tablets. She prepared a report documenting her analysis, which was admitted into evidence without objection. The report further confirmed that the ten white pills recovered during the instant drug transaction were hydrocodone. The report noted that a "presumptive identification was obtained by comparing item's markings to pharmaceutical references. No instrumental analyses were performed." Accordingly, Agent Jackson presumptively identified the ten pills Investigator Pitts purchased from the Appellant and concluded they were hydrocodone pills, and she explained that hydrocodone is classified as a Schedule II controlled substance in Tennessee.

On cross-examination, she explained her analysis was conducted in accordance with TBI policy, which required presumptive identification only of all pills except oxycodone and alprazolam. However, any pill would be chemically analyzed for verification if it appeared "adulterated[,]" which the pills in the instant case did not. When asked to explain the pharmaceutical reference to which she compared the pills, Agent Jackson said "it is an actual drug reference website for [the TBI] lab." She agreed, however, that she did not know "anything about the author or who put that information" on the website. She also agreed counterfeit pills existed; however, she again opined the white tablets in this case were consistent with hydrocodone. Although she could not conclude with "100 percent" certainty that the pills were hydrocodone absent chemical testing, she was "pretty sure" they were hydrocodone pills.

On redirect examination, Agent Jackson stated that she had analyzed "thousands" of pills in her tenure as a forensic scientist, and the pills in the instant case were "authentic" and consistent with hydrocodone. Had she seen any "abnormalities" in the pills, Agent Jackson agreed she would have verified them with chemical analysis. When asked if hydrocodone was "typically fake[,]" she explained that was not a "trend we have been seeing in the lab." In her years of experience as a forensic scientist, Agent Jackson had

never observed "adulterated" hydrocodone. Finally, in her expert opinion, Agent Jackson concluded the ten white pills recovered in this case were hydrocodone.

The Appellant did not offer any proof.

A sentencing hearing was conducted on June 3, 2022. The State had previously filed a notice of enhancement on August 6, 2021, based on the Appellant's six prior felony convictions. The State maintained at the hearing, and the Appellant did not dispute, that the Appellant should be classified as a Range II, multiple offender, with a sentencing range of six to ten years. The presentence report was admitted into evidence and showed that the Appellant, age forty-six, provided his version of the instant offense as something that "would not happen again and shouldn't have happened in the first place but did and I am sorry for that." Based on the report, in addition to his felony convictions, the Appellant had a prior criminal history consisting of ten driving related offenses which occurred from 2009 to 2016, driving under the influence, and four prior revocations of community corrections or probation which occurred between 1996 and 2003. The Appellant self-reported dropping out of school in the ninth grade and receiving his GED at the age of sixteen. He reported his mental health as "fair" and reported that he had good relationships with his family. He denied participation in any treatment programs. The Appellant also reported he was self-employed in 2005 doing construction and remodeling work. Prior to this time, the Appellant reported sporadic employment in various fast food restaurants. In 2021, he became the sole caregiver for his disabled stepbrother. The risk and needs assessment categorized the Appellant as a "low risk offender."

Emily Williams, the manager of the Tennessee Department of Correction, Probation, and Parole Office in Murfreesboro, testified regarding portions of the presentence report. Williams read into evidence the Appellant's personal version of the offense, in which the Appellant stated that the offense "should not have happened in the first place, but [] did and I'm sorry for that." She obtained the Appellant's criminal history from the National Crime Information Center and confirmed that information with the judgments from the counties of conviction. After the State detailed the Appellant's criminal history, all of the Appellant's certified convictions were admitted into evidence as a collective exhibit. On cross-examination, Williams agreed she did not personally meet with the Appellant. When asked the origin of the recitation of facts, Williams said it was from the sheriff's department's incident report. She agreed upon review of the Appellant's criminal history that, in the past decade, there were no violations of probation.

The presentence report provided that Vickie Farrar, an employee of the Tennessee Department of Correction, Probation, and Parole, interviewed the Appellant via virtual platform. The report indicated the Appellant was cooperative and able to obtain permanent housing and employment if released. Farrar testified at the sentencing hearing that she

conducted the portion of the Appellant's presentence report concerning the Strong R interview, as well as the education portion of report. As to employment history, the Appellant told her that he had worked at numerous restaurants, which information was verified from the 1990's. He advised that he could also be a manager at a restaurant and did construction and remodeling. The construction and remodeling were self-employment jobs. For the months preceding the offense, the Appellant had been helping his stepbrother and sister-in-law because his stepbrother was disabled. The Appellant denied any drug addiction problems; however, he agreed that he was an alcoholic and drank a "12 pack a day[.]" She said although the report may reflect that the Appellant did not display any threatening, aggressive, or violent behavior in the past five years, this assessment did not include the Appellant's criminal history. The Appellant told her he was a caregiver for his disabled stepbrother. The Appellant was cooperative, and he stated, "'if he had his time to [d]o over[,] he would not have done it.'" She agreed that the Appellant apologized for his actions. On redirect examination, Farrar agreed that during the preparation of her report she had no knowledge the Appellant had other charges pending for "multiple sales." She also agreed that all of the needs reflected in the Strong R assessment could be addressed in prison.

Investigator Mike Pitts testified regarding the danger of hydrocodone and the impact it has had on the community in Lincoln County. He said hydrocodone was an addictive drug that was sold frequently to support "the opioid problem[,]" and had a high risk of overdose. He said "[m]ore people are becoming addicted to drugs, not working, and theft and burglary rates are going up." He also said it creates a larger caseload for law enforcement and that they were dealing with a "spike" in overdoses. Based on his experience, he believed jail time would serve to deter this activity. There was no indication the Appellant was selling drugs to support his own drug habit. On cross-examination, he agreed that in the two months the Appellant had been in jail in this case, his caseload had not decreased dramatically, although it did eliminate one case. He agreed he was a member of the alternative sentencing program and supported such programs. He agreed that programs such as community corrections and probation could also provide a deterrence to drug crimes. He agreed there was no evidence in the instant case was linked to Fentanyl or an overdose. On redirect, he agreed that the Appellant had been involved in "selling repeatedly" in the community and that law enforcement received a call to his residence concerning a suspected drug overdose.

The Appellant testified that he was a widower and lived in a home in Lincoln County along with his stepsister and stepbrother since 2018 or 2019. He helped his stepbrother by mowing the lawn and by "help[ing] him get around." The Appellant explained that his stepbrother had had multiple back surgeries, two strokes, and was diagnosed with dementia within the past five years. Neither his stepsister or stepbrother were employed, and his stepbrother needed around-the-clock care. He confirmed that he had worked at various

restaurants and had done construction since he was fourteen years old. Since he had lived in Lincoln County, he was supported by his stepbrother's disability check, which paid their rent and all of their bills. He dropped out of high school in the ninth grade and received his GED when he was sixteen years old. He agreed he had not had steady employment, and the longest period of time he had held a job was one year. He agreed he had a criminal history which included multiple felonies from the 1990's but said he had not been convicted of anything except misdemeanors since then. The Appellant denied associating with drug users or anyone with a felony record prior to the instant offense because he did not want to "be in any trouble [himself]." He said he was twenty-one in 1996, and twenty-three in 1998, when he was last convicted. He requested alternative sentencing and affirmed that he would comply with the requirements.

On cross-examination, he agreed that he violated his prior community corrections probation multiple times by not paying his probation fees. He explained that he also lost several jobs because he had to report to his probation officer twice a week. The longest job he held was doing construction. He said a "friend" in Nashville gave him the hydrocodone pills in the instant case. Following the sentencing hearing, the trial court imposed a sentence of nine years and six months in confinement. The Appellant filed an unsuccessful motion for new trial on July 5, 2022. The Appellant filed a timely notice of appeal, and this case is now properly before this court for review.

ANALYSIS

I. Sufficiency of Evidence. The Appellant contends the State failed to prove the identity of the ten white pills that were purchased during the instant drug transaction because they were not verified by chemical analysis. Accordingly, the Appellant argues that without chemical analysis of the pills, they could not be identified, beyond a reasonable doubt, as hydrocodone. The Appellant also argues the trial court in its capacity as the thirteenth juror erred in not dismissing the charges because the evidence was insufficient. The State responds that the evidence was sufficient to show that the pills were hydrocodone and that the Appellant's standalone claim regarding the trial court's role as the thirteenth juror is not properly before this court.

Rule 33(d) of the Tennessee Rules of Criminal Procedure provides that a "trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence." Though an appellate court reviews the sufficiency of the evidence after judgment has been entered, a trial court assesses the weight of the evidence before it enters judgment on a jury verdict of guilt. See State v. Stephens, 521 S.W.3d 718, 726-27 (Tenn. 2017) (internal citation omitted). "In this respect, the trial judge is acting as the 'thirteenth juror,' and has the authority to 'grant a new trial . . . if it disagrees with the jury about the weight of the evidence[.]'" Id. (quoting Tenn. R. Crim. P. 33(d)). An appellate

court "'may presume that the trial court approved the verdict as the thirteenth juror' when it has overruled a motion for new trial without comment." State v. Leath, 461 S.W.3d 73, 115 (Tenn. Crim. App. 2013) (quoting State v. Biggs, 218 S.W.3d 643, 653 (Tenn. Crim. App. 2006)). It is only when "the record contains statements by the trial judge expressing dissatisfaction or disagreement with the weight of the evidence or the jury's verdict, or [evidence] indicating that the trial court absolved itself of its responsibility to act as the thirteenth juror, [that] an appellate court may reverse the trial court's judgment" on the basis that the trial court failed to carry out its duties as the thirteenth juror. State v. Carter, 896 S.W.2d 119, 122 (Tenn. 1995). Otherwise, appellate review is limited to sufficiency of the evidence pursuant to Tennessee Rule of Appellate Procedure 13(e). State v. Burlison, 868 S.W.2d 713, 718-19 (Tenn. Crim. App. 1993). If the reviewing court concludes that the trial court failed to fulfill its duty as the thirteenth juror, the appropriate remedy is to grant a new trial. State v. Moats, 906 S.W.2d 431, 435 (Tenn. 1995).

In this case, the Appellant does not argue nor does the record reflect that the trial court disagreed with the weight of the evidence, or that it absolved its responsibility to act as the thirteenth juror. In reflecting on the evidence at the motion for new trial hearing, the trial court specifically stated:

> I remember a picture of [the Appellant's] face being plastered on the monitors up here. And so[,] I think that was a pretty damning piece of evidence against [the Appellant]. And in this particular case[,] I believe the jury could find him guilty beyond a reasonable doubt and I will approve that verdict.

We agree with the State and conclude that the Appellant is not entitled to relief as to this issue. Accordingly, our review is limited to the sufficiency of the evidence.

When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979); Tenn. R. App. P. 13(e). "The State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom." State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). "Questions concerning the credibility of witnesses, the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). "This [c]ourt does not reweigh or reevaluate the evidence." Id. (citing Cabbage, 571 S.W.2d at 835). "Nor may this [c]ourt substitute its inferences for those drawn by the trier of fact from circumstantial evidence." Id. (citing Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956)). Because a jury conviction removes the presumption

of innocence with which a defendant is initially cloaked with at trial and replaces it on appeal with one of guilt, a convicted defendant has the burden of demonstrating to this Court that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

A guilty verdict can be based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Hall, 976 S.W.2d 121, 140 (Tenn. 1998). "The standard of review 'is the same whether the conviction is based upon direct or circumstantial evidence.'" State v. Dorantes, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting State v. Hanson, 279 S.W.3d 265, 275 (Tenn. 2009)). As stated in Holland v. United States, this is so because:

> Circumstantial evidence . . . is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

348 U.S. 121, 140 (1954); Dorantes, 331 S.W.3d at 380.

"A criminal offense may, of course, be established exclusively by circumstantial evidence." State v. Sisk, 343 S.W.3d 60, 65 (Tenn. 2011) (citing Duchac v. State, 505 S.W.2d 237, 241 (Tenn. 1973)). Ultimately, however, the jury must decide the significance of the circumstantial evidence, as well as "'[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence.'" Id. (citing State v. Rice, 184 S.W.3d 646, 662 (Tenn. 2006) (quoting Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958)).

The Appellant in this case was convicted as charged of alternative counts of possession with intent to sell and possession with intent to deliver hydrocodone in violation of Tennessee Code Annotated section 39-17-417. To sustain a conviction for this offense, the State was required to prove that the Appellant "knowingly . . . [d]eliver[ed] a controlled substance . . . [or][sold] a controlled substance. . . ." Tenn. Code Ann. § 39-17-417(a) (2022). In prosecutions of drug offenses, the identity of the controlled substance is an element of the crime. Accordingly, the State was also required to prove that the controlled substance the Appellant knowingly delivered or sold was hydrocodone. As charged in this case, hydrocodone is a Schedule II controlled substance. Id. § 39-17-408(b)(1)(F); see also State v. Pruitt, No. W2010-02269-CCA-R3-CD, 2013 WL 865330, at *10 (Tenn. Crim. App. March 6, 2013) (holding that certain kinds of dihydrocodeinone, the chemical name

for hydrocodone, are also Schedule III controlled substances). Tennessee Code Annotated section 39-17-417 generally makes possession of a Schedule II controlled substance with intent to sell or deliver a Class C felony. Id. § 39-17-417(c)(2)(A) ("Any . . . Schedule II controlled substance [except cocaine or methamphetamine above certain amounts] is a Class C felony. . . .").

In State v. White, a law enforcement officer found a "piece of a smoked marijuana cigarette" in the defendant's car during a traffic stop, and the defendant was subsequently charged with possession of marijuana, among other offenses. 269 S.W.3d 903, 904 (Tenn. 2008). At the defendant's trial, the officer testified based on his training and experience that the substance he found was marijuana. Id. There was no other testimony establishing the substance as marijuana. When the State moved to admit the substance identified as marijuana into evidence, the trial court conducted a bench conference and questioned whether there would be additional proof concerning the marijuana; however, the defense did not object. Id. After the State submitted additional case authority to the trial court on the issue, the trial court admitted the evidence at trial. Id. On appeal, the defendant challenged the sufficiency of the evidence establishing the identification of marijuana as an essential element of the offense. Id. at 903. At the outset, the Court clarified that the admissibility of the officer's identification testimony was not at issue because the defendant did not object to the testimony or the exhibit, and the issue was therefore waived. Id. at 905. The Court then surveyed cases where this court held that an officer's identification testimony was sufficient to establish the controlled substance element of the offense when accompanied by field testing or when accompanied by incriminating circumstantial evidence such as the defendant's implicit or explicit admission that the substance was marijuana and the discovery of drug paraphernalia commonly associated with marijuana use. Id. at 906-07.

In each of these cases, White recognized that the officer's identification testimony occurred in the context of a drug deal. Id. Ultimately, the Court held that the jury could have rationally concluded the substance was marijuana from the officer's testimony, from the evidence that the defendant was under the influence, and from inferences drawn from the defendant's refusal to submit to drug testing. Id. at 907. While the Court cautioned "the far better practice is to conduct a field test or a pre-trial scientific analysis," it nevertheless concluded that a rational jury could have found that the cigarette contained marijuana and that the evidence was sufficient to support the defendant's conviction for possession of a controlled substance beyond a reasonable doubt. Id.; see also State v. McDowell, No. E2020-01641-CCA-R3-CD, 2022 WL 1115577, at *11 (Tenn. Crim. App. Apr. 14, 2022), perm. app. denied (Tenn. Oct. 4, 2022) (noting that although the substance was not tested by the laboratory, two investigators testified that it was visually consistent with the larger rock-like substance, the latter of which was tested and confirmed to be cocaine base); State v. Fleming, No. E2014-01137-CCA-R3-CD, 2015 WL 799778, at *8

(Tenn. Crim. App. Feb. 25, 2015) (lay testimony from the defendant's daughter was sufficient to support the conclusion that the substance was cocaine even without a laboratory test, which was made impossible by the co-defendant's destruction of the evidence). Accordingly, chemical analysis is not a prerequisite to establish the identity of a controlled substance, and the essential elements of a drug related offense may be established circumstantially.

While Tennessee has yet to squarely address the issue presented for our review, state courts around the country have divided on the question of whether law enforcement's reliance on comparison images from online websites to pills and capsules seized in a criminal investigation is sufficient to prove the identity of drugs. See, e.g., Kellensworth v. State, 614 S.W.3d 804, 807 (Ark. 2021) (upholding a drug conviction based on forensic chemist expert identification and comparison to online drug database and discussing various cases addressing the issue); State v. Brazzle, 411 P.3d 1250, 1256-57 (Kan. Ct. App. 2018) (same); State v. Youmans, 383 P.3d 142, 147-48 (Idaho Ct. App. 2016) (holding chemical analysis not essential to prosecution of drug offense when police officer used an online source to identify hydrocodone); Jones v. Commonwealth, 331 S.W.3d 249, 254 (Ky. 2011) (affirming in part because two "fully-qualified" chemists "visually identified" the drug by relating that "based upon the shape, color, and markings, the drug visually appeared to be alprazolam", and based upon blackletter law that "chemical testing of an alleged controlled substance is not required to sustain a conviction"); People v. Mooring, 223 Cal. Rptr. 3d 616, 619 (Cal. Ct. App 2017), as modified on denial of reh'g, (Oct. 23, 2017) and review denied, (Jan. 17, 2018) (concluding that the "Ident-A-Drug" website fell within the published compilation exception to the hearsay rule and that the defendants' confrontation clause claim failed because challenged hearsay was not testimonial); People v. Spradlin, 52 N.Y.S.3d 833, 838 (N.Y. City Ct. 2017) ("While it may be best practice for an officer to recite his training and experience, such absence is not fatal to an accusatory where the officer specifically identifies the appearance of pills which includes the imprint markings as required by Federal Law [21 C.F.R § 206.10] and enters such data in to the drugs.com data base."); State v. Carter, 981 So.2d 734, 744 (La. Ct. App. 2008) (stating an expert in forensic chemistry identified the "green pills" as containing hydrocodone by performing a "visual inspection and comparison with pictures in a book"); State v. Stank, 708 N.W.2d 43, 54-55 (Wisc. Ct. App. 2005) (stating a forensic scientist identified a pill as OxyContin by, among other things, using Physician's Desk Reference). But see People v. Hard, 342 P.3d 572, 579 (Colo. App. 2014) (holding that information on www.drugs.com was insufficiently reliable to qualify as a market report exception to hearsay); State v. Alston, 802 S.E.2d 753, 755 (N.C. Ct. App. 2017) (finding plain error where the detective identified the controlled substances by visual inspection and reference to www.drugs.com when the pills were never submitted for chemical analysis); State v. Ward, 694 S.E.2d 738, 745-47 (N.C. 2010) (noting that the forensic expert's visual analysis of the drug was a technique for "cutting corners" and reversing the drug conviction

because the methodology was not sufficiently reliable); People v. Mocaby, 882 N.E.2d 1162, 1165-68 (Ill. App. Ct. 2008); State v. Brubaker, 805 N.W.2d 164, 172-74 (Iowa 2011), as amended on denial of reh'g, (Nov. 3, 2011), (reversing drug conviction upon applying the factors set forth in United States v. Dolan, 544 F.2d 1219, 1221 (4th Cir. 1976), and reasoning that the jury was left to speculate as to whether the pills were Clonazepam).

The approach taken by the majority of courts acknowledges generally that reliance upon physical characteristics of a pharmaceutical drug and consultation with a website by a layperson are to be addressed in evidentiary terms of hearsay exceptions or witness qualifications. Absent an objection to an officer or lay witness identification, the testimony is generally deemed proper and admissible. Based upon the foundation set in White, we adopt the majority view and conclude that law enforcement's reliance on comparison images from online websites to pills and capsules seized in a criminal investigation may serve as circumstantial evidence to prove the identity of drugs.

Applying the above authority to the instant case, we note that the Appellant did not object to the testimony of Investigator Pitts and TBI Special Agent Lela Jackson, both of whom provided their opinion that the pills were hydrocodone. Nor did the Appellant object to Special Agent Jackson's report concluding that the ten white pills were presumptively identified as hydrocodone. Accordingly, any issue as to the admissibility of the testimony or evidence has been waived.

Viewing the evidence in the light most favorable to the State, the record shows that Investigator Pitts had extensive training in narcotics investigations and was responsible for the majority of the narcotics investigations in Lincoln County. He had received "a lot" of training in identifying drugs, including completion of certain schools, on the job training, and confirmation from the TBI lab of his preliminary identifications. Prior to the offense, Investigator Pitts had arranged through the CI to purchase ten hydrocodone pills in exchange for $100 in cash. On the date of this offense, Investigator Pitts met with the CI to prepare for a controlled purchase of hydrocodone from the Appellant and followed his normal security and safety procedures. He and the CI then met the Appellant at a predetermined location, a residence located in Park City. In his undercover capacity, Investigator Pitts approached the location, and the Appellant exited the residence. Investigator Pitts parked the car in the front, and the Appellant walked to the passenger side of the car. The CI referred to the Appellant by his first name and introduced Investigator Pitts as "CJ." The Appellant walked to the side window and handed the CI a pill bottle that contained ten hydrocodone pills. Investigator Pitts analyzed the numbers on the pills, "M-367," and confirmed that it was hydrocodone. He conducted a "check" on the imprinted numbers on the pills and identified the pills with a picture, shape, and number. Investigator Pitts suspected the pills were hydrocodone tablets based on the

information he had already gathered "going into [the instant] controlled purchase[.]" Investigator Pitts agreed that the controlled drug buy unfolded as expected because he received the same number of pills for the same amount of money that had been prearranged.

Additionally, TBI Special Agent Lela Jackson testified as an expert in analysis and identification of controlled substances or things that are believed to be controlled substances. She had been certified in the drug division for forensic drug chemistry for seven years, and she had previously testified in court as an expert in forensic chemistry. She used the same steps and methodologies in her drug analysis when identifying the substances in this case as used by other experts in the field of forensic chemistry. Agent Jackson had analyzed "thousands" of pills in her tenure as a forensic scientist, and she concluded that the pills in the instant case were "authentic" and consistent with hydrocodone. As part of her analysis of the pills in the instant case, Agent Jackson visually examined the writing on the pills which contained an actual imprint that was consistent with hydrocodone. The indentions and edges of the tablets in the instant case were also consistent with other pills that she had previously tested and identified as hydrocodone. Agent Jackson did not observe any "abnormalities" in her analysis of the instant pills, and per TBI policy, she conducted a presumptive identification of the pills by comparing their markings to pharmaceutical references. The pharmaceutical reference to which she compared the pills was a drug reference website specifically for the TBI lab. Although she could not conclude with "100 percent" certainty that the pills were hydrocodone absent chemical testing, she was "pretty sure" they were hydrocodone pills. Had she seen any "abnormalities" in the pills, Agent Jackson would have verified them with chemical analysis. Fake or counterfeit hydrocodone was atypical, and Agent Jackson had never observed "adulterated" hydrocodone.

We hold based upon the entirety of the above evidence that a reasonable juror could conclude beyond a reasonable doubt that the pill substance the Appellant sold to the CI in this case was hydrocodone. Accordingly, the Appellant is not entitled to relief.

II. <u>Sentencing.</u> Next, the Appellant challenges the sentence imposed by the trial court as excessive. Specifically, the Appellant argues the trial court "should have started the sentencing consideration at the minimum length of the sentence" and that the trial court noted the presence of two mitigating factors but failed to apply them. The Appellant further asserts, generally, that the trial court did not appropriately apply the sentencing considerations in Tennessee Code Annotated section 40-35-103. In response, the State contends the trial court properly imposed sentencing in this case, and the Appellant is not entitled to relief. 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 Tenn. Code Ann. §§ 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 Tenn. Code. Ann. § 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. Tenn. Code Ann. § 40-35-401, Sent'g 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.

In determining a specific sentence within a range of punishment, the trial court should consider, but is not bound by, the following advisory guidelines:

> (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
>
> (2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

Tenn. Code Ann. § 40-35-210(c).

As a Range II, multiple offender convicted of a Class C felony, the Appellant was subject to a sentencing range of not less than six years nor more than ten years. See Id. § 40-35-106 (a)(1), -112(b)(3). In determining the length of the Appellant's sentence, the record shows the trial court applied two enhancement factors: enhancement factor one, the Appellant had a history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, and enhancement factor eight, the Appellant, before trial or sentencing, had failed to comply with the conditions of a sentence involving release into the community. See Id. § 40-35-114(1), (8). Contrary to the Appellant's claim, the trial court considered mitigating factor one, the Appellant's criminal conduct neither caused nor threatened serious bodily injury, but did not afford it "really any weight." Id. § 40-35-113(1). Moreover, because the Appellant had additional convictions beyond those establishing his status as a Range II offender, the trial court increased the sentence to the high end of his sentencing range. However, the trial court explicitly accredited the Appellant's candor in the presentence report when admitting his involvement in the instant offense, and based on the catchall mitigating factor, the trial court believed a sentence slightly less than the maximum should be imposed. The trial court sentenced the Appellant to nine years and six months. Id. § 40-35-112(b)(3). The record reflects that the trial court properly considered the enhancement and mitigating factors, imposed a sentence within the applicable range for the Appellant's Class C felony offense, and made the requisite findings in support of its ruling. Accordingly, the Appellant is not entitled to relief as to this claim.

The Appellant next contends he established his suitability for probation because, prior to the instant offense, he had not been convicted of an offense in twenty years and had not violated alternative sentencing in ten years. Under the revised Tennessee sentencing statutes, a defendant is no longer presumed to be a favorable candidate for alternative sentencing. Carter, 254 S.W.3d at 347 (citing Tenn. Code Ann. § 40-35-102(6)). Instead, the "advisory" sentencing guidelines provide that a defendant "who is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). A defendant shall be eligible for probation, subject to certain exceptions, if the sentence imposed on the defendant is ten years or less. Id. § 40-35-303(a). A defendant is not, however, automatically entitled to probation as a matter of law. The burden is upon the defendant to show that he is a suitable candidate for probation. Id. § 40-35-303(b); State v. Goode, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997); State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). In order to meet this burden, the defendant "must demonstrate that probation will 'subserve the ends of justice and the best interest of both the public and the defendant.'" State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995) (quoting State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990)).

In determining a defendant's suitability for alternative sentencing, the trial court should consider whether:

> (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[.]

Tenn. Code Ann. § 40-35-103(1)(A)-(C). A trial court should also consider a defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. Id. § 40-35-103(5); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). A defendant with a long history of criminal conduct and "evincing failure of past efforts at rehabilitation" is presumed unsuitable for alternative sentencing. Tenn. Code Ann. § 40-35-102(5). Ultimately, in sentencing a defendant, a trial court should impose a sentence that is "no greater than that deserved for the offense committed" and is "the least severe measure necessary to achieve the purposes for which the sentence is imposed." Id. § 40-35-103(2), (4).

The record shows the trial court reviewed the presentence report, considered the purposes and principles of the Sentencing Act, and addressed each of the sentencing factors to determine whether confinement was appropriate in this case. The trial court acknowledged, "Granted while he was in his 20's he did violate probation and there was also a note . . . [the Appellant] was caught driving on revoked. . . . So we have a series of smaller offenses that just keep repeating themselves." This reflected negatively on the Appellant's ability to be rehabilitated in the community. On the other hand, the trial court acknowledged that the prior violations of community corrections occurred when the Appellant was a "pretty young man" and weighed this factor in favor of alternative sentencing. The trial court considered whether incarceration would serve as a deterrent and acknowledged that the drug problem was an "epidemic;" however, it declined to deny alternative sentencing solely on this ground. In finding that the alternative sentencing factors collectively weighed against alternative sentencing, the trial court stated "[the Appellant's] previous record has kind of caught up with [him]." Based on our review of the record, the Appellant failed to establish his suitability for probation. Accordingly, we conclude that the trial court did not abuse its discretion in denying probation or any other form of alternative sentence, and the Appellant is not entitled to relief.

CONCLUSION

Based on the above reasoning and authority, we affirm the judgment of the trial court.

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CAMILLE R. MCMULLEN, PRESIDING JUDGE